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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OPINION
PENDING
ADJUDICATION

In the Matter of

MICHEL A. PHILIPPON

(Denial of Senior Reactor Operator
License Application)

) Docket No. 55-32443-SP
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)

NRC STAFF'S PETITION FOR REVIEW OF
THE PRESIDING OFFICER'S INITIAL DECISION (LBP-99-44)

The NRC Staff (Staff) hereby files its petition for review of the Presiding Officer's Initial Decision (LBP-99-44), dated December 9, 1999, issued in connection with the hearing request by Mr. Michel A. Philippon regarding his failure to pass his senior reactor operator license exam. In LBP-99-44, the Presiding Officer found that two of the four contested grades Mr. Philippon received on the operating portion of his exam should be increased. Both grade increases are necessary for Mr. Philippon to pass the exam. The Staff believes that the Presiding Officer's ruling increasing one of the two grades was clearly erroneous, and pursuant to 10 C.F.R. § 2.786, raises a substantial question warranting Commission review.

BACKGROUND

In April 1998, Mr. Philippon took an examination as required by 10 C.F.R. § 55.33 for a senior reactor operator license for the Fermi 2 facility. The Staff issued a proposed denial of the license on May 20, 1998, for failure to pass the operating test portion of the examination. On July 2, 1998, Mr. Philippon requested an NRC review of the grading of his examination.

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Following an informal review by the Staff and an evaluation by a Staff Appeal Panel, Mr. Philippon was informed by letter dated October 4, 1998, that he did not pass the operating test. The Staff's letter also provided Mr. Philippon with an opportunity to request a hearing pursuant to 10 C.F.R. § 2.103(b). Mr. Philippon filed a timely hearing request on October 16, 1998.

On December 14, 1998, the Staff submitted the hearing file.¹ Mr. Philippon filed his written presentation on December 30, 1998, arguing that grades for four "competencies" -- categories of senior reactor operator required proficiencies -- should be increased.² The Staff filed a response dated February 12, 1999, and Mr. Philippon filed a reply dated March 2, 1999. Following several rounds of questions from the Presiding Officer and responses by the parties,³ the Presiding Officer issued LBP-99-44 on December 9, 1999.⁴

¹Several filings made by the parties, supported by exhibits, effectively supplemented the Hearing File during the proceeding. In addition, a correction to the Hearing File was made by the Staff on March 3, 1999. See NRC Staff's Response to Order Dated March 1, 1999 (Mar. 3, 1999).

²In order to pass the examination, it was not necessary for Mr. Philippon to receive increased grades in every one of the four competencies he contested.

³On March 19, 1999, the Presiding Officer served a first set of questions to the parties. Mr. Philippon filed answers on March 29, 1999, and the Staff filed its answers on April 16, 1999. Mr. Philippon also filed a reply to the Staff's answers, on April 20, 1999. The Presiding Officer then posed a second set of questions to the parties, by Order dated June 16, 1999. The Staff filed its answers on July 8, 1999, and Mr. Philippon filed responses to these answers on July 19, 1999. The Presiding Officer subsequently issued an Order dated July 30, 1999, setting forth a third set of questions for the parties. Mr. Philippon filed answers on August 5, 1999, the Staff filed answers on August 12, 1999, and Mr. Philippon filed a reply to the Staff's answers on August 15, 1999.

⁴*Michel A. Philippon* (Denial of Senior Operator License Application), LBP-99-44, 50 NRC ___, slip op. (Dec. 9, 1999).

In LBP-99-44, the Presiding Officer sustained the Staff's grading of Mr. Philippon's operating test performance on contested competencies C.4.b (Procedures, Correct Use), and C.8.a, (Technical Specifications, Recognize). However, the Presiding Officer determined that the Staff erred in scoring competencies C.8.c (Technical Specifications, Compliance), and C.4.c (Procedures, Crew Implementation). Competency C.4.c is the focus of this Petition.

DISCUSSION

I. Standards for Commission Review

The Commission's regulations at 10 C.F.R. § 2.786(b) provide as follows:

- (b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer . . . , a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. * * *
- (b)(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:
 - (i) A finding of material fact is clearly erroneous . . .

II. Argument

The Staff believes that the Presiding Officer clearly erred in his analysis regarding competency C.4.c (Procedures, Crew Implementation), and in determining that Mr. Philippon's performance during the simulator portion of the operating exam pertaining to competency C.4.c warranted a grade of "3," rather than the grade of "2" assigned by the Staff in its final grading. The practical outcome of this one grade increase by the Presiding Officer is that Mr. Philippon would pass his examination.⁵ The Presiding Officer's analysis is based upon a clearly erroneous

⁵In order to pass his examination, Mr. Philippon is required to receive a total score of greater than 1.8 for each competency tested (there is one exception not relevant here regarding competency C.6, Communications). A score of "2" in competency C.4.c renders the total score, (continued...)

finding of material fact concerning the Staff's position put forward during this proceeding,⁶ which was consistent with the Staff's final position leading to Mr. Philippon's hearing request.

A. The Presiding Officer's Erred In Construing The Staff's Position

In LBP-99-44, the Presiding Officer states that the Staff failed to defend the conclusions of the Staff's Appeal Panel, and, therefore, effectively waived a defense of the Appeal Panel's position, "tantamount to conceding Mr. Philippon's position . . ." LBP-99-44, slip op. at 62-63. The error is based upon the Presiding Officer's misunderstanding of the basis of the Appeal Panel's -- the Staff's -- grade assigned to Mr. Philippon with respect to competency C.4.c.

With respect to competency C.4.c, the Staff based its grading on Mr. Philippon's performance of the Abnormal Operating Procedure (AOP), 20.300.03, "Loss of Offsite Power," and his performance of the Emergency Operating Procedure (EOP) 29.100.01. In general, Mr. Philippon demonstrated problems in the safe and efficient implementation of both procedures. *See, e.g., Staff's Response to Written Presentation by Michel A. Philippon (Feb. 12, 1999), affidavit of H. Peterson at 29-34; NRC Staff's Answers to Questions by the Presiding Officer (Apr. 16, 1999), affidavit of H. Peterson at 19-23; see also Hearing File, Relevant Reference Material, Item 62ST-OP-802-3001-001, Rev 1, Introduction to Emergency Operating Procedures (EOPs) (Facility Licensee Student Training Material).*

⁵(...continued)
for competency C.4, Procedures, 1.75, whereas a score of "3," as assigned by the Presiding Officer, raises the total score to 2.00.

⁶The Presiding Officer throughout the Initial Decision makes reference to the Staff's affidavits submitted in support of the Staff's position as "Mr. Peterson's position." While Mr. Hinorori Peterson, the original examiner, signed the Staff's affidavits, the affidavits were clearly submitted on behalf of the Staff, accurately represented the Staff's position, and in particular were consistent with the Staff Appeal Panel's views.

The Presiding Officer's determination with respect to competency C.4.c appears to be predicated on his view that the Staff based its grade of "2" on a determination that there was a "lapse" in Mr. Philippon's performance of the EOP. In fact, there was never a "lapse" issue associated with the EOP. Because the Staff did not specifically address a "lapse" in the EOP, the Presiding Officer concluded that the "Staff now effectively concedes that no lapse occurred in implementing the emergency operating procedure." LBP-99-44, slip op. at 65. Accordingly, without addressing the true concerns raised by the Staff regarding Mr. Philippon's implementation of the EOP,⁷ and without addressing the fact that the actual lapse issue concerned the AOP, the Presiding Officer elevated Mr. Philippon's grade from a "2" to a "3."

The record shows that the Staff previously referenced Mr. Philippon's incorrect actions on the EOP, as well as the lapse in performing the subject AOP. *See, e.g.*, Attachment to Letter from L. Spessard to M. Philippon (Oct. 4, 1998) at 10-11 (Hearing File, File Correspondence, Item 4) (regarding the AOP); NRC Staff's Response to Written Presentation by Michel A. Philippon (Feb. 12, 1999), affidavit of H. Peterson at 33-34 (regarding the EOP); NRC Staff's Answers to Questions by the Presiding Officer (Apr. 16, 1999), affidavit of H. Peterson at 24-27 (regarding the EOP and the AOP). There is, in short, no basis in the record to support the Presiding Officer's conclusion that a nonexistent "lapse" on the EOP was "the very basis upon which the appeal board graded Mr. Philippon's performance for competency C.4.c," LBP-99-44,

⁷In summary, the Staff's concerns were that during the relevant scenario, Mr. Philippon did not preserve the heat capacity of the degrading suppression pool (torus) for as long as possible until a requirement for emergency reactor pressure vessel depressurization actually existed. In contrast to any notion of a lapse in the procedure, Mr. Philippon directed steps that were premature and that actually exacerbated a challenge to the primary and secondary containment; these steps were contrary to the safe and efficient implementation of the EOP.

slip op. at 65, or explanation of how the "lapse" issue became separated from the AOP and became associated with the EOP. This clear factual error by the Presiding Officer, which was material to the Presiding Officer's determination that Mr. Philippon has passed, rather than failed, the SRO examination, warrants Commission review.⁸

B. Commission Review Should Be Exercised

As discussed above, the Presiding Officer made a fundamental error in misunderstanding the Staff's basis for assigning a grade of "2" to Mr. Philippon in connection with competency C.4.c. The result of this error is material -- Mr. Philippon passes, rather than fails, his SRO examination.

The lapse in the AOP by Mr. Philippon was a significant problem. In summary, the AOP lapse impacted the timely and efficient restoration of electrical power to buses that could have been used to power equipment to depressurize the reactor, among other things, mitigating a challenge to the reactor and enhancing reactor safety.⁹ In addition, Mr. Philippon's unsafe and

⁸The Staff notes that neither Mr. Philippon nor the Staff "put into controversy" competency C.7.b (Directing Operations, Safe Directions). Except as provided by 10 C.F.R. § 2.1251(d), "[m]atters not put into controversy by the parties may not be examined and decided by the presiding officer." Although the Presiding Officer did pose certain questions to the Staff during the proceeding concerning competency C.7.b (which was answered) during the proceeding, there was otherwise no indication -- for example, by providing the required notification to the Commission (in response to which the Commission may take appropriate action) -- that the Presiding Officer intended to consider this issue to be a matter in controversy, until it again surfaced in the Initial Decision. There, the Presiding Officer makes special note of the fact that Mr. Philippon received a grade of "3" for competency C.7.b in providing additional support for his finding that a grade of "3" is warranted for competency C.4.c. See LBP-99-44, slip op. at 66-67. Since the Presiding Officer apparently relied on a matter not put into controversy by the parties, leading in part to his findings on competency C.4.c, the Staff believes that the Presiding Officer further erred in arriving at his conclusion on competency C.4.c.

⁹See, e.g., NRC Staff's Response to Written Presentation of Michel A. Philippon (Feb. 12, (continued...)

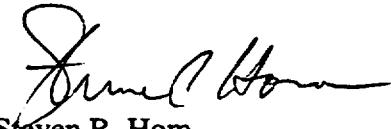
inefficient implementation of the EOP was also significant in that it resulted in placing the reactor in an unstable condition and exacerbating a challenge to the primary and secondary containment.¹⁰

While it is readily apparent from the record that there was a disagreement among the Staff as to whether the appropriate grade for competency C.4.c should be a "1" (the original grade assigned by the examiner) or a "2," there was never a question in the Staff's opinion -- nor is there any basis in the record for concluding -- that Mr. Philippon's performance comes close to rising to the level of a "3." The Presiding Officer, due to the errors cited above, has issued a ruling that fails to correctly address the actual basis for the Staff's grade of "2."

CONCLUSION

For the foregoing reasons, the Commission should grant the Staff's Petition for Review of LBP-99-44.

Respectfully submitted,



Steven R. Hom
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of December 1999

⁹(...continued)
1999), affidavit of H. Peterson at 33-34.

¹⁰*Id.*

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Docket No. 55-32443-SP

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S PETITION FOR REVIEW OF THE PRESIDING OFFICER'S INITIAL DECISION (LBP-99-44)" in the above-captioned proceeding have been served on the following by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a single asterisk by U.S. mail, first class, or as indicated by a double asterisk by hand delivery, this 23rd day of December 1999:

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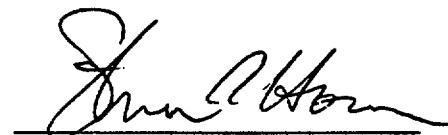
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