

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

November 9, 1981

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MEMORANDUM FOR: Chairman Palladino  
Commissioner Gilinsky ✓  
Commissioner Bradford  
Commissioner Ahearne  
Commissioner Roberts

FROM: Martin G. Malsch *MG*  
Deputy General Counsel

SUBJECT: DEGREE OF PROOF NECESSARY IN A REGULATORY  
ENFORCEMENT ACTION

At the Commission briefing on proposed-enforcement matters, October 27, 1981, Commission Gilinsky requested a statement of the degree of proof necessary in a regulatory enforcement action as opposed to a criminal case.

Assuming that the question refers to the legal standard for proof in an adjudicatory hearing on an enforcement action, the answer is, as OELD stated at the briefing, that the presiding board or administrative law judge must reach the result dictated by a preponderance of evidence in the record. This is true because the agency has made its rules for adjudications applicable to enforcement matters, see 10 CFR 2.700 and 2.204(e), and the preponderance standard has been held to be the correct one under those rules. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 360 (1978), citing inter alia Charlton v. FTC, 543 F.2d 903, 907 (D.C. Cir. 1976); Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323, 356-357 (1974). Moreover, in license suspension and revocation proceedings the APA applies as provided by sections 181 and 189a of the Atomic Energy Act, and under the APA the preponderance of the evidence is the proper standard. This is a less stringent standard than the criminal standard which, as the Commission is aware, requires proof beyond a reasonable doubt.

Last term the Supreme Court upheld the preponderance standard in a challenge to an SEC disciplinary proceeding that resulted in debarring petitioner from practicing his profession. The Court

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found that where Congress has not specifically required a different standard and the proceeding is an adjudication subject to the APA, the preponderance standard is the correct one. Steadman v. SEC, U.S. \_\_\_, 67 L.Ed.2d 69, rehearing den. 68 L.Ed.2d 318 (1981). <sup>1/</sup> Congress has not provided specifically for a standard of proof in civil penalty hearings and, while such hearings may not technically be subject to the APA, by agency rule they apply the same standard the agency applies to adjudications governed by the APA. Thus it is safe to say that the preponderance standard would be upheld <sup>2/</sup> even in an NRC enforcement action that had serious personal consequences for a named offender. See also Vance v. Terrazas, 444 U.S. 252 (1980) (finding no constitutional infirmity in deprivation of citizenship based on preponderance of evidence). <sup>3/</sup>

Although it need not do so, in our view the Commission could probably require a greater burden of persuasion depending on the gravity of the matters in question or the gravity of the anticipated effect in terms of imposition on individuals of severe penalties or permanent stigma. See Virginia Electric and Power Company (North Anna Power Station, Units 1, 2, 3 and 4), 1 NRC 10, 17 n.18), and Steadman v. SEC at 80 (Justices Powell and Stewart dissenting). As the Supreme Court has frequently stated, agencies are free to grant the public greater protection than the APA requires. See e.g., Vermont Yankee Nuclear Power Co. v. NRDC, 435 U.S. 519, 545 (1978). The Commission could consider such action in its review of enforcement policy.

Finally, a different but related question refers to the standard that should underlie the agency's decision to proceed with an enforcement action. Such a decision is in the nature of a prosecutorial decision and must in large measure be guided by the Commission's policy on how aggressive an enforcement stance it

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- <sup>1/</sup> For a more complete discussion of this case see March 2, 1981 memorandum from Bickwit on that subject (SECY-81-129).
  - <sup>2/</sup> This assumes a challenge in the Court of Appeals. An aggrieved party has the alternative of a trial de novo in the district court.
  - <sup>3/</sup> In Steadman petitioner did not argue for the criminal standard, but urged that a "clear and convincing" evidence standard should be applied. "Clear, convincing and unequivocal" was the standard at issue in Vance.

wishes to maintain. The decision must, of course, recognize that in the event the party against whom the enforcement action is brought requests a hearing, the agency must meet its burden of proof. 4/

cc: OPE  
SECY

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4/ At that time, however, the full panoply of trial procedures are available to assist in meeting that burden.