

August 5, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	IA-05-021
)	
ANDREW SIEMASZKO)	ASLBP No. 05-839-02-EA
)	

NRC STAFF PARTIAL OBJECTION TO JULY 22, 2005
MEMORANDUM AND ORDER "GRANTING THE NRC STAFF'S MOTION. . . ."

INTRODUCTION

Pursuant to the July 22, 2005 Memorandum and Order ("Granting the NRC Staff's Motion For A 120-Day Delay of Proceedings and Setting Case Schedule") in this proceeding, the NRC Staff (Staff) hereby submits an objection to one aspect of the Order. Order at 8. In particular, the Staff objects to the language on page 2 of the Order that states:

More specifically, the NRC Staff must prove that, in preparing CR No. 2000-1037 and Work Order No. 00-001846-000, Mr. Siemaszko intentionally provided an incomplete and inaccurate description of the work activities and corrective action taken relative to the presence of boric acid deposits on the RPV head *knowing that by doing so he would cause FENOC to be in violation of NRC Regulations.*

Order at 2 (emphasis added). As discussed below, it is the Staff's position that this language is predicated on an apparent misapprehension of the legal standard applicable to this case.¹

¹ The Staff is also filing a joint motion to revise the discovery schedule directed by the Board in its July 22nd Order. Furthermore, the Staff respectfully disagrees with the Board's characterization that "there will be little, if any, material difference between the information received through the criminal discovery procedures and the discovery received through this administrative proceeding." Order at 7, FN12. Civil discovery in an administrative proceeding such as this one conducted pursuant to subpart G permits depositions of witnesses, which could potentially prejudice the criminal proceeding. Although the language in Footnote 12 of the Order is dictum, given the current procedural posture of the case, the Staff notes that at such time as the matter may become ripe, the Staff intends to address that matter.

BACKGROUND

On April 21, 2005, the Staff issued an “Order Prohibiting Involvement in NRC-Licensed Activities” to Andrew Siemaszko, who was previously employed as a system engineer at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by NRC licensee FirstEnergy Nuclear Operating Company (FENOC). 70 Fed. Reg. 22719 (May 2, 2005). In relevant part, that Order determined that Mr. Siemaszko “engaged in deliberate misconduct that has caused the Licensee to be in violation of 10 C.F.R. § 50.9 *by deliberately providing to the Licensee information that he knew to be incomplete or inaccurate in a respect material to the NRC, in violation of 10 C.F.R. § 50.5.*” *Id.* at 22721 (emphasis added).

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 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 July 22, 2005 the Board issued a Memorandum and Order “Granting the NRC Staff’s Motion For a 120-Day Delay of Proceedings and Setting Case Schedule” (Scheduling Order). The Board required that any objection to any aspect of the Order must be served and filed no later than August 5, 2005; the Staff hereby presents its objection.

DISCUSSION

In characterizing the issue to be decided in this proceeding, the Board stated:

More specifically, the NRC Staff must prove that, in preparing CR No. 2000-1037 and Work Order No. 00-001846-000, Mr. Siemaszko intentionally provided an incomplete and inaccurate description of the work activities and corrective action taken relative to the presence of boric acid deposits on the RPV head knowing that by doing so he would cause FENOC to be in violation of NRC Regulations.

Order at 2. In so stating the nature of the proceeding, the Board seems to be interpreting the governing Commission regulation as requiring the Staff to prove both that Mr. Siemaszko

intentionally provided false or inaccurate information and also that he knew that by doing so he would be placing FENOC in violation of NRC regulations.

In the Staff's view, however, to sustain the suspension Order at issue in this case, the Staff need only prove that, in preparing CR No. 2000-1037 and Work Order No. 00-001846-000, Mr. Siemaszko intentionally provided an inaccurate or incomplete description of the work activities and corrective actions taken relative to the presence of boric acid deposits on the RPV head. The Staff is not required to demonstrate further that Mr. Siemaszko also knew that his provision of inaccurate and incomplete information would cause FENOC to be in violation of the NRC regulations.

The relevant regulation in this matter, 10 C.F.R. § 50.5(a) "Deliberate Misconduct," states in part that an employee of a licensee may not:

(1) Engage in deliberate misconduct that causes or would have caused, if not detected, a licensee or applicant to be in violation of any rule regulation or order; or any term condition, or limitation of any license issued by the Commission; or

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

10 C.F.R. § 50.5(a)(1),(2) (emphasis added).

Sections 1 and 2 of 10 C.F.R. § 50.5(a) are separated by a disjunctive "or"; therefore, an order based on deliberate misconduct may be sustained where an employee has either caused a licensee to be in violation of NRC regulations or where an employee has deliberately submitted information that the employee knew to be incomplete or inaccurate in some respect material to the NRC. Thus the Staff does not need to prove that an individual who intentionally provided incomplete or inaccurate information also knew that by doing so he would cause a licensee to be in violation of NRC regulations.

The Commission has made clear that the deliberate misconduct rule permits the NRC to take action against an individual on the grounds alone of deliberately providing information that the individual knows to be incomplete or inaccurate. The Commission emphasized in the statements of consideration that, in addition to applying to persons who cause a licensee to be in violation, the rule “also puts those on notice of their individual liability for their deliberate submission of incomplete or inaccurate information. . . .” 56 Fed. Reg. 40664, 40665 (Aug. 15, 1991). In the proposed rulemaking statements of consideration, the Commission recognized that “certain misconduct may not be a violation of a Commission requirement.” 55 Fed. Reg. 12374, 12375-76 (April 3, 1990). The Commission reasoned, however, that the inclusion of such conduct within the Deliberate Misconduct Rule is warranted because:

[W]hen that misconduct [which does not cause a licensee to be in violation of NRC regulations] occurs in connection with licensed activities or reasonably reflects on the ability of the individual to safely undertake licensed activities within the Commission’s jurisdiction and raises a serious question as to whether there is reasonable assurance of adequate protection of the public health and safety if the person continues to be involved in licensed activities, NRC should have the ability to issue an order to the person involved in the misconduct.... This provision is intended to address cases in which the willful misconduct does not in itself constitute or create a violation of Commission requirements. . . .

55 Fed. Reg. at 12376. Responding to a comment that the Rule would be too broad in scope and include misconduct that does not involve a violation of NRC Rules, the Commission explained that the current form of the Misconduct Rule was written to provide notice to a person who “knows that he or she is acting in an area that relates to a licensee’s activities subject to NRC regulations. . . .” that deliberately providing “false or inaccurate information that is material to the NRC presents a health and safety concern within the NRC’s regulatory sphere.”

56 Fed. Reg. at 40670. As an example, the Commission specifically noted that an order to an individual might be appropriate when “an unlicensed individual . . . deliberately provides an inspector, investigator, or other NRC employee with inaccurate or incomplete information on a matter material to the Commission’s regulatory responsibilities.” *Id.* at 40680. Such is just the

case with respect to the Staff's Order against Mr. Siemaszko, which is based on his provision of incomplete and inaccurate information that was materially relevant to the NRC.

In its most recent amendment to the deliberate misconduct rule, the statements of consideration again emphasized the need to be able to take enforcement action even where the misconduct might not have put an NRC licensee in violation. See 63 Fed. Reg. 1890, 1891 (January 13, 1998). The Commission articulated that in order to "effectively exercise its authority under the AEA, the Commission needs to prevent or otherwise deter the deliberate submittal of materially false or inaccurate information by those entities not currently covered by the rule," (i.e., individuals who do not necessarily put an NRC licensee in violation). *Id.*

Thus, in light of the foregoing, to sustain the Order at issue in this case prohibiting Mr. Siemaszko from engaging in NRC-licensed activities for a period of 5 years, the Staff must establish only that Mr. Siemaszko intentionally provided incomplete or inaccurate information regarding the work activities and corrective actions taken relative to the presence of boric acid deposits on the RPV head. Although the relevant portion of the Order does note that Mr. Siemaszko's actions caused the licensee to be in violation of NRC requirements, the operative part of the phrase addressing Mr. Siemaszko's specific conduct focuses on the providing of incomplete or inaccurate information. It is, therefore, inappropriate, as a matter of law, to require the Staff to prove additionally that Mr. Siemaszko knew his intentional provision of incomplete and inaccurate information would cause FENOC to be in violation of NRC regulations.

CONCLUSION

For the reasons discussed above, the Staff hereby objects to the language on page 2 of the July 22, 2005 Memorandum and Order stating that the Staff must also prove Mr. Siemaszko knew that by intentionally providing incomplete and inaccurate information in CR No. 200-1037 and Work Order No. 00-001846-000 "he would cause FENOC to be in violation of NRC regulations."

Respectfully Submitted,

/RA/

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

Dated at Rockville, Maryland
this 5th day of August, 2005

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF PARTIAL OBJECTION TO JULY 22, 2005 MEMORANDUM AND ORDER "GRANTING THE NRC STAFF'S MOTION. . . ." 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 5th day of August, 2005.

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