

DISCUSSION

The Staff maintains, as discussed below, that notwithstanding the provisions of the order and the Commission's regulations, Mr. Geisen's letter does not constitute the response required by the order, nor does it satisfy the requirements of 10 C.F.R. § 2.202, for requesting a hearing or challenging the immediate effectiveness of the order. The order issued to Mr. Geisen on January 4th directed him to the provisions of 10 C.F.R. § 2.202, which set forth the procedures through which an answer must be made to the order, a hearing may be requested, and the immediate effectiveness of the order may be challenged. Mr. Geisen's letter to the Secretary failed to satisfy the foregoing.

Because of the primacy of the issue, the Staff will first address Mr. Geisen's challenge to the immediate effectiveness of the order. In this regard, Mr. Geisen's letter failed to meet the requirements for challenging immediate effectiveness, found in 10 C.F.R. § 2.202(c)(2)(i), which was cited in the order. Specifically, a person challenging immediate effectiveness may:

move the presiding officer to set aside the immediate effectiveness of the order on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. The motion must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on.

Apart from its obvious failure to be in the required form of a motion, Mr. Geisen's letter more importantly, is devoid of any statement of "reasons why the order is not based on adequate evidence" and was not accompanied by affidavits or other evidence relied on, as called for by 10 C.F.R. § 2.202(c)(2)(i). The importance of the foregoing can be seen in the way in which the process to challenge immediate effectiveness is structured. While the Staff has the ultimate burden of persuasion that its decision to make the order immediately effective is supported by adequate evidence, Mr. Geisen has the initial burden of going forward to demonstrate in what respects the order, including its immediate effectiveness determination, is

not based upon adequate evidence, but instead upon mere suspicion, unfounded allegations, or clear error. *United Evaluation Services, Inc.*, (Beachwood, New Jersey) LBP-02-13, 55 NRC 351, 354 (2002), citing *Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC 211, 216 (1996). In establishing the procedural framework for responding to individual orders and the immediate effectiveness aspect of such orders, the Commission was clear in its intent that a mere sentence stating the desire to challenge the immediate effectiveness is not sufficient. The Statements of Consideration that accompanied the establishment of the process for disputing the immediate effectiveness of an individual order stated that:

A motion to set aside immediate effectiveness must be based on one or both of the following grounds: The willful misconduct charged is unfounded or the public health, safety or interest does not require the order to be made immediately effective. No other ground or challenge is permitted inasmuch as no other ground is relevant. **The motion must set out specifically its supporting reasons and must be accompanied by any necessary affidavits providing the factual basis for the request.** [emphasis added].

Proposed Rule: "Revisions to Procedures to Issue Orders: Challenges to Orders that are Made Immediately Effective," 55 Fed. Reg. 27645 (1990).

In finalizing the proposed rule, the Commission reiterated its expectation that parties are to present the presiding officer with the evidence supporting their position. After stating that the motion shall be accompanied by supporting affidavits to which the staff would respond with its supporting evidence, the Commission noted that the presiding officer would then decide the motion "on the basis of the information provided by the parties." Final Rule, "Revisions to Procedures to Issue Orders: Challenges to Orders That Are Immediately Effective," 57 Fed. Reg. 20194, 20196 (1992).

Here, the letter from Mr. Geisen's counsel fails to provide the factual argument and supporting affidavits that would allow the staff to reply meaningfully to his request nor does it

serve to establish the record contemplated by the Commission that would form the basis for the presiding officer's decision. Without such specification, the Staff is foreclosed from submitting a timely and substantively meaningful reply and the presiding officer's obligation to render an expeditious ruling is thwarted. At this point, Mr. Geisen has provided nothing to which the Staff can respond. On its face, the requirement for an "affidavit or other evidence" clearly contemplates that the response to the order is to contain sufficient information to determine what specific facts are in issue in a proceeding. Seen in this context, it is clear that Mr. Geisen's failure to properly move that the immediate effectiveness be set aside, to state his reasons with particularity, and to support his motion by affidavit or other evidence, demonstrate that his request is facially insufficient and should be denied.

In addition, 10 C.F.R. § 2.202(b) requires Mr. Geisen, as a person to whom the Commission has issued an order, to respond to the order by filing a written answer under oath or affirmation. Notwithstanding the preceding requirements, Mr. Geisen's letter was not filed under oath or affirmation, providing a second basis for finding that the letter is not in conformance with section 2.202. Further, under the terms of both the regulations and the order, Mr. Geisen's answer must "specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which [he] relies, and, if the order is not consented to, the reasons as to why the order should not have been issued." Mr. Geisen's letter simply includes a general statement whereby he "denies the allegations contained in the above referenced Order." This response is patently insufficient to serve as an answer.

St. Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D. (d.b.a. St. Joseph Radiology Associates, Inc. and Fisher Radiological Clinic) LBP-93-14, 38 NRC 18, 19 (1993) (After ruling on immediate effectiveness issue, Board dismisses answer where subject's brief letter challenging immediate effectiveness fails, on its face, to conform to the requirements for an answer in section 2.202(b)); *see also Geo-Tech Associates, Inc.*, (Geo-Tech Laboratories,

43 South Avenue, Fanwood, New Jersey 07023) LBP-92-33, 36 NRC 312, 315 (1992) (Board requires subject of order who filed a late and cursory response to specifically admit or deny each allegation).

Just as a hearing on immediate effectiveness cannot take place without a proper enunciation of the disputed issues, the specific issues that are to be contested in a hearing on the merits of the order must be bounded.¹ The answer exists to certify that there is, in fact, a dispute, and the specific matters that are in dispute. This is why the answer must be filed under oath or affirmation. Answers are a tool used by tribunals to limit the scope of litigation by clarifying the extent of the dispute. Hence, answers must specifically admit or deny the allegations. The letter filed by Mr. Geisen does not constitute a response as contemplated by the regulations and the order.²

Finally, Mr. Geisen's letter includes a cursory statement challenging the order on due process grounds. Once again, this statement provides little in terms of either facts or legal theory to which the staff can meaningfully respond. This claim is not presented with sufficient specificity for the staff to understand the theory on which the constitutional claim is made.

¹ See *Yarnell v. Roberts*, 66 F.R.D. 417, 423 (E.D.Pa. 1975) (Defendant's pleading should apprise the plaintiff of the allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable plaintiff to prevail). See also 5 Wright and Miller, Federal Practice and Procedure § 1261.

² The time provided under the order during which Mr. Geisen may file a response has not yet lapsed. Should a valid response, under oath or affirmation, which requests a hearing, be filed during the time allowed under the order, the staff will respond to the request for hearing in accordance with 10 C.F.R. § 2.309(h).

CONCLUSION

For the foregoing reasons, Mr. Geisen's January 12 letter constitutes a patently deficient challenge to immediate effectiveness as well as a patently deficient answer under 10 C.F.R. § 2.202. Accordingly, his requests should be denied.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of January, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DAVID GEISEN) IA-05-052
)
)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of January, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
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DAVID GEISEN) IA-05-052
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO DAVID GEISEN'S LETTER TO THE SECRETARY" 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 17th day of January, 2006.

Office of the Secretary * **
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