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UNITED STATES OF AMERICA
Nuclear Regulatory Commission

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Before Administrative Law Judge
Morton B. Margulies

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In the Matter of
General Public Utilities Nuclear
Corporation
(Three Mile Island Nuclear
Station, Unit No. 1)

Docket No. 50-289(CH)

(ASLBP No. 85-514-02-0T)

February 27, 1986

Report and Order
On Initial Prehearing Conference

I. Introduction:

By Notice of Hearing, issued September 5, 1985, the Commission ordered that a hearing be instituted to determine: (a) whether the Appeal Board's condition barring Charles Husted from supervisory responsibilities insofar as the training of non-licensed personnel should be vacated, and (b) whether he is barred by concerns about his attitude or integrity from serving as an NRC licensed operator, or a licensed operator instructor or training supervisor. Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1224 (1984).

In the September 5, 1985 Notice, the Commission directed the hearing to focus on whether the following four concerns regarding

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Mr. Husted are true, and, if so, whether they require that he not be employed in the jobs in question:

- (1) the alleged solicitation of an answer to an exam question from another operator during the April 1981 NRC written examination;
- (2) the lack of forthrightness of his testimony before the Special Master;
- (3) his poor attitude toward the hearing on the cheating incidents; and
- (4) his lack of cooperation with NRC investigators.

This matter had its genesis in 1981 when the NRC ordered reactor operator examinations at the facility where Mr. Husted was a licensed operator training instructor. Questions were raised concerning his attitude and integrity as related to the testing and investigation and hearing that followed. The condition barring Mr. Husted from supervisory responsibilities, insofar as the training of non-licensed personnel, was imposed in an appeal of a proceeding involving the ability of licensee's management to operate the facility in a competent, responsible and safe manner. Mr. Husted was not a party to the proceeding leading to the limitations imposed on his employment. The Appeal Board's condition has been suspended by the Commission during the pendency of this proceeding. Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 317 (1985).

As to (b) above, the Licensee and the Commonwealth of Pennsylvania entered into a stipulation wherein the former agreed not to employ Mr. Husted in the enumerated capacities.

Interested parties were given an opportunity to petition to intervene in the subject proceeding. The NPC Staff was directed to participate as a full party and to ensure that the record is fully developed.

After my appointment to hear this matter, Three Mile Island Alert, Inc. (TMIA) and General Public Utilities Nuclear Corporation (GPU) filed petitions to intervene. In an order of December 6, 1985, I found that both petitioners satisfied standing and interest requirements to participate as parties except to the extent of filing litigable contentions, as required by 10 CFR 2.714(b). The order scheduled an initial prehearing conference for February 19, 1986, at Harrisburg, Pennsylvania. A listing of areas to be covered at the conference was provided including deciding on the litigability of any proposed contentions. Petitioners, Staff and Mr. Husted were encouraged to meet and confer prior to the conference in order to attempt to narrow and simplify the issues.

The participants did meet in advance of the prehearing conference at which time they agreed on a significant number of issues and expressed disagreement on others. Issues considered included proposed contentions submitted by TMIA and GPU. A summary of the results of the meeting was contained in a letter which was submitted to me in advance of the conference. As ordered, the initial prehearing conference was held on February 19, 1986 with all participants in the proceeding in attendance. The planned agenda contained in the December 6 order was

followed. This Report and Order reviews the matters covered during the prehearing conference and sets forth the final rulings on the issues considered.

II. Discussion of Rulings:

a. Following the rephrasing of TMIA's proposed contentions, it was agreed by the participants that they are litigable. The proposed contentions are:

1. The Appeal Board's condition barring Charles Husted from supervisory responsibilities insofar as the training of non-licensed personnel is concerned should not be vacated by reason of his demonstrated bad attitude and lack of integrity.
2. Husted should be barred from serving as an NRC-licensed operator or licensed operator instructor or training supervisor by reason of his demonstrated bad attitude and lack of integrity.

TMIA's proposed contentions make allegations in regard to matters at issue in the proceeding. They are specific, adequately supported by bases and reasonably apprise Mr. Husted of what he need defend against. They are found to be litigable contentions under the requirements of 10 CFR 2.714(b).

The contention proposed by GPU provides:

The conduct and attitude of Charles Husted with which GPU is familiar indicates that the NRC should not disqualify Mr. Husted from swerving as an NRC-licensed operator or an instructor of licensed or non-licensed personnel.

The proposed contention also goes to a matter at issue; it bears on Mr. Husted's qualifications to be employed in the jobs in question. It is sufficiently precise to provide adequate notice to the parties on the matter addressed. This contention, too, is found to be litigable.

At the prehearing conference a question was raised as to whether the evidence that could be presented under the GPU contention must be limited to the time that preceded the imposition of the condition by the Appeal Board. TMIA subscribes to that position. The other participants do not. After consideration, I find that such a limitation would be excessively restrictive. Although the Appeal Board was necessarily limited to considering that which transpired prior to the time it issued its opinion, the Notice of Hearing calls for what is a de novo hearing to provide "Mr. Husted with an opportunity to demonstrate his fitness for the position at issue." A full and fair hearing requires that on a matter bearing on Mr. Husted's qualifications to be employed in the jobs in question, there be no restrictive time limitations on the evidence submitted.

b. TMIA and GPU, in submitting litigable contentions and having otherwise qualified as intervenors, are each admitted as a party to the proceeding. NRC Staff, TMIA, GPU and Charles Husted are parties to the proceeding.

c. Staff, Husted and GPU are in agreement that this proceeding is in the nature of an enforcement proceeding and, as such, Mr. Husted should not bear the burden of persuasion.

Staff differentiates this proceeding from the regular enforcement proceeding where the Staff is the proponent of the enforcement order, takes a position in favor of enforcement and bears the burden of going forward with a prima facie case. Staff states that in this proceeding it is not the proponent of the order in question and its role, at least

initially, is only for the purpose of developing a full record. Staff contemplates offering the prior record for itself, without requesting that it be accepted for the truth of the matter stated therein, but that the record might establish a prima facie case in support of the order. Staff looks to having the record admitted provisionally, that is, subject to establishing the truth of the matters asserted therein by offering Mr. Husted and others the opportunity to call witnesses and to cross-examine those witnesses whose testimony is in the record. It is of the position that to the extent there is a proponent of the order it is TMIA.

Mr. Husted's position in the matter is that the prior proceeding was fundamentally flawed, insofar as it dealt with Mr. Husted and that what is required is a de novo proceeding, with the burden of establishing wrongdoing by Mr. Husted on the party who wants to impose the sanction.

TMIA believes the proceeding is in the nature of an appellate review and regardless of the nature of the proceeding, Mr. Husted has the burden of persuasion.

GPU is of the opinion that Staff need not put witnesses on the stand but that to avoid unfairness they must formulate a position on the issues at the same time as the other parties do. GPU further asserts that Staff does not have to be an advocate in support of or against Mr. Husted.

The matter of deciding the nature of the proceeding and the responsibilities of the parties that result from the determination is

particularly difficult. This difficulty arises from the way the matter evolved, and from the fact that the notice instituting the hearing does not readily place it in the format of a typical proceeding.

This proceeding is most appropriately determined to be a hearing on an enforcement action. Mr. Husted is faced with the possible imposition of an agency sanction. A material issue for decision is whether the Appeal Board's sanction barring Mr. Husted from employment in a particular area should be vacated. The Commission, in effect, found the record before the Appeal Board inadequate because Mr. Husted was not a party to the earlier proceeding. The Commission again is raising the possibility of imposing the same sanction on Mr. Husted by means of the subject proceeding. Thus, the proceeding is not in the nature of an appellate review as TMIA contends because it calls for a new record developed through a hearing de novo.

The possible sanction cannot be construed to be anything other than an agency sanction. Initially, it was imposed by the Appeal Board. The principal issue of the subject proceeding is whether the Appeal Board's sanction should be continued. When the proceeding was instituted, the parties were but Staff and Mr. Husted. Had not TMIA come forward voluntarily to participate in the proceeding, the proceeding could never be viewed as anything but an enforcement proceeding involving the possible imposition of an agency sanction. Nothing TMIA has done in participating has caused a change in the nature of the proceeding. Although TMIA seeks the imposition of the sanction, TMIA's status is still that of an auxiliary participant, not the moving

party. This is not a proceeding instituted at the complaint of TMIA so that it must assume the burden of proof in the matter.

The proceeding threatens Mr. Husted with restrictive action being taken against him and having limitations put on the kind of employment he might pursue. Due process provides that in addition to an opportunity for a hearing the person is entitled to a statement of reasons for the proposed action so that the person can gather the evidence to meet the charges. The Administrative Procedure Act, 5 U.S.C. 554(b) provides:

Persons entitled to notice of an agency hearing shall be timely informed of -

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted.

Mr. Husted is entitled to have his due process requirements met. A reasonable interpretation of the Notice of Hearing is that the Commission intended Staff to fulfill the role of the proponent of the sanction and to assume the burdens that go with it, including the burden of going forward, the burden of persuasion and meeting the due process requirements so that Mr. Husted can defend against the charges levied. It is concluded that this was the Commission's intent in light of its statement in instituting the proceeding, "The NRC Staff is to participate as a full party, and is to ensure that the record is fully developed." The only other party to the proceeding was Charles Husted. There is no party but Staff that the Commission could logically have

intended to act as the proponent of the sanction and carry the responsibilities that accompany possible agency action, including the meeting of due process requirements. Under our system of law, Mr. Husted, as an accused, has no initial burden to go forward and has no burden of persuasion on the matters at issue.

Staff believes that it may submit the prior record into the record of this proceeding, without requesting that it be accepted for the truth of the matter stated therein, and thus, the earlier record could establish a prima facie case. The Staff's reasoning is in error. The Commission has already considered the record to be inadequate in that Mr. Husted was not a party to that proceeding, resulting in the subject proceeding. The issues in this proceeding do not permit a prima facie case to be made on evidence that is not offered for its truth. What Staff is proposing will not develop the record even as Staff interprets that requirement.

Due process requires that Mr. Husted know in advance of the hearing of the charges against him and the law and facts that are asserted to support the allegations. In this way he may defend against the charges. In order to conduct the hearing in a fair and impartial manner and pursuant to the Notice of Hearing, it is determined that Staff shall be considered the proponent of the possible agency sanction and assume responsibilities attendant to the moving party for the reasons stated.

d. TMIA identified what it believes to be the key legal questions in this proceeding:

I. Did the Appeal Board in ALAB-772 have authority to impose

the order barring Husted from supervising the training of non-licensed personnel?

- II. Are the issues: (2) the lack of forthrightness of his testimony before the Special Master; (3) his poor attitude toward the hearing on the cheating incidents; and (4) his lack of cooperation with NRC investigators, litigable in this proceeding?

TMIA asserts that Question I requires an affirmative answer and is the only issue that need be decided in this proceeding. It further believes that even if the answer were determined to be "no," the decision of the Appeal Board in ALAB-772 on issues (2), (3) and (4) constitutes final agency action and is binding in this proceeding.

Staff, Husted and GPU believe Question I is moot in light of the fact that the Commission initiated this proceeding. Those parties also are of the opinion that the issues specified under Question II are litigable because the principal purpose of this proceeding is to examine these issues anew.

Issues involving the Appeal Board's authority as exercised in ALAB-772 will not be considered in this proceeding. The Commission in CLI-85-2, supra at 317, stated it had no intention of resolving such issues but instead provided for the subject proceeding. In the Notice of Hearing, the Commission specifically called for the litigation of items (2), (3) and (4). The alleged solicitation of an answer to an exam question from another operator during the April 1, 1981 NRC written examination was also clearly set out as an issue for consideration in the Notice of Hearing, and remains a viable issue. The Commission's institution of the subject proceeding as a de novo hearing evidences its

determination that consideration during this proceeding of the Appeal Board's authority would serve no useful purpose. To do so would run contrary to the action taken by the Commission.

As to Question II, the record does not support the claim that the Appeal Board's action in ALAB-772 is final agency action, binding the agency. To the contrary, the Commission has not accepted the Appeal Board's action as that of the agency, but has ordered these issues to be litigated in this proceeding.

Mr. Husted would raise as a legal issue the question of what standards should be applied in determining whether he should be barred from any of the specified positions. This is an appropriate legal issue which should be addressed during the course of the proceeding.

e. As to factual issues, Staff, GPU and Husted agree that in addition to the four issues referred to in d. above, others to be considered include: (5) What does Husted's performance of his responsibilities with GPU reflect about his attitude and integrity?; (6) In light of the answers to (1) through (5), is any remedial action required with respect to Husted?; and (7) If remedial action is required, what is it? TMIA takes the position that these issues may be addressed but not relitigated. It bases its assertion on the fact that several of these matters were in the earlier proceeding, and claims that since Mr. Husted had the opportunity to participate at that time, he has waived the right to litigate these issues presently.

I find (5), (6) and (7) are appropriate factual questions to be answered by this proceeding. The Commission instituted the subject

proceeding because Mr. Husted did not participate as a party in the prior proceeding. The Notice of Hearing mandated that items (1) through (4) be heard and (5) through (7) are logical extensions of those factual issues. A thorough understanding of the full complement of issues involved is necessary for a fair determination in this proceeding.

f. I find the parties are correct in their conclusions that (1) I lack authority to dissolve or otherwise affect directly the Stipulation between the Licensee and the Commonwealth of Pennsylvania that bars the former from employing Mr. Husted in certain capacities and (2) I am free to resolve any factual issues about Mr. Husted's attitude and integrity. The parties' second conclusion affords the opportunity to determine whether Mr. Husted should be barred, based on attitude considerations and integrity from serving in such capacities, without regard to the existence of the Stipulation. All of the foregoing is called for by the Notice of Hearing.

g. The burden of proof and of going forward are those of Staff, who is considered the proponent of the enforcement order. It will be left to the parties to determine how intervenors should be fitted into the order of presentation of their cases and to what extent they are to participate. Should the parties be unable to resolve these matters, they should be raised for decision at the next prehearing conference.

The evidence pertaining to whether Mr. Husted should be barred from supervisory responsibilities insofar as the training of non-licensed personnel is concerned should be similar to that used to determine whether he should be barred from serving as an NRC licensed operator, or

a licensed operator instructor, or training supervisor. It would be impractical to bifurcate the hearing on the issues relating to licensed and non-licensed activity as suggested by TMIA because they are not discrete matters. To attempt to do so would be impracticable, unworkable and cause undue delay.

h. The parties were not able to reach a conclusive determination as to what use should be made in this proceeding of the record of the prior proceedings. Should the parties be able to do so in advance of the hearing, it would prove helpful. If it is not possible, formal rulings will be made at the hearing as the material is offered.

i. All of the participants agree that an opportunity for discovery is necessary. They further agree that two rounds of interrogatories and document requests should be provided for, with the understanding that all discovery would be completed within two months after it begins. Document production is to be made within a 14-day time frame. The dates reflected in the discovery schedule are receipt dates. The discovery schedule agreed to by the parties is made subject to the understanding that any party may seek an extension of the time period for good cause shown. The schedule agreed upon is as follows:

Discovery begins	March 1, 1986
Discovery is completed (responses and production due)	May 1, 1986

The nature of the case makes the request for discovery and the proposed discovery schedule reasonable. It is adopted as the schedule for the proceeding.

The hearing schedule agreed to by the parties is likewise reasonable and is adopted as the schedule for the proceeding. It provides as follows:

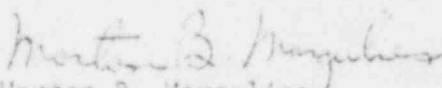
Final pre-hearing conference	May 12, 1986
Testimony is filed	June 1, 1986
Hearing begins	June 23, 1986

ORDER

Based upon all of the foregoing, it is hereby ORDERED that:

This order, which incorporates all of the rulings contained in section II above, shall control the subsequent course of the proceeding unless modified by further order.

Objections to this ORDER may be filed by a party within five (5) days after service of the Order, except that the Staff may file objections within ten (10) days after service.


Morton B. Margulies
ADMINISTRATIVE LAW JUDGE

Dated at Bethesda, Maryland
this 27th day of February, 1986.