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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH P7:01

OFFICE OF SECRETARY  
DOCKETING

In the Matter of:

DOCKET NOS.-030-01993

Hurley Medical Center  
One Hurley Plaza  
Flint, Michigan 48502

070-1393

License Nos.

21-00338-02  
SNM-1393  
(EA 85-89)

HURLEY'S PROPOSED FINDINGS  
OF FACT, CONCLUSIONS OF LAW,  
AND ORDER IN THE FORM OF  
AN INITIAL DECISION.

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PDR ADOCK 070-1393  
C PDR

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## INTRODUCTION

Hurley's submission will be in the form of responding to NRC's submission in those areas of disagreement - Hurley's numbered paragraphs will coincide with the numbered paragraphs contained within NRC's submission-

1. No disagreement.
2. No disagreement.
3. No disagreement.
4. No disagreement.
5. No disagreement.
6. No disagreement.
7. No disagreement.
8. No disagreement.

## FINDINGS OF FACT

### I. LICENSEE'S VIOLATIONS

A. The violations discovered during the 1935 inspection and their safety significance.

9. The 14 violations discovered during the May 2, 3, and 24 routine inspection of licensee's facility were:

- (1). No disagreement
- (2). No disagreement
- (3). No disagreement
- (4). No disagreement
- (5). No disagreement
- (6). No disagreement
- (7). No disagreement
- (8). No disagreement
- (9). No disagreement
- (10). No disagreement
- (11). No disagreement
- (12). No disagreement
- (13). No disagreement
- (14). No disagreement

(NRC EX.4). Hurley disagrees with NRC's submission and submits the following:

In determining whether civil penalties are appropriate for these violations, it is first necessary to establish their safety significance. For the following reasons, I have concluded that each of these violations have minimal safety and/or potential safety implications and, for the purposes of assessing their severity, do not have safety or environmental significance.

#### VIOLATION A.

10. No disagreement.

11. Hurley disagrees with the submission of the NRC and submits the following:

Its failure to meet no less than once in each quarter arose from the committees understanding that meeting semi-annually was sufficient. That compliance was achieved immediately following May 24, 1985, the date of the most recent inspection by NRC (NRC EX. 3 - Response to Violation A.) Its failure to meet was not an intentional, willful violation. That this violation was of no environmental significance; resulted in no safety incident and was of no, or at least, minimal safety significance.

#### VIOLATION B

12. Hurley disagrees with the submission of the NRC (other than the restatement of the violation with which there is no disagreement) and submit the following:

That Hurley accurately reported to the NRC the use of an unauthorized room and the discovery of the violation involves no claim that Hurley took any steps or actions to withhold information from the NRC (Sreniawski - TR. - 99). That Hurley as of June 6, 1985 submitted an appropriate amendment to its license.

13 Hurley disagrees with the submission of the NRC and submits the following:

That Hurley had determined that the air flow in the room being used was in fact sufficient. Had no such determination been made such failure may have been safety significant, however under the circumstances it was of no safety significance.

#### VIOLATION C

14. No disagreement.

15. Hurley disagrees with the submission of the NRC and submits the following:



That notwithstanding it is good practice to require the wearing of film badges Hurley's particular situation created no safety significance and that compliance with this portion of Hurley's license was achieved June 7, 1985.

16. Hurley disagrees and submits as presented within 15 above.

17. Hurley disagrees and submits as contained within 15 above.

#### VIOLATION D

18. No disagreement.

19. Hurley disagrees with the submission of the NRC and submits as follows;

Hurley in fact conducted some surveys before inspection by the NRC of the rooms occupied by patients (Reichold-TR-113 and Sreniawski-TR-112). That no variables were found to have occurred (Sreniawski-TR-110-111). That Hurley took steps to stay in compliance and was achieved on June 7, 1985.

#### VIOLATION E

20. No disagreement.

21. Hurley disagrees with the submission of the NRC and submits as follows:

Notwithstanding the claim of the NRC that, had in fact the person appointed not been qualified the severity level and penalty could have been much greater, the fact is that the person appointed was qualified. Recognizing and not minimizing the NRC's right to inspect and regulate does not in and of itself create a safety or environmental significance. I find no safety or environmental significance. This is not to say "the ends justify the means." Hurley took prompt steps to correct this violation by filing the appropriate license amendment request.

22. Hurley disagrees with the submission by the NRC and Hurley's submission is within 21 above.

#### VIOLATION F

23. No disagreement.

24. Hurley disagrees with the submission by the NRC and Hurley submits as follows:

That in relation to the incident regarding the Funeral Director the pacemaker was in fact received in a non-leaking safe condition (Sreniawski-TR.-117-118). That in relation to the pacemaker in question dropping it from 3 or 4 feet would not cause it to break open and that it would be necessary to apply an outside force, such as a hammer or vise, to cause it to break open. (Sreniawski-TR.-119-120). That notwithstanding that the death was reported to the NRC, after inspection, NRC witnesses were unable to testify, that in fact NRC followed up on the death to obtain the information they seek when such a death is reported timely (Sreniawski-TR-122 ; Reichold-TR-122,125).

25. Hurley disagrees with the submission of the NRC and submits as follows:

That this violation represents a failure to report timely and is of minimal significance especially so when, as in this instance, the NRC was unable to testify that the information sought following timely reporting was sought following actual reporting although untimely. (See reference to testimony as cited above.)

27. Hurley disagrees with the submission of NRC and submits as follows: (As indicated Hurley is responding by paragraph as numbered by NRC's submission and no paragraph 26 appears in the NRC submission, page 12 of the NRC submission).

The conclusion of the NRC that this violation was a significant safety concern, is rejected for the reason stated within paragraph 25 above.

#### VIOLATION H.

28. No disagreement.

29. Hurley disagrees with the submission of the NRC and submits as follows:

That this violation is the failure to report. (Counsel Dewey's representation on behalf of the NRC-TR-147-148). That the loss of contact with the patients in question was temporary and that in fact contact was made with each patient. (Sreniawski-TR-134; and Reichald-TR-140). That the numbers of patients involed was three in 1982 and two in 1984. That this violation was of no safety and/or environmental significance.

#### VIOLATION I

30. Hurley disagrees with the submission of the NRC, aside

from the statement describing the violation, and Hurley submits as follows:

That this violation is the failure to report monthly and in view of there being no claim, that there was no reporting and that Hurley requested an amendment to their license, I find no safety or environmental significance.

#### VIOLATION J

31. Except as to the restatement of the violation Hurley disagrees with the submission of the NRC and submits as follows:

That the failure to inventory related to the sources in storage. (Testimony of Banks following TR-206) That this violation represents minimal potential for harm and is of little or no safety significance. That there is no testimony indicating that the sources were "lost" or even stolen or that Hurley was not aware of their location at all times.

32&33 Hurley disagrees with the submission of the NRC and submits as contained within paragraph 31 above.

#### VIOLATION K

34. Except as to the restatement of the violations Hurley disagrees with the submission of the NRC and submits as follows:

That Hurley in fact inventoried as required but did not do so as often as required. I find minimal safety and/or environmental significance.

35&36 Hurley disagrees with the submission of the NRC and submits as contained within paragraph 34 above.

#### VIOLATION L

37. No disagreement.

38. Hurley disagrees with the submission of the NRC and Hurley submits as follows:

I find that the testimony of witness Banks to the effect that the sources referred to were in a solid state while being stored and had no potential for leakage to be un rebutted. Further that this violation represents no potential for harm.

39. Hurley disagrees with the submission of the NRC and submits as contained within paragraph 38 above.



#### VIOLATION M.

40. Except as to the restatement of the violation Hurley disagrees with the submission of the NRC and submits as follows hereafter.

41. Hurley disagrees with the submission of the NRC and submits as follows:

I find that at least a portion of this violation is the failure to record (Testimony of Banks as to item M-TR-Following p.206). I find this to be of minimal safety significance.

42; 43; and 44 Hurley disagrees with the submission of the NRC and submits as contained within paragraph 41 above.

#### VIOLATION N

45. No disagreement.

46. No disagreement.

#### B. LICENSEE'S VIOLATIONS COMPARED TO OTHER LICENSEE

47. Hurley disagrees with the submission of the NRC relative to paragraphs 47 and 48 and submits the following:

The testimony relative to the comparisons made by the NRC staff is of little value in these proceedings other than to indicate that (1) based on recall Hurley was similar to five other institutions in terms of numbers of violations (Sreniawski-TR-54); (2) That 5 violations indicates a management problem, (Sreniawski-TR-85); (3) Specific comparisons were made however with only two other institutions the identity of which could not be recalled. (Sreniawski-TR-81). The generality of the testimony is of little or no value in determining the issue in this case. The NRC, apparently, would have this case decided on the basis of numbers rather than substance which I decline to do.

#### C. LICENSEE'S PREVIOUS INSPECTION.

49. Hurley disagrees with the submission of the NRC and submits the following:

A previous inspection of Licensee's facilities in June, 1981 had identified 10 violations. The testimony of the NRC did not disclose the specifics of the violations other than to indicate that two of them were

the same as violations H and I in these proceeding.  
The fact of previous violations in and of itself is not of significant value in determining the issue in this case.

## II. WHETHER A CIVIL PENALTY IS APPROPRIATE

### A. THE NRC'S ENFORCEMENT POLICY

50&51 Hurley disagrees with the submission of the NRC and submits the following:

In determining the issue in this matter a review of the General Statement of Policy and Procedure for NRC Enforcement actions as found in 10 CFR Part 2, Appendix C, is appropriate. In part that statement provides:

"...It is the Commission's intent that sanctions should be designed to ensure that a licensee does not deliberately profit from violations of NRC requirements. Each enforcement action is dependent on the circumstances of the case and requires the exercise of discretion after consideration of these policies and procedures". (Emphasis supplied.)

In this case I find that Hurley not only did not profit from the violations cited but, that the NRC does not so claim.

In this case I find that the enforcement order issued in this case was, in part, based upon some comparisons with other institutions.

I find that an enforcement conference was held in this matter and also find, based upon the unrefuted testimony of Dagenais (TR-223-224) that the conference was of little or no significance in that the objectives had already been decided upon by NRC.

The purpose of an enforcement conference are (10 CFR 2 IV).

- (1). Discuss the violations, their significance and causes and the licensee's collective actions;
- (2). Determine whether there are any aggravating or mitigating circumstances; and
- (3). Obtain other information which will help determine the appropriate enforcement action.



The significance of the above findings is that in fact the NRC did not follow its enforcement policy. Whether or not under a given set of circumstances an enforcement conference is necessary, is immaterial in terms of, if there is to be one, the licensee should be afforded all his prerogatives thereunder. In this case it is clear that the matter of enforcement had already been decided upon prior to the conference.

B. THE SEVERITY LEVELS OF THE VIOLATIONS IF ASSIGNED SEPARATELY.

52&53 Hurley disagrees with the submission of the NRC in paragraphs 52 and 53; agrees as to paragraph 54 and further submits the following:

I find from the testimony that no incidents occurred as a result of any of the violations cited in this cause. The NRC, except as to violation N. and F; alleges and contends that all other violations " had the potential of resulting in serious safety events." The NRC quotes Supplement IV, D. 50 V, D.2; and VI, D. 2 as stating that severity levels IV require "more than minor safety or environmental significance." Obviously if one agrees with the NRC's first conclusion then the latter follows. In view of the evidence and the nature of the violations, I find that the use of word "potential" as used by the NRC to mean nothing more than a possibility of harm. I find that test to be inappropriate. I find that violations, to have " more than minor safety or environmental significance", should have likelihood of harm, something more than possibility. Worse scenario situations do not comport with NRC policy of deciding matters dependent upon the circumstances of each case taking into consideration the nature of the violation.

C. THE BASIS FOR THE SEVERITY LEVEL III VIOLATION

55&56 Hurley disagrees with the submission of the NRC and submits as follows:

The NRC claims that the gravamen of the violations for which Hurley was cited were failure of management control.(See page 22 of NRC submission). I agree that the NRC policy allows individual violations to be viewed collectively and a single severity level attached. Again, in view of the nature of the violations, the overall enforcement policy as hereinbefore discussed and the compliance by Hurley., as hereafter discussed, I find such a procedure to be inappropriate. I find the "collective severity level III" not to be sustained by the evidence. I find 13 severity level V violations and one severity level IV violation. I find the 13 violations to be of minor safety and/or environmental significance.

#### D. THE NEED FOR A CIVIL PENALTY

57 thru 63 Hurley disagrees with the submission of the NRC and submits as follows:

The NRC claims that a civil penalty is needed to get the message to other licensees. The NRC claims that such is not "making an example of Hurley". (Robinson-TR-93-94) The NRC's argument also assumes that the violations should be aggregated and assigned a severity level III. Without that assumption there would be no civil penalty.

Based upon previous determinations and my findings hereafter, I find no need nor basis for a civil penalty.

#### III WHETHER THE CIVIL PENALTY SHOULD BE REMITTED OR MITIGATED.

64 thru 70 Hurley disagrees with the submission of the NRC and submits as follows:

It is clear that in this case Hurley does not seek "mitigation of the penalty" as opposed to having the penalty set aside as inappropriate. One of Hurley's claims in that regard has not heretofore been discussed, ie, the time within which Hurley brought the violations into compliance.

Hurley became aware of the violations on May 24, 1985. Compliance with Violation A was had immediately following the May 24, 1985 inspection; as to Violation B. Hurley forwarded an overall floor plan to the NRC on June 6, 1985.

As to Violation E. Hurley forwarded the required change of name and the subject was approved.

As to Violation F. Hurley indicated it could not determine whether a violation occurred, but had adopted a standard practice as to violations C, D, G, H, I, J, K, L, M, N. Hurley had achieved compliance by June 7, 1985. The contention of the NRC that Hurley only did what would be expected of it is overly simplistic. When one considers the above with the additional contention of the NRC that Hurley did not act "promptly" the conclusion that Hurley's actions are not deserving of consideration is one with which I cannot agree. The NRC alleges that they expect a licensee to go beyond that which is necessary to comply (Robinson-TR-226;228-229). What that means exactly is difficult to determine. The NRC does not relate that requirement to the nature or circumstances of the violation. One can only expect a licensee, in terms of a violation, to

correct it and put in place, if appropriate, a mechanism to ensure as much as possible, another violation will not occur. I find that Hurley did just that. Hurley did that as soon as they possibly could (Robinson-TR-226).

Under the circumstances of this case and considering the Enforcement policy of the NRC, I find that the imposition of a civil penalty in this case to be inappropriate and not sustainable by the record.

#### CONCLUSIONS OF LAW

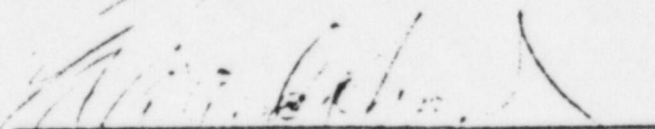
71. Based upon the record compiled in this proceeding, and for the reasons described above, I reach the following conclusions of law:

1. No disagreement as submitted by the NRC.
2. It is not appropriate to categorize these violations in the aggregate, however if such is appropriate, I find the aggregate severity level to be severity level V.
3. The licensee should not be assessed a civil penalty.

#### ORDER

72. Based upon the above findings and conclusions, IT IS HEREBY ORDERED that the civil penalty heretofore assessed be and is hereby set aside.

Respectfully Submitted

  
Edward P. Joseph  
O'Rourke, Goldstein, Joseph  
and Kelly, P.C.  
727 S. Grand Traverse St.  
Flint, Michigan 48502



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

In the Matter of:

DOCKET NOS. 030-01993

Hurley Medical Center  
One Hurley Plaza  
Flint, Michigan 48502

070-1393

LICENSE NOS. 21-00338-02  
SNM-1393  
(FA 85-89)

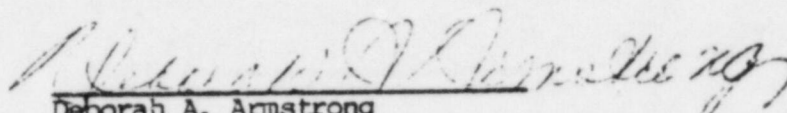
### PROOF OF SERVICE

STATE OF MICHIGAN)  
COUNTY OF GENESEE)

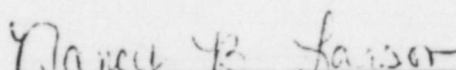
Deborah A. Armstrong being duly sworn, deposes and says that on December 16, 1986 she did serve a copy of Hurley's Proposed Findings of Fact, Conclusions of Law, and Order in the form of an intital decision documents in the above entitled matter upon the following persons:

1. Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D. C. 20555
2. Atomic Safety and Licensing Appeal Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555
3. Docketing and Service Station Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555

by depositing them in the U.S. Mail enclosed in a sealed envelope, with First Class Postage fully prepaid thereon, and deposited in the U.S. Post Office receptacle, properly addressed to the above-named persons.

  
Deborah A. Armstrong

Subscribed and sworn to before me, a Notary Public, on this 16th day of December 1986.

  
Nancy B. Larson  
Nancy B. Larson, Notary Public  
Genesee County, MI  
My commission expires: 1-13-90

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE ADMINISTRATIVE LAW JUDGE IVAN W. SMITH

'86 DEC 29 P7:01

In the Matter of:

DOCKET NOS. 030-01993

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Hurley Medical Center  
One Hurley Plaza  
Flint, Michigan 48502

070-1393

LICENSE NOS. 21-00338-02  
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STATE OF MICHIGAN)

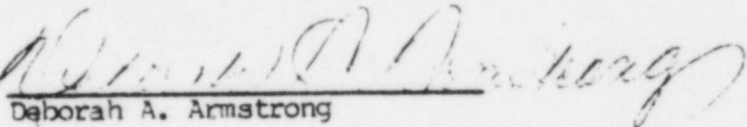
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COUNTY OF GENESEE)

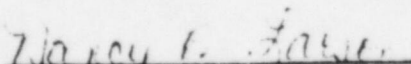
Deborah A. Armstrong being duly sworn, deposes and says that on December 16, 1986 she did serve a copy of Hurley's Proposed Findings of Fact, Conclusions of Law, and Order in the form of an initial decision documents in the above entitled matter upon the following persons:

1. Ivan W. Smith, Administrative Law Judge Atomic Safety and Licensing Board Panel; U. S. Nuclear Regulatory Commission, Washington, D. C. 20555
2. Lee Scott Dewey, Counsel for NRC Staff, Maryland National Building, Bethesda, Maryland.

by forwarding them Federal Express, properly addressed to the above-named persons.

  
Deborah A. Armstrong

Subscribed and sworn to before me, a Notary Public, on this 16th day of December 1986.

  
Nancy B. Larson, Notary Public  
Genesee County, MI  
My commission expires: 1-13-90