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Clerk of Court

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
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(415) 556-9800

February 12, 2005

U.S. Court of Appeals Docket Number: 05-70718
Agency Number: NRC-030-07710-CO
Short Title: Farmer v. NRC

Dear Counsel:

Your Petition for Review has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this Court of Appeals docket number when corresponding with this office about your case.

The due dates for filing the parties' briefs and otherwise perfecting the petition have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. 9th Cir. R. 42-1.

The following information is being provided in an attempt to answer the most frequently asked questions regarding the appellate process. Please review this information very carefully. For convenience, we use the term "Circuit Rules" instead of "Rules of the United States Court of Appeals for the Ninth Circuit" and "FRAP" instead of "Federal Rules of Appellate Procedure."

Enclosed with this letter is an appellate processing schedule along with a case processing checklist to help you monitor the progress of your case.

Petitioners who are filing pro se should refer to the accompanying information sheet regarding the filing of informal briefs.

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

FEB 12 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ROBERT L. FARMER,

Petitioner,

v.

NUCLEAR REGULATORY
COMMISSION,

Respondent.

No. 05-70718

NRC No. NRC-030-07710-CO

**TIME SCHEDULE
ORDER**

The parties shall meet the following time schedule:

5/3/05 Appellant/petitioner's opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1;

6/2/05 The brief of appellee/respondent shall be filed and served, pursuant to FRAP 32 and 9th Cir. R. 32-1

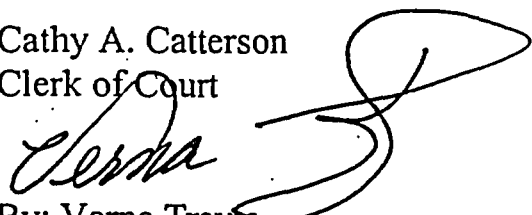
*** The optional appellant/petitioner reply brief shall be filed and served within fourteen days of service of the appellee/respondent's brief, pursuant to FRAP 32 and 9th Cir. R. 32-1.

Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. 9th Cir. R. 42-1

Appellants/Petitioners without representation of counsel in a prisoner appeal may have their case submitted on the briefs and record without oral argument, pursuant to FRAP 34(a). Within 10 days of the filing of the appellant's opening brief, parties may file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court


By: Verna Travis
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 11 2005

ROBERT L. FARMER,

Petitioner

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION,

Respondent.

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

PETITION FOR REVIEW

05-70718

Robert L. Farmer hereby petitions the Court for review of the October 17, 2004 Order of the United States Nuclear Regulatory Commission (NRC) denying, on the basis of standing, his request for a hearing under Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a).

Respectfully submitted,

Billie Pirner Garde (pnc)

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Attorney for Petitioner Robert L. Farmer

Certificate of Service

I hereby certify that copies of the foregoing Petition for Review were served, this 10th day of February 2005, by regular U.S. mail, on the following:

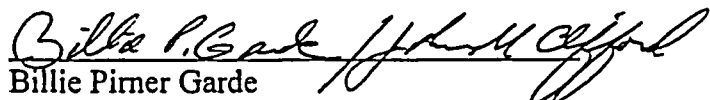
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

DOCKETED
USNRC

December 14, 2004 (1:16pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED December 14, 2004

In the Matter of)
)
STATE OF ALASKA DEPARTMENT OF)
TRANSPORTATION AND PUBLIC)
FACILITIES)
)
(Confirmatory Order Modifying License))
)

Docket No. 030-07710-CO

CLI-04-38

MEMORANDUM AND ORDER

This proceeding arises from Robert Farmer's challenge to a confirmatory order modifying the materials license of the State of Alaska Department of Transportation and Public Facilities (ADOT). The confirmatory order implemented an agreement between ADOT and the NRC staff settling an enforcement action. In CLI-04-26, we reversed a Licensing Board decision granting Farmer's intervention petition and admitting one of his contentions.¹ Farmer has moved for reconsideration of CLI-04-26. ADOT and the NRC Staff oppose Farmer's motion. We deny the motion.

"A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid."² Farmer has not demonstrated such an error.

¹See *State of Alaska Dept. of Transportation and Public Facilities (Confirmatory Order Modifying License)*, CLI-04-26, 60 NRC __ (Oct. 7, 2004).

²10 C.F.R. § 2.345(b). See *Louisiana Energy Services, L.P. (National Enrichment Facility)*, CLI-04-__, 60 NRC __ (Dec. 8, 2004), slip op. at 4 & nn. 11-12.

His two chief arguments for reconsideration are: (1) that the Commission "misstated the facts" when it said that the NRC staff understood ADOT's conduct to be "deliberate;"³ and (2) that in finding no injury "traceable" to the Confirmatory Order the Commission disregarded Farmer's claims of ongoing "egregious harassment" that, he says, "likely would be redressed" by a Board decision rescinding the order.⁴

The first argument, even if it were true, is not a ground for reconsideration because the Commission's alleged factual error was not "material" to the Commission's decision. The case actually turned on settled principles of standing deriving from a 1983 court decision, *Bellotti v. NRC*.⁵ The section of CLI-04-26 regarding the role of factual disputes in *Bellotti* cases was merely advisory, not necessary to the result, and could have been deleted without impairing the analytical foundations of the holding.⁶

Our precise holding in CLI-04-26 was:

[W]e address the question whether petitioners may obtain Licensing Board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient. The answer, under a longstanding Commission policy upheld in *Bellotti v. NRC*, is no. The only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening.⁷

We reasoned that Farmer lacked standing under *Bellotti* because the Confirmatory Order required ADOT to take various whistleblower protection measures, and thus did not "adversely

³ See Motion for Reconsideration, at 3-7 (Oct. 18, 2004).

⁴ See *id.* at 8-9.

⁵ 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982). See CLI-04-26, 60 NRC at ___, slip op. at 5-10.

⁶ See *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 A.E.C. 491, 504 (1973).

⁷ CLI-04-26, 60 NRC at ___, slip op. at 5.

affect[] Farmer because it actually "improve[d] the safety situation."⁸ We characterized our standing determination as "dispositive of this case."⁹

We offered our perspective on fact issues in confirmatory order cases only because a majority of the Board in LBP-04-16 had discussed at length possible discrepancies in the factual basis for the Confirmatory Order.¹⁰ We held that in such cases "a challenge to the facts themselves by a non-licensee is not cognizable."¹¹ We added that, contrary to the Board's view, we saw no "genuine dispute" on the question whether ADOT acted against Farmer "deliberately."¹² We pointed to the Notice of Violation's use of the term "retaliatory" – which, we said, meant that the NRC staff, like Farmer, "by definition" must have considered ADOT's actions "deliberate."¹³

Farmer, however, calls our attention to an NRC staff letter indicating that the staff in actuality "did *not* develop evidence that managers acted deliberately with respect to NRC's requirements."¹⁴ While this discrepancy suggests that we may have oversimplified the "deliberate" issue,¹⁵ our misunderstanding, if any, is inconsequential because it amounts to

⁸ *Id.* at __, slip op. at 7.

⁹ *Id.* at __, slip op. at 10.

¹⁰ See LBP-04-16, 60 NRC 99, 107-108, 114-116, 118 (2004). *Cf. Patel v. Sun Co., Inc.*, 141 F.3d 447, 462 (3d Cir. 1998) (language in decision responding to criticism from dissent about issues not directly before the court is *dictum*).

¹¹ CLI-04-26, 60 NRC at __, slip op. at 11.

¹² *Id.* at __, slip op. at 12-13.

¹³ *Id.* at __, slip op. at 13.

¹⁴ Motion for Reconsideration, at 5, *quoting* Letter from Frank J. Congel, Director, NRC Office of Enforcement, to Billie P. Garde, Counsel for Petitioners at 1 (April 5, 2004) (emphasis supplied).

¹⁵ The NRC Staff has requested clarification of our rather loose use of the term

(continued...)

dicta.¹⁶ It does not undercut our core ruling in this case; namely, that under *Bellotti* Farmer lacks standing to obtain a hearing to challenge an NRC enforcement order out of a desire for more aggressive relief.

We also reject Farmer's second argument – that the Commission disregarded Farmer's injury. Harm to Farmer resulted from retaliatory conduct by ADOT; thus, his injury does not derive from the Confirmatory Order and does not give him standing to challenge it. The Commission fully considered Farmer's alleged injury before concluding that there was no cause and effect relationship between any injuries Farmer personally suffered and a Confirmatory Order that "directly addresses ADOT's wrongful behavior by mandating a program designed to alter the Safety Conscious Work Environment favorably and prevent similar injuries in the future."¹⁷ The Confirmatory Order plainly enhances public safety and increases protection of the licensee's employees.

Throughout his petition for an NRC hearing Farmer based his standing argument on the concept that if the Confirmatory Order were rescinded, the Staff would necessarily impose stricter enforcement actions on ADOT. Similarly, Farmer's motion for reconsideration maintains

¹⁵(...continued)

"deliberate" in CLI-04-26. See "NRC Staff Response to Robert F. Farmer's Motion for Reconsideration" at 4-5 n. 20 (Oct. 28, 2004). As we said in CLI-04-26, an action described as "retaliatory" is by definition "deliberately" taken against the object of the action. Our discussion in CLI-04-26 addressed deliberateness in this sense to show that the NRC staff was aware of the underlying factual allegations and their seriousness. See CLI-04-26, 60 NRC at __, slip op. at 12-14. By contrast, violations of NRC whistleblower regulations are, in NRC parlance, "deliberate" when the retaliator *knows* that the conduct is contrary to an NRC regulatory requirement. Farmer apparently disputes the NRC staff letter stating that ADOT's actions were not "deliberate" in this second sense. But, as we stated in CLI-04-26, "allowing a petitioner to attack a confirmatory order in the guise of a factual dispute would effectively permit an end run around *Bellotti*." *Id.* at __, slip op. at 11.

¹⁶ We introduced our brief factual discussion with the statement, "while we need not decide this issue . . ." CLI-04-26, 60 NRC at __, slip op. at 12.

¹⁷CLI-04-26, 60 NRC at __, slip op. at 9.

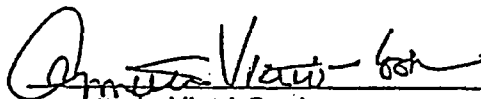
that "appropriate" and "better" mitigative and protective action ultimately will emerge if the Board rescinds the Confirmatory Order.¹⁸ At bottom, Farmer's reconsideration petition simply reargues his position that the Confirmatory Order is not strict enough and did not take account of the ADOT's allegedly deliberate disregard of regulatory requirements. But *Bellotti*, a long-standing precedent, prescribes a contrary rule – a hearing petitioner like Farmer may not seek enhanced enforcement actions by raising factual or remedial questions. Under *Bellotti* the NRC may exclude claims for more extensive enforcement relief.

For the foregoing reasons, we deny Farmer's motion for reconsideration of LBP-04-26.

IT IS SO ORDERED.



For the Commission


Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 2004.

¹⁸ See Motion for Reconsideration, at 7.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

STATE OF ALASKA)
DEPARTMENT OF TRANSPORTATION)
AND PUBLIC FACILITIES)

(Confirmatory Order Modifying License)
Effective Immediately))

Docket No. 030-07710-CO

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-38) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal distribution.

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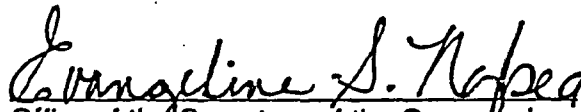
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Docket No. 030-07710-CO
COMMISSION MEMORANDUM AND
ORDER (CLI-04-38)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 2004