

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman  
Richard S. Galzman  
Dr. W. Reed Johnson



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In the Matter of \_\_\_\_\_  
NUCLEAR ENGINEERING COMPANY, INC. \_\_\_\_\_  
(Sheffield, Illinois Low-Level \_\_\_\_\_  
Radioactive Waste Disposal Site) \_\_\_\_\_  
\_\_\_\_\_

SERVED

SEP 6 1978

Docket No. 27-39

Messrs. William J. Scott, Attorney General of  
Illinois, and Dean Hansell, Assistant Attorney  
General of Illinois, Chicago, Illinois (Mr.  
Russell R. Eggert and Ms. Susan N. Sekuler,  
Chicago, Illinois, of counsel), for the inter-  
venor State of Illinois.

Mr. John M. Cannon, Chicago, Illinois, for the  
Intervenor Chicago Section, American Nuclear  
Society.

Messrs. Troy B. Conner, Jr. and Mark J. Wetterhahn,  
Washington, D.C., for the licensee Nuclear  
Engineering Company, Inc.

Mrs. Ellen Silberstein Friedell for the Nuclear  
Regulatory Commission staff.

MEMORANDUM AND ORDER

September 5, 1978

(ALAB - 494)

1. This proceeding involves the Nuclear Engineering  
Company's application for renewal and amendment of its  
license to operate a low-level radioactive waste burial

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site near Sheffield, Illinois. One of the parties is the Chicago Section of the American Nuclear Society (Chicago Section).<sup>1/</sup> In view of this circumstance, another party, the State of Illinois, seeks to disqualify Dr. Forrest J. Remick from further service as a member of the Licensing Board assigned to the proceeding because he is a member of the American Nuclear Society (ANS).

\* 2/4 According to Illinois' disqualification motion, although he is a Pennsylvania resident<sup>2/</sup> and does not belong to the Chicago Section

Because the Society intends to adduce evidence on matters which go beyond the narrow interests of the Chicago Section \* \* \*, Dr. Remick's affiliation with the Society raises at least the appearance of impropriety. While the State is in no way suggesting that Dr. Remick would act in other than complete good faith, in fairness to all parties to this proceeding, as well as to the process itself, Dr. Remick should be disqualified as a member of this Licensing Board.

1/ The Licensing Board initially denied the Chicago Section's petition for leave to intervene. On the appeal taken from that denial, we agreed with the Board below that the Chicago Section lacked standing to intervene as a matter of right but nonetheless determined that it should be given another opportunity to demonstrate that it should be allowed to participate as a matter of discretion. ALAB-473, 7 NRC (May 3, 1978). The Chicago Section availed itself of that opportunity and was admitted as a party by Licensing Board order of June 20, 1978.

2/ Dr. Remick is a part-time technical member of the Atomic Safety and Licensing Board Panel, from which the licensing boards for particular proceedings are drawn. He is principally employed by the Pennsylvania State University in State College.

The motion was opposed by the Chicago Section, the licensee and the NRC staff. On August 16, 1978, the Licensing Board entered an order in which it expressed the unanimous view that there was no reason why Dr. Remick should be disqualified and therefore referred the motion to us for determination. <sup>3/</sup> On full consideration of the arguments of the respective parties, we reach the same conclusion.

2. In the Midland proceeding, we canvassed the statutory and judicial authority respecting the grounds on which disqualification of a member of an adjudicatory body such

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3/ 10 CFR 2.704(c) explicitly requires such a referral in circumstances where the Licensing Board does not grant a motion to disqualify one of its members and the member in question does not recuse himself.

As the Licensing Board pointed out, Section 2.704(c) also requires that a disqualification motion "be supported by affidavits setting forth the alleged grounds for disqualification". We have held that this requirement must be observed even if the motion is founded wholly on matters of public record. Duquesne Light Co. (Beaver Valley Power Station, Units 1 and 2), ALAB-172, 7 AEC 42, 43 fn. 2 (1974). By motion filed August 25, 1978, Illinois has sought to supply the missing affidavit. The document submitted, however, though signed by counsel of record, does not bear the attestation of a notary or other official authorized to administer oaths and is thus inadequate. Nonetheless, the absence of an affidavit here is not crucial. The Illinois' motion is founded on a fact to which the Board itself had called attention in its March 1, 1978 order ruling upon various intervention petitions (at fn. 2). Further, in light of the narrow scope of the State's challenge to Dr. Remick's continued participation, an affidavit was not needed to reduce "the likelihood of an irresponsible attack upon the probity or objectivity of the Board member \* \* \* in question". Beaver Valley, ALAB-172, supra, at fn. 2.

as a licensing board may be sought. Our conclusion was that

\* \* \* an administrative trier of fact is subject to disqualification if he has a direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual -- as distinguished from legal or policy -- issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

\* 2

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973). None of these bases has even arguably been shown to be present here.

It is of course not claimed that, by reason of his ANS membership, Dr. Remick has a pecuniary interest in the outcome of the proceeding, is personally biased against Illinois or another of the parties, or has prejudged factual issues. Rather, as we have seen, Illinois explicitly disclaims any suggestion that Dr. Remick "would act in other than complete good faith". It puts its entire reliance upon the "appearance of impropriety" which assertedly would flow from his continued participation on the Licensing Board in the face of the ANS affiliation.

We can take official notice of the fact that the ANS is a professional organization of national scope. Its



membership (which according to the staff totals approximately 13,000) is drawn from the ranks of (inter alia) industry, government, universities, nuclear medicine facilities and research laboratories. This being so, it seems scarcely likely that anyone would presume that positions taken by the Chicago Section -- in litigation or otherwise -- reflect the viewpoints and interests of all of the members of that Section -- let alone the nationwide ANS membership. <sup>4/</sup> We think it is unreasonable to conclude that, simply because of his ANS affiliation, a risk exists that a Pennsylvania State University faculty member would be partial to the litigating posture of an ANS Section (to which he does not belong) in a proceeding involving a distant waste burial site in which he has no interest. <sup>5/</sup>

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<sup>4/</sup> In this regard, it is our understanding that the by-laws of the Chicago Section preclude it from acting for or in the name of the ANS and also provide that no expression of the Section shall be considered an expression of the ANS as a whole without prior approval of the latter's Board of Directors.

<sup>5/</sup> This is true whether or not, as Illinois maintains, the Chicago Section proposes "to present evidence of relevance to questions of national policy." For one thing, there is nothing to indicate that the Chicago Section's views on appropriate national policy would coincide with those of Dr. Remick. For another, in its August 16 order the Licensing Board stated that it would entertain no evidence of that character.

Illinois has not cited, and we have not discovered on our own, any authority to support its thesis that membership in a national professional organization perforce disqualifies a person from adjudicating a matter to which a local chapter of the organization is a party. On the other hand, the staff has called attention to authority pointing in the opposite direction. In re Rhodes, 370 F.2d 411 (8th Cir.), certiorari denied, 386 U.S. 999 (1967) (judicial members of an integrated bar may hear disbarment proceedings). See also, Abbott Labs., Ross Labs. Division v. NLRB, 540 F.2d 662, 664-65 (4th Cir. 1976); Overlook Nursing Home, Inc. v. United States, 556 F.2d 500, 503 (Ct. Cl. 1977).

The staff further provided the Licensing Board with a copy of a letter from the Acting Assistant Attorney General in charge of the Antitrust Division of the Department of Justice to a judge of the District Court for the District of Columbia, dealing with whether membership in the American Bar Association disqualified her from hearing an antitrust action challenging the ABA's restrictions on advertising by lawyers. <sup>6/</sup> The letter stated that, in the view

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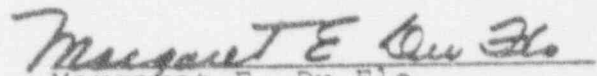
<sup>6/</sup> Letter from Acting Assistant Attorney General Joe Sims to Judge June L. Green, dated August 16, 1976, re United States of America v. American Bar Association (Civil Action No. 76-1182, D.C. D.C.).

of the United States, "mere membership in the ABA, an association of approximately 200,000 attorneys, would not create an appearance of partiality on the part of a judge hearing this matter" and thus would not require the judge to disqualify herself by reason of 28 USC 455(a). <sup>7/</sup> In order for that Section to come into play, the letter continued, the judge would have had to have been an active participant "in activities involving adoption or interpretation of the ABA's restrictions on advertising by lawyers." Although needless to say we are not bound by that analysis here, it appears both sensible and in full conformity with the jurisprudence on the subject. It therefore commends itself to us in the analogous circumstances of this case.

The motion to disqualify Dr. Remick is denied.

It is so ORDERED. \*

FOR THE APPEAL BOARD



Margaret E. Du Flo  
Secretary to the  
Appeal Board

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<sup>7/</sup> Section 455(a), added to the Judicial Code in 1974, provides that "[a]ny \* \* \* judge \* \* \* shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned".

\* Because he is a member of the American Nuclear Society (albeit not of the Chicago Section), Dr. Johnson did not participate in the consideration or disposition of this motion. In view of the conclusions reached by his colleagues, he will participate in any further matters coming before this Board for decision.