IN RESPONSE, PLEASE
REFER TO: M970807B

MEMORANDUM FOR THE FILE

FROM: John C. Hoyle, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 11:00 A.M., THURSDAY, AUGUST 7, 1997, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-97-165 - Ralph L. Tetrick, Atomic Safety and Licensing Board Initial Decision, Memorandum and Order Denying Reconsideration and Stay, and Order on Remand: LBP-97-2, LBP-97-6, LBP-97-11

The Commission approved an order responding to the staff's petition for review of LBP-97-2 and LBP-97-6. The order grants the petition for review and reverses the Presiding Officer's decision requiring issuance of an SRO license to Mr. Tetrick. The Commission disagreed with the Presiding Officer's conclusion that the the staff should have anticipated the need to present evidence and agruments on the rounding issue at the hearing bars it from reconsideration. Further, the Commission disagreed with the rounding of an examination score, but agreed that Mr. Tetrick incorrectly answered Question 63.

II. COMSECY-97-017 - 7/30/97 Letter from Native American Petitioners in the Matter of Energy Fuels Nuclear, Inc. (International Uranium (USA) Corporation (White Mesa Uranium Mill; Alternate Feed Material))

The Commission approved an order responding to the Native American Petitioners appeal of the Presiding Officer s Order (LBP-97-12) rejecting their claims of standing.

The Commission has voted to instruct the Presiding Officer to pass upon the motions to (1) reconsider his decision and (2) to reopen the record. The Commission believes the Presiding Officer s greater familiarity with the prior proceeding and pleadings in this case renders him better equipped than the Commission to make prompt initial rulings on the merits of the motions. Further, the Commission disapproves of the practice of simultaneously seeking reconsideration of a Presiding Officer s decision and filing an appeal of the same ruling because taking that approach would call for rulings on the same issues at the

same time from both a trial and appellate forum.

(Subsequently, on August 7, 1997, the Secretary signed the Orders.)

Attachments:
As stated

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
EDO
OGC
OCAA
OCA
OIG
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR - Advance
DCS - P1-17

UNITED STATES OF AMERIC
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

_____

)
In the Matter of)

)
RALPH L. TETRICK)
) Docket No. 55-20726-SP
(Denial of Application)
for Reactor Operator)
License))
_____)

CLI-97-_

MEMORANDUM AND ORDER

On February 28, 1997, the Presiding Officer issued an Initial Decision in this proceeding concluding that Ralph L. Tetrick, who is currently a reactor operator at the Turkey Point Nuclear Generating Plant (Units 3 and 4), had answered correctly 78 out of 98 valid questions on his Senior Reactor Operator (SRO) written examination. As a result of this ruling, the Presiding Officer revised Mr. Tetrick's score upwards to 79.59 percent. The Presiding Officer then rounded Mr. Tetrick's revised score upwards still further -- to the nearest integer, 80 -- thereby giving him a passing grade on the written examination. LBP-97-2, 45 NRC 51, reconsid'n denied, LBP-97-6, 45 NRC 130 (1997). The Presiding Officer accordingly ordered issuance of an SRO license to Mr. Tetrick. The NRC Staff has filed a petition for review seeking Commission reversal of the Presiding Officer's decision.

Mr. Tetrick, in addition to supporting the Presiding Officer's ruling on the "rounding" issue, also asserts as an alternative ground for affirmance that he should be given credit for a correct answer to Question 63 of the written SRO examination. (The Presiding Officer had found that Mr. Tetrick's answer was incorrect. See 45 NRC at 53-55.) Recently, because of new information submitted to the Commission, we remanded the Question 63 issue for further consideration by the Presiding Officer. CLI-97-5, 45 NRC 355 (May 20, 1997). On remand, the Presiding Officer issued a Memorandum and Order again concluding that Mr. Tetrick's answer to Question 63 was incorrect. LBP-97-11, 45 NRC ___ (June 25, 1997).

For the reasons set forth below, we agree with the staff's positions regarding both the rounding issue and Question 63. We therefore grant the staff's petition for review and reverse the Presiding Officer's decision requiring the staff to issue Mr. Tetrick an SRO license.

BACKGROUND

Pursuant to Part 55 of our regulations, an applicant for a SRO license must pass both a written and an operating examination. The passing score for the written examination is 80 percent. "Operator Licensing Examiner Standards," NUREG-1021. Mr. Tetrick passed the operating exam but received an initial score of only 78 percent on his 100-question written test, taken on June 14, 1996.

On July 30, 1996, he sought an informal staff review of his score on the latter exam, challenging the grading of four questions. On September 12, 1996, the staff upheld the grading of three contested questions but agreed with Mr. Tetrick that the fourth was invalid and should be deleted. The staff therefore raised Mr. Tetrick's score to 78.8 percent (78 out of 99).

On September 25, 1996, Mr. Tetrick sought a hearing before a Presiding Officer. Mr. Tetrick continued to challenge the grading of the remaining three questions, and also contested the scoring of another question. Following an informal hearing under 10 C.F.R. Part 2, Subpart L, the Presiding Officer issued LBP-97-2, ruling that one of the challenged questions (Number 96)

was ambiguous and should be stricken from the written examination, but holding that Mr. Tetrick's answer to the other three challenged questions (Numbers 63, 84 and 90) were indeed incorrect. 45 NRC at 53-58.

This ruling had the effect of raising Mr. Tetrick's score to 79.59 percent (78 out of 98 questions). Because the Presiding Officer concluded that the written SRO tests were "not so precise that tenths of a percent have any meaning," he rounded Mr. Tetrick's revised score of 79.59 to the nearest integer, 80, thereby giving him a passing grade on the written examination. LBP-97-2, 45 NRC at 60.

On March 10, 1997, the staff sought reconsideration of the Initial Decision. The staff challenged the Presiding Officer's authority to round up Mr. Tetrick's score and submitted supportive evidence showing a staff practice not to round scores upwards to the nearest integer.

On March 27, 1997, the Presiding Officer denied the staff's request on the ground that the staff had improperly raised an argument based on evidence that the staff could have (but had not) submitted during the hearing stage of the proceeding. According to the Presiding Officer, the staff should have anticipated the possibility that he would rule in Mr. Tetrick's favor regarding one of the four contested questions and that the rounding issue would therefore arise. In justifying his prior ruling regarding rounding, the Presiding Officer explained that the staff's recent amendment of NUREG-1021 to require a passing score of "80.00 percent" rather than simply "80 percent" was not yet in effect at the time Mr. Tetrick took his written exam, and that there was no other published guidance concerning either the number of significant digits in an examination score, or whether and how the score should be rounded. LBP-97-6, 45 NRC 130, 131-32.

The staff filed with the Commission both a request for stay and a petition for review of the Presiding Officer's rulings in LBP-97-2 and LBP-97-6 on the rounding issue. Responding to the staff's petition for review, Mr. Tetrick asserted that, if the Commission were to review the Presiding Officer's decisions on the rounding issue, it should also examine whether the Presiding Officer was correct in ruling that Mr. Tetrick had incorrectly answered Question 63 of the written SRO examination.

Shortly thereafter, the staff submitted to the Commission a May 1, 1997 letter in which Mr. R. J. Hovey, the utility's Vice-President at Turkey Point stated his belief that Mr. Tetrick's answer to Question 63 was a correct one. The staff, however, continued to maintain otherwise.

The Commission concluded in CLI-97-5, 45 NRC 355 (May 20, 1997), that the Question 63 issue appeared to turn ultimately on the interpretation of language in a number of technical documents, some of which might not be in the record. The Commission therefore remanded the issue to the Presiding Officer and directed him to reconsider his prior ruling. The Commission also retained jurisdiction over the staff's petition for review of the Presiding Officer's rulings on the rounding issue; deferred ruling on that issue; and granted a temporary stay of LBP-97-2

and LBP-97-6.

On remand, the Presiding Officer sought further information from the parties (May 27, 1997 unpublished order) and, based on that information, issued LBP-97-11, 45 NRC ___ (June 25, 1997), reaffirming his earlier determination that Mr. Tetrick had incorrectly answered Question 63. The Presiding Officer reasoned that Mr. Hovey's support of Mr. Tetrick's answer was based on the erroneous assumption that the question posited only one annunciator. The Presiding Officer also found that Mr. Tetrick's proposed verification of the two consistent annunciators was unnecessary, given that they verified each other. In addition, the Presiding Officer was influenced by Mr. Tetrick's failure to respond directly to the questions regarding what specific steps Mr. Tetrick would take to verify the validity of the alarms and what would persuade him not to take the required IMMEDIATE ACTION after he had taken those steps. Slip op. at 8-11.

The case is now back before the Commission to decide the staff's petition for review challenging the Presiding Officer's decision that Mr. Tetrick should receive his SRO license.

DISCUSSION

We are faced with three issues in this proceeding: (1) whether the Presiding Officer erred in concluding that the staff's failure to present its rounding arguments at the hearing bars it from raising it on reconsideration; (2) if so, is the staff's argument on rounding correct; and (3) is the Presiding Officer correct that Mr. Tetrick incorrectly answered Question 63. We answer all three questions "yes."

A. The "Rounding" Issues

We cannot accept the Presiding Officer's conclusion that the staff should have anticipated at the hearing that it would need to present its evidence and arguments on the rounding issue. Although we agree with the Presiding Officer that the staff could reasonably have anticipated both that he might rule in Mr. Tetrick's favor on one of the exam questions and that such a ruling would raise his score to either a 79.59 (question deleted) or 79.80 (question graded in Mr. Tetrick's favor), we see no reason why the staff should have further anticipated that the Presiding Officer would then round the revised score upwards to the next integer.

The version of NUREG-1021 in effect at the time Mr. Tetrick took his exam (Revision 7, Supp. 1 (June 1994)) did not address rounding directly but did state that a successful applicant must answer correctly "at least 80 percent" of the questions on the written examination. We believe that the phrase "at least" on its face suggests strongly that 80 percent is the minimal acceptable score and that rounding up lower scores is impermissible. Our conclusion is supported by The Oxford English Dictionary which defines this two-word phrase as "a qualifying phrase, attached to a quantitative designation to indicate that the amount is the smallest admissible." See also Webster's Third New International Dictionary (G. & C. Merriam Co. 1976) at 1287 ("at least" means "at the lowest estimate").

The staff's consistent prior practice confirms our under-

standing of the "at least 80 percent" standard. The staff has refused in the past to "round up" almost-passing scores and has considered the 80-percent cutoff score as the grade below which a candidate will not pass the written exam. "Agency practice, of course, is one indicator of how an agency interprets its regulations." Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-6, 43 NRC 123, 129 (1996). Given that the staff itself set the 80-percent threshold in the first place, we are disinclined to disturb its consistently-held view.

At bottom, the decision whether to round up near-passing scores requires a policy choice. Either option is plausible. Here, in the adjudicatory setting, we decline to set aside the NRC staff's policy judgment, supported by the language of NUREG-1021, to draw the pass-fail line at 80-percent minimum, without rounding up. Cf. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 722 n.15 (1989), aff'd, CLI-90-5, 31 NRC 337 (1990). In our view, when the Presiding Officer ordered rounding up on the ground that the SRO written examinations "are not so precise that tenths of a percent have any meaning" (LBP-97-2, 45 NRC at 60) and essentially reduced the passing score from 80 percent to 79.5 percent, he stepped into a staff area of responsibility.

B. Question 63

Mr. Tetrick raises with the Commission the issue whether he correctly answered Question 63 of his written SRO examination. That question read as follows:

Plant conditions:

- Preparations are being made for refueling operations
- The refueling cavity is filled with the transfer tube gate valve open.
- Alarm annunciators H-1/1, SFP LO LEVEL and G-9/5, CNTMT SUMP HI LEVEL are in alarm.

Which ONE of the following is the required IMMEDIATE ACTION in response to these conditions?

a. Verify alarms by checking containment sump level recorder and spent fuel level indication.
b. Sound the containment evacuation alarm.
c. Initiate containment ventilation isolation.
d. Initiate control room ventilation isolation.

All parties, including Mr. Tetrick, recognize that answer "b" is correct. Therefore, the only issue before us on appeal regarding Question 63 is whether Mr. Tetrick's answer of "a" is also correct. For the reasons set forth in both LBP-97-2 and LBP-97-11, we conclude that answer "a" is incorrect. We therefore cannot use Mr. Tetrick's answer to Question 63 as a ground to affirm the Presiding Officer's result in this case. CONCLUSION

We grant the staff's petition for review and reverse the Presiding Officer's rulings in both LBP-97-2 and LBP-97-6 regarding the "rounding" of Mr. Tetrick's written examination score.

Commissioner Diaz disapproved this order.

IT IS SO ORDERED.

For the Commission

_____
John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this ____ day of August, 1997.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

_____
In the matter of)

)
INTERNATIONAL URANIUM (USA))
CORPORATION)
)Doc
ket No.
40-8681-MLA
(White Mesa Uranium Mill;)
Alternate Feed Material))
_____)

CLI-97-__

MEMORANDUM AND ORDER

On July 30, 1997, three petitioners jointly submitted a letter to Chairman Jackson styled as an "appeal" of the Presiding Officer's order (LBP-97-12) rejecting their claims of

standing. The same letter also asked the Presiding Officer to reconsider his decision and to reopen the record.

The Commission disapproves of the practice of simultaneously seeking reconsideration of a Presiding Officer's decision and filing an appeal of the same ruling, Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84, 85 (1981), because taking that approach would call for rulings on the same issues at the same time from both a trial and appellate forum.

Here, the Presiding Officer's greater familiarity with the prior proceeding and pleadings in this case renders him better equipped than the Commission to make prompt initial rulings on the merits of the motions for reconsideration and reopening of the record. See Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 94 (1995). We therefore instruct him to pass upon the two motions on their merits expeditiously, notwithstanding the pendency of the appeal. See Portland General Elec. Co. (Trojan Nuclear Plant), ALAB-627, 13 NRC 20, 21 n.6 (1981). We will take appropriate action on the appeal after the Presiding Officer decides whether to grant or deny the requests for reconsideration and reopening.

IT IS SO ORDERED.

For the Commission

_____

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this _____ day of August, 1997.