RAS 11388

DOCKETED
USNRC

March 13, 2006 (8:45am)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	Docket No. IA-05-021
ANDREW SIEMASZKO	ASLBP No. 05-839-02-EA
	March 10, 2006

APPEAL OF THE ATOMIC SAFETY AND LICENSING BOARD'S MARCH 2, 2006 ORDER TO HOLD THE ENFORCEMENT PROCEEDING AGAINST ANDREW J. SIEMASZKO IN ABEYANCE

On April 21, 2005 Andrew Siemaszko, a former systems engineer at the Davis-Besse nuclear power plant, was accused by the Nuclear Regulatory Commission (NRC) Staff of deliberate misconduct by providing "incomplete and inaccurate information" concerning the description of the efforts and results associated with the removal of boric acid deposits from the reactor pressure vessel head. (Order Prohibiting Involvement In NRC-Licensed Activities, April 21, 2005) He immediately requested a hearing on the charges. His request for a hearing was granted and an Atomic Safety and Licensing Board (ASLB) established, but the Staff has repeatedly sought to delay the hearing. The Board has repeatedly granted the Staff's requests, and now has granted the Staff's penultimate request to delay the enforcement hearing until the conclusion of a criminal case against Mr. Siemaszko. Mr. Siemaszko appeals from this Order.

I. The Split Opinion of the ASLB

The decision whether or not to hold or delay the hearing for Mr. Siemaszko is a question of law. That question is, essentially, whether permitting Mr. Siemaszko a hearing would interfere with the criminal proceeding in some material way. There is a long history of case law

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SECY-02

that has analyzed this question in a variety of circumstances and identified the factors to be evaluated, and the type of situations where a hearing may be granted without any harm to the criminal case, or where – as here – no harm could reasonably be anticipated to occur as a result of a civil case proceeding prior to or concurrent with the criminal case. On this issue, the law favors Mr. Siemaszko's opportunity to proceed with the hearing, and the legal member of the Board agrees. The non-lawyers on the Board agree with the Staff and have, again, granted its request to delay the proceeding – in this case until the conclusion of the criminal matter. Not only is justice being denied by reason of this delay, but the Board's order awards a strategic advantage to the government – the dilatory party – and tilts the playing field against Mr. Siemaszko, who has sought to vindicate his interests by following the rules.

II. ARGUMENT AGAINST HOLDING HEARING IN ABEYANCE

The Board has granted the Staff's request for a stay, pending the outcome of the criminal matter. It was supported by an affidavit from the Department of Justice, but at no time has the Staff, either itself directly or through the Department of Justice, ever explained how proceeding with the civil case first would even potentially cause harm to the criminal case. Thus, the Staff did not meet its burden under *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 50-60 (1993). As the ASLB Chairman Laurence McDade said in his dissenting opinion:

> As I read *Oncology* (citation omitted), 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. (Footnote citations omitted)
>
> 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 resources, and does not reside within 1,000 miles of the Davis-Besse facility, I do not see

> how providing 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.

Id., at 6.

Judge McDade correctly cites the law and identifies the total lack of basis in the Staff's argument in support of the Stay. The pendency of a criminal trial does not automatically mean that civil proceedings should be stayed. "In some situations it may be appropriate to stay the civil proceeding.... In others it may be preferable for the civil suit to proceed – unstayed." *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir., 1962), citations omitted. In the *Campbell* case, Judge Wisdom, writing for the Court determined that, in an action against the government, initiated by the Plaintiff, in anticipation of a criminal indictment, that the trial court should have stayed the civil case. That is not this case, nor are these the circumstances for Mr. Siemaszko. Here, both the civil and the criminal proceedings have been initiated by the government against him. While the government is clearly within its rights to do so, Mr. Siemaszko has not initiated these proceedings as an end run on the criminal prosecution. He is trying to defend himself against government actions initiated against him – he neither chose the forum nor the action.

It is true, as Judge Wisdom wrote, that "[t[here is a clear cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Proceedings." *Id.* However, it was not the mere existence of a criminal proceeding that led to a decision to stay the civil proceeding, it was the fact that the discovery sought – and to which the Plaintiff in the civil case was entitled – would have been precisely the type of information that would have been withheld in a criminal case. "Courts are often asked to limit

civil proceedings arising out of the same or related transactions as those involved in a pending criminal proceeding.... The determination of how best to address these considerations is within the discretion of the court and should be made in light of the particular circumstances of each case." *Avi Nakash, et al. v. United States Department of Justice*, 708 F.Supp 1354, 1366 (S.D.N.Y, 1988), citations omitted. At this point, it is within the Commission's discretion and authority to evaluate the unique circumstances of this case and determine whether the enforcement proceeding should be stayed, or to craft a procedure that protects the interests of all the parties.

It is Mr. Siemaszko's position (agreed to by Judge McDade and not rebutted by the majority of the Board) that the Enforcement Proceeding should go forward, and that doing so can not cause harm to the criminal proceeding. Mr. Siemaszko's position is based on the following: 1) the foundations for the two proceedings are not the same, nor are they so closely intertwined that the enforcement proceeding would undermine the criminal case;[1] and 2) the Board can monitor discovery to ensure that any disputes are considered and resolved in a manner that is sensitive to the government's concerns about the criminal case, while still protecting Mr. Siemaszko's rights in the enforcement action.

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[1] Most of the cases cited by the Staff in support of its legal argument to the Board to stay the case so as not to harm the criminal case are in cases where the civil and criminal cases are based on the same set of facts, and most often in situations in which a civil case is initiated by a civil litigant in anticipation of a criminal case. See, for example, "The wrongful conduct about which the Plaintiffs complain in this case is the same as in the Criminal case." *Trustees of the Plumbers and Pipefitters National v. Transworld Mechanical, Inc.* 886 F. Supp 1134, 1138 (S.D.N.Y. 1995) and *Maloney and Rendina v. Thomas P. Gordon, et al.*, 328 F.Supp.2d 508, 512(DC Del). "However, because they are now under criminal indictment in a case concerning nearly identical issues with respect to the alleged Election Scheme, and because the facts between the two cases overlap substantially, I hold that the risks to the fair resolution of the criminal case outweigh the benefits of expedition in the civil case."

A. Applicable Legal Standards

Mr. Siemaszko agrees with the authority cited by the Staff as to the guiding agency regulations and authority, i.e., 10 C.F.R. §2.202(c)(2)(ii), permitting a presiding officer to stay a hearing of an immediately effective order and *Oncology Services Corp.*, CLI-93-17, 38 NRC 44, 50 (1993). Under this authority the Commission should consider the reason for the stay request, the length of time of the requested stay, the affected individual's assertion of his right to a hearing, and harm to the affected person of an erroneous deprivation. *Id.* Although the Board disagreed with some aspects of Mr. Siemaszko's analysis, he asserts that all of the reasons now lean in his favor, and that the arguments advanced by the Staff should be critically considered and rejected.

1. Reason for Stay

The majority of the Board has assessed this factor in favor of the Staff. Board Order, at 3. The Staff's position is unadorned *ipse dixit* – Mr. Siemaszko has been indicted and is awaiting a trial, so "a stay of this proceeding is necessary." (Staff Motion In Support of Stay, at 3) Although it does not bother to explain why a stay is now "necessary," the Staff's argument has changed little, if at all, from the argument that it has made since seeking its first delay of this case; that is, the enforcement action should be stayed because Mr. Siemaszko would be entitled to broader discovery in the enforcement action than he would be entitled to in a criminal proceeding. Technically, that is true. The Federal Rules of Criminal Proceedings provide narrower discovery than the Federal Rules of Civil Procedure, or in this case, the NRC's discovery procedures. And, generally, criminal cases do not permit additional interrogatories or depositions. It does not follow, however, that this Enforcement Proceeding must be held in

abeyance until after the criminal case has reached finality. That decision is within the discretion of the trial court.[2] Moreover, in this case where the DOJ is providing "open file" discovery, where Mr. Siemaszko has been interviewed dozens of times, where all of the relevant documents, facts and information are generally already a matter of public record – the government is building its case on information that is already available, not surprise.

Perhaps most importantly, the two cases are based on very different facts and events, years apart, with only marginal connections. With respect to the distinction between the issues and facts before the ASLB and the issues in the criminal case, they do not substantially overlap. The criminal indictment is based on a theory that Mr. Siemaszko allegedly engaged in a criminal conspiracy with others, initiated after August, 2001 to conceal material facts from the NRC about the condition of Davis-Besse's reactor vessel head, in order to gain the NRC's permission for the plant to operate beyond December 31, 2001. For what reason Mr. Siemaszko would have done so is beyond the imagination – as the lowest person on the engineering totem pole, it is unfathomable how Mr. Siemaszko could have, or would have, been able to orchestrate a conspiracy of the nature alleged. However, even given that scenario, the conspiracy is not alleged to have begun until after August, 2001 – well over a year after the date when the Staff alleges Mr. Siemaszko prepared documents he knew to be false. Under the facts and circumstances of this proceeding, which focuses on two documents from 12 RFO in the spring of

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[2] "The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence." *SEC v. Dresser Industries, Inc.*, 202 U.S. App. D.C 345 (D.D.C., 1980).

2000, any concern that the two sets of facts overlap in any meaningful way is unfounded.[3] Mr. Siemaszko's "state of mind" in 2000, as he prepared the Work Order and CAR at issue in the enforcement proceeding, is not dispositive one way or the other on whether he engaged in a conspiracy in 2001.

Finally, as to the alleged negative impact of discovery on the criminal case, as Judge McDade observed, 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 privileges to 'surprise the prosecution.'" Board Order, at 6. Since Mr. Siemaszko agreed to be deposed about the events at issue in the Enforcement Proceeding prior to taking his own deposition, this is a specious argument. The only party hiding is the Staff – apparently afraid to try the case it brought with much ballyhoo almost a year ago.

Simply put, the Board's ruling to hold this proceeding in abeyance until the close of the criminal proceeding, i.e., to protect the criminal proceeding from overly broad discovery and therefore potential tampering by Mr. Siemaszko, does not withstand scrutiny. The Board can craft and monitor discovery to prevent any potential abuse by either party by maintaining the scope of discovery to the facts from 12 RFO surrounding the enforcement action, and not the facts from the fall of 2001 giving rise to the criminal proceeding.

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[3] The Staff's reference to Counts 2, 3 and 4 of the indictment misstate the record. In the fall of 2001, Mr. Siemaszko did not sign ANY letters to the NRC. As the Staff and the DOJ are well aware, he signed a "green sheet" to one draft of a letter, which was significantly altered after the green sheet was signed and before it was sent to the NRC. Nothing about the 2001 letters, Mr. Siemaszko's limited role in the "development" of the letters, or the alleged conspiracy he is charged with, have anything to do with the enforcement action initiated by the Staff over the Work Order or CAR from the Spring of 2000.

2. The Length of the Stay

Even the Board concedes that this factor weighs in Mr. Siemaszko's favor. The length of time for the criminal case is unknowable and could stretch well beyond the career life of the Board, the lawyers, and Mr. Siemaszko.

3. Mr. Siemaszko's Assertion of a Right to a Hearing

The Board has agreed, and the Staff has conceded, that Mr. Siemaszko has asserted his right to a hearing, and that he is entitled to one; this factor weighs in his favor.

4. The Prejudice to Mr. Siemaszko

The majority of the Board has divided the alleged prejudice into two components -- the first dealing with Mr. Siemaszko's ability to litigate the charges in the Enforcement Order, and second, the prejudice to his obtaining employment in the industry. The entire Board, the Staff, and Mr. Siemaszko agree that the impact of the Enforcement Proceeding on his ability to find employment in the industry has been eclipsed by the impact of the criminal proceeding. That makes the potential prejudice to Mr. Siemaszko in not being able to vindicate himself from these wrongful charges even more serious. The impact of being exonerated will now have the potential to influence the outcome of the criminal case against him, not simply his ability to get a job.

The Commission must only imagine the impact on the criminal case if, in fact, as we believe to be true, Mr. Siemaszko is able to defeat the assertions that the Staff has made in this enforcement action. The Staff was wrong about what happened during 12 RFO involving Mr. Siemaszko.[4] If it was wrong, and Mr. Siemaszko can prove that, shouldn't he be able to take that

[4] See, generally, Union of Concerned Scientists "work performed without deviation" paper regarding its review of the facts against Mr. Siemaszko, attached to the March 13, 2006 filing of UCS in this matter.

into a criminal trial? Instead, the Staff will get two runs at Mr. Siemaszko -- first in the criminal case, and then, years later, following the substantial emotional and financial cost of the criminal defense, the Staff will again be able to pick up its sword against him.

CONCLUSION

For all the foregoing reasons, Mr. Siemaszko respectfully requests that the Commission reject the March 2, 2006 Order of the Board granting the NRC Staff's Motion To Hold This Proceeding In Abeyance) and direct the Board to fashion a reasonable path forward to provide Mr. Siemaszko a timely hearing on the charges against him while protecting the articulated interests of the government, or direct the Staff to dismiss the Enforcement Proceeding for its failure to timely prosecute it.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Appeal of the Atomic Safety and Licensing Board's March 2, 2006 Order to Hold the Enforcement Proceeding Against Andrew J. Siemaszko in Abeyance** were served this 10th day of March, 2006, by the means indicated (electronic mail *; regular U.S. Mail **; facsimile ***), on the following:

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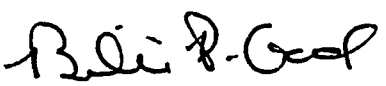

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