

June 6, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	IA-05-021
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ANDREW SIEMASZKO)	ASLBP No. 05-839-02-EA
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NRC STAFF REPLY TO RESPONSE OF ANDREW SIEMASZKO
TO NRC STAFF MOTION FOR DELAY OF PROCEEDINGS

INTRODUCTION

Pursuant to the Board Order of May 19, 2005, the NRC Staff hereby replies to the Response of Andrew Siemaszko to the NRC staff motion for delay of proceedings.

BACKGROUND

Andrew Siemaszko was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by FirstEnergy Nuclear Operating Company (FENOC). On April 21, 2005, the Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities" (Enforcement Order) to Mr. Siemaszko. 83 Fed. Reg. 22719 (2005). The Order prohibits Mr. Siemaszko from any involvement in NRC-licensed activities for a period of five years from the effective date of the Order. The Order was not immediately effective, because a hearing has been requested and granted, and does not become effective until the conclusion of the hearing. On April 22, 2005, Mr. Siemaszko filed his "Request for a Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities" (Hearing Request). On May 11, 2005, the Hearing Request was referred to the Atomic Safety and Licensing Board Panel. On May 17, 2005, the Staff filed a Motion to Delay the Proceeding (Motion). This

Atomic Safety and Licensing Board (Board) was established on May 18, 2005. On May 19, 2005, the Board issued an Order which granted Mr. Siemaszko's hearing request. On June 1, 2005, Mr. Siemaszko filed his "Response to NRC Staff Motion For Delay of Proceedings", dated May 31, 2005 (Response.) Pursuant to the Board Order of May 18, 2005 the Staff hereby replies to the Response to the Staff Motion.

DISCUSSION

A. Legal Standards Governing Stays of Proceedings

In determining whether to hold an enforcement proceeding in abeyance because of the concurrent consideration of criminal prosecution by the Department of Justice, as is the case here, the Commission requires a balancing of competing interests. See *Oncology Servs. Corp.* CLI-93-17, 38 NRC 44, 50 (1993). The factors to be considered in balancing these interests are; the length of delay, the reason for the delay, the affected individual's assertion of his or her right to a hearing, prejudice to the affected person, and the risk of erroneous deprivation of property or other interest, such as an NRC license. *Id.* at 52-59. Mr. Siemaszko believes that the Board should look to the factors set out in 10 C.F.R. § 2.342(e), the factors generally applied in connection with stay requests, which are (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of the stay would harm other parties; (4) where the public interest lies. See Response at 4-5. The Staff, in its Motion, addressed the factors from both standards.

B. The Due Process Rights of Mr. Siemaszko

Mr. Siemaszko argues that his due process rights have been effectively denied by a delay in the proceeding. He further argues that his liberty interest to pursue his occupation has been infringed by an attack on his good name. See Response at 4, 6. The NRC Staff issued the Enforcement Order to Mr. Siemaszko since it lacked the requisite reasonable assurance

that the health and safety of the public will be protected if Mr. Siemaszko is permitted to be involved in NRC-licensed activities. See Enforcement Order, 83 Fed. Reg. at 22721. The NRC Staff believes that it has not damaged Mr. Siemaszko's reputation, since the Staff believes the Enforcement Order to be accurate in all respects.

However, assuming *arguendo* that Mr. Siemaszko's reputation has in fact been damaged, a person has no cognizable liberty interest in his reputation, and statements which may adversely affect one's reputation do not implicate a liberty interest. See *Beischel v. Stone Bank School Dist*, 362 F.3d 430, 439 (7th Cir. 2004). The Supreme Court has explicitly held that damage to a person's reputation, standing alone and apart from any other governmental action, does not state a claim for relief under the 14th Amendment. See *Paul v. Davis*, 424 U.S. 693, 694 (1976). In *Davis* the Police Department published a flyer distributed to local area merchants of mug shot photos of active shoplifters. Mr. Davis appeared on the flyer because he had been arrested for shoplifting. At the time the police distributed the flyer Mr. Davis's guilt or innocence had not been resolved. Shortly after circulation of the flyer, the charges against Mr. Davis were dismissed. *Id.* at 695-96. Mr. Davis argued that this publication violated his due process rights. The Court held that the weight of its decisions established no constitutional doctrine converting every false statement by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the 14th Amendment. *Id.* at 702. In order to implicate a liberty interest damage to reputation must be coupled with the alteration of a legal status, such as the loss of an employment position. See *Id.* at 710 (1976); *Townsend v. Vallas*, 256 F.3d 661, 669 (7th Cir. 2001). In the instant case, there has been no alteration of legal status by virtue of the Order issued. The NRC Staff did not remove Mr. Siemaszko from his position. Mr. Siemaszko was removed from his position in 2002 by FENOC. See *Andrew Siemaszko v. First Energy Nuclear Operating Company*, 2003-ERA-00013,

Department of Labor Complaint at 2.¹ Mr. Siemaszko was not working in the nuclear industry in April, 2005 when the Staff issued its Enforcement Order to Mr. Siemaszko. See Hearing Request at 1.

Even assuming, *arguendo*, that the Staff had somehow altered Mr. Siemaszko's legal status, in order to implicate a due process liberty interest he still must demonstrate that he has suffered a tangible loss of other employment opportunities. See *Townsend* at 670. In the instant case, Mr. Siemaszko simply cites to press coverage of the Enforcement Order to demonstrate that his liberty has been infringed. He has failed to give any specific instances of positions that he has been denied as a result of the Enforcement Order. Since Mr. Siemaszko is unable to identify any legally cognizable deprivation, his due process rights are not implicated by deferring his requested hearing.

C. Likelihood of Prevailing on the Merits

For the reasons set forth in the Staff Motion, the Staff believes that this standard, while applicable to requests for stays pending review, is inapplicable to the instant delay request. Mr. Siemaszko does not truly argue that the factor is an appropriate one for consideration in this type of request, but rather simply argues that the "Staff's unwillingness to assert its case is fundamentally unfair." See Response at 6. Both parties agree that in order for the Staff to prove its case, and for Mr. Siemaszko to defend himself, access to the facts underlying the Office of Investigations (OI) Report is essential. See Response at 7. The Staff cannot rebut Mr. Siemaszko's assumptions of what the Staff relied upon in support of its Enforcement Order, or Mr. Siemaszko's characterization of the facts leading up to the Enforcement Order, without divulging material from the OI Report. The purpose of the Staff's Motion is to avoid divulging this material until after the completion of the ongoing criminal investigation, so as not to impede

¹ Posted at <http://www.ohiocitizen.org/campaigns/electric/2003/nuc2003a.html>.

or otherwise prejudice that investigation and the Department of Justice's consideration of criminal prosecution. See Thomas T. Ballantine Affidavit, appended to the Staff's Motion.

D. Irreparable Injury

Mr. Siemaszko argues that there is no irreparable injury since most of the statements given by witnesses have already been made public through the FENOC Root Cause investigation. See Response at 7. The Staff respectfully disagrees. The Staff is unaware of any public disclosure of the OI report, or supporting exhibits. OI does not rely on witness statements from the licensee root cause investigation, but rather performed an independent investigation.²

Mr. Siemaszko further argues that the Staff could have protected the grand jury proceedings by waiving the civil action against Mr. Siemaszko. See Response at 9. While Mr. Siemaszko is correct that the Staff could have chosen not to take this enforcement action, to do so would have been, for reasons stated in the Order, a dereliction of the Staff's duty to protect the public health and safety. Moreover, his citation to 10 C.F.R. § 10.11(a)(9) to demonstrate that if he is criminally convicted, he would be banned from the industry is incorrect. See *Id.* Part 10 of the Commission's regulations establishes the criteria for granting access to Restricted Data or National Security Information and eligibility for employment clearance with the NRC. See 10 C.F.R. § 10.1(a). The criteria used to determine clearance eligibility include, among many other criteria, conviction of a crime. See 10 C.F.R. § 10.11(a)(9). The Staff disagrees that this regulation would have the effect of banning Mr. Siemaszko from the industry if he is indicted and subsequently convicted.

² The Staff would note that Mr. Siemaszko's characterization of his interactions with OI (Response at 3), which is at best tangential to any matter before the Board, mischaracterizes events.

E. The Public Interest

Mr. Siemaszko states “the chilling effect” on the industry from OI investigations is well recognized, and cites the Agency Discrimination Task Group Report as support for this proposition. It is unclear what relevance the Discrimination Task Group Report has to the instant case. The Discrimination Task Group was chartered to evaluate the Agency’s handling of matters covered by its employee protection standards. See Discrimination Task Group Report, April 2002 (Report) (Adams Accession No. ML 022120514) at iii. The instant case is not related to employee protection standards. It is further unclear what “chilling effect” Mr. Siemaszko believes that OI investigations impose on the industry. The Discrimination Task Group did receive comments from the industry regarding the way in which OI investigations are conducted. However, the comments further stated that “current OI techniques are appropriate for other wrongdoing investigations related to non-discriminatory deliberate misconduct involving NRC regulations.” See Report at 81. The public interest weighs heavily in favor of avoiding compromise of possible criminal prosecution.

CONCLUSION

Regardless of which standards are used, the NRC Staff has demonstrated good cause for a deferral of this proceeding. The pending grand jury investigation is an overriding public interest which justifies the delay. Moreover, the delay does not infringe on Mr. Siemaszko’s due process rights, since the Enforcement Order has not yet taken effect. The Staff’s Motion for a Delay of 120 days should, therefore, be granted.

Respectfully submitted,

/RA by Sara E. Brock/

Sara E. Brock
Melissa L. Duffy
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of June, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO RESPONSE OF ANDREW SIEMASZKO TO NRC STAFF MOTION FOR DELAY OF PROCEEDINGS" in the above captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 6th day of June, 2005.

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