

August 24, 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 RESPONSE TO BOARD ORDER REQUESTING
FURTHER BRIEFING REGARDING THE SCOPE OF THIS PROCEEDING

INTRODUCTION

Pursuant to the August 17, 2005 Order (“Request for Further Briefing Regarding the Scope of this Proceeding”), the NRC Staff (Staff) hereby responds to the Board questions regarding the scope of the Proceeding.

BACKGROUND

On April 21, 2005, the Staff issued an “Order Prohibiting Involvement in NRC-Licensed Activities” (Enforcement Order) 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.

On April 22, 2005, Mr. Siemaszko filed his “Request for a Hearing in Response to Order Prohibiting Involvement in NRC-Licensed Activities”. 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” (July 22nd Order). In the July 22nd Order the Board stated that the Staff must prove that “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.” On August 5, 2005, the Staff filed “NRC Staff Partial Objection to July 22, 2005 Memorandum and Order ‘Granting the NRC Staff’s Motion..’.” The Staff noted that 10 C.F.R. § 50.5 does not require that the Staff prove that Mr. Siemaszko knew he was causing FENOC to violate 10 C.F.R. § 50.9 in order for the Staff to prevail. On August 15, 2005, Mr. Siemaszko filed “Response of Andrew Siemaszko to NRC Staff Partial Objection to July 22, 2005 Memorandum and Order Granting the NRC Staff’s Motion.” On August 17, 2005, the Board issued an Order “Requesting Further Briefing Regarding the Scope of this Proceeding” (August 17th Order). The Staff hereby responds to the Board questions in the August 17th Order.

DISCUSSION

The August 17th Order asked the Staff to answer the question “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?” The August 17th Order asked that the analysis include a discussion of the Commission’s Order, the scope of the ASLBP jurisdiction, and the requirements of pleading in administrative proceedings. The August 17th Order also asked whether the instant case could be distinguished from *Tennessee Valley Authority*, 60 NRC at 205, and if so, how. See August 17th Order at 4. The Staff will address each of these questions below.

1. The Enforcement Order

The Enforcement Order states that Mr. Siemaszko deliberately provided to the Licensee information that he knew to be incomplete or inaccurate. See 70 Fed. Reg. 22721. The Enforcement Order describes his misconduct, namely, the recording of information on licensee documents indicating that the reactor vessel head was cleaned of boric acid deposits, when he knew that the head had not, in fact, been cleaned. See 70 Fed. Reg. 22720. The Enforcement Order then reiterates that “Mr. Andrew Siemaszko, while employed by the Licensee, 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.” See 70 Fed. Reg. 22721.

It is undisputed that the Enforcement Order alleges a violation of 10 C.F.R. § 50.5, deliberate misconduct. The Board’s reading of the Enforcement Order is that it alleges a violation of 10 C.F.R. § 50.5(a)(1), which is deliberate misconduct which causes a licensee to be in violation of any rule, regulation, or requirement. The Staff reads the Enforcement Order to allege a violation of 10 C.F.R. § 50.5(a)(2), which is deliberately submit information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC. The Enforcement Order does not specifically state whether it alleges a violation of 10 C.F.R. § 50.5(a)(1) or 10 C.F.R. § 50.5(a)(2). However, it clearly states that Mr. Siemaszko deliberately submitted incomplete or inaccurate information, which is the violation found in 10 C.F.R. § 50.5(a)(2). Specifically, the Enforcement Order states 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.” 70 Fed. Reg. 22721. The statements in the Enforcement Order regarding the 10 C.F.R. § 50.9 violation on the part of the Licensee caused by Mr. Siemaszko demonstrate the materiality of the information. The Staff, in its Enforcement Order demonstrated the significance and materiality of the incomplete and inaccurate information by noting, among other things, that it caused the Licensee to be in violation. The plain language of the Enforcement Order alleges a violation of 10 C.F.R. § 50.5(a)(2).¹

¹ The August 17th Order appears to suggest that the Board read the Staff’s August 5th filing to suggest the Staff need not prove willfulness. The Staff disagrees. 10 C.F.R. § 50.5 is the Deliberate Misconduct Rule. The Staff must prove a deliberate act whether it alleges a violation of 10 C.F.R. § 50.5(a)(1) or 10 C.F.R. § 50.5(a)(2).

2. The scope of ASLBP jurisdiction

The August 17th Order requested the parties to address the scope of ASLBP jurisdiction. See August 17th Order at 4. The Commission's decision in *TVA* reflects that the scope of an enforcement adjudication is the enforcement order. See 60 NRC 160, 203, *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 (2004). Agency fact finders are delegates of the Commission who may exercise jurisdiction only over those matters the Commission specifically commits to them. See *Id.* at 204. In the instant proceeding, the Board is limited to adjudicating those issues set forth in the Enforcement Order. Thus, the issues in the instant case are those set forth in the Enforcement Order, namely whether Mr. Siemaszko deliberately submitted incomplete or inaccurate information.

3. The requirements for pleading in administrative proceedings

The August 17th Order requested that the parties address the requirements for pleadings in administrative proceedings. See August 17th Order at 4. Administrative proceedings require notice pleadings. A party responding to an agency enforcement complaint has been afforded due process so long as the charges against it are understandable and it is afforded a full and fair opportunity to meet those charges. See *Citizens State Bank v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984). Pleadings in administrative proceedings are not judged by standards applied to an indictment at common law, but are treated more like civil pleadings where the concern is with notice. See *Aloha Airlines, Inc. V. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979). See also *Indiana Regional Cancer Center*, 40 NRC 22, 30 (1994). LBP-94-21.

In the instant case, it is beyond dispute that Mr. Siemaszko is clearly on notice of the misconduct and the underlying incidents which the Enforcement Order relies on as the justification for the violation with which is charged in the Enforcement Order. The Enforcement Order states that he deliberately provided incomplete and inaccurate information on two documents, Work Order No. 00-001846-000 and CR 2000-1037. 70 Fed. Reg. 22720. The Enforcement Order further states that Mr. Siemaszko violated 10 C.F.R. § 50.5. 70 Fed. Reg. 22721. The Enforcement Order clearly states that the incomplete and inaccurate information Mr. Siemaszko supplied was material to the NRC. *See Id.* Mr. Siemaszko asserts that the Staff should not be “permitted to prove a lesser charge” since the Staff issued a press release.² *See Response of Andrew Siemaszko to NRC Staff Partial Objection to July 22, 2005 Memorandum and Order Granting the NRC Staff’s Motion*, dated August 15, 2005 at 6. It is unclear to the Staff in what respect a violation of 10 C.F.R. § 50.5(a)(2) for providing incomplete and inaccurate information is a “lesser charge.” The Staff has consistently viewed the Enforcement Order as alleging a violation of 10 C.F.R. § 50.5(a)(2) and chose a penalty commensurate with the seriousness with which the Staff viewed Mr. Siemaszko’s misconduct. To the extent that Mr. Siemaszko believes a lesser penalty is warranted for his misconduct, he is of course, free to argue for mitigation of the penalty at hearing, but the underlying violation of 10 C.F.R. § 50.5(a)(2) remains as the charge which the Staff must support in this proceeding.

² The Staff press release issued April 21, 2005 was titled “\$5,450,000 fine for Davis-Besse Reactor Vessel Head Violations” and reflected that the Staff had proposed a 5.45 million dollar fine against FENOC. The release included a sentence which states “the agency found that he [Mr. Siemaszko] had deliberately provided incomplete and inaccurate information in plant documents.” See <http://www.nrc.gov/reading-rm/doc-collections/news/2005/05-070.html>.

4. The Commission decision in TVA

The Board requested 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.” See August 17th Order at 4. The Staff views the reference to *TVA* as inapposite. *TVA* was a civil penalty case involving a licensee violation of 10 C.F.R. § 50.7 (employee protection). See *TVA*, 60 NRC 160. During discovery in *TVA* the Staff learned of three new protected activities not identified in the Notice of Violation. See *Id.* at 205. The *TVA* board relied in part on these new activities in its decision. The Commission partially reversed the Board noting that it was beyond dispute that the Notice of Violation contains no reference to the three new basis in question. See *Id.* at 205. In the instant case, the Staff has not attempted to supplement the Enforcement Order with additional facts. Unlike the *TVA* case, Mr. Siemaszko has full notice of the incidents on which the Staff intends to rely to support the Enforcement Order. *TVA* would be analogous if during the discovery process the Staff discovered that Mr. Siemaszko had provided additional incomplete or inaccurate information on other documents, and attempted to use these additional basis to support the Enforcement Order.³ The Enforcement Order alleges that Mr. Siemaszko deliberately provided incomplete or inaccurate information that was material to the NRC in two documents, CR 2000-1037 and Work Order No. 00-001856-000. See 70 Fed. Reg. 22721. The Staff is not suggesting altering the Enforcement Order in any way to reflect new facts or legal theories. Therefore, the *TVA* concern is inapplicable to the instant case.

³ Naturally if, during discovery or through other means, the Staff does uncover evidence of additional misconduct on the part of Mr. Siemaszko and believes that additional action is necessary to fulfill its regulatory responsibilities, the Staff will initiate a new enforcement action in accordance with the dictates of *TVA*. See *TVA* at 205.

CONCLUSION

Thus, in order to sustain the Enforcement Order the Staff must prove the Mr. Siemaszko deliberately provided incomplete or inaccurate information on two documents, CR-2000-1037 and Work Order No. 00-001846-000. Any further requirement of proof on the Staff would be incorrect as a matter of law.

Respectfully Submitted,

/RA/

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

Dated at Rockville, Maryland
this 24th day of August, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BOARD ORDER REQUESTING FURTHER BRIEFING REGARDING THE SCOPE OF THIS PROCEEDING" 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 24th day of August, 2005.

Administrative Judge * **
Lawrence McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: lqm1@nrc.gov

Administrative Judge * **
E. Roy Hawken
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: erh@nrc.gov

Administrative Judge * **
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: psl@nrc.gov

Billie Pirner Garde * **
Sandy Shepherd
Clifford & Garde
1707 L Street, NW, Suite 500
Washington, D.C. 20036
E-mail: bpgarde@aol.com
sshepherd@cliffordgarde.com

Atomic Safety and Licensing Board Panel *
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of Commission Appellate Adjudication *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-mail: hearingdocket@nrc.gov

David Lochbaum * **
Nuclear Safety Engineer
Union of Concerned Scientists
1707 H Street NW, Suite 600
Washington, D.C. 20006
E-mail: dlochbaum@ucsusa.org

Jonathan Rund * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: jmr3@nrc.gov

Sandy Buchanan * **
Executive Director
Ohio Citizen Action
614 W. Superior Avenue, Suite 1200
Cleveland, OH 44113
E-mail: sbuchanan@ohiocitizen.org

/RA/

Sara E. Brock
Counsel for NRC Staff