

In accordance with the Appeal Board's Order, the NRC Staff hereby submits its views concerning this matter. ^{2/} For the reasons more fully set forth below, the Staff submits that even if one assumes that Mr. Harstead has violated the legal standards governing conflicts of interest, any such conflict of interest does not appear likely to have an effect upon the Appeal Board's consideration of base mat issues, and no further action by the Appeal Board with regard to this situation is necessary.

DISCUSSION

As the Appeal Board is aware, following the referral of this matter to the Department of Justice, the Department of Justice decided not to prosecute Mr. Harstead and closed its files on this matter. ^{3/} Thereafter, the Appeal Board requested the Office of the General Counsel to provide further information concerning the preliminary views contained in its previous memorandum on this subject; as of this date, this additional information has not yet been provided by the General Counsel.

However, even if a finding had been made that Mr. Harstead violated the legal standards governing conflicts of interest, the Appeal Board's inquiry should go further. In our view, the Appeal Board properly should evaluate the materiality of any such conflict of interest, as a necessary step in reaching a determination as to whether the views presented by Mr.

^{2/} Affidavits concerning this matter were prepared by the Staff in response to a request by the Office of the General Counsel, copies of which were submitted to the Appeal Board and parties on September 4, 1984.

^{3/} A decision not to prosecute, of course, is not equivalent to a finding that no criminal violation has occurred.

Harstead are likely to be biased, lacking in objectivity, or otherwise unreliable. See generally, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-E2-73, 16 NRC 974, 979 (1982); Regents of the University of California (UCLA Research Reactor), LBP-82-99, 16 NRC 1541, 1544, 1547-48 (1982). Further, the Appeal Board should reach a determination as to Mr. Harstead's credibility and the amount of weight properly to be attributed to his views. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 529 (1984); UCLA, supra, 16 NRC at 1544, 1547-48.

In our view, upon consideration of these questions the Appeal Board should find that any conflict of interest on Mr. Harstead's part is not likely to have affected the reliability of the views he has expressed in this proceeding. While Mr. Harstead did work as a consultant for both the Staff and the Applicant on base mat-related matters, the apparent conflict of interest created by this situation appears to be insubstantial and immaterial. Mr. Harstead was employed by the Staff as a technical consultant in connection with its review of the Waterford facility for only a limited and remote period of time -- encompassing some ten days over a three month period (March-May, 1981), and ending more than two years prior to the time he commenced work on behalf of the Applicant. (Affidavit of Frank Rinaldi dated September 4, 1984, Enclosure to Attachment 1, at pp. 1-2 and 5). During the time he worked for the Staff on Waterford-related matters, Mr. Harstead served as a member of the audit team which audited the structural engineering design of all Category I structures at the facility, only one of which was the foundation base mat (Id., at 2). Moreover, the structural design audit team did not per-

form an evaluation of base mat cracks, and the structural staff was not aware of any such cracks at the time the audit was conducted (Id., at 3).

Further, it is significant that Mr. Harstead worked first for the Staff and later for the Applicant, rather than vice versa. If Mr. Harstead had first worked for the Applicant, there might have been reason to suspect the impartiality of his subsequent work for the Staff. Here, however, we do not perceive that Mr. Harstead's prior work for the Staff presents any possible motive for him to have later submitted partial or biased views on behalf of the Applicant. ^{4/}

In view of these facts, the Staff perceives no reason to question the objectivity of the views expressed by Mr. Harstead on behalf of the Applicant, and we accept the subsequent assurances which have been provided by Mr. Harstead in this regard. See Affidavit of Gunnar Harstead, dated August 23, 1984, at 2. For the same reasons, we perceive no reason to question Mr. Harstead's credibility, and submit that the Appeal Board should accord Mr. Harstead's views the same amount of weight it would have

^{4/} We might have reached a different conclusion if Mr. Harstead had first worked on base mat issues for the Applicant and later worked on such issues for the Staff, or if the base mat-related work he performed on behalf of the Staff had been of a more substantial nature or had specifically dealt with the safety of the mat in its cracked condition. In either of those events, there might have been more reason for the Appeal Board to conduct a limited examination of Mr. Harstead in order to evaluate his credibility, with an opportunity available for the parties to cross-examine Mr. Harstead in this regard. See generally, Shoreham, supra, 16 NRC at 979. Here, however, in light of the insubstantial and immaterial nature of any possible conflict of interest, and in view of the sworn affidavit which has been submitted by Mr. Harstead attesting to his objectivity, further proceedings in this regard appear to be unlikely to shed further light on this matter and are unnecessary.

given those views if no question of conflict of interest had arisen. In reaching this conclusion, we recognize that Mr. Harstead's reports were submitted by the Applicant as a means of demonstrating the adequacy of the Waterford base mat, and both the Staff and the Appeal Board have accepted those reports without questioning their impartiality or credibility. ^{5/} These facts do not alter our conclusion that any conflict of interest here is too insubstantial and immaterial to have an effect upon the outcome of this proceeding.

Finally, we note that the Appeal Board's referral of this matter to the General Counsel mentions the fact that Mr. Harstead provided his audit team notes to Mr. Shewmaker in June 1983, apparently reflecting a concern that some impropriety may have been occasioned thereby. The

^{5/} In its memorandum to the General Counsel dated August 7, 1984, the Appeal Board stated that "[t]he Staff, through counsel (rather than by affidavit) disclaims any reliance on the work performed and notes provided by Harstead," referring to a letter from Staff Counsel to the Appeal Board dated August 2, 1984. We wish to clarify that members of the Staff and our consultants from BNL have relied, to some extent, upon various aspects of the work performed by Mr. Harstead and his firm (Harstead Engineering Associates) on behalf of the Applicant, without questioning Mr. Harstead's objectivity. However, the Staff and its consultants have gone beyond the evaluation performed by Mr. Harstead, and have conducted their own independent analyses in assessing the adequacy of the base mat.

It should be noted that Staff Counsel's letter of August 2, 1984, states that "the I&E Inquiry Team did not place any reliance on the work performed or the notes provided by Mr. Harstead," referring to Mr. Harstead's prior work on behalf of the Staff. As Mr. Shewmaker has indicated, the I&E Inquiry Team issued its report in July 1983 -- before any of Mr. Harstead's reports had been issued by the Applicant. See Affidavit of Robert E. Shewmaker dated September 4, 1984, Enclosure 2 at p. 2, and discussion *infra* at 6. Staff Counsel did not intend to suggest that the Staff's subsequent base mat review did not rely in any way upon the Harstead reports.

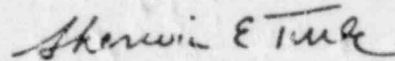
Staff does not believe that Mr. Harstead's action in this regard was improper. As indicated in an affidavit prepared by Mr. Shewmaker, Mr. Harstead provided those notes to him upon learning that Mr. Shewmaker was preparing to visit the Waterford site as a member of the I&E Inquiry Team (Affidavit of Robert E. Shewmaker dated September 4, 1984, Enclosure 2 at 1). To the best of our knowledge, at the time Mr. Harstead transmitted his notes to Mr. Shewmaker, he had not yet been hired to work for the Applicant (Id., at 2), and there is no reason why he should not have provided those notes to Mr. Shewmaker. Further, Mr. Harstead's notes do not contain any information which could have adversely affected the outcome of the I&E Inquiry Team's review, and there is no indication that the Inquiry Team improperly relied upon those notes in reaching its conclusions. On the contrary, the Inquiry Team's report identified various concerns related to the base mat and recommended that the Applicant undertake a comprehensive independent evaluation in order to resolve those concerns. See Board Notification BN-83-133, dated September 15, 1983. Moreover, upon learning that Mr. Harstead's firm had been hired by the Applicant to consult on base mat issues, Mr. Shewmaker advised him that they could no longer discuss matters related to Waterford, and no further discussions concerning the Waterford base mat took place between them after that time (Affidavit of Robert E. Shewmaker, supra, Enclosure 2 at p.2).

CONCLUSION

For all of the reasons set forth above, the Staff submits that even if one assumes that Mr. Harstead violated the technical legal standards

governing conflicts of interest, any such conflict of interest is unlikely to have an effect upon the Appeal Board's deliberations in this proceeding, and no further action by the Appeal Board in this regard is necessary.

Respectfully submitted,



Sherwin E. Turk
Deputy Assistant Chief
Hearing Counsel

Dated at Bethesda, Maryland
this 14th day of November, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
LOUISIANA POWER AND LIGHT COMPANY) Docket No. 50-382
(Waterford Steam Electric Station,)
Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE PURSUANT TO THE APPEAL BOARD'S ORDER OF OCTOBER 3, 1984," in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 14th day of November, 1984.

Christine N. Kohl, Chairman*
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard A. Wilber*
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Walter H. Jordan
Administrative Judge
881 West Outer Drive
Oak Ridge, TX 37830

Dr. Harry Foreman, Director
Administrative Judge
University of Minnesota
Box 395, Mayo
Minneapolis, MN 55455

Luke B. Fontana, Esq.
824 Esplanade Avenue
New Orleans, LA 70116

Dr. W. Reed Johnson*
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Sheldon J. Wolfe, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Malcolm Stevenson, Esq.
Monroe & Lemann
1424 Whitney Building
New Orleans, LA 70130

E. Blake, Esq.
B. Churchill, Esq.
Shaw, Pittman, Potts &
Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Ian Douglas Lindsey, Esq.
7434 Perkins Road
Suite C
Baton Rouge, LA 70808

Brian P. Cassidy
Regional Counsel, FEMA
John W. McCormack Post
Office and Courthouse
Boston, MA 02109

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John T. Collins
Regional Administrator, Region IV
U.S. Nuclear Regulatory Commission
Parkway Central Plaza Building
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

William J. Guste, Jr., Esq.
Attorney General for the State
Of Louisiana
234 Loyola Avenue
7th Floor
New Orleans, LA 70112

Carole H. Burstein, Esq.
445 Walnut Street
New Orleans, LA 70118

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Gary L. Groesch
2257 Bayou Road
New Orleans, LA 70119

Lynn Bernabei, GAP
1555 Connecticut Ave., N.W.
Suite 202
Washington, D.C. 20036

Sherwin E Turk

Sherwin E. Turk
Deputy Assistant Chief
Hearing Counsel