

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

DOCKETED
USNRC

August 31, 2005 (4:19pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

ANDREW SIEMASZKO

Docket No. IA-05-021

ASLBP No. 05-839-02-EA

August 31, 2005

**ANDREW SIEMASZKO'S REPLY TO BOARD ORDER, AND STAFF RESPONSE,
REGARDING THE SCOPE OF THIS PROCEEDING**

Andrew Siemaszko ("Petitioner") herein responds to the August 17, 2005 Order of the Atomic Safety and Licensing Board ("Board") regarding the scope of the proceeding and jurisdictional issues arising from the failure of the Nuclear Regulatory Commission ("NRC") Staff to specify the charge against him. As set forth in this Reply, Mr. Siemaszko believes that there is a fatal jurisdictional flaw in the Staff's April 21, 2005 Order prohibiting him from engaging in NRC-Licensed activities ("Barring Order") that sets forth the action against him¹; however, if the Board maintains jurisdiction has been established, he agrees that the scope of the proceeding has been correctly identified by the Board in its July 22, 2005 *Licensing Memorandum and Order (Granting the NRC Staff's Motion for a 120-Day Delay of Proceedings*

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

and Setting Case Schedule).

When the Staff disagreed with the scope of the proceeding the Board undertook further consideration of the issue. In its August 17, 2005 Order, the Board directed the parties to answer the following question:

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?

Order, at p. 4.

The same Order, at page 3, also seeks the parties' views on the question of whether the Board even has jurisdiction to adjudicate a violation of 10 C.F.R. § 50.5(a)(2), given the express language of the Commission's Order in the most recent decision considering the limitations on jurisdiction of the Board in cases such as this. See, *In the matter of: 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, 204 (2004)

BACKGROUND

It is undisputed that the Barring Order that is the foundation of this proceeding does not specify whether Mr. Siemaszko is being charged with a violation of § 50.5(a)(1) or (a)(2) or both. The Staff admits that its Enforcement Order failed to specifically state whether it was alleging a violation of (a)(1) or (a)(2), but states that its failure to do so is irrelevant because it must prove willfulness – a deliberate act – whether it alleges a violation of § 50.5(a)(1) or (a)(2). (Staff Response at p. 3 and note 1.) The Staff states that it 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." (*Id.*, at 5, emphasis added..) The Staff now specifies that the Notice of Violation was intended to charge that Mr. Siemaszko's underlying conduct violated 10 C.F.R. § 50.5(a)(2), and that is the charge it believes it must support in the proceeding. (*Id.*) In essence the Staff claims that the failure to specify the specific charge, or the degree of scienter required, is a flaw without any significance whatsoever in determining jurisdiction or the scope of the proceeding.

Mr. Siemaszko disagrees, and as discussed below, believes that the failure to specify the charge is either a fatal flaw in the Order, depriving the Board of jurisdiction entirely², or, cured by the scope of the proceeding as defined by the Board.

THE ENFORCEMENT ORDER FAILS TO CONFER BOARD JURISDICTION

The lesson of the Commission's TVA Order (CLI-04-24) is that this Board has no plenary jurisdiction. It only has jurisdiction over matters committed to it by the Commission. "The scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing ..." which jurisdiction can neither be enlarged nor contracted. *Id.*, at 204. However, the Commission's Order which gave rise to this case does not allege that Siemaszko violated either 10 C.F.R. § 50.5(a)(1), or 10 C.F.R. § 50.5(a)(2), or both, but instead charged him with a new violation, created by the Staff out of whole cloth and unreferenced to any regulatory authority.

Although the Staff's interpretation of its own charge claims that it has to show "willfulness" under (a)(2), what the Staff gives with one hand, it attempts to take away with the

² Mr. Siemaszko has not yet determined whether to file a Motion To Dismiss the claims against him on jurisdictional or constitutional grounds, and preserves his right to do so. However, his reputational interests are best served by defeating the case on the merits and he continues towards that end.

other. It claims that the reference in the charge to causing the licensee to be in violation of 10 C.F.R. § 50.9 is only included to show materiality. In fact, the Staff's Response is an unpersuasive attempt to parse itself out of the jurisdictional dilemma it created when drafting the Barring Order. For whatever reason, the initiating Barring Order conflated the elements of (a)(1) and (a)(2). As a result, the correct answer to the Board's question, whether the "Commission's Order allege[d] a violation of 10 C.F.R. § 50.5(a)(1), or 10 C.F.R. § 50.5(a)(2), or both"— is "no," or "none of the above."

Simply stated, the Staff, in attempting to clarify in its response what the charge against Mr. Siemaszko was intended to be has, in fact, demonstrated that the original Barring Order failed to specify a viable basis for Board jurisdiction. Thus, applying the disciplined approach to the Board's limited jurisdictional authority articulated in the Commission's decision in CLI-04-24, it must be read to limit this matter to the jurisdictional boundaries of the Barring Order.³

While "notice" pleading may be sufficient as to the factual allegations of wrongful conduct that Mr. Siemaszko is being accused of, the failure to present the specific charge is a fatal jurisdictional flaw. The Commission's TVA Order unmistakably endorsed the long-standing position of the Commission that the Board's authority is limited to the jurisdictional boundaries of the Barring Order. *Id.*, at 205. .

Furthermore, the time for amending the Enforcement Order to include any charges

³ See, also, In The Matter of Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998), in which the Commission points out that contentions in proceedings governed by Subpart G are limited to the nature of the application and pertinent Commission regulations. As translated to an Enforcement Proceeding such as this, it clearly means that the Board is limited to the Enforcement Order, setting out the charge, and the pertinent regulations. *Id.*, at 22.

connected to the Davis-Besse refueling outage conducted in the spring of 2000, from which these charges stem, has now expired.

ASSUMING THERE IS JURISDICTION, THE BOARD'S CONSTRUCTION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE ENFORCEMENT ORDER AND FAIRLY DESCRIBES THE SCOPE OF THE PROCEEDING

Accepting the Staff's admission that both sections require proof of willfulness, the difference between the violations described in (a)(1) and (a)(2) is in the conduct they regulate. The first deals with "deliberate misconduct that causes or could cause a violation of any rule."⁴ The second deals with the act of "deliberately submit[ting]... information that the submitter knows is incomplete or inaccurate in some respect material to the NRC." 10 C.F.R. § 50.5. (Emphasis added.) The Staff's proposed Barring Order joins the two violations in an unholy union, by alleging that Siemaszko "engaged in deliberate misconduct that has caused the Licensee to be in violation of [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 [50.5]." Order Prohibiting Involvement in NRC-Licensed Activities: Andrew Siemaszko, 70 Fed. Reg. 22720, 22721 (May 2, 2005).

Since the Staff chose to have it both ways, justice requires at a minimum that the Staff be

⁴ Deliberate misconduct is specifically defined by 10 C.F.R § 50.5 as:

- [a]n intentional act or omission that the person knows: (1) Would cause 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) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor.

required to prove that Siemaszko both willfully and deliberately submitted inaccurate information, knowing that it would cause the licensee to be in violation of the regulations, and that he had actual knowledge that the information he submitted was inaccurate/incomplete in a way that was material to the NRC.

Thus, the Board's formulation – requiring the Staff to prove that Siemaszko submitted inaccurate information that he knew would cause FENOC to be in violation – is a fair recitation of the burden established by the charge as the Staff drafted it, *assuming that the Board has jurisdiction*. However, as stated above, the Barring Order fails to create jurisdiction, and actually defeats it.

CONCLUSION

For the reasons discussed in this Reply, Mr. Siemaszko urges the Board to consider the jurisdictional dilemma now identified, and, if appropriate, order that the Commission's Order be dismissed. However, if the Board concludes that it does have jurisdiction notwithstanding the Commission's failure to charge a violation of either 10 C.F.R. § 50.5(a)(1), or 10 C.F.R. § 50.5(a)(2), or both, then Mr. Siemaszko agrees that the scope of the hearing identified by the Board is an appropriate response to the charge actually drafted and bought by the Commission.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ANDREW SIEMASZKO'S RESPONSE TO BOARD ORDER REQUESTING FURTHER BRIEFING REGARDING THE SCOPE OF THIS PROCEEDING were served this 31st day of August, 2005, by the means indicated (electronic mail *; regular U.S. Mail **; facsimile ***), on the following:

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