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June 17, 1985

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OFFICE OF SPECIAL AGENT
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BRANCH

Alan S. Rosenthal, Esq., Chairman
Gary J. Edles, Esq.
Mr. Howard A. Wilber
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Long Island Lighting Company
(Shoreham Nuclear Power Station);
Docket No. 50-322-OL

Gentlemen:

We are in receipt of your letter dated June 10, 1985, to Martin Bradley Ashare, the Suffolk County Attorney. In that letter, the Board references a June 3 letter of Mr. Ashare and assumes that Mr. Ashare, rather than Kirkpatrick & Lockhart, will represent Suffolk County in proceedings before the NRC related to Shoreham.

Please be informed that Kirkpatrick & Lockhart continues to represent Suffolk County on Shoreham matters. We refer you to the following:

- On June 3, a majority of the Suffolk County Legislature advised us that Mr. Cohalan's Executive Order of May 30 (Executive Order 1-1985) was unlawful and that this "law firm should continue to represent" Suffolk County in accordance with the policies enunciated in Suffolk County Resolutions. (See Attachment 1)
- On June 9, the law firm of Arnold & Porter advised Kirkpatrick & Lockhart that Mr. Cohalan's purported termination of this firm was not lawful and that we had an ethical obligation to continue our representation of the County. (See Attachment 2)

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KIRKPATRICK & LOCKHART

Alan S. Rosenthal, Esq.

Gary J. Edles, Esq.

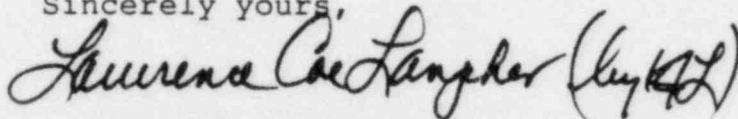
Mr. Howard A. Wilber

June 17, 1985

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- On June 10, the New York State Supreme Court ruled that Mr. Cohalan's Executive Order 1-1985 is unlawful and ordered it "rescinded, annulled and set aside." The Court also enjoined Mr. Cohalan and all persons acting in concert with him (including specifically the County Attorney) from modifying the County's policies on emergency planning and from modifying the County's opposition to a low power license. (See Attachment 3). The State Supreme Court Appellate Division has scheduled oral argument on the merits of the County Executive's appeal of the decision for Wednesday, June 19.
- On June 11, the County Legislature resolved that Kirkpatrick & Lockhart has not been terminated as counsel for Suffolk County. (See Attachment 4).

Sincerely yours,

A handwritten signature in cursive script that reads "Lawrence Coe Lanpher" followed by a circled set of initials "LCL".

Lawrence Coe Lanpher

LCL:so

Attachments

cc: All Parties

Martin Bradley Ashare, Esq.

OFFICE OF THE COUNTY LEGISLATURE

COUNTY OF SUFFOLK



From: The Suffolk County Legislature

To: Kirkpatrick & Lockhart
1900 M Street, N.W.
Washington, D.C. 20036

Date: June 3, 1985

Dear Mr. Brown,

We have received copies of your letter dated May 31, 1985 to the Suffolk County County Attorney. This is to advise you that you are correct in your understanding that Kirkpatrick & Lockhart is retained to represent the County of Suffolk and not the County Executive in an independent capacity. The Executive Order Number 1-1985, signed on May 30th by the County Executive is in violation of the Suffolk County Charter and Suffolk County resolutions 262-1982, 456-1982, and 111-1983. Accordingly, the Executive Order is beyond the authority of the County Executive and should be considered null and void. Members of the legislature intend to initiate legal action later this week to obtain a prompt judicial resolution of this conflict.

Suffolk County wishes to emphasize that the contract of retainer with Kirkpatrick and Lockhart remains in effect and that the law firm should continue to represent and promote the interests of Suffolk County in accordance with those resolutions and others duly enacted by the county of Suffolk. In the event that the present conflict between the county's resolutions and the executive's order create logistical problems with respect to any pending litigation or other proceedings, we are instructing you, as necessary, to notify the concerned parties and tribunals of such conflict and to request a postponement, where appropriate, or other temporary remedies until this matter is resolved in Suffolk County. We also request that you seek a postponement of the oral argument scheduled on June 4th before the Commissioners of the Nuclear Regulator Commission concerning low power licensing issues.

Moreover, we want to emphasize that you should no longer adhere to the unilateral restrictions of your activities imposed by the letter to you from Chief Deputy County Executive, John Gallagher, dated April 18th, 1985. Such restrictions, particularly in light of the County Executive Cohalan's reversal of position, create obstacles to efficient and effective representation of the interests of the County of Suffolk, and are accordingly prejudicial to the pursuit of the county's resolutions and public welfare.

We also request that you keep members of the legislature informed of all significant filings which are made on the county's behalf, and any significant activities in which you believe we should be properly informed.

Sincerely,

James M. Morey
Joseph P. Fazio
Robert L. LaBine
Lois Laurence
John J. De/ey
Steve Englebright
Jane Reine

Gregory F. Blum
Thomas E. Allen
Andrew J. Smith
Wayne Crossfield
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June 9, 1985

Kirkpatrick & Lockhart
1900 M Street, N.W.
Washington, D.C. 20036
Attn: Herbert H. Brown, Esquire
Lawrence Coe Lanpher, Esquire

Gentlemen:

In connection with your representation of Suffolk County, a municipal corporation of the State of New York, in proceedings pending before the Nuclear Regulatory Commission (the "NRC") relating to the licensing of the Shoreham Nuclear Power Station, Shoreham, New York ("Shoreham"), you have asked us for our opinion with respect to the applicable standards governing certain aspects of your future professional conduct and with respect to the legality of certain actions taken by Suffolk County's current County Executive, Peter F. Cohalan ("Cohalan").

Background

The Suffolk County Legislature (the "Legislature") has duly enacted four resolutions (together, the "Resolutions") setting forth the policies of Suffolk County with respect to Shoreham. Copies of these Resolutions are attached hereto as Appendix A.

In Resolution No. 43-1982, the Legislature authorized the Suffolk County Executive (the "County Executive") to retain legal counsel to assist the Suffolk County Attorney in representing Suffolk County in the Shoreham proceedings. Pursuant to that resolution, Cohalan, on behalf of Suffolk County, retained Kirkpatrick & Lockhart (then Kirkpatrick, Lockhart, Hill, Christopher & Phillips). The parties to the retainer agreement (the "Agreement") were the County of Suffolk and Kirkpatrick & Lockhart. A copy of the Agreement is attached hereto as Appendix B.

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In Resolution 262-1982, the Legislature resolved that the Suffolk County Planning Department should prepare a County Radiological Emergency Response Plan; that such plan (the "Plan") would not be operable or capable of being implemented until approved by the Legislature; and that the Plan was not to be submitted to the NRC or the Federal Emergency Management Agency until so approved.

In Resolution 456-1982, the Legislature resolved, inter alia, that Suffolk County "shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive."

In Resolution 111-1983, the Legislature resolved, inter alia, that the plan, as amended, submitted on October 6, 1982, by Long Island Lighting Company ("LILCO") to the New York State Disaster Preparedness Commission ("DPC") "will not be approved and will not be implemented"; that "no local radiological emergency plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents"; that therefore "no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented"; and that "the County Executive is hereby directed to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisions mandated by this Resolution."

You have informed us that each of the Resolutions was adopted by a majority of the Legislature, was approved by the County Executive, and has never been repealed.

Until recently, the County Executive was in full accord with the position set forth in the Resolutions.

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On May 30, 1985, Cohalan announced that he was reversing his position on the Shoreham plant and that he now favors its operation, provided there is a successful test of LILCO's emergency plan. On May 30, 1985, Cohalan issued Executive Order 1-1985 directing County personnel to review, evaluate and test LILCO's proposed emergency response plan. A copy of Executive Order 1-1985 is attached hereto as Appendix C.

On May 31, Cohalan orally requested Kirkpatrick & Lockhart to remain as counsel for the County to represent the County in accordance with his new views. Kirkpatrick & Lockhart replied that it could not represent his new views but could continue to represent the County if the prior County position (as reflected in the County resolutions) were to constitute the County policy. On June 3, 1985, Mr. Cohalan sent a letter (the "Termination Letter") to Kirkpatrick & Lockhart purportedly terminating its representation of the County because the firm refused to represent the County Executive's new position. A copy of that letter is attached hereto as Appendix D.

Issues Requested to be Addressed

You have requested our opinion with respect to the following issues:

1. Under applicable rules governing the professional conduct of Kirkpatrick & Lockhart:

(a) whether Kirkpatrick & Lockhart may properly refuse to turn over the files in Kirkpatrick & Lockhart's possession pertaining to its representation of Suffolk County as has been requested in the Termination Letter. (This issue is sometimes hereinafter referred to as "Issue 1(a)".)

(b) if the NRC grants a low power license for operation of the Shoreham Nuclear Power Plant and the County Attorney refuses to or otherwise does not take action on behalf of Suffolk County to seek a stay of that grant or the implementation of the license, whether

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Kirkpatrick & Lockhart may, and under what circumstances it may, properly take action seeking such a stay on behalf of Suffolk County. Specifically, you have asked us to consider whether Kirkpatrick & Lockhart may file an application and a brief on behalf of Suffolk County seeking a stay of an NRC grant or implementation of the license (i) on the merits of issues underlying the grant of the license or (ii) until the internal conflicts within the Suffolk County government are resolved. (This issue is sometimes hereinafter referred to as "Issue 1(b)".)

2. Whether, under New York law, the actions of the County Executive in issuing Executive Order 1-1985 were lawful. (This issue is sometimes hereinafter referred to as "Issue 2".)

Qualifications and Assumptions

We have made such investigation of law, public records and other matters as we have deemed necessary to enable us to render the opinions set forth herein. We have, with respect to all documents which we have examined and upon which we have relied, assumed the genuineness of all signatures, the authenticity of all documents submitted to us as originals, and the conformity to original documents of all documents submitted to us as certified or photostatic copies and the authenticity of the originals of such latter documents. We have further assumed the compliance of the adoption of the Resolutions with applicable procedural requirements.

The opinions expressed herein are further qualified by the fact that we are not, and the attorneys who assisted in the preparation of this opinion are not authorized to practice law in the State of New York and are therefore not specialists in the interpretation of the laws of the State of New York.

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Please note that we are opining only as to matters expressly set forth herein, and no opinion should be inferred as to any other matters. The opinions expressed herein are specifically limited to and by the facts as set forth above. Any change of facts or the applicability of additional facts and circumstances would have a material bearing on the opinions set forth herein, and we therefore express no opinion on matters resulting from any such change or additional facts and circumstances.

You should be aware that a number of questions raised by the matters discussed herein have not been definitively answered by statute, regulation, rulings or court decisions. Moreover, with respect to some of such matters, existing precedents provide little guidance. While our opinions and views expressed herein are based upon our best interpretations of existing sources of law and express what we believe applicable authorities would conclude if presented with these issues, no assurance can be given that such interpretations would be followed if they became the subject of judicial or administrative proceedings.

Applicable Ethical Principles and Laws

We offer no opinion whether the disciplinary authorities with jurisdiction over Kirkpatrick & Lockhart's professional conduct will be those of New York or Washington, District of Columbia. Kirkpatrick & Lockhart is clearly subject to the jurisdiction of the District of Columbia Bar Association. In addition, New York bar authorities will have jurisdiction to the extent that Kirkpatrick & Lockhart lawyers are admitted to practice in New York State or have entered appearances before New York courts or otherwise have submitted themselves to regulation by the New York State bar disciplinary authorities.

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In addition, we offer no opinion concerning which jurisdiction's disciplinary and ethical rules would be applied by authorities exercising jurisdiction over the professional conduct of Kirkpatrick & Lockhart. For example, we understand that the District of Columbia bar disciplinary authorities look to the ethical rules of the jurisdiction to which the actions at issue bear a "substantial relation." In the instant case, such a test would appear to point to the applicability of New York disciplinary rules by the District of Columbia disciplinary authorities, but we can offer no conclusive opinion on that issue.

Similar, but not identical versions of the American Bar Association Code of Professional Responsibility (the "Code") have been adopted by the appropriate authorities with jurisdiction over the bar of the State of New York and Washington, D.C. You have been provided with copies of both versions of the Code. In all respects pertinent to this opinion, the Code adopted by the two jurisdictions is the same.

The Code will govern the professional standards applicable to the conduct of Kirkpatrick & Lockhart. The Code is comprised of "Canons", "Ethical Considerations" and "Disciplinary Rules."

The functions of the Canons, the Ethical Considerations and the Disciplinary Rules are discussed in the Preliminary Statement of the Code which states that:

"The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

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"The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

"The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action . . . An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations."

We have not relied upon the authority, whether persuasive or mandatory, of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules") adopted by the House of Delegates of the American Bar Association on August 6, 1983. To date, the Model Rules have been adopted by only a few jurisdictions, but have not been adopted in New York or Washington, D.C. To the extent the Model Rules are relevant in evaluating the conduct of Kirkpatrick & Lockhart, Rule 1.13 and the comments thereto appear pertinent, and they are attached hereto as Appendix E.

Issue 1(a) and Issue 1(b)

Discussion

We believe that a determination with respect to Issue 1(a) and Issue 1(b) requires determination of the following additional questions:

1. Who is the client represented by Kirkpatrick & Lockhart?
2. Did the purported termination of Kirkpatrick & Lockhart's employment by the Termination Letter lawfully terminate that employment?

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Who Is Kirkpatrick & Lockhart's Client?

With respect to whom Kirkpatrick & Lockhart represents, it is our opinion that under New York law, Suffolk County is Kirkpatrick & Lockhart's client, not the County Executive or the County Attorney. Under New York law, the identity of a client in situations where the attorney deals with both an organizational entity such as a governmental body or a corporation and its constituents (e.g., its officers) is a question of fact. See Evans v. Artek Systems Corporation, 715 F.2d 788, 794 (2d Cir. 1983) (corporation). Although New York law recognizes that an attorney may simultaneously represent both an entity and the constituents of that entity, see Opinion 80-45 of the Committee of Professional Ethics of the Association of the Bar of the City of New York ("The test [of whether the corporation or the individual officer is the client] is whether this former officer reasonably understood that he was also a client of the law firm and whether his relationship was one in which confidences imparted by the officer would be protected."), on the facts set forth above, it seems clear that Kirkpatrick & Lockhart's client was Suffolk County. The Agreement was authorized by the Suffolk County legislature, the governing body of Suffolk County. The Agreement clearly identifies Suffolk County as the entity to which the duties of Kirkpatrick & Lockhart run. The Agreement states that the Agreement is being entered into to carry out the provisions and intent of Resolution 43-1982, i.e., to assist the County Attorney with the presentation of the County's intervention in the Shoreham licensing proceedings. Finally, the County Executive clearly signed on behalf of the County.

By his actions throughout the period of Kirkpatrick & Lockhart's employment, the County Executive, as well as all other parties, believed Suffolk County was the sole client of Kirkpatrick & Lockhart. The Termination Letter clearly recognizes that Cohalan understood that the client was the County.

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Therefore, we conclude that Suffolk County, and only Suffolk County, was Kirkpatrick & Lockhart's client.

Was The Termination of Employment Proper?

Whether the Termination Letter's purported termination of Kirkpatrick & Lockhart was lawful depends on whether the County Executive had either inherent authority to fire Kirkpatrick & Lockhart or had been granted that authority by the County Legislature.

We have seen no pertinent precedent on the inherent authority of a County Executive to fire counsel, the retention of which was authorized by the County Legislature. However, we note that the scope of a county officer's duties and authority are defined by legislative grant, see e.g., Village of Ft. Edward v. Fish, 156 N.Y. 363, 50 N.E. 973, 975 (1898), and that the relevant granting document, Suffolk County Charter, provides no such right to fire.*/ We also note with respect to the retention of counsel that the prevailing rule is that the power to employ counsel by a municipal officer is not incidental to the powers of the officer, (see Weinstock v. Long, 29 Misc.2d 795, 214 N.Y.S.2d 593, 597 (1961) (town officials), and that express authority, by resolution of the governing body, is necessary to justify the retention of an attorney by a municipal officer. Id.; See Cohn v. Town of Huntington, 29 N.Y.2d 451, 328 N.Y.S.2d 672 (1972).

In the somewhat analogous situation of creation of offices by the County Legislature, the applicable general principle is that repeal or modification of a statute requires a legislative act of equal dignity and

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But note Section 303(d), granting the right of "general supervision over all administrative units of the county, except as otherwise provided in this charter."

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import and not solely action of the executive. See Gallagher v. Regan, 42 N.Y.2d 230, 397 N.Y.S.2d 714, 716, 366 N.E.2d 804 (1977), and see Henry v. Noto, 424 N.Y.S.2d 506, 508, 74 A.D.2d 604 (1980).

Based upon existing New York precedent, we believe that the Suffolk County Executive had no inherent authority to fire Kirkpatrick & Lockhart.

We also believe the County Legislature did not grant to the County Executive the authority to fire Kirkpatrick & Lockhart. The question of the scope of the authority granted to the County Executive appears to be one of fact. See Lindlots Realty Corporation v. Suffolk County, 278 N.Y. 45, 15 N.E.2d 393, 395 (1938). In terms of retaining and discharging Kirkpatrick & Lockhart, the County Executive was the agent of the County Legislature. Although there appears to be no pertinent New York precedent, the general principle applicable in agency situations is that an agent specifically authorized to employ attorneys to act in specific matters does not have power to discharge those whom he has engaged, unless the language authorizing the engagement permits the agent to undertake other acts essential to the enforcement of the claim of the principal or some other language exists which is sufficiently extensive to permit the discharge. 2A C.J.S. § 180 at p. 894. It is our opinion that Resolution 43-1982 authorizing the County Legislature to retain Kirkpatrick & Lockhart contains no such language.

Although a county executive is entitled to reasonable discretion in implementing legislative commands, Henry v. Noto, 424 N.Y.S.2d 506, 508, 74 A.D.2d 604 (1980) and is granted supervisory rights and duties under Section 303(d) of the Suffolk County Charter, any decision by Suffolk County to fire counsel, originally employed by reason of a legislative resolution, properly belongs to the policy making, appropriating, governmental body, the County Legislature. See N.Y. County Law § 153(1) ("A power of a county shall, except as otherwise expressly provided, be exercised through a local law or resolution duly adopted by the board"); Weinstock v. Long, 214 N.Y.S.2d 593, 597 (1961)

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(town board, not town officials, has right to employ counsel) and cases cited therein. The right to discharge counsel properly rested with the County and was properly exercisable by the County Legislature, not the County Executive. South Buffalo Terminals, Inc. v. Grobe, 148 Misc. 646, 266 N.Y.S. 119 (1932), aff'd 239 A.D. 881, 266 N.Y.S. 127.

Finally, even if the County Executive generally had the right to fire counsel, which we have concluded he does not have, it is not clear that the right was properly exercised here. If, as we conclude below, the County Executive's actions in promulgating Executive Order 1-1985 were unlawful and if the dismissal was intertwined with and an essential part of those unlawful actions, the dismissal of Kirkpatrick & Lockhart was also unlawful for that additional reason.

Conclusions

Issue 1(a)

We have concluded that Suffolk County, not the County Executive or the County Legislature, is Kirkpatrick & Lockhart's client and that the County Executive has acted beyond the scope of his authority in authorizing the testing and implementation of the Plan and in purporting to terminate Kirkpatrick & Lockhart's employment. Based upon these conclusions, and because the unauthorized act of a municipal official is not binding on a municipal corporation, see e.g., Lindlots Realty Corporation v. Suffolk County, 278 N.Y. 45, 15 N.E.2d 393, 395 (1938) we are of the opinion that neither DR 2-110(B)(4) of the D.C. Code nor DR 2-110(B)(4) of the New York Code require the withdrawal of Kirkpatrick & Lockhart as counsel for Suffolk County. Further, neither DR 2-110(A)(2) of the D.C. Code, DR. 2-110(A)(2) of the New York Code nor any other provision of the D.C. Code or the New York Code require return of client papers pursuant to the request of the County Executive and the County Attorney, nor would the failure to so return subject Kirkpatrick & Lockhart to discipline.

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It should be further noted that EC 5-18 is instructive as to how Kirkpatrick & Lockhart should function in the present situation. EC 5-18 states:

"A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a . . . officer . . . or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization."

Therefore, Kirkpatrick & Lockhart is obligated, in the exercise of its independent professional judgment, on behalf of Suffolk County, and in the best interests of Suffolk County to itself determine whether return of its client's files to the County Attorney is appropriate.

To the extent the ABA Model Rules of Professional Conduct (the "Model Rules") are relevant, Model Rule 1.13(a) and comments thereto clearly indicate that Suffolk County, as a governmental organization, is Kirkpatrick & Lockhart's client and that only the activities of its duly authorized constituents are actions of the client which should be obeyed. Assuming that, based upon the conclusions set forth above, Kirkpatrick & Lockhart "knows"*/ that the County Executive has acted in a manner which is a violation of a legal obligation to Suffolk County, and further assuming that Kirkpatrick & Lockhart "knows" that the County Executive's action is likely to result in substantial injury to Suffolk County, then Rule 1.13(b) requires Kirkpatrick & Lockhart to proceed as is reasonably necessary "in the best interests of the organization." Rule 1.13(b) also sets

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"Knows", as defined in the Preamble to the Model Rules, "denotes actual knowledge of the fact in question. A person's knowledge may be derived from circumstances."

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forth the relevant standards and considerations which would govern Kirkpatrick & Lockhart's conduct. Provided that due consideration was given to those factors, we believe, under Rule 1.13, that Kirkpatrick & Lockhart could properly refuse to give the files to the County Executive.

Issue 1(b)

Assuming that the County Attorney's failure or refusal to seek a stay of an NRC grant of a license to operate the Shoreham Nuclear Power Plan is based upon instructions of the County Executive, which in turn are illegal because they derive from Executive Order 1-1985 and the failure to follow faithfully resolutions passed by the County Legislature, we are of the opinion that nothing in the D.C. Code or the New York Code would prevent Kirkpatrick & Lockhart from, or subject Kirkpatrick & Lockhart to discipline for, seeking a stay on behalf of the County based upon the merits of the action of the NRC or seeking a stay pending clarification of the dispute between the County Legislature and County Executive. In such event, Suffolk County, and not the County Attorney or the County Executive, remains Kirkpatrick & Lockhart's client, and as noted above, EC 5-18 provides that Kirkpatrick & Lockhart should keep paramount the County's interests and not the personal desires of any other person or organization. We note that Kirkpatrick & Lockhart would be obligated to conform to DR 7-101A(1), which provides:

"A. A lawyer shall not intentionally:

1. Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. . . "

To the extent the Model Rules are relevant, assuming that Kirkpatrick & Lockhart "knows" that the County Attorney's action in failing to file a brief was

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a violation of a legal obligation to Suffolk County, and further assuming that Kirkpatrick & Lockhart "knows" that the County Attorney's action is likely to result in substantial injury to Suffolk County, Rule 1.13(b) again counsels Kirkpatrick & Lockhart to proceed as is "reasonably necessary" in the best interests of Suffolk County. Provided that due consideration was given to those factors, we believe, under Rule 1.13, that Kirkpatrick & Lockhart could properly seek a stay and file a supporting brief on behalf of the County. Under Rule 1.13, it would also be appropriate, and perhaps desirable, for Kirkpatrick & Lockhart in the future to take the steps specifically set forth in Rule 1.13(b):

- (1) ask the County Attorney and County Executive for reconsideration of the matter;
- (2) advise Suffolk County that a separate legal opinion on the matter be sought for presentation to the County Legislature and perhaps the County Attorney and County Executive;
- (3) refer the matter to higher authority, probably the County Legislature.

Issue 2

Discussion

Executive Order 1-1985 states that Executive Law, Article 2B and Suffolk County Charter § 302 give the County Executive the authority to order on behalf of Suffolk County the actions set forth therein, i.e., that Suffolk County police and planning personnel to "carry out and cause to be conducted a test and exercise" of LILCO's emergency evacuation plan.

It should be noted at the outset that Executive Order 1-1985 directly conflicts with Resolution 456-1982 which provides that Suffolk County "shall not assign funds or personnel to test or implement any radiological emergency response plan" for Shoreham unless the plan has been approved by the Suffolk County Legislature and the County Executive. Resolution 111-1983 provides that the LILCO plan "will not be approved and will not be implemented. . ."

ARNOLD & PORTER

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The Suffolk County Charter (the "Charter") establishes the duties and functions of the County Executive. In pertinent part, the Charter provides:

"Section 303. Function of county executive.

In addition to the functions assigned to the county executive in other provisions of this charter, the county executive shall:

(d) take care that all laws applicable to the county and that all laws and resolutions of the County are faithfully executed." (emphasis added)

See also N.Y. Const.

Art. IV, § 3 (same duty applied to state executive branch).

Under relevant New York precedent, it is unlawful for the executive branch of the government to override policy declarations of the legislative branch. Where the executive takes unauthorized action inconsistent with duly authorized legislative enactments, the actions of the executive are unlawful because they exceed the executive powers and are an improper exercise of the legislative function. County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407, 411-412, 404 N.E.2d 133 (1980) (Executive Order of Governor impounding funds appropriated by the State Legislature was unlawful); Subcontractors Trade Association v. Koch, 62 N.Y.2d 422, 477 N.Y.S.2d 120, 124, 465 N.E.2d 840 (1984) (Mayor's executive order mandating share of construction contracts awarded by city be given to local enterprises was beyond mayor's executive function and was unlawful usurpation of legislative function); Matter of Fullilove v. Beame, 48 N.Y.2d 376, 423 N.Y.S.2d 144, 145, 398 N.E.2d 765 (1979) (Mayor's affirmative action regulation was unlawful in absence of legislative authorization); Broidrick v. Lindsay, 39 N.Y.2d 641, 385 N.Y.S.2d 265, 268, 350 N.E.2d 595 (1976) (Mayor's affirmative action regulations were invalid because, inter alia, there was no legislative authorization and because they were inconsistent with applicable state statute).

Although Section 304 of the County Charter permits the County Legislature to delegate to the County Executive the powers and duties of the County Legislature, we are aware of no legislative authorization (state or local) for Executive Order 1-1985.

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The language of the Resolutions is unambiguous and does not confer the discretion on the County Executive to issue Executive Order 1-1985 or the actions authorized therein. See County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407 at 412, 404 N.E.2d 133 (1980). Nor is the County Executive compelled by Article 2B or otherwise to test or implement the LILCO plan; therefore, there can be no corresponding power to perform the non-existent duty. See County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407 at 410-411, 404 N.E.2d 133 (1980).

Section 20(1)(b) of Article 2B of the Emergency Preparedness Law (Executive Law § 20 et seq.) does state:

- (1) It shall be the policy of the state that
 - (b) local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with the authority and responsibility to insure the success of such programs;"

However, in Section 23 of Article 2B the authority to develop disaster preparedness plans is granted to the "County", not the chief executive of the county. Article 2B nowhere gives the chief executive of a county the authority to test and implement plans not approved by the legislature. Furthermore, Article 2B nowhere explicitly takes the extraordinary action of altering existing governmental relations. Rather, its structure seems to provide for the development and implementation of emergency preparedness plans within existing frameworks, and recognizes and distinguishes between the County, the County Legislature and the chief executive of a county. The policy of active involvement and authority to insure the success of such programs seems a restatement of the general authority of the executive branch to implement laws properly passed by the legislative branch. Only in specific, narrow carefully set forth circumstances (e.g., Section 24, the right to declare a state of emergency) is the normal governmental structure altered. The extraordinary power to unilaterally test and implement plans directly contrary to duly enacted law is nowhere granted.

ARNOLD & PORTER

Kirkpatrick & Lockhart
June 9, 1985
Page Seventeen

While there appears to be no pertinent precedent interpreting the provision, Article 2B as a whole contemplates that the responsibility for preparation and implementation of emergency disaster plans and programs should be shared by the state and local governments within the usual governmental channels. We conclude that Article 2B does not validate Executive Order 1-1985. See County of Oneida v. Berle, 49 N.Y.2d 515, 427 N.Y.S.2d 407, 411 N.Y.S.2d 404, 404 N.E.2d 133 (1980).

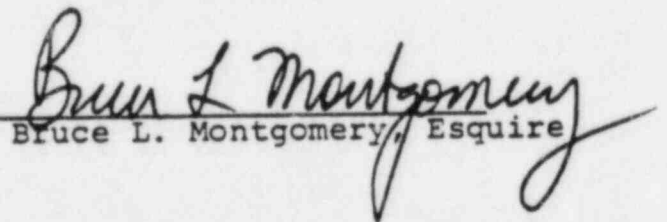
Conclusion

Based upon our conclusion that the issuance of Executive Order 1-1985 was not authorized by either state law (Article 2B), the Suffolk County Charter or the Suffolk County Legislature and was an improper exercise of legislative authority in direct conflict with existing Suffolk County policy, we are of the opinion that such issuance was unlawful under New York law.

Very truly yours,

ARNOLD & PORTER

By:


Bruce L. Montgomery, Esquire

Enclosures

At a Special Term, Part I, of
the Supreme Court of the State
of New York, Suffolk County,
held at the Courthouse,
Griffing Avenue, Riverhead, New
York, on the 10th day of June,
1985.

HON. ROBERT W. DOYLE
Justice

-----X
In the Matter of the Application of)
THE TOWN OF SOUTHAMPTON, THE TOWN OF)
EAST HAMPTON, THE TOWN OF SOUTHDOLD)
and THE TOWN OF RIVERHEAD,)
Petitioners,)
)
For a Judgment under Article 78 of)
the Civil Practice Laws and Rules,)
)
-against-)
)
PETER F. COHALAN, County Executive)
of the County of Suffolk,)
Respondent.)
-----X

ORDER

Index No.

85-10520

-----X
In the Matter of the Application of)
WAYNE PROSPECT, et al.,)
Petitioners,)
)
For a Judgment under Article 78 of)
the Civil Practice Laws and Rules,)
)
-against-)
)
PETER F. COHALAN, County Executive)
of the County of Suffolk,)
Respondent.)
-----X

Upon reading and filing the Petition of the Town

of Southampton, et al., sworn to the 5th day of June, 1985, the Petition of Wayne Prospect, et al., sworn to the 5th day of June, 1985, the Respondent's Notice of Motion to Dismiss the Petition and disqualify counsel, and upon all the papers and proceedings herein, it is hereby

ORDERED that respondent's Executive Order 1-1985 issued on the 30th day of May, 1985 is hereby rescinded, annulled and set aside, and it is further

ORDERED:

(a) that the respondent, his attorneys, agents, servants, employees and all persons acting in concert with them including but not limited to those of the Suffolk County Planning Department, Suffolk County Police Department and Suffolk County Attorney are enjoined from taking any action whatsoever to enforce, implement or carry out the directions, ~~policies~~ or terms of Executive Order 1-1985 issued by Respondent on May 30, 1985 or any directive or instruction relating

thereto; *nothing herein shall preclude the respondent and/or his attorney from taking such legal action as may be available to him,*
(b) that the respondent is enjoined from assigning *pursuant*

or expending any funds or resources in contravention of Resolutions 262-1982, 456-1982 and 111-1983, or directing any County personnel to review, test or implement the LILCO plan or any Radiological Emergency

*For
Town
of
AK
RWD
JSC*

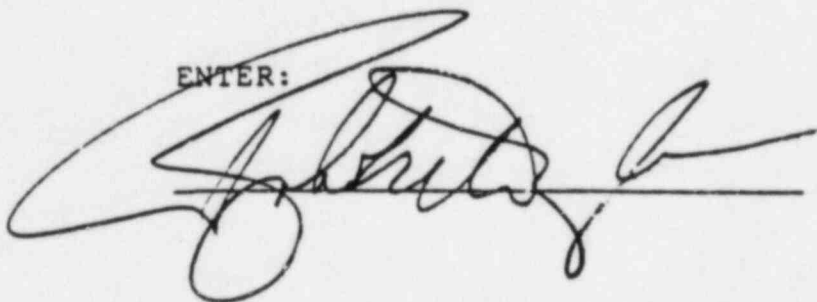
Response Plan (RERP), for the Shoreham nuclear plant
without ~~first presenting to the Suffolk County~~
~~Legislature the need therefor~~ and securing a resolution
adopted by the County Legislature and approved by the
County Executive; ~~in accordance with the provisions of~~
~~the Suffolk County Charter and applicable statutes,~~
~~local laws and regulations;~~

(c) that the respondent and the persons hereinabove
described are enjoined from modifying the policy and
legal position of Suffolk County in any Shoreham related
proceedings ~~(as established by the County (and its Special~~
~~Counsel, Kirkpatrick and Lockhart, Esqs., and the County~~
~~policy))~~ as set forth in the resolutions 262-1982,
456-1982 and 111-1983, and from communicating to the
Nuclear Regulatory Commission (NRC), the Public Service
Commission (PSC), or to any federal or state judicial
tribunal, administrative agency, department of
government or official, either verbally or in writing
directly or indirectly that such policy is other than as
described in said resolutions or that such County policy
has been changed ~~(from that of being opposed to the~~
~~operation of Shoreham);~~

(d) that the respondent is enjoined from
^{or modifying}
withdrawing the County's opposition to the issuance by

the NRC to LILCO of a low power operating license for
Shoreham.

ENTER:

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is highly cursive and appears to be a name, possibly "John" or "John D.", followed by a surname. The ink is dark and the strokes are fluid.



VETERANS MEMORIAL HIGHWAY
HAUPOUGE, NEW YORK 11788

360-4070

WE THE UNDERSIGNED SUFFOLK COUNTY LEGISLATORS SUPPORT THE FOLLOWING RESOLUTION

WHEREAS, Kirkpatrick & Lockhart was hired pursuant to Resolution 43-1982, and

WHEREAS, such retention was achieved with the involvement of the Suffolk County Legislature, and

WHEREAS, acting under the authority of an Executive Order, dated May 30, 1985, the County Executive, by letter dated June 3, 1985, terminated the services of Kirkpatrick & Lockhart, without the approval of the Suffolk County Legislature, and

WHEREAS, the Supreme Court of the State of New York has declared the Executive Order to be invalid and illegal, therefore, be it

RESOLVED, that the services of Kirkpatrick & Lockhart have never been terminated by Suffolk County, and be it further

RESOLVED, that the contract between Suffolk County and Kirkpatrick & Lockhart continues in full force and effect in every way, and be it further

RESOLVED, the letter of Suffolk County Executive, dated June 3, 1985, is to be ignored as an action contrary to the June 10, 1985 ruling of the New York State Supreme Court.

Gregory J. Blum
James M. Mingo
Philip C. Nolan
Sandra Luchetti
Jane Devine
Joseph King
Paul Glass
Avaime Brockett

John J. Tooley
Robert L. LaBue
Donald J. Ryan
Rudolph Caracciolo
Steve Englebright
Patrick J. Heaney

Dated: June 11, 1985