



Comptroller General
of the United States

Washington, D.C. 20548

Decision

CP/PR

Matter of: Nuclear Regulatory Commission Licensing Examiners

File: B-242942

Date: August 27, 1991

DIGEST

1. The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing operators for nuclear facilities does not involve the performance of inherently governmental activities. The Commission's guidelines are so comprehensive and detailed regarding all aspects of the testing procedures that the contract employees exercise minimal discretionary authority and make limited value judgments in preparing recommendations for Commission employees who decide whether to grant these operator licenses.

2. The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing nuclear plant operators does not involve the improper use of personal services contracts because the contract employees are not subject to continuous supervision and control by employees of the Commission.

DECISION

The issue in this decision is whether the Nuclear Regulatory Commission (NRC) may contract out for examiners to perform the testing procedures involved in licensing nuclear reactor operators.^{1/} The questions are whether such contracts are impermissible because the contract examiners are performing an inherently governmental function or because the contracts may be considered prohibited personal service contracts. For the reasons set forth below, we conclude that the NRC may continue to contract out for the examiners to conduct the testing procedures.

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70 Comp. Gen. 682

^{1/} The matter was submitted by Mr. James M. Taylor, Executive Director for Operations, Nuclear Regulatory Commission.

BACKGROUND

The Nuclear Regulatory Commission is responsible for licensing reactor operators and senior reactor operators.^{2/} As provided in 10 C.F.R. Part 55 (1991), the Commission administers examinations to evaluate an individual's understanding of the facility design and familiarity with the controls and operating procedures for the nuclear facility. These examinations consist of both written tests and operating tests.

Most pertinent to our discussion is the operating examination which is designed to test the individual's level of knowledge on the design and operation of the reactor and its associated plant systems, both internal and external to the control room. See 10 C.F.R. § 55.45 (1991). The operating examination consists of (1) a test of the operator's ability to control the plant during a simulated operating condition, and (2) a plant walkthrough, where the operator is tested on his or her knowledge of the plant outside of the control room.

For several years, the Commission has relied on its employees and private contractors to perform the tests involved in licensing operators. Thus, at times, a contract examiner will conduct all tests involved in licensing and will then forward a comprehensive examination file and recommendations to the Commission for review and decision by the chief examiner and branch chief. The chief examiner and branch chief are employees of the Commission.

The Commission's Inspector General (IG) reviewed the contracts under which these contract examiners are procured and issued a report questioning whether these contracts were impermissible personal service contracts and whether the contractor personnel were performing inherently governmental functions that should only be performed by government employees.^{3/}

In regard to the issue concerning the contract examiners performing inherently governmental functions, the IG's major

^{2/} See Section 107 of the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 939 (1954), as amended, and Section 201 of the Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1242 (1974).

^{3/} According to the IG report, the Commission obtained contract examiners from Sonalysts, Inc., as well as two Department of Energy national laboratories, the Idaho National Engineering Laboratory and the Pacific Northwest Laboratory. The contract examiners from these laboratories are not government employees.

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concern was that the contract examiners had to make value judgments about a candidate's performance and ultimately make a recommendation to pass or fail a candidate. The IG noted that during an operating examination, a contract examiner may conduct all aspects of the examination without any employee of the Commission being in attendance to supervise or observe the ongoing examination. The IG suggested that the examiner is the only person who could effectively evaluate a candidate's performance on this segment of the examination and this places the contract examiner in the position of having to make an independent decision as to whether or not the applicant should pass this portion of the examination.

Concerning the matter of whether the contracts were personal service contracts, the IG was concerned whether under the contract the degree of supervision afforded the contract employees was of such a high degree that they would appear to be federal employees.

The Commission's Office of General Counsel (OGC) responded to the IG report and stated that while the licensing of nuclear reactor operators is a governmental function, the contract examiners are only assisting the Commission staff in performing the licensing function. In support of its view, OGC explains that the Commission's contract examiners must comply with extensive and tightly controlled internal guidelines which carefully limit their discretion. These internal guidelines describe the content of the examinations, the procedures to be used by the examiners in testing the operators, and how to grade the examinations.

Moreover, the Commission's OGC argues that the key test is the nature and significance of the discretion exercised by the contractor, not the government's ability to independently verify all acts by the contractor. Therefore, in view of the limited discretion exercised by these contract examiners, the Commission's OGC concludes that the contract examiners are not performing an inherently governmental function.

The Commission's OGC also states these contracts are not impermissible personal services contracts since the Commission is providing technical direction and scheduling for these contract examiners but does not exercise relatively continuous supervision and control over the contract personnel.

OPINION

The first issue is whether the contract examiners may be performing a function deemed to be inherently governmental which should only be performed by government employees as provided for in Office of Management and Budget (OMB) Circular A-76 and the Federal Acquisition Regulations (FAR) Part 37.

OMB Circular No. A-76⁴ defines a governmental function in para. 6e as one "so intimately related to the public interest as to mandate performance by Government employees." Included in these functions are those activities which necessitate either the exercise of discretion in applying government authority or the use of value judgment in making decisions for the government.^{4/}

Consistent with the guidance set out in OMB Circulars No. A-76 and A-120,⁴ we have held that certain functions are so related to the agency's mission that it would be inappropriate to contract out these type functions. For example, in B-237356,⁴ Dec. 29, 1989, we held that the use of contract hearing officers by the Department of Energy (DOE) to determine eligibility for a DOE security clearance was an inherently governmental function since the hearing officers had to consider and rule on evidence in disputed matters, make specific findings as to the truth of the information provided, and preliminarily determine whether the access should be granted, denied, or revoked. Although an agency official made the final determination to grant or deny an individual's security clearance, we ruled that the process was inherently governmental since these contractors were exercising broad discretionary authority and making individual value judgments for the government in virtually every aspect of the hearing process. B-237356,⁴ supra.^{5/}

However, in the present case we conclude that the contract examiners are not performing a government function when they prepare, administer, and grade the operating examination. Our determination is based on the NRC's internal guidelines for preparing, administering, and grading operating tests which provide such extensive detail and guidance that the contract examiners cannot exercise discretion and make value judgments to the extent that the contract examiners can be deemed to be performing the government function of deciding who has passed

^{4/} Further guidance is contained in OMB Circular No. A-120 which provides guidelines for the use of "advisory and assistance" (consulting) services; under para. 7B of this Circular, advisory and assistance services may not be utilized for "work of a policy, decision-making or managerial nature which is the direct responsibility of agency officials."

^{5/} See B-198137, June 3,⁴ 1982, where we held that certain legally required auditing tasks that involved making discretionary decisions regarding the disposition of disputed monetary claims against the government could not be contracted out but routine matters such as examining vouchers and verifying invoice amounts could be done under⁴ a contract. See also 64 Comp. Gen. 408⁴ (1985); B-192518,⁴ Aug. 9, 1979.

the examination and will be licensed. For example, in preparing an operating test, the contract examiner must prepare a test that includes questions and simulations in three categories that are further broken down into detailed subcategories. Indeed, the detail within the agency regulations is so extensive that while the contract examiners have some discretion in choosing specific subcategories within the three main categories, the contract examiners essentially must comply with the specific mandates of the regulations once the subcategory or subcategories are selected.

Also, there is a comprehensive grading system that precludes a contract examiner from exercising broad discretion or making extensive value judgments about an applicants score. For each part of a test, an applicant is given a score of one, two, or three, and the regulations set out in great detail the behavior and reaction on the part of the applicant that will earn him or her the appropriate score. In addition, the Commission has ensured that in administering the test the examiners will follow a precisely defined mode of operation.

Finally as regards the examiner's documentation and grading of the operating test, the Commission's guidance ensures that this is done uniformly. Examiners must recommend whether an applicant should pass or fail the operating test but in so doing may only make recommendations that are documented and consistent with the Commission's criteria. For example, the examiner must indicate whether an applicant performed in a satisfactory or unsatisfactory manner in certain parts of the operating test, but the Commission's guidance sets out in great detail the criteria for what constitutes satisfactory or unsatisfactory performance thereby limiting the examiner's use of independent judgment and discretion.

Accordingly, since the Commission's guidance enables contract examiners only to exercise discretion and make value judgments within severely prescribed parameters, we do not consider the contract examiners to be engaged in the performance of an inherently governmental function.^{6/}

The second issue is whether the contract might be an impermissible personal services contracts. A personal service contract is a contract that by its express terms or by the way

^{6/} Our discussion in this case has been limited to the operating test aspect of the licencing procedure. Obviously, if the operating test can be conducted by contract examiners, then conducting the written test, for which the Commission has detailed guidance for the preparation, administration, and grading, would provide much less opportunity to exercise discretion and make value judgments.

in which it is administered makes it appear that the contractor personnel are federal employees. FAR, § 37.101, codified at 48 C.F.R. § 37.101 (1990). Although a number of factors may indicate whether there is an employee and employer relationship, generally the main indicia of this would be whether the contractor personnel are subject to the relatively continuous supervision and control of a government officer or employee. See FAR, § 37.104(c)(1). If such a relationship does exist, then the personal service should not be provided by contract personnel but rather by employees hired under competitive selection or some other method required by the civil service laws. FAR, § 37.104(a).

We do not consider these contracts to be personal service contracts since the facts demonstrate that the contract examiners are not subject to the continuous supervision and control of Commission employees. Indeed, the degree of independence afforded the contract examiners was one of the areas of concern for the IG. As we view it, the contract examiners are providing advisory and assistance services which are appropriate for the Commission to obtain by contract.^{7/}

Milton J. Bowler
for Comptroller General
of the United States

^{7/} "Advisory and assistance services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance." FAR, § 37.203 (emphasis added).