UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
John H Frye, III, Chairman
Glenn O. Bright
Emmeth A. Luebke

In the Matter of	Docket No. 50-142 OL (Proposed Renewal of Facility License)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA	
(UCLA Research Reactor)	June 5, 1984

MEMORANDUM AND ORDER

On April 13, 1984, we issued a Memorandum and Order in which we concluded that William H. Cormier, UCLA's representative, should be reprimanded pursuant to 10 C.F.R. § 2.713. Our conclusion was based on Mr. Cormier's statement made in an August 25, 1983, filing made in support of Staff's motion for reconsideration of LBP-83-25A, 17 NRC 927 (1983) that the UCLA Security Plan did not provide protection against sabotage. We afforded Mr. Cormier an opportunity to respond prior to issuing a reprimand.

In the April 13 Memorandum and Order, we also concluded that no basis existed to take action against Staff Counsel, Colleen P. Woodhead, on account of statements made by her to the effect that Staff imposed no requirement on research reactors with less than a formula quantity of special nuclear material to provide protection against sabotage. However, we did not pass on the question of whether Staff Counsel's

clients were aware of these apparent misrepresentations because of our need for further information which was promised by Staff Counsel in her letter of March 16, 1984.

The history of our concerns with regard to these matters is set forth in our unpublished Memorandum and Orders of April 13 and February 24, 1984. The former Memorandum and Order will be published as an Appendix to this Memorandum and Order.

In this Memorandum and Order we conclude that no disciplinary action should be taken against William H. Cormier. We also conclude that no basis exists to pursue these matters with regard to the Applicant, The Regents of the University of California. We continue to hold in abeyance our conclusions with regard to the representations of the NRC Technical Staff, both those raised in our Memorandum and Order of February 24 and those referred to the Office of Inspector and Auditor by our Memorandum and Order of December 23, 1983, pending the receipt of further information.

Responses to the April 13 Memorandum and Order

In his declaration filed May 1, Mr. Cormier responds to our conclusion that he should be reprimanded. Much of this response concerns the confusion which he perceives with regard to our ruling in LBP-83-25A, the regulations, the Staff's position, and the measures espoused by Contention XX. In the light of his perception of these factors, Mr. Cormier argues that the statement in question is not false. He goes on to point out in ¶ 26 of his response that there was no advantage to be gained by his client through deceiving the Board with

regard to the nature of the Security Plan and asserts that his actions indicate that he had no such intent. In ¶ 24, he points out that in making expurgations to the Plan, he highlighted many of the provisions in question to the Board, and saw no need for further explanation. He also argues that the response procedures accompanying the Security Plan, some of which are clearly concerned with sabotage, are not considered a part of the Security Plan and were not submitted to the Staff for review, although they are kept with the Plan. He makes a similar argument with respect to a provision of the Plan which we view as concerning sabotage and which was submitted to the Staff for review.

In its separate response to the April 13 Memorandum and Order and in ¶ 25 of Mr. Cormier's declaration, UCLA answers our inquiry with regard to the review given Mr. Cormier's representations. It appears from these statements that Mr. Cormier's representations were not reviewed by any other representative of the Regents until called into question.

CBG has filed a lengthy response which comments on Mr. Cormier's and UCLA's responses. CBG's response was not invited by the Board. UCLA requests the opportunity to comment on it if it is considered. We have read CBG's response and considered it only to the extent CBG requests relief, which we deny. Thus, we view the request to comment on it as moot. Nonetheless, we briefly summarize CBG's response below.

CBG's response reviews in detail the representations made to the Board by UCLA and Staff. In many respects this review appears to be more relevant to Staff's representations than UCLA's. The response next

addresses what it regards as omissions from UCLA's and Mr. Cormier's responses. First, CBG notes that Glenn R. Woods and Christine Helwick have never responded to the Board with regard to their conduct. Second, CBG notes that none of the Regents of the University have responded. Third, CBG identifies UCLA faculty and Staff members who, CBG maintains, should respond but have not done so. Finally, CBG finds fault with the information furnished indicating who reviewed the representations here in question.

CBG then proceeds to a detailed criticism of the defenses put forward. CBG argues that an institutional advantage did accrue to UCLA from the misrepresentation - three years of delay. CBG also asserts that it was CBG, not Mr. Cormier, which was instrumental in bringing provisions of the plan directed toward sabotage to the Board's attention. CBG concludes that the Board should impose sanctions against Mr. Cormier under 10 C.F.R. § 2.713 and against UCLA under 10 C.F.R. § 50.100. CBG requests that, if these sanctions are not imposed, it be afforded a hearing. CBG bases this last request on the proposition that it has been injured by these misrepresentations.

Discussion

Whatever rationale Mr. Cormier advances to support his statements here under consideration, one conclusion is inescapable. UCLA has seen fit to take measures to protect the NEL against radiological sabotage. Not all of the measures which it has instituted were submitted to the Staff for review, and it appears that UCLA was acting on its own

initiative in adopting most of them. We noted in our April 13 Memorandum and Order that these measures were precisely the sort of provisions which we had in mind in our holding in LBP-83-25A. It is obvious that UCLA has viewed the matter of protection against sabotage in the same way as this Board, albeit from a different perspective. In this circumstance, no conceivable advantage could flow to UCLA from the concealment of this fact.

We do not concur in CBG's view that the concealment worked to UCLA's advantage by effecting a delay in these proceedings. While some delay undoubtedly resulted, we do not perceive that that delay was in any way advantageous to UCLA. The discovery materials which have been submitted to the Board do not indicate that UCLA is faced with an insuperable burden on this Contention. While it may be that, after hearing, we may conclude that CBG has made some valid points, the discovery materials tend to indicate that any such points should be relatively easy to accommodate. In this circumstance, we do not perceive an advantage to be gained by UCLA from delay.

It also appears that the statement in question was made without the knowledge that it was false, and hence without any intent to deceive. While the lack of an intent to deceive is not relevant to a consideration of whether a material false statement has been made, it is relevant to a consideration of sanctions. Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-691, 16 NRC 897 at 914-15 (1982).

The lack of any advantage to be gained by UCLA and the lack of any intent to deceive on Mr. Cormier's part weigh strongly against the

imposition of sanctions against either UCLA or Mr. Cormier. Further, we take note of the fact that, while Mr. Cormier did not affirmatively bring our attention to the provisions of the Plan dealing with sabotage on his discovery of them, he did not conceal them and, through his indication to us of the expurgations he wished to make to the copy of the Plan made available to CBG, he highlighted some of them.

What comes through from Mr. Cormier's declaration is the proposition that the parties have not understood the Board's rulings on protection against sabotage. Even Staff has failed to adopt a consistent position. Staff has, in this Board's opinion, in the position it espoused in this proceeding, sought to overturn the plain meaning of 10 C.F.R. § 73.40(a) improperly through informal Staff action rather than rulemaking.

With the exception of 10 C.F.R. § 73.40(a), the regulations themselves defy comprehension. CBG's recent request, which we denied, that we reconsider our ruling that 10 C.F.R. § 73.60 forms an upper bound to the requirements of 10 C.F.R. § 73.40(a), a request which clearly is not without merit, illustrates to a minor degree this difficulty. And it involves a regulation which, in comparison, is a model of clarity.

Mr. Cormier's misstatement clearly was not made with malice. No gain could possibly accrue to him or his client by it. And while it was not a true statement, it was made against a background of confusion. All of the circumstances set forth in his declaration dictate the conclusion that it was at worst a mistake in judgment, prompted by a zealousness on behalf of his client, and fed by a Staff position which

not only ignored the plain meaning of 10 C.F.R. § 73.40(a), but ongoing practices within the Staff's organization. (With respect to the latter, see Staff Counsel's letter to the Board of March 16, 1984.) In these circumstances, while we believe a careful approach would have prevented the making of the statement, we cannot penalize Mr. Cormier for having made it, and we can excuse his failure to have affirmatively called our attention to it last January.

We believe this situation is in some respects similar to that facing the Licensing Board in Consumers Power Company (Midland Plant, Units 1 and 2) LBP-81-63, 14 NRC 1768 (1981). The conclusions of that Board, discussed at page 19 of our April 13 Memorandum and Order, are similar to our own. We would part company only with its conclusion that the high standards of affirmative disclosure have not been adequately addressed by the Appeal Board or Commission. Since that Board reached that conclusion, we believe those standards have been adequately addressed by both the Commission and Appeal Board. However, that difference does not affect our conclusion that, in these circumstances, no sanction should issue.

With respect to UCLA, we believe that proper case management by it might well have revealed the error much earlier and thus avoided the difficulty. Nonetheless, the error was apparently unknown to those who might have corrected it. While we do not condone this approach, we can understand how it might come to pass. Had the error worked to UCLA's advantage, we would be far more interested in learning in more detail the circumstances which led to it. However, it did not work to UCLA's

advantage and was apparently unknown to those who were in a position to correct it. Thus UCLA's mistake appears to be at most a careless one. These circumstances do not argue for the imposition of sanctions. They do, however, serve as a stern warning that no more such mistakes should occur.

CBG has requested a hearing in the event that we do not impose sanctions against UCLA and Mr. Cormier. CBG views itself as the party injured by our failure to take such action. CBG misperceives its role in this consideration.

The sanction which we proposed to impose on Mr. Cormier was contemplated by us solely as a means of regulating his conduct before us. It stemmed from our inherent and explicit power over the conduct of attorneys and representatives appearing before us, not as the result of the complaint of another party. The Court of Appeals for the Seventh Circuit has addressed a similar problem as follows:

> Preliminarily, it would be well to note that disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Ex parte Wall, 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552 (1882). Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession imbued

> with public trust. In re Fisher, 179 F.2d 361 (7th Cir. 1950), cert. denied sub nom. Kerner, et al. v. Fisher, 340 U.S. 825, 71 S.Ct. 59, 95 L.Ed. 606 (1950).

In re Echles, 430 F.2d 347 at 349-50 (7th Cir. 1970).

In Echles the Court of Appeals agreed with respondent that the United States lacked standing to appeal a decision not to disbar respondent. The Court did, however, uphold the standing of the United States Attorney to appeal on the ground that he had received specific authority to do so from the Chief Judge of the District Court which issued the order in question.

We believe the situation presented here is similar to that presented in Echeles. CBG brought no complaint against Mr. Cormier. Rather, this matter was initiated by the Board in order to preserve the integrity of the proceeding before it. As such, it is not in the nature of a controversy between or among the parties. While CBG claims that it has been injured by Mr. Cormier, any such injury is indirect rather than a direct, palpable one. While there has been delay which may be attributed to Mr. Cormier's representation, which CBG apparently believes constitutes injury to its interests, CBG's substantive and procedural rights remain unscathed. And we are compelled to note that the relief which CBG seeks would only increase the delay and hence CBG's perceived injury. In these circumstances, we do not believe CBG has standing to request a hearing.

Next we address CBG's request for a hearing on the question of the imposition of sanctions against UCLA under 10 C.F.R. § 50.100. At the outset we note that this Board never proposed to impose such sanctions and called for a formal response as we did in Mr. Cormier's case. Thus there is no proceeding on the question of sanctions pursuant to § 50.100 at this time. Because we do not choose to initiate such a proceeding in the circumstances presented, there is no such a proceeding in which CBG may participate, unless CBG may cause such a proceeding to commence. We know of no way in which CBG could do so short of advancing a tardy contention. CBG does not, in its filing, seek to have such a contention admitted and does not address the five factors of 10 C.F.R. § 2.714 which must be weighed if such a contention were to be admitted. Consequently we must deny its request for a hearing.

In consideration of the foregoing, it is this 1st day of June, 1984, ORDERED

1. The charges pending against William H. Cormier pursuant to 10 C.F.R. § 2.713 are dismissed; and

2. CBG's requests for hearing on those charges and on the question of whether sanctions should be imposed against the Regents of the University of California pursuant to 10 C.F.R. § 50.100 are denied.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Glenn O. Bright
ADMINISTRATIVE JUDGE

Dr. Emmeth A. Luebke
ADMINISTRATIVE JUDGE

John H Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
June 5, 1984