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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION '85 FEB 20 P4:34

ADMINISTRATIVE LAW JUDGE
Ivan W. Smith

In the Matter of	)	Docket No. 50-289-SP
METROPOLITAN EDISON COMPANY	)	(ASLBP 79-429-09-SP)
(Three Mile Island Nuclear Station, UnitNo. 1)	)	(Restart Remand on Management)

MEMORANDUM AND ORDER
DENYING MOTIONS TO DISQUALIFY

February 20, 1985

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I. INTRODUCTION

The Commonwealth of Pennsylvania by its Governor;[1] Intervenor Three Mile Island Alert (TMIA);[2] and the Union of Concerned Scientists (UCS)[3] move separately that I disqualify myself from serving in this proceeding.

All movants cite as grounds for disqualification a letter of December 27, 1984 to U. S. District Court Judge Sylvia H. Rambo in which

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1 Commonwealth of Pennsylvania Motion to Disqualify Administrative Law Judge Ivan Smith, dated January 11, 1985.

2 Three Mile Island Alert's Motion to Disqualify Judge Ivan W. Smith, dated January 14, 1985.

3 Union of Concerned Scientists' Motion to Disqualify Administrative Law Judge Ivan Smith and Answer to the Commonwealth's Motion to Disqualify, dated January 14, 1985.

I express the hope that James R. Floyd, former TMI-2 supervisor of operations, will receive a lenient sentence. In addition, the Commonwealth and UCS assert as bias what UCS labels a "near obsession" with a concern for fair treatment of TMI-1 licensed operators. TMIA also charges that rulings and remarks made during the remanded proceedings demonstrate a bias against TMIA. The NRC Staff in responding to the motions also calls for disqualification with respect to approximately the same issues raised by UCS and the Commonwealth.[4]

The Licensee opposes the motions.[5] Intervenor Marvin L. Lewis also opposes the motions on the grounds that, as biased and improper as my conduct has been, other NRC judges who might replace me would be less fair.[6]

All motions are denied. I have acted honorably, ethically, and appropriately throughout this proceeding. I have no personal biases against any party or any participating individual, nor have I projected

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4 NRC Staff's Response to Commonwealth of Pennsylvania, Three Mile Island Alert, and Union of Concerned Scientists Motions to Disqualify Judge Ivan Smith, dated January 29, 1985. The Staff's "Response" is functionally a motion and usually references herein to "movants" include the Staff.

5 Licensee's Response to Motions by the Commonwealth of Pennsylvania, UCS and TMIA to disqualify Administrative Law Judge Ivan W. Smith, dated January 24, 1985.

6 Intervenor's Response to Commonwealth of PA, TMIA, and UCS Motions to Disqualify dated Febraury 1, 1985. Mr. Lewis's pleading will not be considered because it is untimely and without factual support and because he has not set out legally sufficient grounds for his position.

the appearance of bias. Dispassionate and reasonable persons, fully apprised of the context of my actions and possessed of all the facts, would agree.

Section III below sets out the applicable legal standards. Except in rare circumstances, not present here, statements made in the exercise of judicial responsibilities, or derived from that source, are not grounds for disqualification. Every statement and action accurately attributed to me were either judicial actions or were derived from those actions. Even those actions inaccurately attributed to me, were they true, would have been judicial or judicially derived. As such, nothing I have said or done may, as a matter of law, disqualify me.

A short memorandum to that effect would be sufficient. However, the motions cast doubt on whether I have been ethical and fair and, consequently, whether the TMI-1 restart hearings have been fair and reliable. Therefore in the memorandum below I have gone beyond a legally sufficient ruling on the motions, and have thoroughly explained the circumstances surrounding my actions. It will be seen that it is easier to accuse than to explain.

It is appropriate that judges should account for their actions, but accounting may seem to cast a judge in the role of an adversary to the movants. At the outset, I wish to assure them that I don't feel that way at all. Events have caused movants to perceive a difficult duty. They may be no more comfortable in seeking my removal than I am in defending against it.

Section IV explains that the letter to Judge Rambo was based solely upon information and opinions developed as a judge in this proceeding and that I violated no professional code in sending it. Rather, the letter was consistent with and in furtherance of the highest standards of professional responsibility. The letter makes it clear that it was not an official communication; but, rather a logical extension of a judicial responsibility to avoid an incorrect result of judicial acts. Moreover the movants have misunderstood and, therefore have mischaracterized the letter. When accurately read, the letter says nothing to indicate a personal bias or any other bias in favor of or against any party or a prejudgment of any factual issue.

Section V explains that interest in fair treatment of TMI-1 licensed personnel is not a self-indulgent excursion into matters beyond my authority, as alleged, but relates to a subissue squarely within the jurisdiction of the Board in this remanded proceeding -- one which the Board is required to decide. Moreover, even were that not the case, the Board, and I, as its Chairman have a responsibility to inquire into matters which bring into question the integrity of the hearing process. A concern for fairness for TMI-1 licensed personnel is not and has not been an indication of bias in favor of Licensee. Most importantly, I point out that due process for licensed operators is not a trade-off for public safety. Both due process and safety must be provided. Indeed, they go hand-in-hand as complementary factors.

TMIA alleges that a large number of comments and rulings made during the hearings on remand constitute a separate basis for

disqualification. Section VI explains that some of the actions TMIA attributed to me simply did not happen and others are taken out of context. All of the cited actions, where they did occur, were routine and appropriate evidentiary rulings and comments.

II. HISTORICAL PERSPECTIVE

Many of the actions and comments alleged as the bases of the disqualification motions have been characterized by movants to be extra-judicial meddling into matters beyond the Board's jurisdiction and my authority. Because of the unprecedented length and breadth of this proceeding, some of the participants currently representing movants have not appreciated exactly what the Board's responsibility is. It is time for review.

On August 9, 1979 the Commission, citing a July 2, 1979 order, directed that a hearing be conducted in this proceeding whether or not intervention petitions were filed. CLI-79-8, 10 N.R.C. 141, 149. The Licensing Board and its members named in the notice of hearing were charged with the independent responsibility of determining whether Unit 1 should be permitted to operate, and if so, upon what conditions. The Board was specifically directed to consider the adequacy of the retraining of all licensed operators at TMI-1 and the quality of Licensee's management. Id. at 144-45.

On March 6, 1980, in CLI-80-5, the Commission placed more specific responsibilities upon the Board with respect to management and operator competence. 11 N.R.C. 408. We were directed to consider twelve

discrete competency issues plus ". . . such other specific issues as the Board deems relevant to the resolution of the issues set forth in this order." The Commission made it clear that our duty was not simply to decide disputed matters among the parties, but to bring our own judgment to the process. Id. at 409-10.

In ALAB-772, 19 N.R.C. 1193, the Appeal Board remanded for further hearing the Dieckamp-mailgram issue because it held the Licensing Board to account for failing to develop a full record on its own. No other party had pursued the mailgram issue during the hearing. It was not the subject of a contention; but, rather, it was first raised by me. Similarly, the training issue was not addressed by any contention.[7] Only the Commonwealth among the present movants originally participated on that issue. The remand on training was also a manifestation of the Appeal Board's determination that this Board failed to develop a full record. Our performance in resolving disputed issues was not questioned.

From the very beginning of the proceeding, the Commission and, later, the Appeal Board, held us responsible for a complete and accurate record no matter what the parties do -- or fail to do.

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7 Chesapeake Energy Alliance Contention 13 was a very narrow contention regarding "mindset" and that intervenor abandoned its intervention. LBP-81-32, 14 N.R.C. at 442. Aamodt Contention 2 turned out to be limited to human factors considerations. Id. at 465.

About 35 lawyers and many lay representatives have appeared in the hearings. They came in waves of teams, each team specializing in a particular phase of the proceeding: plant-design-and-procedures, emergency planning, and the many facets of the management phase. Often the specializing litigants knew little or nothing about phases other than their own, and some litigated with zeal their narrow interests without apparent understanding of the overall effect of their efforts.

This compartmentalization has not been conducive to an orderly proceeding. Nowhere is the effect more troubling than in the separation between the plant-design-and-procedure phase and the operator-training phase. The two phases are logically inseparably commingled as noted in our plant-design-and-procedures partial initial decision:

> In Part II above we have made many determinations favoring restart dependent upon improvements in the TMI-1 machinery. However it can be readily observed that our determinations also depend very heavily upon correct operator procedures essential to safety. Operators whose competence has been ensured by appropriate training which has been verified by NRC and company-administered examinations are an indispensable element of nuclear safety despite the many improvements in plant design.

LBP-81-59, 14 N.R.C. at 1709.

Yet there was almost a complete separation of the participants in the plant-design-and-procedures phase from the participants in the

training phase and still another separation of the participants in the main hearings from those in the remanded hearings.[8]

I was the only person at the remanded hearing who had heard all of the testimony and considered all of the exhibits.[9] There was a special need to bring order to the process. I was particularly sensitive to the fact that an extensive litigation over the adequacy of the licensed-operator training program was in progress despite the fact that none of the movants' lawyers would know what it was that the operators should be trained to do. That information was developed in the plant-design-and-procedures phase four years ago. I have had the concern that none of the counsel for movants fully appreciated how much is asked of the men and women who would operate TMI-1.

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8 UCS, who carried the load for Intervenors on plant-design-and procedures matters did not participate in any aspect of the training and cheating phases until the instant remand began. Now, UCS' counsel is new to the proceeding (except as very early counsel for PANE) and does not appear to bring UCS' experience or expertise on plant operating procedures to the hearing.

Counsel and the technical advisor for the Commonwealth, counsel for the Staff, and counsel for TMIA had no experience in this proceeding until the record was reopened on the cheating phase. Judge Wolfe and Judge Linenberger joined the Board at the remand stage. Only the senior counsel for Licensee had continuous participation in the proceeding.

9 With the exception, of course, of the record of Special Master's hearing. Even there I read the exhibits and the transcript.

UCS' allegation that I have a near obsession for fair treatment of those people, is not stated in terms I would select. But my interest in the treatment received by TMI-1 licensed personnel is, in fact, strong because it is unrealistic to expect any person to adhere scrupulously to procedures and regulations if they are not, in turn, treated in accordance with the law. Respect for the law reinforces obedience to it. The Board previously noted its concern that, through no fault of their own, the large honest majority of TMI-1 operators were denied their licenses because, in part, of a breakdown in the integrity of the NRC examination process. LBP-82-56, 16 N.R.C. 281, 301. That breakdown created a morale problem. Id.

The concern I have expressed about the treatment of the TMI-1 licensed personnel has been founded first on safety considerations, and secondly on a dedication to the rule of law and the belief that the two considerations are complementary -- certainly not incompatible.

III. LEGAL STANDARDS FOR DISQUALIFICATION

A. General Rule

The movants have correctly addressed their motions to me. 10 C.F.R. § 2.704(c). They cite, as pertinent here, three long-recognized NRC tests for disqualification. The judicial officer is disqualified:

(1) if he has a personal bias against a participant;

(2) if he has prejudged factual, as distinguished from legal or policy issues; or

(3) if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 N.R.C. 21, 33-34 (1984); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 A.E.C. 60, 65 (1973).

Licensing Board members are governed by the disqualification standards that apply to federal judges. Public Service Electric & Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 N.R.C. 13, 20 (1984), citing Houston Power and Light Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 N.R.C. 1363, 1365-67. Consequently, Federal statutory grounds for the disqualification of District Judges, 28 U.S.C. 133 and 455, must also be considered:

Section 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

* * * *

Section 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

* * * *

Movants also point to Canon 3C of the American Bar Association Model Code of Judicial Conduct, codified in Section 455, supra:

C. DISQUALIFICATION

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

* * * *

B. The Disqualifying Perception of Bias Must Be Reasonably Based on All the Circumstances

UCS' legal argument presents a reasonable cross section of cases relating to disqualifying bias and a context within which to address a very important point. It is not merely the appearance of bias that disqualifies; the disqualifying bias must be that perceived by a reasonable person possessed of all the facts. UCS states:

> In applying these standards [bias, appearance of bias, and prejudgment of facts], the issue is "whether the reasonable person, knowing all of the surrounding circumstances, would consider the judge to be impartial." United States v. Norton, 700 F.2d 1072, 1076 (6th Cir.), cert. denied, 103 S. Ct. 1885 (1983).

UCS also cites Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980), quoting H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess. (1974) at 5-6; United States v. Cowden, 545 F.2d 257, 265 (1st Cir.), cert. denied, 97 S. Ct. 1181 (1977); and Hall v. Small Business Administration, 695 F.2d 175, 178 (5th Cir. 1983), citing Potashnick v.

Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980). UCS Motion at 4.

In every case cited by UCS, the courts never fail to emphasize that all of the facts and circumstances must be considered reasonably in assessing the asserted bias. In Roberts v. Bailar, the Court stated: "[The disqualification standard] asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge." 625 F.2d at 129.

In Cowden, the theme is continued where the court notes:

> The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man.

545 F.2d at 265.

The requirement is stressed again in Hall v. Small Business Administration, (695 F.2d at 179) and in the final case on this point cited by UCS, Potashnick v. Port City Construction Co. (609 F.2d at 1111).

C. The Perceived Bias Must Stem From An Extrajudicial Source

The Federal standard that disqualifying bias must come from an extrajudicial source has been applied by the Commission to its judicial officers. In South Texas, supra (15 N.R.C. at 1365), the Commission stated:

> As the Supreme Court has held, "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). See also In Re International Business Machines Corporation, 618 F.2d 923, 927 (2d Cir. 1980) ("IBM"). The same standard applies to presiding officers in administrative proceedings. Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974). Indeed, the Commission has expressly adopted this rule, holding that "Preliminary assessments, made on the record, during the course of an adjudicatory proceeding -- based solely upon application of the decision-maker's judgment to material properly before him in the proceeding -- do not compel disqualification as a matter of law," and citing with approval United States v. Grinnell Corp., supra. Commonwealth Edison Company (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 A.E.C. 169, 170 (1973).

The Appeal Board in Public Service Company of New Hampshire, et al. (Seabrook Units 1 and 2), ALAB-749, 18 N.R.C. 1196, 1200, reaffirmed the requirement that disqualifying bias must stem from an extrajudicial source and explained:

> Matters are extrajudicial when they do not relate to the judge's official duties in the case. To demonstrate bias flowing from extrajudicial sources, a party must "identify . . . [a] personal connection, relationship or extrajudicial incident which accounts for the alleged personal animus of the . . . judge."[15] The fact that a judge's actions are, for example, erroneous, superfluous, or even improvident, does not, without more, demonstrate bias of an extrajudicial origin. As we noted in ALAB-748 [18 N.R.C. at 1188] rulings, conduct, or remarks in response to matters that arise during administrative proceedings are not extrajudicial. [Footnote omitted]

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15 In re IBM Corp, 618 F.2d 923 (2d Cir. 1980).

Most of the statements forming the bases of the motions were -- as stated in South Texas and Seabrook -- assessments made in the course of the adjudication. They were either of a preliminary nature, or related to my overall responsibility to preside.

D. The Source, Not The Forum Controls

The letter to Judge Rambo obviously was not sent for the purpose of presiding over this proceeding, and, in that sense, sending the letter was extrajudicial. But no information in the letter, asserted by movants to be a demonstration of bias, came from an extrajudicial source. The important point, as set out in Licensee's brief (at 7-9), is that it is not the forum where the comments were made, but the source of the underlying information that controls.

Several cases demonstrate this point. Licensee cites In re Corrugated Container Antitrust Litigation, 614 F.2d 958 966-67 (5th Cir. 1980) where the challenged comments were made by the judge to an involved lawyer during a golf game. The Circuit Court found that all of the statements set out in the movant's disqualification affidavits reflected comments on the evidence and opinions developed through the judge's participation in the case, and held that:

> "while these thoughts were voiced in an extra-judicial setting . . . the informational source upon which they drew -- the judge's experience as a judge -- was distinctly judicial." Id. at 967, quoting United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976).

In Haldeman, Judge Sirica, at a press party, stated to reporters that he was confident that the defendants in his court could get as fair a trial in the District of Columbia as in any place in the United States -- an issue before him. Id. at 134-35. The D. C. Circuit noted that the comments did not disqualify him, that "the informational source upon which they drew -- the judge's experience as a judge -- was distinctly judicial [footnote omitted]." Id. at 136.

In United States v. Conforte, 457 F.Supp. 641 (D. Nevada 1978), the trial judge in a criminal proceeding held a poor opinion of the defendant, which opinion the judge expressed to his bridge club and at a cocktail party. Another District Judge, designated to preside over the issue of the trial judge's alleged bias, held that judicial opinions and bias developed during the course of court proceedings must be distinguished from personal opinions and bias having their source outside the courtroom. Id. at 657. The trial judge's opinions and biases, although expressed extrajudicially, were judicial in origin and therefore not disqualifying. Id.

My letter to Judge Rambo falls well within the latitude appropriate to the judges in Corrugated Container, Haldeman and Conforte.

E. The Pervasive-Bias Exception to the Extrajudicial Rule

A judge cannot with impunity say anything he or she wishes to say in the course of judicial duties. Although, as noted above, the general rule is that bias sufficient to disqualify must stem from extrajudicial sources, there is an exception where pervasive bias and prejudice shown, by otherwise judicial conduct, is disqualifying. "[T]he single fact that the judge's remarks were made in a judicial context does not

prevent a finding of bias." Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979)[11]

The Commission acknowledges the pervasive-bias exception:

> Although some courts have stated such an exception to the general rule that bias must be extra-judicial, courts have been hesitant to invoke that exception except in the most extreme cases. E.g., United States v. Ritter, 540 F.2d 463 (10th Cir. 1976) (per curiam), cert. denied, 429 U.S. 951 (1976). For example, the United States Court of Appeals for the Second Circuit recently noted that it has never disqualified a judge on the basis of judicial conduct. IBM, supra, at 928 n.6. The Court observed that a judge is more than a passive observer in a case involving a technical and complex field; he must penetrate through the parties' posturing to decide the accuracy of their presentations. [Emphasis in original]

South Texas, supra, 15 N.R.C. at 1366.

Whether my conduct in the course of presiding over this hearing falls within the pervasive-bias exception is a factual matter which must be judged within the context of the proceeding, the relevant events, the issues, and the evidence. In my view there has been no bias whatever, let alone pervasive bias.

E. Bias-in-fact and The Appearance of Bias

Movants seek my recusal on the basis of both the subjective bias-in-fact standard of 28 U.S.C. § 144 and the objective standard of

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11 See also United States v. Holland, 655 F.2d 44, 47 (5th Cir. 1981), quoting Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), and Whitehurst v. Wright, supra.

§ 455(a), i.e., whether the judge's impartiality "may reasonably be questioned." In either case the source of the disqualifying bias or appearance of bias must be the same. It must stem from an extrajudicial source. Johnson v. Trueblood, 629 F.2d 287, 290 (3rd Cir. 1980). See also South Texas, supra, 15 N.R.C. at 1367. The most demanding standards should apply. I have introspectively considered whether, in fact, I harbor a personal bias against any participant, and avow that I do not. I have also applied, as stated in Section III B, supra, the fully-informed reasonable-person test.

G. Prejudgment of Factual Issues

An assessment of factual issues begins with the first discovery dispute among the parties and continues virtually minute-by-minute throughout the trial as the judge is repeatedly called upon to rule on offers of evidence. As South Texas (citing Grinnell and La Salle County) (Section III C, supra) make clear, preliminary assessments of factual issues, made on the record, and based upon the decisionmaker's judgment of material properly before him in the proceeding, does not compel disqualification. See 15 N.R.C. at 1365. Even "crystallized views of the legal and policy issues," as distinguished from factual issues, are not bases for disqualification. Shoreham, supra, 20 N.R.C. at 34-35.

IV. THE LETTER TO JUDGE RAMBO

A. The Letter

The letter to Judge Rambo expressed the personal hope that the court would be lenient with Mr. Floyd. The opening two paragraphs stated how I happened to have information on the subject but emphasized that I know nothing about Mr. Floyd except the "information produced on the public hearings [sic -- should have stated 'on the public record']." Third paragraph sets a factual bases derived from the TMI-1 restart proceeding and the two final paragraphs explain why I believe that a severe penalty is not required as a deterrent. The full text of the letter is attached.

B. Background

In the July 1982 partial initial decision on the cheating phase, the Board summarized the 1979 events leading to Mr. Floyd's (designated as "VV" in the findings) conviction in Judge Rambo's court.

> 2274. He [Floyd] didn't attend FSR classes and therefore was given closed-book take-home exams which he didn't return. Because of a grace period, it wasn't until July 1, 1979 that he finally faced suspension from licensed duties. By then he was desperate. On the evening of July 1, 1979 he was faced with an absolute deadline, and he was also faced with vacation plans beginning the next day. After work VV induced O to help him. VV (or someone on his behalf) turned in O's work, in O's handwriting, as part of VV's own work. The training department detected the handwriting differences. O was absolved, VV was said to be disciplined for his conduct, and VV was later recertified to the NRC for his license renewal based in part, as we find, upon work done for him by O.

> The incident raised three issued: Did Licensee deal correctly with O; with VV; and with the NRC in recertifying VV?

LBP-82-56, 16 N.R.C. 281, 344-45.

It is important to recall that Mr. Floyd's conduct, as such, was never an issue before the Licensing Board. He was assigned exclusively to TMI-2. Our jurisdiction relates only to the management and operation of TMI-1. As the decision makes clear, the Board's collateral interest arose solely because of the use later made of Mr. Floyd's faulty examination by others, in particular, those who had since become involved in the management of TMI-1.

Nothing in the discussion of Mr. Floiyd's conduct relates to any issue pending before the Board in the remand and could not therefore be a prejudgment. Even to the extent that the paragraph was a comment on a subsidiary evidentiary issue that had once pended, it was a post-decisional comment and could not therefore be a prejudgment.

C. Absence of Bias

The discussion of Mr. Floyd's conduct is relevant only to movants' allegations that it reflects a bias in favor of Licensee, thus against the movants. But the language of the letter does not express any attitude toward the Licensee unless one were to infer a bias in favor of Licensee from the expressed hope for leniency for Mr. Floyd. When the letter is understood correctly, there is no bias expressed in favor of Mr. Floyd in the first instance, let alone bias imputable to Licensee.

The letter stated that I know nothing about Mr. Floyd other than what I have learned in this proceeding.[12] I have never met him. He and the information about his conduct are abstractions to me. I expressed no opinion to Judge Rambo, and hold none, as to whether Mr. Floyd is guilty.[13] Nothing expresses admiration for what he has done.

Furthermore, there is no privity between Mr. Floyd and Licensee in this matter. The Licensee will not be benefitted or damaged by the relative severity of Mr. Floyd's sentence.

The partial initial decision demonstrates that, even if there had been a personal sympathy for Mr. Floyd, it was not transferred to Licensee. The Board found several extenuating circumstances respecting Mr. Floyd's actions. 16 N.R.C. at 344, 347. We did not, however, impute any extenuation to Licensee. To the contrary, we severely criticised Licensee's management; found that a false certification had been made to the NRC by Licensee's managers and called for a criminal-type investigation. 16 N.R.C. at 348-55. Moreover we imputed every adverse finding on individuals to the corporate licensee. E.g., 16 N.R.C. at 355, Finding 2318. We took the strongest action against

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12 I learned of his trial and conviction extrajudicially as some of the movants point out and which I discuss below. I also learned from Mr. Floyd's counsel on civil matters that there was a concern that he could be imprisoned and that a letter might be helpful.

13 In fact, Mr. Floyd might have cause to complain. The letter assumes an intent on his part that he may dispute.

Licensee within our power to take.[14] As a consequence the Licensee was assessed a civil penalty in the maximum legal amount. The argument that a concern for individuals would prevent me from making adverse findings against the Licensee is not in accord with the history of this proceeding.

D. Judicially-Derived Information

The portions of the letter to Judge Rambo commenting on Mr. Floyd's conduct[15] was entirely derived from the official record and is, in

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14 By contrast, the NRC Staff, now seeking my removal because of the letter, took a very mild and myopic position on this issue. Staff believed that Licensee was not even required to report Mr. Floyd's faulty examination. The Staff expressed no view on the false certification to it but believed that, simply because his license was no longer being used by the company, Mr. Floyd should not have been recertified. 16 N.R.C. at 353. Even though all of the evidence on the false-certification had already been developed, the Staff made no recommendation whatever in its Comments on the Report of The Special Master, dated May 21, 1982.

15 The third paragraph stated: "I have basically two grounds for believing that leniency is appropriate. The first pertains to the background against which Mr. Floyd's actions should be judged. Mr. Floyd worked very hard in the months following the accident. He possesses excellent technical skills. Management depended very heavily upon him in addressing the many problems needing solution on the island. I have always felt that Mr. Floyd's deception was an impulsive act and that it was not motivated by personal ambition. He could have sought relief from his other duties in order to train properly for the requalification examination, to his personal benefit. He could have passed easily without deception. One senses he neglected his examination responsibilities out of a misguided but altruistic effort to attend to matters of perceived greater urgency. In addition, he apparently felt that he was well qualified notwithstanding his licensing status."

essence, a distillation and paraphrase of pertinent parts of the partial initial decision. See 16 N.R.C. at 344-48, particularly Findings ¶¶ 2274, 2278, 2285, and 2286.

Other evidence, not cited in the partial initial decision, demonstrates the judicial derivation of the paragraph.[16]

It is true, as alleged by UCS and the NRC Staff, that Mr. Floyd's trial and conviction did not come to my attention solely in the course of this adjudication. I learned of his trial on Harrisburg television, and his conviction in the Washington Post the day following the verdict. The argument is a quibble -- an irrelevant one at that. Judges cannot insulate themselves from such events.[17] It is the type of information that, if relevant to this remand, which it is not, could be officially

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16 For example, see Mr. Floyd's testimony where he explains that work priorities had preempted the completion of the exam. Tr. 23,661-63. Mr. Arnold, GPU Nuclear's President, testified that Mr. Floyd was "a very very capable technical person and contributed immensely to the effort after the accident. Mr. Arnold took responsibility for Mr. Floyd not spending more time on training lessons and he stated that training was not then their highest priority. Tr. 23,725. He also testified that Mr. Floyd has been a part of a "non-routine and very intense level of activity" but for which Floyd would have been reassigned to the training program "on a 100% basis." Tr. 23,763 (Arnold).

17 Judges are constantly exposed to extrajudicial information in proceedings of high public visibility. When it has a bearing on the issues, and particularly when it comes from a party, under the ex parte rule, judges make those communications known. In serving my letter to Judge Rambo on the parties, I obviated any potential prejudice from learning about the conviction from the media, even if that information had been relevant to the remand and a source of potential bias.

noticed. Most importantly, no movant argues, nor could it, that learning of the conviction is itself a source of bias or prejudgment. Thus the source of that knowledge is irrelevant.

TMIA argues that I had no judicial basis for the statement (in paragraph 2) that Mr. Floyd's damaged career and public humiliation will be seen by others as too great a risk for any gain from cheating. TMIA's statement is not entirely accurate (see 16 N.R.C. at 347, ¶ 2084). In any event, my opinion, was inferred from the conviction.

E. Canons 2, 2A and 2B - Code of Judicial Conduct

The Commonwealth and TMIA advance, as separate grounds for my disqualification, the argument that I have violated Canons 2, 2A, and 2B of the Code of Judicial Conduct:

Canon 2

> A Judge Should Avoid Impropriety and the Appearance of Impropriety In All His Activities.
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. . . . [A judge] should not lend the prestige of his office to advance the private interests of others;. . . . He should not testify voluntarily as a character witness.

Whether I have violated Canons 2 and 2A is a conclusion that must be made upon an evaluation of all the facts, law and circumstances. Considering all of the circumstances of this case, I believe my conduct has been in furtherance of the Canons -- not in violation of them

Canon 2B has not been violated, either in letter or in spirit.[18] The commentary to Canon 2B explains its purpose:

> The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

My letter to Judge Rambo was neither testimony nor did it relate to Mr. Floyd's character. The letter makes it clear that I know nothing about his character. But, assuming for argument, that the letter can fairly be perceived as a statement about Mr. Floyd's character. As the commentary to the Canon makes clear, a judge may not escape his duty to testify about character, when, in response to a summons, that information is needed. Within the circumstances of this case, Canon 2 B. should not be literally applied. The important test is whether I have employed the prestige of my office to advance Mr. Floyd's private interests.

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18 Movants cite Judge Merritt Ruhlen's Manual For Administrative Law Judges as a basis, in part, for the allegation that I have violated ethical codes. Judge Ruhlen stated:

> An Administrative Law Judge is subject to the canons of ethics of the bar and the ethical standards of the Federal Government [5 CFR Part 735 (1981)] and his agency. In addition, there are certain distinctive standards of judicial conduct he must observe.
>
> Id. Revised Edition, 1982, at 70.

The Federal Administrative Law Judge Conference has considered but, has never adopted, the ABA Uniform Code of Judicial Conduct. The

(Footnote Continued)

No prestige of office was involved. It was a judge-to-judge communication -- not testimony before a jury. The reference to my position as an administrative law judge was solely to explain how I had the opportunity to have useful information. Judge Rambo has the entire trial record and the probation report to consider. She would not give my letter inappropriate weight, and certainly could not be swayed by any prestige attendant to my position.

The letter was not sent to advance Mr. Floyd's private interest, although he might have benefitted from it. It was sent solely for public purposes, i.e., to provide possibly useful -- and undeniably relevant -- information. It was intended only to assure that Mr. Floyd's sentence would not be unjust.

As the commentary, supra, specifies, one of the principal purposes of Canon 2B is to prevent the misunderstanding that the testimonial is official. It is not possible fairly to construe my letter as an official testimonial.

The harm from the letter, if any, would have been in Judge Rambo's court, and only the parties there would have standing to complain. Canon 2B did not, as suggested by TMIA form the basis for 28 U.S.C.

(Footnote Continued)
Code provides valuable guidance where relevant, but some of it does not apply to regulatory administrative law judges who typically do not preside over matters involving their own communities.

455(a) and it is not per se related to bias or prejudgment or to disqualification in another forum.[19]

F. Reasons For The Letter

It is not my responsibility to oversee the dispensation of justice in the United States District Courts. To say that I sent the letter simply because I hoped for leniency for Mr. Floyd is not enough. The letter tried to explain why I, as compared to others, should write to Judge Rambo, but apparently my reasons have not been understood by the movants.

This proceeding has presented an unusual set of circumstances. There is an interface and a nexus between the Board's partial initial decision and Mr. Floyd's conviction in the Court. The evidence which lead to the investigation and indictment of Mr. Floyd first surfaced in this proceeding. It began when Licensee's Mr. Arnold came forward with the information about Mr. Floyd's use of O's help. TMIA developed the evidence further before the Special Master where the NRC evidentiary record was completed. TMIA was the only party who seemed to understand the importance of the evidence.

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19 See TMIA Motion at 7-8. Contrary to the implication of TMIA's motion, Fredonia Broadcasting Corporation, Inc v. RCA Corp., 569 F.2d 251, 257 (5th Cir. 1978) did not discuss Canons 2 and 2A. Even those Canons, arguably relevant to bias and disqualification, were not codified in 28 U.S.C. 455(a).

As noted above, the NRC Staff, incredibly, saw no problem with the false certification to the NRC except that the certification sought an unneeded license renewal. The Commonwealth did not even refer to the matter in its proposed findings before the Special Master and in his comments to the Board, nor did UCS. The Aamodts briefly mentioned the incident in passing. TMIA alone pursued the matter and, in a very summary discussion, called upon the Board to recommend a criminal prosecution of Messrs. Miller, Herbein, Zechman, Beers and Lawyers -- but not Floyd. TMIA's recommendation was to remove Mr. Floyd from any position critical to the public's health and safety.[20] The Special Master evaluated the false-certification incident in terms of management competence. He did not allude to any possible criminality of the event and made no recommendation.

It fell to the Licensing Board to analyze the pertinent NRC regulations and requirements, evaluate the overall significance of the episode, recommend the criminal investigation, and to explain why there was probable cause for such an investigation. After that the next information received was that Mr. Floyd had been tried and convicted on the events covered in that decision.

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20 TMIA's Comments On Special Master's Report and Atomic Safety and Licensing Board's Tentative Final Draft Decision, undated (circa May 24, 1982) at 6-7, 11.

The Board's decision was a link in the direct causal chain of events leading to Mr. Floyd's conviction. But, more importantly, I thought that I had perspective and understanding of the events useful to the Court and probation officers and that no one else could or would communicate.

The letter was not impulsive. I considered several factors, including the fact that such a letter would have no precedent -- but then there is no precedent for the events leading to the letter. Considering the position of the parties when the matter was before my Board, they should not object to a hope for leniency. As discussed above, I considered the circumstance that the facts stated in the letter about Mr. Floyd's conduct had no bearing on factual issues before the Board on remand. I also considered the effect such a letter might have on the proceeding if a party chose to use the letter out of context and concluded that none would do that.

Finally I decided to send the letter in consideration of several major factors:

(1) I had potentially useful information to impart, derived from my judicial role. I could be silent and never be criticized, but I believed that I had an ethical responsibility to write to Judge Rambo. The overriding principle of the Code of Judicial Conduct, as set out in Canon 1, which calls upon all judges to preserve an honorable judiciary.

In contrast to the judges in Corrugated Container, supra, Haldeman, supra and Conforte, supra, I did not chat with friends about the matter on the golf course or cocktail party, I did not write about him to my bridge club, nor did I volunteer information about him in a press conference. My letter was a logical extension of my judicial responsibility. (2) I considered a competing factor: that I had no authority to speak for the Nuclear Regulatory Commission, the Licensing Board, or any other person. Therefore I personally discharged a judicially-derived ethical responsibility. This blending of roles is reflected in the fact that the letter was described as personal and could have been sent to the probation office as a private communication where custom would protect its confidentiality. Instead I served the letter on the parties. (3) Finally, no harm could come to any person because of the letter. I did not and would not comment on Mr. Floyd's guilt or innocence. Judge Rambo will have before her Mr. Floyd's trial record and the probation officer's report. I fully recognized that she would use my letter, if at all, as she deems appropriate, fully informed of all the circumstances. Any harm from the letter flows from the use made of it by others.

G. No Prejudgment

The final paragraph of the letter expresses the opinion that no deterent is needed because deception at TMI in the future is very unlikely.[21] Movants TMIA and UCS argue that it indicates prejudgment on the remanded training issue and is, in essence, a prediction that the Board will find in favor of the Licensee on that issue. I do not believe that that is a fair reading of the paragraph. It does nothing more than express confidence in the NRC's hearing process. It is based upon two considerations. The first is that in the partial initial decision, the Board imposed very substantial conditions on Licensee's training and testing program.

The conditions were designed to prevent cheating in the future and to improve the program. In that respect, the letter was a post-decisional comment. See LBP-82-56, 16 N.R.C. at 384, Finding ¶ 2421, Conditions 1

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21 "More important, however, a severe criminal penalty against Mr. Floyd, is in my personal view, not needed to insure the integrity of the NRC operators' licensing process at Three Mile Island, nor would it be useful. The civil regulatory scheme presently administered by the NRC is exceedingly thorough. It is adequate to assure that the operators of Three Mile Island are persons of competence and integrity. Many weeks of public NRC hearings have been devoted to the issue of TMI management integrity and operator competence and, in fact, hearings on that very issue are still in progress. I have confidence that the NRC administrative regulatory process, with extensive public participation, will provide an orderly and reliable mechanism for assuring that any problems caused by deception respecting Three Mile Island will have been identified and resolved. Deception in the future is very unlikely. A severe sentence for Mr. Floyd would add nothing."

through 4. The second basis for the statement is confidence that the remanded hearings then underway would be fair and thorough, that the Commonwealth and Intervenors would have a full hearing. If the evidence reveals that Licensee failed in its burden of proof on the remanded issues, that circumstance would be dealt with, either by appropriate conditions or an outright denial of the request to operate TMI Unit 1.[22]

Were I not committed to provide a full, fair and reliable hearing, and were I not prepared to impose conditions or deny the restart of TMI-1, if indicated, I could not have made the statement. And in that event, the disqualification motions would not have been necessary. I would have stepped aside on my own motion. The paragraph also states my judicially-derived confidence in the independence and integrity of the NRC hearing process. In that respect it is akin to Judge Sirica's confidence in the quality of justice in the District of Columbia District Court. See Haldeman, supra. At most, it is a view of a legal and policy issue, as distinguished from a factual issue[23] and not a basis for disqualification. See Shoreham, supra, 20 N.R.C. at 34-34.

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22 See Commonwealth Edison Company (Byron Units 1 and 2), LBP-84-2, 19 N.R.C. 36 (1984) (Licensing Board denies application for operating license where Applicant fails in burden of proof).

23 Licensee's comment that the statement could have been made as a preliminary assessment of the evidence already received or prefiled is not correct. Licensee response at 18-19. I made no assessment of that evidence whatever in connection with the letter and did not have any evidence in mind.

In sum, I find no grounds in the letter to Judge Rambo upon which I may disqualify myself.

V. CONCERN FOR LICENSED PERSONNEL

A. Introduction

During the remanded hearing I expressed the Board's strong interest in the fact that Mr. Husted, a licensed operator-instructor, and G and H, control room operators, had lost their NRC operator's licenses. The Board had concluded that Mr. Husted had serious attitude problems and we questioned his ability and willingness to train licensed operators. We recommended that his performance be monitored but delcined to remove or to recommend removal of his license. We found that G and H had cooperatively cheated on a company examination and recommended a formal license removal proceeding against them unless they voluntarily accepted a suspension, which they did. The Commonwealth appealed the Board's decision not to remove their licenses. Based upon the record of the case and the Board's findings, the Commonwealth and the Licensee entered into a stipulated agreement (never presented to any board for approval) that Mr. Husted would surrender his license and be removed as an instructor of licensed operators and that G and H would lose their operator's licenses.

UCS and the Commonwealth assert, as an independent basis for disqualification, my remarks concerning Mr. Husted, G and H and the

agreement between the Commonwealth and Licensee. TMIA adopts their positions.

UCS bases its case on two points: (1) My remarks are evidence that I have unilaterally and, in some respects, extrajudicically, predetermined that the Licensing Board will not take action or make findings adverse to individuals even where the Appeal Board has found such actions necessary to public safety; and (2) even if the record on remand demonstrates that company policies and procedures must be changed, I would not join in imposing the necessary conditions because of an unfair effect upon individuals. Motion at 10-12. In effect, UCS is alleging a subject-matter bias or an unyielding prejudgment of a factual issue. UCS does not allege personal bias.

The Commonwealth states it somewhat differently: that my remarks demonstrate bias against the Commonwealth and that the bias is extrajudicial because the fates of Messrs. Husted, G and H were not issues before the Board. Mr. Au's affidavit at 2, Motion at 6-8.

My expressed concern for the treatment of the TMI-1 licensed personnel is not a manifestation of disqualifying bias or prejudgment, and, to the extent that the motions depend upon the respective statements, they are unfounded. My comments were made on the record during the course of the adjudication concerning issues within the scope of the hearing. As such, those statements, to be disqualifying, must be within the pervasive-bias exception to the extrajudicial rule. See Section IV E, supra, and South Texas, supra, 15 NRC at 1366. Since the

remarks do not reflect bias, let alone pervasive bias, they are not disqualifying.

B. Judicially-Derived Information

The Appeal Board remanded several issues for the Licensing Board's consideration relevant to the treatment of Messrs. Husted and the control-room operators. Pride, enthusiasm, and professionalism of training-department instructors and personnel, and changes within the training department were issues specifically mandated. The treatment of Mr. Husted was directly relevant. 19 NRC at 1234, 1236 n.56.

According to the Appeal Board, the most important matter to address on remand was whether top management met the need to keep aware of the real and perceived problems of its employees. Id. at 1236. Employee perceptions of fairness to G and H were clearly relevant. The Board was expressly directed to inquire into reported bitterness and anxiety among some employees. Id. at 1235. The Appeal Board also noted its sensitivity to morale problems among employees whose training and job performance continue to be under scrutiny despite successful retesting. Id. at 1237.

I am not alone in believing that the loss of licenses by Messrs. Husted, G and H were relevant issues. The other Board members also hold this view. Moreover, contrary to the startling and inaccurate claims by the Commonwealth and UCS that these matters were outside the purview of the remand; the parties, in fact, litigated these issues throughout the remanded training phase.

For example, Dr. Long, appearing with Licensee's panel on the training issue, (ff. Tr. 32,202), testified about Mr. Husted's effective performance since the partial initial decision criticizing him. Dr. Long testified that Mr. Husted had lost his license because of a commitment to Governor Thornburgh, but that the handling of Mr. Husted reflected a company attitude to advance employees appropriately based on their performance, if possible. Id. at 16-18. Thus, the treatment of Mr. Husted was placed squarely into issue by the Licensee. My questions for Dr. Long on the point were essential to a complete and accurate record. Tr. 32,218-323.

I have not been able to review the entire transcript of the remanded training phase, but a spot-check of the record reveals that the treatment of Mr. Husted, G and H was a frequently addressed subissue. UCS Exhibits 17-20, offered, as a part of UCS's affirmative case, relates directly to H's suspension and subsequent removal from licensed duties. Movants cross-examined licensee's witnesses on those exhibits. Counsel for TMIA believed that the handling of Mr. Husted was relevant to management's integrity. Tr. 33,091-093.

Perhaps the most concrete demonstration that the Commonwealth and UCS, as well as the Licensee, believed that the treatment of Messrs. Husted, G and H was an issue within the remanded proceeding occurred on January 18, 1985, (after the Commonwealth had filed the disqualification motion). Counsel for the Commonwealth extensively cross-examined licensee's panel about management's actions in removing the licenses of Mr. Husted and H, and the potential effect those actions had upon the

morale of other licensed personnel. Tr. 33,484-507. Since I had fresh in mind Counsel's affidavit and motion to the effect that concern for Mr. Husted and H was outside the scope of the Board's jurisdiction, it was necessary to confirm that the apparent direction of his cross-examination was, in his view, examination within the scope of the hearing. Counsel assured the Board that the perception by other licensed personnel concerning the fairness of the handling of Mr. Husted and H was indeed an appropriate subject for the hearing. E.g., Tr. 33,494-96; 33,498; 33,504; 33,507-08. I can only conclude, from Counsel's careful cross-examination and forthright statement about the relevancy of his approach, that the Commonwealth has changed its position as stated in the affidavit and motion. The Commonwealth now considers that interest in the treatment of licensed personnel at TMI-1 is relevant.

Similarly, Counsel for UCS cross-examined Licensee's witnesses on whether licensed operators and training personnel perceived as unfair the treatment of Mr. Husted and H. Tr. 33,520-523. See also 33,429. I am at a loss to understand why UCS believes that my concern for Mr. Husted and H is beyond the scope of the remand. Nor can I identify the bases for UCS's statement in its proffered reply to Licensee's response, (January 31, 1985), that my information about G and H stemmed from extrajudicial sources. It came from the large evidentiary record of the subject, several board notifications, in part from UCS's own exhibits and cross-examination, and from no other source.

Accordingly, I find that all of my comments about the treatment of TMI-1 licensed personnel were made on the record during adjudication, that they were comments within the scope of the remanded issues, that they were all based upon judicially-derived information. They were also reasonable as I next discuss.

C. Pervasive-Bias Exception

Movants argue that my comments, even where judicially derived, manifest a bias or prejudgment so pervasive that my disqualification is mandated.

As noted in South Texas, supra, the pervasive-bias test permits a judge very great latitude where his or her comments are judicially connected. The test is whether my comments about the licensed personnel were founded on pervasive bias - not whether they were inappropriate. But since I find that all my remarks were, in fact, appropriate, I cannot, of course, find pervasive bias or prejudgment.

My comments were based upon several concerns. The principal consideration is that the Licensing Board is, as is the Appeal Board, concerned about anxiety and bitterness of licensed personnel. My concern is focused, in part, on a perception by other licensed personnel of unfair treatment of Mr. Husted, G and H. This is not an unfounded concern. In fact, as noted, it was one of the themes of movants' cross-examinations. The fact that a perception of unfairness existed was established by the unrefuted testimony of Licensee's witnesses. See e.g. Tr. 32,321-22 (Long); 33,492-93 (Newton); 33,500-07 (Ross).

The movants do not seem to understand why the Board is concerned about the perception of unfairness by other licensed personnel. As I explained at the outset, the Board believes that morale problems, anxiety and bitterness of licensed operators, generated, in part, by their perception of unfair treatment of Messrs. Husted, G and H, are directly relevant to safety. The NRC and the public demand much of the operators and, above all, we expect them to comply with procedures and the regulations.

Mr. Husted, G and H were never formally charged with any misconduct during the cheating hearings and were not permitted to be present during those hearings when accusations were made against them. Nevertheless, they lost their operator's licenses, the most important aspect of their careers, as a proximate result of the hearings and the Board's partial initial decision. NRC regulations specify that, unless surrendered, a license may be removed, only in accordance with provisions of 10 CFR Subpart B, which, of course, provides for a full due-process hearing. Messrs. Husted and H never had such a hearing nor an opportunity for one; they were bargained away. They have not been treated in accordance with the law.[24] I am strongly concerned that such treatment might send a signal to the licensed operators at TMI-1 that the NRC does not, itself, feel dedicated to the rule of law. I have a strong philosphical

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24 I recognize that an NRC operator's license depends upon a licensed utility sponsoring the operator. It is not unlawful for a utility to withdraw that sponsorship.

conviction that respect for the law reinforces obedience to it -- that principle is fundamental to this government. Thus, as I have stated throughout, the treatment of Messrs. Husted and H is a safety issue as well as a due-process issue.

Moreover, no choice ever had to be be made between safety and due-process. If, on appeal, it had been determined that the Licensing Board was incorrect in not demanding the licenses of Messrs. Husted, G and H, the necessary license-removal proceeding under Subpart B could have been commenced.

My second concern about the treatment of licensed personnel is also related to safety. At best, the hearings on the cheating issues have produced snapshots of the affected individuals. Mr. Husted, for example, was captured on the transcript of the cheating hearing during a brief interlude in his life - apparently a stressful time. The unrefuted testimony of Dr. Long in the remanded proceeding is that Mr. Husted has an excellent nuclear background and that he performed very well on his job. His attitude problem had been resolved. Ff. Tr. 32,202 (Long). Yet, he has lost his license and is no longer available as a licensed-operator instructor. What do we know about his replacement? What has been lost? What is the basis for assuming that safety has been improved by his dismissal from licensed duties? Legitimate doubts were raised about his attitude, and an inquiry was appropriate. But a more deliberate, searching approach to the matter should have been conducted in the interest of retaining, if possible, an experienced and qualified instructor -- all in the interest of safety.

The Board's third reason for inquiring into the treatment of the licensed personnel was to determine whether the NRC adjudicatory process was being abused. We believed that there was a duty, aside from the issues in the case, to inquire into and report, if necessary, any indications of an abuse of the process. Since it was the Board's record, for which we are responsible, that formed the bases for the "out-of-court" removal of the licenses, we inquired as to whether our adjudication was not being used improperly to deny due process to individuals affected by the adjudications.[25]

There was a fourth reason for the inquiry. If, as appeared from the unfolding evidence, there was an interest by the parties in bringing about personnel changes at TMI-1, we wished to be timely informed of that possibility so that the Board could weigh its effect upon our decision.

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25 Normally, in matters affecting the public interest, settlements must be approved by the court, e.g., criminal, government antitrust, and class actions. This is also true with NRC proceedings. If there had been a Subpart B proceeding to remove the licenses of Messrs. Husted, G or H, any such settlement would have to be approved by the presiding officer. 10 CFR 2.203. Licensee took the position before the Special Master and the Licensing Board that G and H did not cheat. However, it now appears that Mr. Hukill, Director, TMI-1, may have been convinced by the Licensing Board's decision that they, in fact, did cheat. See UCS Exhibit 19. If the withdrawal of H's license was predicated upon Mr. Hukill's own determination that H had, in fact, cheated, the surrender of his license would be of no concern to the Board.

All of the foregoing reasons for the Board's interest were explained to the parties at the hearing. See Tr. 32,212-213; 32,317-318; 33,085-093. One cannot determine from the disqualification pleadings that these points have ever been understood by the movants.

D. No Prejudgment

UCS's main argument is that I, as a board member, would be unwilling to impose conditions upon the Licensee if, in doing so, individuals would be affected. That is not so. The very case of G and H demonstrates that I would not hesitate to apply the facts and the law to Licensee. In the partial initial decision, LBP-82-56, the Board found that G & H cheated, but, as was the case with Mr. Floyd, we found extenuating circumstances. We also found due-process considerations for not seeking revocation of their licenses outright. G and H's misdeeds were imputed to Licensee. We held that Licensee had permitted an undisciplined training and examination environment. The Board then exceeded its jurisdiction in an effort to discipline Licensee for G and H's conduct by imposing a monetary penalty upon Licensee. 16 NRC at 303-08. The argument that the Board would shelter Licensee to protect its employees is without basis. No party can cite to where this has happened.

Moreover, UCS's concern that I will not decide the issues properly is premature. Any errors because of my stated concerns about the formerly licensed individuals would be fully apparent on the record and in the decision, and, therefore, subject to correction on appeal.

E. Res Judicata

Both UCS and the Commonwealth attack my interest in Mr. Husted's treatment as beyond my authority because the matter is res judicata in accordance with the Appeal Board's findings in ALAB 772. UCS fairly cites language from ALAB 772 to the effect that the Appeal Board disagreed with the Licensing Board and that, in addition to the stipulation removing his license, Mr. Husted should have no supervisory responsibilities respecting the training of non-licensed personnel. 19 NRC at 1223-24. I agree that my remarks in expressing concern about Mr. Husted may seem to be inconsistent with the Appeal Board holdings cited by UCS. Those holdings, of course, are binding upon this Board.

However, I did not read the whole Husted discussion in ALAB 772 to bar the inquiry I made. First, the issue of how Mr. Husted lost his license was never before the Appeal Board -- no party raised it on appeal. The Appeal Board noted specifically that it was not resolving that dispute (between the Licensing Board and the Special Master). Id. at 1222. The Appeal Board, therefore, never addressed directly the removal of Mr. Husted's license.

To be sure, if the Licensing Board had predicted the disqualification motions, we might have sought additional clarification. But the language of the remand section (id. at 1232-37) gave us broad authority to inquire, as we noted above. And, as noted, all of the parties saw the handling of Mr. Husted as an issue properly before us. It was not res judicata.

The worst that can be said if I have reopened a res judicata issue, would be that, even if true, it was for an appropriate purpose. Our findings would not be decisional, but they would be in furtherance of our independent responsibility to develop a complete and accurate record and to report matters of importance to the Appeal Board for its consideration.

Accordingly, I conclude that all of my comments and actions respecting the licensed personnel at TMI-1 were appropriately within the scope of the remand, were reasonable, and do not constitute pervasive bias or prejudgment. Therefore they may not be the basis for my disqualification.

VI SEPARATE GROUNDS ADVANCED BY TMIA

A. Introduction

TMIA advances as separate grounds for my disqualification a series of comments and evidentiary rulings made during the course of the remanded hearing, particularly during the mailgram phase. Since all of the statements and ruling were made made solely in the course of presiding over the proceeding, TMIA must demonstrate that the pervasive - bias exception to the extrajudicial rule applies. See Section III E, supra. My conduct falls well within permissible limits, and, in fact, in each instance cited by TMIA, where the act did in fact occur, my conduct was not only permissible, but correct.

TMIA's problem is that it received unfavorable rulings on many evidentiary offers. This is not an unusual phenonomen in adjudications and the problem was recognized by the Second Circuit in In Re International Business Machines Corp., supra:

> A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest. As Mr. Justice Frankfurter noted in Wilkerson v. McCarthy, 336 U.S. 53, 65, 69 S.Ct. 413, 419, 93 L.Ed. 497 (1949) (Frankfurter, J., concurring), "A timid judge, like a biased judge, is intrinsically a lawless judge."

618 F.2d at 929.

B. Mr. Gamble's Testimony

TMIA first raises the point of Mr. Gamble's testimony. Motion at 15. The incident involved nothing more than one of the hundreds, perhaps thousands, of routine evidentiary rulings I have made on behalf of the Licensing Board throughout this lengthy proceeding. The quoted language on page 15 reports my comment that "Mr. Gamble's testimony is rather naive and simple. It is not instructive to us." Citing Tr. 29034-35. The quote is offered as evidence of an attack against TMIA's witness.

After adjournment following the comment, it occurred to me that Mr. Gamble, not a party to the proceeding, might not know the purpose for which TMIA was using his testimony. The mailgram issue is very narrow,

but Mr. Gamble's testimony was a broad attack on the NUREG-0760 investigative methods. As such, the testimony was not naive and simple, but was, nevertheless, largely without instructive value. It was TMIA's intended use of the testimony, not the testimony itself, that presented the occasion for the comment and to which my remark should have been addressed. I explained my second thoughts the following day. Tr 29,059.

This incident is typical of the problems judges face in a rapidly moving large adjudication. Evidentiary rulings frequently must be made on the spot. Sometimes after reflection, consultation with other board members, and a review of the record, adjustments should be made. To cite the first ruling as bias and to prove it by the correcting ruling, demonstrates that TMIA does not understand that it may be fairness, not bias, when a judge reconsiders.

TMIA next cites my questioning of Mr. Gamble about his understanding of his role as a criminal investigator representing the Department of Justice in the NUREG 0760 investigation. Motion at 16. As the quoted language indicates, I briefly digressed into an inquiry as to whether Mr. Gamble had ethical misgivings about not revealing to interviewees the criminal-investigation aspects of his participation. And as TMIA acknowledges, I prevented any further digression in that direction. Motion at 17. TMIA does not explain that Mr. Gamble's view of his duty as a criminal investigator differed sharply from the understanding of Mr. Moseley, who directed the investigation. See Tr. 29,829 (Moseley); Licensee's Answer at 34-35; Tr. 30,695 (Smith).

My examination of Mr. Gamble was essential to determine how his opinion of the adequacy of NUREG-0760 methodology was shaped by his view of his responsibilities.

C. Former Commissioners

The Board's rulings on the proffered testimony of former Commissioners Gilinsky and Bradford need no defense. They are thoroughly explained on the record. However, TMIA challenges not only the rulings, but states that I have accused it of deceiving the former Commissioners. This not true. I simply stated, that after reviewing former Commissioner Bradford's proffered written testimony (deposition), the Board determined that Mr. Bradford did not know the issues to which he was speaking and did not know the purpose for which the proposed testimony was to be used. I did not attribute his lack of knowledge to any cause, and did not allude to deception by TMIA or anyone else. Tr. 27,832-33.

Similarly, with respect to Dr. Gilinsky, the matter arose in connection with TMIA's motion for leave to present his testimony without first prefiling it in written form (November 1, 1984). Since the four areas of proposed questioning of Dr. Gilinsky by TMIA, set out in the motion, differed sharply from the Board's oft-stated definition of the mailgram issue in the remand, we concluded that Dr. Gilinsky may not be aware of the issue properly before the Board. Therefore, the value of his opinion testimony could not be demonstrated.

TMIA alleges that I accused it of withholding information from the Board about Dr. Gilinsky's proposed factual testimony. Motion at 18, n.10. This is a regrettable distortion. TMIA, as noted, requested leave to present Dr. Gilinsky's oral testimony and requested a subpoena for that purpose. Incredibly, Counsel for TMIA conceded that she knew what facts Dr. Gilinsky would testify to, but repeatedly declined to reveal to the Board the nature of his testimony. Tr. 27,855-69. I could not, therefore, issue the subpoena.

D. Employee Morale

TMIA charges that I attributed to TMIA and its representative, Ms. Bradfold, responsibility for poor operator attitude and morale. Motion at 18-20. This was a routine evidentiary ruling, but the portion of the ruling cited by TMIA in its motion, (Id.) would seem to support the charge. TMIA had offered its Exhibit 6 (rejected), which was in part a report of a "brainstorming" session with TMI-1 personnel concerning morale problems as a consequence of the hearing on cheating before the Special Master.[26]

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26 As pertinent, Attachment 4 to TMIA Exhibit 6 states:

RESULTS OF BRAINSTORMING

Why employees may be hesitant to cooperate?

- They feel the Company won't stand behind them.
- They are out there alone. Company is looking to keep GPU

(Footnote Continued)

The exhibit was offered as proof of TMIA's allegation that operator morale at TMI-1 is poor and that the fault lies with Licensee's management. As Licensee states, TMIA's argument was circular, that an attendant, but unfortunate product of the hearing on cheating was poor employee morale. We did not determine that that was, in fact, the case, because we ultimately ruled that the document, double hearsay and unattributed, was unreliable. But the observation also had to be made that, if the employee morale was bad because of the cheating hearing, it was necessarily also as a result, in part, of TMIA's participation in the hearing.

The portion of the cited exchange between me and TMIA's representative does not reveal the fact that I was reading, for the first time, TMIA's exhibit 6, and much of the language is from that exhibit and are not my words. See Tr. 32,396-401.

Moreover, the transcript quoted by TMIA fails to capture the emphatic point made later that the Atomic Energy Act and the notice of

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(Footnote Continued)
Nuclear's name clean and doesn't care about its employees.
- Punishment for the two SS was too severe, but it looked good in the public's eye.
- Something minor gets blown out of proportion and causes them more harassment later. Therefore, they will not say anything.
- Our personnel are bitter. They wonder if it's really worth it - obtaining and keeping an NRC license is hard work, takes a lot of personal time and requires sacrifices on the part of the family.
- If they make one error, their job is on the line, it's in the news, and their reputation is ruined.
- They don't trust anyone now.

hearing provide to the parties the right to protect their rights in the hearing, without regard to possible effects on morale, but that the exercise of those rights -- the hearing process - could not per se be used to win the case. Tr. 32,400.

E. Admonitions to Counsel

TMIA states that I attempted to prevent counsel from conferring by admonishing them not to confer during the hearings, citing Tr. 30,958. Motion at 20. There I stated, when explaining a ruling to counsel: "Did you understand what I said? I saw you were in discussion again with Ms. Doroshaw while I was talking." The episode cited by TMIA was one of many such instances when counsel for TMIA began to consult with co-counsel while I was addressing her personally concerning her case. Eg. Tr. 29,039-40; 29,798; 30,150 and 30,506. I did not, as alleged, stop counsel from conferring during the hearing. In fact, the very purpose of my comments and admonitions was to provide to counsel the benefit of both consultation and an understanding of the Board's rulings. I should not have tolerated counsel's apparent disinterest in the Board's rulings as long as I did.

F. Signals To Witnesses

TMIA accuses: "Moreover, Judge Smith has on several occasions signaled to witnesses the correct answers so that the answers would appear credible." Motion at 22. I understand the allegation to be a verbal message on the record, not a physical gesture. I can do no more

than deny the allegation. As the citation in TMIA's allegation demonstrates, my "signal" to Mr. Boyer did not even suggest the answer.[27] But, even if it had, it was my responsibility to develop a complete record on the subject and to determine whether the witness was credible.

I have not addressed all of TMIA's allegations. Some were discussed with respect to the letter to Judge Rambo and the treatment of licensed personnel. Others, in my view, require no response, but, in any event, the NRC Staff and Licensee have adequately addressed them. I conclude that nothing in TMIA's separate allegations provides grounds for my disqualification.

VII. ADDITIONAL COMMENTS

The NRC Staff's response to the disqualification motions requires special comment because it does not depend upon a traditional analysis of the facts and law, but seems to have a largely practical foundation. It is couched in nonpejorative terms and seems intended to be genuinely

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27 JUDGE SMITH: Ms. Bernabei, let me ask. Mr. Boyer, what gave you the idea to send your letter, your comment of October 1, '84 back? How did that idea pop in your mind that that would be a good thing to do?

WITNESS: To send the letter? Oh, it may have come with a note or some other things. Somehow, I received directions that they wanted it back, okay? Tr. 31,564.

helpful. Nevertheless, it is legally and factually defective; predicated on faulty premises; and does not provide justification for my recusal.

First, the overall logic is flawed. The Staff states that it does not believe that I am, in fact, biased or that I have prejudged issues. The Staff states that it has no reason to question my dedication to fairly and objectively decide the issues. Response at 12,22. The Staff has arrived at that assessment of my judicial impartiality and freedom from prejudgment as a dispassionate and fully-informed observer with no institutional interest in the issues except for accuracy and compliance with the law.

Nevertheless, according to the Staff, I should be disqualified because others might see me as a biased -- namely those members of the public whose perception of the matter is reflected in newspaper articles, editorials, letters and, unspecified, "elsewhere." Response at 11. The difficulty with the staff's public-perception test is obvious. As noted under Section III B., supra, the test must be what a reasonable person knowing all the relevant facts would think about the impartiality of the judge.

The critical newspaper articles I have read have quoted only the movants. The Licensee and the Staff have not been quoted about their views of my impartiality. I have been constrained by Canon 3 A. (6) from making any public comment about the motions. The effect of the Staff's approach would be to make disqualification motions self

executing; publicly demand recusal, then, in the motions, cite newspaper accounts of the demand as bases for disqualification.

If the Staff's theory of disqualification were to be given full effect, the impact upon this proceeding and the Commission's business would be profound. The movants cite, and the Staff alludes to, the editorial in the Philadelphia Inquirer of January 10, 1985. That editorial scored the Commission even worse than me. The impending vote on the potential restart of TMI-1 was referred to as "a sham perpetrated on a public that believed the NRC was serious about determining whether Unit 1 was safe." Even prior to the disqualification motions, in another editorial, the Inquirer referred to all of the NRC investigations and hearings as "an outrageous sham." Will the NRC Staff recommend to the NRC Commissioners that they disqualify themselves on that account? For that matter, will the Staff, also criticized for its investigations, deem itself disqualified? Absurd? Of course. But then so is the recommendation that newspaper editorials should form the basis for a judge's disqualification.

I have find other faults with the staff's pleading, particularly its theory that an accumulation of non-disqualifying factors add up to disqualification, and its totally inaccurate premise that I have made commentes based upon extrajudicial information.

The Staff's recusal recommendation seems to be founded principally on the grounds that it is a simple solution to the dispute. Other

judges have flirted with the staff's solution, but they, as I must, have rejected it:

> The easy road would, of course, be for the Court to avoid sitting further on this case by having the same reassigned to another judge and take another case under the random selection system in lieu thereof. The Court's sworn duty, however, is not to do so unless it believes there are proper and reasonable grounds therefor. In this Court's opinion there are not.

Lazofsky v. Sommerset Bus Co., Inc. 389 F. Supp. 1041, 1045 (E.D. New York, 1975).

Nor may I be disobedient to the command of Judicial Canon 3 A. (1): "[A judge] should be unswayed by partisan interests, public clamor, or fear of criticism.

Turning to another matter, these motions have come after I have served more than five years, in over 160 days of hearings, heard hundreds of witnesses, and written thousands of pages of decisions, orders and memoranda. But none of the parties before found it necessary to seek my removal[28]. An increased stridency in this proceeding became apparent during the Special Master's hearing, and continues in the remanded proceedings. This observation is relevant to the allegations that I have demonstrated bias by expressing concern for Messrs. Floyd, Husted, G and H. It is significant that I have never commented in favor

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28 None of the parties alleged bias when I joined my colleagues on the Board in requesting permission from the Commission to take into account psychological stress and community fears in considering the restart of TMI-1. That request was based as a novel legal theory and extrajudicial information. Certification to the Commission on Psychological Distress Issues. LBP-80-8, 11 NRC 297 (1980).

of those individuals or on anything they did. Instead, I have criticized each of them in this proceeding, sometimes quite severely. The very essence of the disqualification motions depends upon the premise that I have not condemned them enough. This is hardly disqualifying bias.

My letter to Judge Rambo has been interpreted by movants as proof of personal bias toward Mr. Floyd. It may bear repeating that I have no bias toward Mr. Floyd, personal or impersonal, favorable or unfavorable. I have never met him. I have explained that my letter to Judge Rambo was prompted by my conern that Mr. Floyd's sentence might be based in part on incomplete information. I felt I was in an unusual, possibly even unique, position to offer a helpful perspective to the sentencing judge. Under those circumstances, and having been asked by Mr. Floyd's counsel to write to Judge Rambo, I thought it was my duty to do so. Duty to one side, I thought it was a decent thing to do. I do not regret it.

VIII. ORDER

The motions to disqualify are denied. Motions by TMIA and UCS to file reply pleadings are denied in a separate memorandum and order. Pursuant to 10 CFR 2.704 all motions and related pleadings are referred to the Appeal Board.

Ivan W. Smith
Administrative Law Judge

Bethesda, Maryland
February 20, 1985

Attachment

December 27, 1984

Honorable Sylvia H. Rambo
U.S. District Judge
% Robert Ruth, Probation Officer
U.S. Probation Office
Federal Building
3rd and Walnut
Harrisburg, Pennsylvania 17108

Re: United States v. James R. Floyd
Crim. No. 84-00099 (M.D. Pa.)

Dear Judge Rambo:

I hope that the Court will be lenient with James R. Floyd. As an administrative law judge with the Nuclear Regulatory Commission, I have served since August 1979 as the Chairman of the Atomic Safety and Licensing Board presiding over the proceeding considering the proposed restart of Three Mile Island Unit No. 1. Much of this proceeding has involved issues of the integrity and competence of the managers and operators of Three Mile Island Nuclear Station. I have been informed that the recommendation contained in the Board's decision of July 27, 1982 (16 NRC 281, 344-55) brought about the investigation and subsequent indictment of Mr. Floyd.

While serving as Chairman of the Three Mile Island Licensing Board I have had an excellent opportunity to gain some insight into the events and the affected persons following the 1979 accident at the station. I hasten to add, however, that I know nothing about Mr. Floyd except the information produced on the public hearings most of which is set out in our July 1982 decision. Also, my comments are personal and I do not speak for the Nuclear Regulatory Commission or for any other person.

I have basically two grounds for believing that leniency is appropriate. The first pertains to the background against which Mr. Floyd's actions should be judged. Mr. Floyd worked very hard in the months following the accident. He possesses excellent technical skills. Management depended very heavily upon him in addressing the many problems needing solution on the island. I have always felt that Mr. Floyd's deception was an impulsive act and that it was not motivated by personal ambition. He could have sought relief from his other duties in order to train properly for the requalification examination, to his personal benefit. He could have passed easily without deception. One senses he neglected his examination responsibilities out of a misguided but altruistic effort to attend to matters of perceived greater urgency. In addition, he apparently felt that he was well qualified notwithstanding his licensing status.

My second reason for hoping for lenient treatment for Mr. Floyd is that severe punishment is not necessary as a deterrent. I recognize that, whatever his motive, cheating on the requalification examination was a very serious matter and cannot be condoned or appear to be condoned. However, Mr. Floyd's damaged career and public humiliation will be seen by others as too high a risk and price for any gain from cheating.

More important, however, a severe criminal penalty against Mr. Floyd, is in my personal view, not needed to insure the integrity of the NRC operators' licensing process at Three Mile Island, nor would it be useful. The civil regulatory scheme presently administered by the NRC is exceedingly thorough. It is adequate to assure that the operators of Three Mile Island are persons of competence and integrity. Many weeks of public NRC hearings have been devoted to the issue of TMI management integrity and operator competence and, in fact, hearings on that very issue are still in progress. I have confidence that the NRC administrative regulatory process, with extensive public participation, will provide an orderly and reliable mechanism for assuring that any problems caused by deception respecting Three Mile Island will have been identified and resolved. Deception in the future is very unlikely. A severe sentence for Mr. Floyd would add nothing.

Sincerely,

Ivan W. Smith

cc: William J. Fulton, Esq.
Herzel E. Plaine, General Counsel, NRC
Parties to TMI-1 proceeding