

May 14, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'85 MAY 14 P4:57

In the Matter of
CHARLES HUSTED

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)
Docket No.

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

DOCKET NUMBER JB-287-CH
PROD. & UTIL. FAC.

HUSTED REPLY TO NRC STAFF
RESPONSE CONCERNING CHARLES
HUSTED'S REQUEST FOR HEARING

In a May 1, 1985 filing, the NRC Staff opposes the request by Charles Husted that the hearing afforded to him by the Commission include within its scope the question whether Husted's attitude or integrity bar his serving as an NRC-licensed operator, or a licensed operator instructor or supervisor. The NRC Staff's position rests on the assertion that Mr. Husted's "unavailability to Licensee as a licensed operator or a licensed operator instructor or training supervisor is a direct result of an agreement between Licensee and the Commonwealth, not a result of any agency action against either Licensee or Mr. Husted." NRC Staff Response to Charles Husted's Request for Hearing, May 1, 1985, at 4.^{1/} For the reasons articulated

^{1/} The NRC Staff makes a second argument concerning the basis for the Commission's hearing offer; however, that argument also is founded on the Staff's distinction between "Licensee's voluntary action in entering an agreement with the Commonwealth," and "Commission action against a licensee which operates as a sanction against an individual." NRC Staff Response at 5.

below, Mr. Husted believes the NRC Staff's position is an inappropriately narrow characterization of the events precipitating the hearing opportunity afforded Mr. Husted by the Commission. Moreover, the NRC Staff's position is significantly injurious to Mr. Husted's interest without offering any countervailing benefits to the agency.

In September, 1981, the TMI-1 restart proceeding was reopened because of the discovery of cheating by two senior reactor operators on NRC operator license examinations.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), unpublished Licensing Board Memorandum and Order of September 14, 1981. The subject of that reopened proceeding was how the cheating that occurred affected GPU Nuclear's qualifications and ability to operate TMI-1. One of the particular issues in the reopened proceeding was the extent of cheating which occurred on NRC or GPU Nuclear examinations. However, this issue, and the general issue of the quality of GPU Nuclear's operating personnel, was raised solely in the context of the facility licensee's competence and integrity. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), unpublished Licensing Board Memorandum and Order of October 14, 1981. Whether or not individual operators were properly and therefore should remain licensed was not at issue. The question was, if individuals lacked necessary qualifications, should TMI-1 be authorized to restart?

In the reopened proceeding, numerous GPU Nuclear operators testified pursuant to intervenor subpoenas and the Special Master's request, both of which were resolved by stipulation among the parties, including GPU Nuclear. Clearly, however, individuals were testifying in their professional capacity as the facility licensee's employees. In fact, when one of the two SROs whose cheating precipitated the proceeding sought to appear with counsel, the Special Master expressed the view that counsel was not permitted to fully participate because his client was not a party to the proceeding. TMI-1 restart proceeding transcript at 26,177-178, 26,183-190 (attached). Moreover, GPU Nuclear's counsel was extraordinarily limited in its ability to even converse with its client's employees about their forthcoming testimony because of a court-ordered sequestration order. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 N.R.C. 1193, 1274-76 (1984). In short, the agency process unquestionably assumed that it was GPU Nuclear, and not any individual employee, whose license was at issue.

As a result of the reopened hearing, findings were made by the Special Master and the Licensing Board concerning, inter alia, Mr. Husted's attitude and integrity. On the basis of these findings and its own view of the record, the Commonwealth of Pennsylvania filed exceptions to the Licensing Board's decision. Commonwealth of Pennsylvania Exceptions to the Partial Initial Decision (Reopened Proceeding), July 27, 1982. The

Commonwealth argued that restart of TMI-1 should not be authorized unless and until action was taken to suspend Mr. Husted's use of his license pending a hearing. Commonwealth of Pennsylvania's Brief in Support of Exceptions to the Atomic Safety and Licensing Board Partial Initial Decision Dated July 27, 1982 (Reopened Proceeding - Operator Cheating), September 30, 1982 ("Commonwealth Brief on Appeal"), at 33. The Commonwealth essentially maintained that, pending a hearing to fully air the issue, it would be unsafe or contrary to the public interest to operate TMI-1 with Mr. Husted serving in any licensed capacity. See id. at 16-27, 31-33.^{2/}

Not surprisingly, the TMI-1 licensee sought to reach an agreement with the Commonwealth of Pennsylvania which would result in the removal of the stated basis for the Commonwealth's public position against restart. Not only was this action directed at resolving GPU Nuclear's interests, but Mr. Husted personally understood and agreed with the need for such a resolution, given the Commonwealth's unfortunate decision to deem Mr. Husted's licensed status an obstacle to TMI-1's restart.

The stipulation between the Commonwealth and GPU Nuclear was reviewed and approved by the Appeal Board. Metropolitan

^{2/} Consistent with the focus of the remanded proceeding on cheating, the Commonwealth of Pennsylvania characterized the action it proposed against two other individuals who were found to have cheated as "an appropriate remedy against the Licensee, i.e. to direct that Licensee not be permitted to operate TMI-1 until appropriate enforcement actions are taken against these individuals." Commonwealth Brief on Appeal at 30.

Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), unpublished Appeal Board Memorandum of September 22, 1983.^{3/} In ALAB-772, the Appeal Board again endorsed the stipulation; however, it concluded that the stipulation alone was insufficient to remedy the situation. Consequently, "in addition to those commitments reflected in the stipulation," the Appeal Board required that Mr. Husted have no supervisory responsibilities insofar as the training of non-licensed personnel is concerned. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 N.R.C. 1193, 1224 (1984).

Thus, the record developed in an NRC adjudication in which Mr. Husted was not a party, or on notice of a possible sanction against him, served as the basis for the Commonwealth of Pennsylvania taking a position extremely adverse to Mr. Husted's personal interests. Moreover, this "no-Husted" position was assumed by the Commonwealth and transpired solely in the context of the facility licensee's qualifications to operate TMI-1.

In these circumstances, Mr. Husted does not agree with the Staff's characterization of Mr. Husted's license removal as "not a result of any agency action against either Licensee or

^{3/} Because of the Appeal Board's approval of the stipulation, in the recent remand on training the Licensing Board considered the issue of GPU Nuclear's judgment in allowing Mr. Husted to become Supervisor, Non-Licensed Operator Training to be outside the scope of the remanded proceeding. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), Partial Initial Decision on the Remanded Issue of Licensed Operator Training at TMI-1, May 3, 1985, slip op. at 71-72.

Mr. Husted." NRC Staff Response at 4. It was the NRC proceeding on restart of TMI-1 which led to the Commonwealth's position concerning Mr. Husted. Moreover, the Commonwealth utilized the NRC restart proceeding process -- its right to appeal -- as a way to effectively obtain removal (or at least suspension) of Mr. Husted's license.

NRC Staff argues that litigation of Mr. Husted's qualifications to serve as a licensed operator would "effectively rescind" the contract between GPU Nuclear and the Commonwealth concerning Mr. Husted. But the circumstances involved are much more complex than NRC Staff states. First, it is undetermined whether the Commonwealth of Pennsylvania would want to "enforce" its stipulation with GPU Nuclear if a hearing exculpated Mr. Husted. See March 25, 1985 letter from counsel for Mr. Husted to the Commission, at 3.

Furthermore, the NRC Staff does not address two other considerations of great importance to Mr. Husted: (1) the possibility that Mr. Husted might seek an operating license for another nuclear power plant; and (2) the value to Mr. Husted of re-establishing his absolute integrity and qualifications in the nuclear power field, whether or not he ever seeks licensed operator status again. Perhaps the NRC Staff is suggesting that it would never oppose a request by Mr. Husted to be licensed at any other nuclear reactor on the basis of the findings made against him in the TMI-1 proceeding. However, Mr. Husted has no such assurance from the NRC Staff.

Moreover, as Mr. Husted previously suggested, perhaps the most important, albeit intangible, value to Mr. Husted from a hearing on his qualifications to be a licensed operator is the opportunity to clearly reestablish his good name and character. This opportunity might be significantly diminished by a proceeding which failed to address his licensed operator status. It was in an NRC proceeding that a cloud was cast over Mr. Husted's character and integrity. Fairness to Mr. Husted dictates that he be afforded the opportunity to fully remove that cloud.

Finally, the NRC Staff argues that Mr. Husted's removal from licensed duties is not the agency's concern or doing; consequently, "there is no apparent reason why the scope of that hearing should be expanded." NRC Staff Response at 6. The reasons previously articulated by Mr. Husted in his letter of March 25, 1984 clearly meet the NRC Staff's opposition. These reasons were: (1) Mr. Husted's request would not expand the scope of the factual inquiry that would be involved;^{4/} (2) consequently, entertaining this request would not entail an additional commitment of agency time or resources; and therefore (3) fundamental fairness to Mr. Husted suggests that the

4/ In a pleading in which TMIA purports to oppose Mr. Husted's request, TMIA in fact supports it, stating, "even the scope of the proposed hearing, as narrowly stated by the Commission . . . must touch all four issues discussed above" See TMIA's Response to Licensee's Notice Transmitting Husted's Request for Hearing, April 22, 1985 ("TMIA's Response"), at unnumbered page 10.

hearing include Husted's ability to serve in a licensed operator capacity. The NRC Staff identifies no facts or arguments which undercut these compelling reasons for granting Mr. Husted's request, nor does Mr. Husted believe any exist.^{5/}

In summary, Mr. Husted respectfully suggests that the NRC Staff's argument is unreasonable. Mr. Husted restates his request for a hearing which encompasses the adequacy of his attitude and integrity to serve in both a licensed and non-licensed operator capacity.

Respectfully submitted,

Deborah B. Bauser
Deborah B. Bauser

SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1215

Counsel for Charles Husted

Dated: May 14, 1985

5/ The NRC Staff does suggest that Mr. Husted's request denies TMIA a ruling on one basis for its appeal in the TMI-1 restart proceeding, namely, its view that Mr. Husted had attempted to cheat on an NRC examination. Staff Response at 4 n.3. This argument is odd, considering the absence of any objection by the NRC Staff to the issues Mr. Husted identified as encompassed within the Husted proceeding, including the issue of whether Husted cheated, whether or not his licensed capacity is at issue. See letter from counsel for Husted, March 25, 1985, at 2 n.1. It also is noteworthy that TMIA does not raise this objection, presumably because they concur with Mr. Husted that to resolve his qualifications in a non-licensed or licensed operator capacity, the proposed hearing "must touch all four issues" identified by Mr. Husted. TMIA's Response at unnumbered page 10.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Husted Reply to NRC Staff Response Concerning Charles Husted's Request for Hearing" were served this 14th day of May, 1985, by deposit in the U.S. mail, first class, postage prepaid, to the parties on the attached Service List.

Deborah B. Bauser
Deborah B. Bauser

BEFORE THE COMMISSION

)
) Docket No.
)

Jack R. Goldberg, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

3 - - - - - X

4 In the Matter of: :

5 METROPOLITAN EDISON COMPANY :

Docket No. 50-289
(Restart)

6 (Three Mile Island Unit 1) :

7 - - - - - X

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Dauphin County Courthouse
Commissioners Hearing Room
Harrisburg, Pennsylvania

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Saturday, December 5, 1981

11

12 The hearing in the above-entitled matter convened
13 in in camera session at 9:07 a.m., pursuant to notice.

14 BEFORE:

15 GARY MILHOLLIN, Special Master,
Atomic Safety and Licensing Board

16

On behalf of the Licensee, Metropolitan Edison Company:

17

ERNEST L. BLAKE, JR., Esq.

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BONNIE GOTTLIEB, Esq.

Shaw, Pittman, Potts and Trowbridge

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On behalf of the Commonwealth of Pennsylvania:

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ROBERT ADLER, Esq.

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Assistant Attorney General

505 Executive House

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Harrisburg, Pennsylvania

24

25

1 On behalf of Mr. and Mrs. Norman Aamodt:

2 JOHN CLEWETT, Esq.
3 The Christic Institute
4 1324 North Capitol Street
5 Washington, D. C. 20002

6 On behalf of Three Mile Island Alert:

7 LOUISE BRADFORD
8 JOANNE DOROSHOW
9 1011 Green Street
10 Harrisburg, Pennsylvania 17102

11 On behalf of the Regulatory Staff:

12 MARY E. WAGNER, Esq.
13 JACK R. GOLDBERG, Esq.
14 Office of the Executive Legal Director
15 U.S. Nuclear Regulatory Commission
16 Washington, D. C.

17 On behalf of an Unnamed Party, Mr. W:

18 DAVID E. COLE, Esq.
19 Smith and Smith
20 Riverside Law Center
21 2931 North Front Street
22 Harrisburg, Pennsylvania 17110

23 On behalf of an Unnamed Party, Mr. O:

24 MICHAEL F. MC BRIDE, Esq.
25 LeBoeuf, Lamb, Leiby & MacRae
1333 New Hampshire Avenue, N.W.
Washington, D. C. 20036

1 by the Office of Inspection and Enforcement dated August 11,
2 1981, which I believe is Staff Exhibit Number 26, and I
3 believe you are identified in that exhibit in various places
4 as "Mr. O," and you are that individual, are you not?

5 MR. O: Yes, I am O.

6 JUDGE MILHOLLIN: Very well.

7 The order of cross examination for this witness
8 will be changed so that the Commonwealth will go first.

9 MR. BLAKE: Judge Milhollin, to my knowledge, Mr.
10 O has not previously been sworn.

11 JUDGE MILHOLLIN: Yes, you are perfectly right.

12 MR. MC BRIDE: Before we begin, Judge Milhollin, I
13 wonder if we could put on the record a discussion about the
14 matters you and I had off the record; that is to say, what
15 role, if any, I will be permitted to play during the
16 testimony of this witness.

17 JUDGE MILHOLLIN: It would be possible for us to
18 have that discussion now. It also is possible it would
19 never be necessary for us to have that discussion if there
20 never comes a time when it is necessary to define your
21 role. Then we could avoid having the discussion.

22 If there should come a time, then it would be, I
23 think, a more realistic discussion if it were had in the
24 context of a specific -- if it were had in the context of a
25 specific issue rather than simply a general theoretical

1 discussion.1

2 MR. MC BRIDE: Okay. Why do we not defer the
3 discussion until the situation arises where it may be
4 required to have the discussion?

5 JUDGE MILHOLLIN: I think that would be the best
6 procedure.

7 Whereupon,

8

MR. O

9 called as a witness by counsel for Intervenor, TMIA and the
10 Amodts, having first been duly sworn by the Chairman, was
11 examined and testified as follows:

12

CROSS EXAMINATION

13

BY MR. ADLER:

14

Q Good afternoon, Mr. O. My name is Robert Adler,
15 and I represent the Commonwealth of Pennsylvania.

16

A Hello.

17

Q You have in front of you a document on your left,
18 which is Staff Exhibit 26. And I believe it is open to
19 Enclosure 4, which is a statement dated 7/31/81. Is that
20 the statement that you signed during the course of the NRC
21 investigation?

22

(Witness reviewing document.)

23

JUDGE MILHOLLIN: This is a handwritten
24 statement.

25

THE WITNESS: Yes, sir.

1 A Okay.

2 Q Towards the bottom of the page there is an
3 investigator's note which says, "When VV name was first
4 brought up, O appeared not to remember any incident
5 involving VV and him." Do you recall that, Mr. O?

6 A Could you tell me where --

7 MR. MC BRIDE: Your Honor, I think the question is
8 ambiguous. He has not defined what the antecedent is of
9 that, whether it is the incident of the discussion with the
10 investigator.

11 JUDGE MILHOLLIN: I can see we are going to have
12 have our discussion. It is not my understanding that I
13 agreed that the witnesses would have attorneys for the
14 purposes of objecting to questions on other than grounds
15 which are peculiar to the interest of the witness, such as
16 privilege. And I think it is irregular for that to be
17 done. There is certainly no right for a witness to have an
18 attorney.

19 MR. MC BRIDE: It may be irregular, Your Honor,
20 but this is an irregular proceeding.

21 JUDGE MILHOLLIN: I do not think this is an
22 irregular proceeding.

23 MR. MC BRIDE: Well, I think it is unusual that
24 this proceeding is being conducted in camera and that the
25 circumstances that caused that occurred. In any event a few

1 weeks ago when I presented the stipulation to you, we had a
2 discussion on the record of some what I will call "side bar"
3 agreements with the parties about what certain words in the
4 stipulation meant. And one of those references that I made
5 was to paragraph 10 of the stipulation which referred to the
6 objections that might be raised during the course of this
7 proceeding.

8 And I stated that paragraph 10 of the stipulation
9 meant that we were waiving certain privileges that we had
10 asserted in the pleadings filed with the Commission prior to
11 that date. We were specifically waiving for the purpose of
12 the testimony that was sought, as I understood it, the Fifth
13 Amendment, Privacy Act, and Freedom of Information Act.

14 I also specifically stated that what I referred to
15 as "routine" objections -- and I gave three examples:
16 attorney-client privilege, relevance, and form -- we were
17 not waiving and that we intended to preserve our ability to
18 raise those objections at the testimony that was taken in
19 this proceeding.

20 Now, I can understand that in the course of that
21 discussion there might have been a misunderstanding. I am
22 not saying that you are going contrary to what our
23 understanding was. But I am saying that was my
24 understanding of what our understanding was. And it was on
25 the basis of that understanding that I entered into the

1 stipulation on behalf of this witness.

2 JUDGE MILHOLLIN: The witness has no right to be
3 free from repetitive or irrelevant questions except insofar
4 as that injures the interest of a party to the proceeding.
5 That is first.

6 However, I agree with you that I did not
7 understand there to be a waiver of the right of a party to
8 assert or to object to a question to the witness on any
9 ground whatsoever other than the privilege against
10 self-incrimination.

11 I think the need for orderly proceeding is such
12 that it is inappropriate for persons other than parties to
13 make objections which are grounded on anything other than a
14 privilege personal to the witness, and even then an
15 objection to a question based on privilege should be
16 asserted by the witness after consultation with the witness'
17 counsel if the witness believes that is necessary.

18 MR. MC BRIDE: Let me first ask a question of
19 clarification: Do I interpret what you just said as meaning
20 that if the witness desires to discuss with me the question
21 or his answer before he gives his answer, that I have that
22 right?

23 JUDGE MILHOLLIN: Only if the question relates to
24 something which infringes on a privilege which is peculiar
25 to the witness.

1 MR. MC BRIDE: Well, let me also say --

2 JUDGE MILHOLLIN: Such as the Fifth Amendment
3 privilege or the right to counsel privilege.

4 MR. MC BRIDE: Let me also say that the record
5 will speak for itself. But when I explained paragraph 10 of
6 the stipulation on the record and as I understand it,
7 although I was not there, a similar discussion was had with
8 Mr. Cole today following after you had had an opportunity to
9 study the stipulation, and he said essentially the same
10 thing, referring to my statement of the previous evening.

11 It was clearly my understanding, with the words I
12 spoke at that time I may have used a somewhat ambiguous
13 pronoun, such as "our," but I believe I referred to our
14 ability to raise routine objections of the type that I
15 discussed.

16 Let me also say that although it may be true --
17 and let us assume arguendo that it is true -- that a witness
18 is generally not entitled to have counsel present to object
19 to questions other than, as you referred to it, privileges
20 that may be peculiar to the witness, you had also ruled that
21 we had no right to confidentiality as a matter of law. Yet,
22 nevertheless you in your discretion and the Licensing Board
23 in its discretion approved the stipulation that the parties
24 and we entered into which provided for confidentiality.

25 It seems to me that although the witness may in

1 the abstract not have the right to have counsel present to
2 make those kinds of objections, you in your discretion may
3 do so. And I do not think it would be any more irregular
4 for you to do that than it was for you to approve the
5 stipulation.

6 And it does seem to me that this catches me
7 somewhat blind. I had been under the understanding until
8 today that I would have the ability to participate as though
9 I was representing a party.

10 JUDGE MILHOLLIN: Mr. Cole may also have had that
11 understanding. I think it is fair to say that it was
12 possible to receive the testimony of the witness represented
13 by Mr. Cole without the need for him to object to
14 questions.

15 MR. MC BRIDE: I hope the same thing is true with
16 this witness. All I was trying to do there -- and believe
17 me, I am not trying to obstruct or delay the proceeding --
18 but all I was trying to do was make the question clear where
19 I thought it was unclear.

20 JUDGE MILHOLLIN: My observation of the parties so
21 far in this proceeding has been that they have been quite
22 vigilant in preventing the record from being confusing. And
23 where their vigilance has failed, sometimes I have come to
24 their aid. So I think it is unlikely that the record is
25 going to be confusing as a result of imprecise questioning.

1 So I can appreciate your concern about it, but I
2 am confident that we can negotiate that difficulty on our
3 own.

4 MR. MC BRIDE: When you say "on our own," who do
5 you include in "our"?

6 JUDGE MILHOLLIN: I include the parties and
7 myself.

8 MR. MC BRIDE: So that you mean to say if I feel
9 at some point into this testimony that I have a need to
10 speak, you are not going to hear me?

11 JUDGE MILHOLLIN: I am saying that -- well, again,
12 it could be that there will come a time when you feel that,
13 based on my remarks that I have just made, that it would be
14 appropriate for you to speak. If there does come such a
15 time, I assume you will speak out.

16 MR. MC BRIDE: Okay. Well, I am going to instruct
17 the witness, a la the situation tha occurs in a grand jury
18 proceeding where the witness is in one room and the lawyers
19 are out in the hall, that if the witness does feel the need
20 to consult with me, as I understand your ruling, he has that
21 right and he only has to so state on the record.

22 JUDGE MILHOLLIN: The witness technically has no
23 right to consult with you.

24 MR. MC BRIDE: I thought you just stated that he
25 did.

1 JUDGE MILHOLLIN: He does if I let him. Well, I
2 mean he may consult with you if I permit him to consult with
3 you. I will permit him to consult with you so long as it
4 does not obstruct the proceeding.

5 MR. MC BRIDE: Why do we not proceed and see how
6 it goes? I will say that I am not receding from my position
7 that I would have a right to fully participate today,
8 subject to the limitations of the stipulation. And I am not
9 suggesting that you do not have a right to hold a contrary
10 view. But that is my position.

11 MR. ADLER: I have a pending question which I am
12 going to withdraw and rephrase.

13 BY MR. ADLER: (Resuming)

14 Q Do you recall the NRC investigators bringing to
15 your attention the incident in 1979 involving VV?

16 A Yes.

17 Q Do you recall that when they first brought it to
18 your attention you did not remember it?

19 A When he first brought it out, it did not ring any
20 bells until he started to pursue it. You know, he went down
21 the line and pursued it a little more then. Then it came
22 back.

23 Q The second line of that note states, "When
24 Investigator Baci provided further details, however, O
25 appeared dismayed and looked nervous and upset." Is that an

1 accurate representation of your behavior?

2 A I do not know how I appeared to him. What
3 happened to me was it seemed like a question that came out
4 of left field, and it just took me completely by surprise.
5 I did not know what he wanted or, you know, what he was
6 asking or anything like that.

7 Q Did you then recall the incident?.

8 A Once he -- once he pursued the incident, I did,
9 yes.

10 Q Do you now have a fairly good recollection of the
11 facts involving the VV-O incident right now?

12 A Do you mean my conversation with the
13 investigator?

14 Q No, no.

15 A Or do you mean the incident itself?

16 Q The incident itself.

17 A Oh, yes. You know, once he was able to tell me
18 what he was doing and, you know, what he wanted and he
19 refreshed my memory, then I knew what he was talking about.

20 Q Do you recall Mr. VV asking you to provide the
21 answers to some questions?

22 A Yes.

23 Q Did you know at that time that these questions
24 were a training assignment?

25 A No, I did not.