

RAS 11283

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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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
March 2, 2006

MEMORANDUM AND ORDER

(Granting the NRC Staff's Motion To Hold This Proceeding in Abeyance)

On January 19, 2006, a federal Grand Jury in the Northern District of Ohio handed up an Indictment in which Andrew Siemaszko, and two other individuals, were charged with willfully causing material facts to be concealed in a matter within the jurisdiction of the U.S. Nuclear Regulatory Commission (NRC), an agency of the United States.

Based on that felony Indictment, on February 1, 2006, the NRC Staff asked that this administrative enforcement proceeding be held in abeyance until the conclusion of the pending criminal proceeding. Mr. Siemaszko opposed the NRC Staff's Motion and reiterated that he wishes to resolve the administrative enforcement action that was initiated against him by the NRC as expeditiously as possible. The majority of this Board has concluded that the NRC Staff's Motion has merit, and the Motion is therefore granted.¹

¹ Judge McDade does not share this conclusion. He does not believe that the NRC Staff has satisfied its burden of showing that, based on the facts of this case, there is a reasonable possibility that the criminal proceeding would be compromised if this administrative enforcement action were to move forward before the criminal charges are resolved. Accordingly, Judge McDade has filed a dissenting opinion that immediately follows this Memorandum and Order.

Subject to the conditions outlined below, this proceeding will be held in abeyance until the conclusion of the pending criminal proceeding, or until the NRC Staff advises the Board that this proceeding may move forward without having an inappropriate impact on the criminal proceeding. Mr. Siemaszko, however, may at any time ask this Board to reconsider its decision to hold these proceedings in abeyance on a showing of materially changed circumstances.

In granting this stay, we direct the NRC Staff to file a status report with this Board on or before April 3, 2006, and thereafter at periodic intervals, which shall not exceed 3 months, until this matter is resolved.

Analysis

As we noted in our earlier opinions in this case, in Oncology Services Corp., CLI-93-17, 38 NRC 44, 50 (1993), the Commission instructed that “whether a delay [in an enforcement proceeding] is reasonable depends on the facts of a particular case and requires a balancing of the competing interests.”² The factors to be considered when conducting the balancing test are: (1) the length of delay; (2) the reason for delay; (3) the timely assertion of a right to a hearing; (4) prejudice to the party opposing the stay; and (5) the risk of erroneous deprivation. Applying that balancing test here, we conclude that the scales tip in favor of granting the NRC Staff’s request for a stay of this enforcement proceeding.

The first factor – the length of delay – weighs in favor of Mr. Siemaszko. The delay requested by the NRC Staff is open ended and depends on factors, such as the state of the trial docket in the Northern District of Ohio, that are totally outside the control of the NRC.

The second factor – the reason for delay – weighs in favor of the NRC Staff. Given the limited discovery that is available to Mr. Siemaszko in the criminal proceeding, in contrast to the expansive discovery available to him in our administrative proceeding, particularly the ability to

² Id. at 50-51.

depose potential witnesses and submit interrogatories to the NRC Staff, we conclude that the NRC Staff has demonstrated the need for a further delay of the administrative proceeding in order to preserve the integrity of the criminal process.³

The third factor – the timely assertion of the right to a hearing – weighs in Mr. Siemaszko's favor. He requested a hearing promptly after the Staff issued the Enforcement Order, and has continually expressed his desire to move this proceeding forward with all possible speed.

The fourth factor in this case – the prejudice to Mr. Siemaszko – includes two components: (1) the prejudice to Mr. Siemaszko's ability to litigate the charges in the Enforcement Order, and (2) the prejudice to his interest in obtaining employment in the nuclear industry. As to the first component, we perceive no cognizable prejudice to Mr. Siemaszko's ability to litigate the Enforcement Order if we grant the Staff's request for a finite delay. If anything, Mr. Siemaszko would be better prepared to defend this administrative action after the completion of the criminal trial. Nor do we view the second component as weighing in Mr. Siemaszko's favor now that the Grand Jury has handed up an Indictment charging him with committing work-related crimes that seriously threatened the public safety.

Prior to the return of the Indictment, we viewed the Enforcement Order as effectively precluding Mr. Siemaszko from obtaining employment in the nuclear industry. Now, however, the adverse impact of the Indictment on his ability to obtain employment in the nuclear industry has virtually eclipsed the adverse impact of the enforcement order on his ability to obtain such employment. Given the existence of the Indictment, as well as the other determinants that adversely affect Mr. Siemaszko's ability to obtain employment in the nuclear

³ See generally NRC Staff Motion to Hold the Proceeding in Abeyance (Feb. 1, 2006) [hereinafter Staff Motion], Exh. B, Affidavit of Thomas Ballantine, Trial Attorney, U.S. Department of Justice [hereinafter Ballantine Affidavit].

industry,⁴ we find that the fourth factor does not weigh in his favor.

Finally, the fifth factor – the risk that Mr. Siemaszko would suffer an erroneous deprivation – favors the Staff. The enforcement order barring Mr. Siemaszko from involvement in NRC-licensed activities for five years is not immediately effective; it does not become effective, if at all, until after its validity has been affirmed in a final adjudicative order or, alternatively, after Mr. Siemaszko withdraws his challenge. Accordingly, as a matter of law, Mr. Siemaszko has not yet been deprived of anything, much less deprived of anything erroneously.⁵

On balance, we conclude that – given the Government interest underlying the requested delay – the scale tips in favor of the NRC Staff. Accordingly, we grant the request that this proceeding be held in abeyance. We direct the Staff to submit a status report on or before April 3, 2006, that includes the status of the criminal prosecution, including the trial date and the anticipated duration of the trial. The NRC Staff shall continue to provide periodic status reports at intervals not to exceed 3 months until the criminal proceeding is completed or the Staff is otherwise prepared to go forward with this administrative proceeding. As previously noted, Mr. Siemaszko may at any time – based on a showing of changed circumstances – move to terminate the stay and go forward with the administrative proceeding.

⁴ Other significant determinants are also operating to reduce Mr. Siemaszko's employment prospects in the nuclear industry, including (1) his discharge by FirstEnergy Nuclear Operating Company (FENOC) prior to the Staff's issuance of the Enforcement Order, (2) the intense press coverage of Mr. Siemaszko's alleged conduct at FENOC that gave rise to the Enforcement Order, and (3) the press coverage of the pending criminal proceedings.

⁵ Although the Enforcement Order is not immediately effective and therefore does not – as a matter of law – prohibit Mr. Siemaszko from obtaining employment in the nuclear industry, we recognize its detrimental impact on his employment prospects. However, as discussed supra in text, the adverse affect of the order is significantly overshadowed by the Indictment and the other significant determinants that adversely affect his employment prospects.

In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be filed within ten (10) days after it is served.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁶

/RA/

Lawrence G. McDade*
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

* Judge McDade disagrees with the Board's decision to grant the stay requested by the NRC Staff and has filed a dissenting opinion which immediately follows this Memorandum and Order.

Rockville, Maryland
March 2, 2006

⁶ Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to: (1) counsel for Mr. Siemaszko, (2) counsel for the NRC Staff, (3) David Lochbaum, Union of Concerned Scientists, and (4) Sandy Buchanan, Ohio Citizen Action.

Dissenting Opinion of Judge McDade

As I read Oncology Services Corp., CLI-93-17, 38 NRC 44, 50-60 (1993), and the other relevant case law, the burden is on the NRC Staff to demonstrate a reasonable possibility that the pending criminal prosecution would be jeopardized if the requested delay is not granted. Accordingly, in order to justify the requested stay, I believe that the NRC Staff must explain how – on the facts of this case – some aspect of this proceeding would facilitate witness intimidation, perjury, or the manufacture of evidence.⁷

Given that Mr. Siemaszko no longer works for FENOC, does not supervise potential witnesses, does not have access to any corporate data bases or other records, has limited financial resources, and does not reside within 1,000 miles of the Davis-Besse facility, I do not see how providing the discovery to Mr. Siemaszko which is specified by 10 C.F.R. § 2.336(b) would prejudice the criminal proceeding. Nor, in my judgment, has the NRC Staff offered any meaningful explanation of how moving forward with our administrative proceeding would jeopardize the criminal proceeding.

Instead of presenting the Board with an analysis of the facts relevant to this case, as a basis for its motion the NRC Staff merely suggests that it would be unfair to allow Mr. Siemaszko to use Section 2.336(b) discovery to obtain information, and then to hide behind his self-incrimination privilege to “surprise the prosecution.”⁸ In this case, however, Mr. Siemaszko has been interviewed 37 times and has made 2 lengthy statements to NRC OI investigators. He has further stated that he will not claim privilege if deposed on matters relevant to the

⁷ See Founding Church of Scientology v. Kelley Inc., 77 F. R. D. 378, 380-81 (D.D.C. 1977). See also Nakash v. U.S. Dep’t of Justice, 708 F. Supp. 1354, 1365-66 (S.D.N.Y. 1988); United States v. Hugo Key and Son, Inc., 672 F. Supp. 656, 658 (D.R.I. 1987).

⁸ Staff Motion at 3.

enforcement proceeding,⁹ and the Board raised the possibility that Mr. Siemaszko's deposition could be scheduled first to insure that this representation is honored.¹⁰ Finally, the Department of Justice has represented that it is providing "open files" discovery in the criminal case.¹¹ It does not seem to me that there will be many surprises at Mr. Siemaszko's criminal trial regardless of what we do in our administrative proceeding. And the NRC Staff offers nothing concrete to contradict this conclusion, or to otherwise support its request for an indefinite stay.

The conclusory representations that we have been given (to the effect that moving forward with this enforcement proceeding might, in some unspecified way, jeopardize the criminal proceeding) should not be sufficient. To secure a stay, the NRC Staff should be required to demonstrate that – given all relevant factors – this is a case where it is appropriate for the NRC proceeding to be stayed. In my judgment, it has not done so.

While I agree with my colleagues that the return of the Indictment charging Mr. Siemaszko in 5 felony counts of lying to the NRC renders the harm to his reputation and employability caused by the Enforcement Order little more than background noise, I see little on the NRC Staff's side of the balance that would justify an indefinite delay. Because the Staff has failed to explain in any concrete way how our proceeding would jeopardize the criminal proceeding, I believe that this Board should move expeditiously toward the resolution of the matter before us. Accordingly, I would not hold this administrative action in abeyance based on the record now before us.

⁹ Response of Andrew Siemaszko to NRC Staff Motion to Hold Enforcement Action in Abeyance (Feb. 10, 2006) at 4.

¹⁰ Siemaszko Prehearing Conference Transcript, Feb. 16, 2006, at 194.

¹¹ Ballantine Affidavit at 2.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING THE NRC STAFF'S MOTION TO HOLD THIS PROCEEDING IN ABEYANCE) 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 2nd day of March 2006