



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

SECRETARIAT/RECORD COPY

May 15, 1984

MEMORANDUM FOR: Chairman Palladino  
Commissioner Gilinsky  
Commissioner Roberts  
Commissioner Asselstine  
Commissioner Bernthal

FROM: Herzel H. E. Plaine *HHEP hhp*  
General Counsel

SUBJECT: REMOVAL OF ASLB MEMBER FROM HEARING

Enclosed is a memorandum providing information (based on a brief examination of the law) regarding the removal of Licensing Board members from a proceeding, [

Enclosure: As stated

cc: OPE  
SECY

8506150285 850319  
PDR FOIA  
BELAIR85-A-5 PDR

Contact:  
Trip Rothschild, OGC, 41465

XOM7 ASLBP

F/1

5/15/84

DISQUALIFYING OR REMOVING ADMINISTRATIVE LAW JUDGES  
DURING A PROCEEDING

Section 191 of the Atomic Energy Act

Under Section 181 of the Atomic Energy Act, the provisions of the Administrative Procedure Act were made applicable to the Commission. By amendment, Section 191 of the Atomic Energy Act authorized the Commission to establish atomic safety and licensing boards. The legislative history underlying that section makes clear that even though the Commission was no longer required to use administrative law judges, the APA provisions relating to the relationship between the judges (including judges who constituted the panels), and the agency were applicable. The Joint Committee on Atomic Energy report stated:

The great bulk of the provisions of the Administrative Procedure Act will remain applicable, pursuant to section 181 of this act, and the only exceptions authorized by these amendments are to permit the Board to preside at hearings in lieu of a hearing examiner, and to permit the Board to render final as well as intermediate decisions.

Report No. 1966 on H.R. 12336, 87th Cong., 2d Sess. at 7 (July 5, 1962). [

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Administrative Procedure Act

Section 5 U.S.C. 556(b) provides:

A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matters as a part of the record and decision in the case.

In Marcus v. Director, Office of Worker's Compensation Programs, 548 F.2d 1044 (D.C. Cir. 1976) the court explained this provision:

Whereas disqualification is mandatory under section 554(d) of the APA, 5 U.S.C. § 554(d) (1970), whenever a government employee or official would otherwise combine both prosecutorial and adjudicatory functions, disqualification under section 556(b) is entirely voluntary, although a decision not to disqualify oneself may be subject to subsequent review by the agency." (Emphasis supplied)

[

The Attorney General of the United States issued an opinion on January 18, 1977 which addressed whether the Department of Interior could reprimand an administrative law judge. 43 Att'y Gen. Op. No. 9. ]

However,  
he asserted that the "clear legislative prescription for independence of adjudicatory action clearly does prevent the use of reprimand as a means of effecting, controlling or sanctioning an administrative law judge's decision in a formal APA proceeding." Id. at p. 6. The remedy is on review by the appellate body of the agency.

[

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December 21, 1984

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Director  
Office of Administration  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

FREEDOM OF INFORMATION  
ACT REQUEST

FOIA-84-942  
rec'd 12/24/84

Subject: Freedom of Information Act Request

Gentlemen:

On behalf of our client, Suffolk County, we request pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"), and the rules of the Nuclear Regulatory Commission ("NRC") issued thereunder, 10 C.F.R. Part 9, copies of written materials in the possession or control of the NRC, whether in the Commissioners' offices, the Office of General Counsel, the Office of Policy Evaluation, the Office of the Executive Director of Operations, or any other NRC office, which relate in any manner whatsoever to the issues discussed in "CLI-84-8" -- a May 16, 1984 Commission order pertaining to exemption requirements in the Shoreham operating license proceeding.\*

Without limiting the scope of this request, but merely to assist the NRC in its search, the materials that we are requesting may include the following:

1. Transcripts and/or notes of any meetings attended by the Commissioners and/or by NRC Staff and/or by other persons at which issues addressed in CLI-84-8 were discussed.

\* Suffolk County has already obtained copies of the transcripts of the May 7 oral argument before the Commission and the Commission's Shoreham meetings of April 23, 24, 26 and 27. Therefore, copies of these transcripts need not be produced except to the extent that the NRC has possession or control of transcripts which have handwritten notations thereon.

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U.S. Nuclear Regulatory Commission

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December 21, 1984

2. Any materials relating to the "as safe as" standard adopted in CLI-84-8, including any materials which relate to whether the "as safe as" standard will affect the application of the provisions in 10 C.F.R. § 50.47(d) to the Shoreham low power exemption proceeding.
3. Any materials relating to whether to replace the Licensing Board for low power matters chaired by Marshall E. Miller, Esq., and any materials relating to the Miller Board's involvement in the Shoreham proceeding.

In the event that access is denied to any part of the requested materials, please supply the following information:

- A. Identify the withheld or deleted material and specify the statutory basis for the denial, as well as your reasons for believing that an exemption applies, as required by 10 C.F.R. § 9.10(b).
- B. Segregate the non-exempt from the allegedly exempt portions of all materials and release the former, as required by 10 C.F.R. § 9.5(b).
- C. Supply a detailed statement of the content of the withheld or deleted material, along with the date on which the material was written; its title or section heading; its author; the author's title; and the identification of any persons or entities who have received copies of such material, as required by applicable case law. Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973).
- D. Separately state your reasons for not invoking your discretionary power to release the allegedly exempt materials. 10 C.F.R. § 9.9.

The undersigned is willing to inspect the requested material prior to its reproduction in order to identify specific material for reproduction.

KIRKPATRICK & LOCKHART

U.S. Nuclear Regulatory Commission

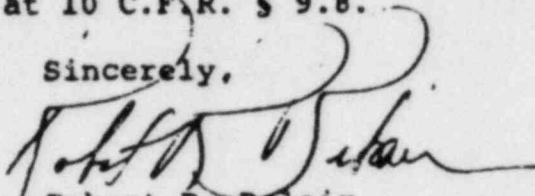
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December 21, 1984

The undersigned will pay charges for search time and copying fees, as provided by NRC regulations at 10 C.F.R. § 9.14. If search and copying fees to be incurred by the undersigned will exceed \$500, please notify the undersigned before this sum is exceeded.

We expect to receive your response to this FOIA request within ten (10) working days of your receipt of this request, as required under the FOIA and as set forth at 10 C.F.R. § 9.8.

Sincerely,



Robert R. Belair

RRB/lbw

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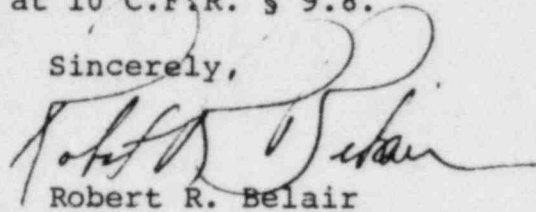
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Sincerely,

A handwritten signature in cursive script, appearing to read "Robert R. Belair", written in dark ink. The signature is fluid and somewhat stylized, with a long horizontal stroke at the end.

Robert R. Belair

RRB/lbw