

RAS 10328

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 08/17/05

ATOMIC SAFETY AND LICENSING BOARD

SERVED 08/17/05

Before Administrative Judges:

Lawrence G. McDade, Chairman
E. Roy Hawkens
Dr. Peter S. Lam

In the Matter of

ANDREW SIEMASZKO

Docket No. IA-05-021-EA

ASLBP No. 05-839-02-EA

August 17, 2005

ORDER

(Request for Further Briefing Regarding the Scope of this Proceeding)

On April 21, 2005, the Nuclear Regulatory Commission (NRC) Staff issued an Order to Andrew Siemaszko which, inter alia, prohibited his involvement in NRC-Licensed activities for a period of five (5) years from the effective date of the Order.¹ In the letter forwarding that Order to Mr. Siemaszko, the Commission stated that the inclosed Order prohibiting his involvement in Nuclear Regulatory Commission Licensed Activities was being issued: “because you engaged in deliberate misconduct as defined in 10 CFR 50.5, causing the FirstEnergy Nuclear Operating Company (FENOC) to be in violation of 10 CFR 50.9 at the Davis-Besse Nuclear Power Station.” Likewise, the Order itself states that: “the NRC determined that Mr. Andrew Siemaszko engaged in deliberate misconduct that caused the Licensee to be in violation of the NRC requirement to maintain and provide to the NRC materially complete and accurate information, 10 CFR 50.9.”² That Order also stated that: “Mr. Andrew Siemaszko, while employed by the Licensee, engaged

¹ See Order Prohibiting Involvement in NRC-Licensed Activities: Andrew Siemaszko, 70 Fed. Reg. 22,719 (May 2, 2005).

² Id. at 22,720.

in deliberate misconduct that has caused the Licensee to be in violation of 10 CFR 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 CFR 50.5.”³

Thereafter, in order to insure that all parties to this litigation would be moving forward with the same understanding of the scope of the proceeding and the burden of proof, in a preliminary Order this Board articulated its understanding of the scope of this proceeding.⁴ Specifically, we stated that, as we interpreted the Commission’s Order which initiated this proceeding,⁵ these proceedings will be limited to a determination of whether, in or about April, 2000, Mr. Siemaszko engaged in deliberate misconduct (10 C.F.R. § 50.5) that caused FENOC to be in violation of the NRC Requirements to maintain materially complete and accurate information (10 C.F.R. § 50.9).⁶ More specifically, we stated that, in order to uphold the Commission Order barring Mr. Siemaszko from NRC-Licensed activities, we must determine whether, 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 actions 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. We entered the Order in that form because, as we read the Commission’s Order, we believed that it alleged a violation of 10 C.F.R. § 50.5(a)(1) (“deliberate misconduct that causes . . . a licensee . . . to be in violation of any . . . regulation”). And, pursuant

³ Id. at 22721.

⁴ See Licensing Board Memorandum and Order (Granting the NRC Staff’s Motion for a 120-Day Delay of Proceedings and Setting Case Schedule) at 2 (July 22, 2005).

⁵ See 70 Fed. Reg. at 22,719.

⁶ By materially complete we mean that the failure of the records to be complete and accurate had a natural tendency or capacity to influence agency (NRC) action. Virginia Electric & Power Co., (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 491 (1976), aff’d, 571 F.2d 1289 (4th Cir. 1978).

to 10 C.F.R. § 50.5(c), willful conduct is a necessary element of proof when a violation of 10 C.F.R. § 50.5(a)(1) is alleged.

On August 5, 2005, the NRC Staff filed an objection to the Board's interpretation of the scope of this proceeding.⁷ The Staff argued that it should not be required to demonstrate that Mr. Siemaszko knew that the provision of inaccurate and incomplete information would cause FENOC to be in violation of the NRC Regulations.⁸ In support of this argument the NRC Staff offered an analysis of 10 C.F.R. § 50.5(a) which supports the proposition that in order to establish a violation they need not prove that Mr. Siemaszko acted willfully, that is, that he knew that his actions would cause FENOC to be in violation of NRC Regulations.

As pointed out by the Staff, 10 C.F.R. § 50.5(a) allows for pleading in the disjunctive and 10 C.F.R. § 50.5(a)(2) does not require proof that the person charged with a violation acted willfully. However, in the Board's view, that does not conclude the analysis. As we saw it when we issued our Order on July 22, 2005, the question is not whether Mr. Siemaszko could have been charged with a violation of 10 C.F.R. § 50.5(a)(2) but rather, given the express language of the Commission's Order, was Mr. Siemaszko charged only with violating 10 C.F.R. § 50.5(a)(1) which, as defined at 10 C.F.R. § 50.5(c), requires proof of willfulness. Specifically, given the express language of the Commission's Order, does this Board have jurisdiction to adjudicate a violation of 10 C.F.R. § 50.5(a)(2)?

We recognize that the ASLBP does not have plenary subject matter jurisdiction in Commission proceedings. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2) ALAB-739, 18 NRC 335, 339 (1983). The Board is a delegate of the Commission and, as such, may exercise authority over only such matters as the Commission directs to it. Carolina Power and

⁷ NRC Staff Partial Objection to July 22, 2005 Memorandum and Order "Granting the NRC Staff's Motion . . ." (Aug. 5, 2005).

⁸ Id. at 3.

Light Co. (Shearon Harris Nuclear Power Plant Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18, 25 (1980). Accordingly, the Board is only authorized to conduct such hearings as the Commission may direct. 42 U.S.C. § 2241. Further, hearing notices are the means by which the Commission identifies the subject matter of the hearings and delegates to the Board authority to conduct proceedings. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-76-1, 3 NRC 73, 74 (1976). Therefore, the ASLBP does not have the power to explore matters beyond those specified by the Notice of Hearing for the particular proceeding. See Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 200-05 (2004). See also Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 (1979).

The Board's question then is the following. Given the wording of the Commission's Order prohibiting Mr. Siemaszko's involvement in NRC related activities, must the NRC Staff establish that Mr. Siemaszko acted willfully (10 C.F.R. § 50.5(c)) in order for the Board to uphold the Order? Or, stated differently, did the Commission's Order allege a violation of 10 C.F.R. § 50.5(a)(1), or 10 C.F.R. § 50.5(a)(2), or both? We request that your analysis include a discussion of the Commission's Order, the scope of ASLBP jurisdiction, and the requirements of pleading in administrative proceedings. We also request that the parties address, given the specific language of the Commission's Order stating the basis for the agency action, whether this case can be distinguished from Tennessee Valley Authority, 60 NRC at 200-05, and, if so, how.⁹

⁹ If it is the NRC Staff's position that the Commission's Order included an alleged violation of 10 C.F.R. § 50.5(a)(1), as well as a violation of 10 C.F.R. § 50.5(a)(2), the Staff should also address whether it will withdraw the Section 50.5(a)(1) allegation, in light of its apparent intent to prove only a violation of 10 C.F.R. § 50.5(a)(2). See NRC Staff Partial Objection to July 22, 2005 Memorandum and Order "Granting the NRC Staff's Motion" at 5.

We ask that the NRC Staff file, and serve its response to this Order via e-mail, no later than 5:00 PM E.D.T. on August 24, 2005, and that any reply be filed, and served via e-mail, no later than 5:00 PM E.D.T. on August 31, 2005.

IT IS SO ORDERED.¹⁰

FOR THE ATOMIC SAFETY AND LICENSING BOARD

/RA/

LAWRENCE G. McDADE, Chairman
Administrative Judge

Rockville, Maryland
August 17, 2005

¹⁰ Copies of this order were sent this date by Internet e-mail transmission to: (1) counsel for Mr. Siemaszko, (2) the Union of Concerned Scientists; (3) Ohio Citizen Action; and (4) counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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ANDREW SIEMASZKO) Docket No. IA-05-021
)
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (REQUEST FOR FURTHER BRIEFING REGARDING THE SCOPE OF THIS PROCEEDING) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of August 2005