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Title: Status Conference ITMO Andrew Siemaszko

Docket Number: IA-05-021-EA

Location: (telephone conference)

Date: Thursday, March 19, 2009

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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STATUS CONFERENCE

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IN THE MATTER OF) Docket No.
ANDREW SIEMASZKO) IA-05-021-EA
(Enforcement Action))
_____)

Thursday,
March 19, 2009

Via Teleconference

The above-entitled matter came on for
hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

LAWRENCE G. McDADE, Chair

E. ROY HAWKENS, Administrative Judge

1 APPEARANCES:

2 On Behalf of Mr. Siemaszko:

3 BILLIE PIRNER GARDE, Esq.

4 SANDRA L. SHEPHERD

5 Of: Clifford & Garde

6 1707 L Street, N.W., Suite 500

7 Washington, D.C. 20036

8

9 On Behalf of the NRC Staff:

10 LISA B. CLARK, Esq.

11 KIMBERLY A. SEXTON, Esq.

12 U.S. Nuclear Regulatory Commission

13 Office of the General Counsel

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P-R-O-C-E-E-D-I-N-G-S

(2:02 p.m.)

1
2
3 JUDGE MCDADE: Okay, we are here in the
4 matter of Andrew Siemaszko, which is an enforcement
5 action. What I would like to do at the beginning of
6 this, having called the status conference to order, is
7 to have the parties to identify themselves. With me
8 is Judge Roy Hawkins. Judge Trikouros is not
9 participating in this particular status conference.
10 From the standpoint of the NRC staff, would you
11 identify who is present on the line?

12 MS. CLARK: Yes, this is Lisa Clark, and
13 with me is Kimberly Sexton.

14 JUDGE MCDADE: Okay. And I think Clark and
15 Sexton are easy enough to spell, so I don't know that
16 we need to go back and have you spell them for the
17 court reporter. For Mr. Siemaszko?

18 MS. GARDE: This is Billie Garde, and with
19 me is paralegal Sandra Shepherd.

20 JUDGE MCDADE: Okay, Mr. Boss who
21 represented Mr. Siemaszko in the criminal matter with
22 you, he's not on the line?

23 MS. GARDE: He is not, and neither is my
24 partner, Mr. Clifford, who is tied up in another court
25 hearing in the District, but may be joining me if he

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1 gets back here.

2 JUDGE MCDADE: Okay, fine. And is Mr.
3 Siemaszko on the line?

4 MS. GARDE: No, he's not.

5 JUDGE MCDADE: Okay. What I would ask you
6 to do as we're going through this, just so the court
7 reporter is clear as to who is speaking, to just, when
8 you speak, to identify yourselves so we can make sure
9 we have an appropriate record of who has said what
10 during the course of this proceeding. Just a little
11 bit of history, and to make sure that we're all
12 dealing with the same cards here, this matter, I
13 believe, was sort of generated with an NRC bulletin
14 that was issued back in August of 2001 that Davis-
15 Besse, including Mr. Siemaszko, responded to that NRC
16 bulletin during the period September to November of
17 2001.

18 It was alleged in a criminal indictment
19 and also in an NRC enforcement order that the
20 responses were materially false, and that was the
21 basis both for an NRC debarment order in April of
22 2005, and also a criminal indictment. A request for
23 a hearing was made in response to the debarment order
24 that was issued on April 21st of 2005. The request was
25 promptly made on April 22nd of 2005. Subsequent to

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1 that, the NRC staff, at the request of the Department
2 of Justice, requested that the matter be delayed. The
3 matter was ultimately delayed after a number of
4 decisions by this board and an appeal to the
5 Commission.

6 The Commission affirmed the delay, pending
7 a resolution of the criminal matter in the Northern
8 District of Ohio. And as I understand it, the
9 criminal matter was resolved to the point of the
10 sentencing, and the judgment and commitment order was
11 issued on February 6th of 2009. The first question I
12 have, Ms. Garde, is has an appeal been filed, or has
13 an extension been granted as to a time for appeal?

14 MS. GARDE: An appeal has been filed, your
15 Honor.

16 JUDGE MCDADE: It has been?

17 MS. GARDE: Yes. I mean, we haven't filed
18 the brief, but the notice of appeal was finally filed.

19 JUDGE MCDADE: And do you have any kind of
20 a briefing schedule set out by the 6th circuit at this
21 point?

22 MS. GARDE: Not yet, your Honor.

23 JUDGE MCDADE: Do you know, has the trial
24 transcript been prepared?

25 MS. GARDE: The trial transcript was

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1 prepared during the proceeding, but it hasn't yet been
2 certified to the 6th circuit by the court reporter.
3 I'm not exactly sure why, but it is ready. It hasn't
4 been certified.

5 JUDGE MCDADE: So you would anticipate that
6 it would be ready for certification in the relatively
7 near term?

8 MS. GARDE: Yes.

9 JUDGE MCDADE: Okay. Do you anticipate
10 appealing the conviction itself, or the sentence, or
11 both?

12 MS. GARDE: The conviction, not the
13 sentence.

14 JUDGE MCDADE: The conviction and the
15 sentence?

16 MS. GARDE: No, not the sentence.

17 JUDGE MCDADE: Just the conviction.

18 MS. GARDE: Yes.

19 JUDGE MCDADE: Okay. I guess the first
20 question that I would have is to ask of Mr. Siemaszko
21 what his position is at this point with regard to
22 future participation in the nuclear industry. Does
23 Mr. Siemaszko wish to go forward with the hearing?

24 MS. GARDE: Well, those are two different
25 questions. The answer to the practical question, does

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1 Mr. Siemaszko intend to work in the nuclear industry,
2 probably not. He's not here to speak for himself on
3 that subject, but he is re-employed within a different
4 industry, is doing well in that industry, likes his
5 job, and is hopeful that that will continue. And just
6 based on my general understanding, is not expecting to
7 apply, as a practical matter, back for work in the
8 industry.

9 The second question is does he want to
10 proceed with the hearing? He wants to resolve the NRC
11 matter consistent with his continually held belief
12 that he did not do anything knowingly and willfully in
13 violation of the Atomic Energy Act.

14 JUDGE MCDADE: Okay. Let me just note for
15 the record that we had made a request for information
16 of Mr. Siemaszko, and by letter dated March 12th,
17 2009, we were furnished various exhibits, including a
18 copy of the judgment and commitment order, a
19 transcript of the sentencing hearing, and a copy of
20 the indictment. And I do note that during the
21 sentencing hearing, there were discussion with Mr.
22 Siemaszko about his current employment in the, I
23 believe, ship-building industry, and his intent to
24 remain in the ship-building industry, at least in the
25 near term.

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1 With regard to the issues that we
2 currently have before us -- now, one of the issues
3 that would be coming up, I think, is what, if any,
4 effect the criminal conviction has on this proceeding.
5 In other words, does collateral estoppel limit the
6 issues to be decided in this particular case by this
7 particular board? Does it limit what Mr. Siemaszko
8 can argue? And before we get into that, let me ask,
9 by way of a preliminary question, given the fact that
10 we have reached a point where we do have a final
11 judgment, but that judgment is subject to change,
12 pending the appeal, the general parameters of
13 collateral estoppel would allow us, if appropriate, to
14 apply collateral estoppel, even though the matter is
15 up on appeal.

16 Ms. Garde, do you wish to move forward on
17 this matter at this time, or do you wish to wait until
18 the validity of the conviction is resolved one way or
19 the other by the 6th circuit?

20 MS. GARDE: Judge, as a practical matter,
21 I would prefer to wait until the 6th circuit resolves
22 the issue, but the staff and I have had a preliminary
23 discussion about potential settlement of this claim.
24 And I may perhaps let Lisa address that more fully.
25 But in the absence of settlement, we would prefer to

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1 wait until the 6th circuit resolves the issue.

2 JUDGE MCDADE: Okay. Let me go to Ms.
3 Clark then, and say, before we discuss the issue of
4 whether a delay would be appropriate, Ms. Garde sort
5 of threw the ball to you to talk about possible
6 settlement discussions. Are these contingent upon the
7 conviction being upheld, or are these independent of
8 that?

9 MS. CLARK: Your Honor, this is Lisa Clark.
10 Our discussions would be independent of any outcome of
11 the appeal. Ms. Garde and I met this morning and had
12 initial discussions, and exchanged some information,
13 and we are hoping that we might be able to reach
14 settlement on this issue and then in that event not
15 have to go forward with the hearing.

16 JUDGE MCDADE: How much time would you need
17 in order to pursue those discussions?

18 MS. CLARK: It's difficult to say for
19 certain, since today was our first meeting.

20 JUDGE MCDADE: Okay.

21 MS. CLARK: I would say as a preliminary
22 matter, at least two weeks.

23 JUDGE MCDADE: Okay. Before we move off
24 that subject, let me add some preliminary matters.
25 One of the conditions of probation -- and that

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1 probation would begin at the time of the J&C, which
2 was, I believe, the 6th of February, was no
3 participation in the nuclear industry without the
4 approval of the probation officer. Has the probation
5 officer expressed what conditions, what criteria that
6 he or she would use in order to determine whether or
7 not further participation during the period of
8 probation would be appropriate?

9 Did they indicate whether they would defer
10 to the NRC or have anything to say with regard to what
11 criteria they would use? Ms. Clark, do you know?

12 MS. CLARK: We have not had any interaction
13 with the probation officer.

14 JUDGE MCDADE: Ms. Garde?

15 MS. CLARK: I don't know if Ms. Garde has
16 any more information.

17 MS. GARDE: I do have a little bit more
18 information, but Mr. Boss is the one who has had
19 primary contact with the probation officer. But Mr.
20 Siemaszko has of course reported to the probation
21 officer in Houston, has had a number of meetings with
22 him. Including, as part of that, that any employment
23 change be reported to the probation officer
24 immediately. I don't know that the probation officer
25 completely understands the NRC prohibition, but we

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1 have advised him of it, and advised him that we have
2 a continuing obligation that if Andrew would either
3 ask or seek employment in the nuclear industry, that
4 he would have to go back through the NRC.

5 The probation officer has not, to the best
6 of my knowledge, put out any other more prescriptive
7 requirements on Andrew, other than notifying him.
8 Which I think we already are under a continuing
9 obligation to notify the NRC anyway.

10 JUDGE MCDADE: Okay, at this point in time,
11 as we sit here right now, we're approximately seven
12 and a half years after the incident that gave rise to
13 this particular piece of litigation. And more than
14 four years after the debarment order. Currently, Mr.
15 Siemaszko is neither working in the nuclear industry
16 nor under the terms of probation from the district
17 court, northern district of Ohio, is he able to
18 participate in the nuclear industry. That said,
19 absent strong objection, or objection by the parties,
20 I think it may well be appropriate for us to continue
21 this matter at this point and schedule another status
22 conference.

23 During that period of time that we would
24 be until the next status conference, you all would
25 have a further opportunity to discuss whether or not

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1 a settlement could be reached in this matter between
2 Mr. Siemaszko and the NRC staff. And also, Ms. Garde,
3 you would have a better idea of the schedule with
4 regard to the appeal. Just based on my experience, I
5 would anticipate that it would probably be many --
6 several months before there would be any final
7 decision from the 6th circuit with regard to this
8 matter. And again, at this point, I don't know
9 specifically what the issues are and how narrowly the
10 issues that would be addressed on appeal would be.

11 Step one would be the certification of the
12 transcript and the submission of the record to the
13 court of appeals. But even in the best of
14 circumstances, it usually takes several months from
15 the time that they receive the record to the time that
16 they would schedule the briefing, schedule oral
17 argument as appropriate, and render a decision in it.
18 So we may be several months before there's a
19 resolution on the appeal.

20 An issue that will come up in the event
21 that we go forward on this, in the event that there is
22 not a settlement between Mr. Siemaszko and the NRC,
23 will be the issue of collateral estoppel. And that is
24 something that, as I said, I believe we would be able
25 to apply the doctrine, if appropriate, given the

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1 judgment and the judgment commitment order of the
2 district court. And that's something we'd ask the
3 parties to take into consideration.

4 And also what I would ask the parties to
5 take into consideration as well, in the event that you
6 are not able to reach an agreement on this, is to
7 discuss, basically, what would go into -- when I was
8 litigating, most courts referred to as a pre-trial
9 order, which would be listing the issues that you
10 believe are necessary for resolution. Any briefing,
11 legal issues that we would need to resolve prior to
12 the time we went to the hearing.

13 Also to describe what the scope of that
14 hearing would be, as far as what witnesses you would
15 wish to call as live witnesses. How much, if any,
16 reliance on the testimony, the sworn testimony that
17 came in as a criminal trial would the parties wish to
18 make. Generally speaking, the urging is for the
19 parties to agree on a pre-trial order to the maximum
20 extent possible, to submit it to the judges for
21 approval. And to just have those areas where you
22 can't reach an agreement separately written by each of
23 the two parties.

24 Before we go any further, what I would
25 like to do is ask first to the NRC staff, then to Ms.

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1 Garde, whether or not there's any other matters you
2 believe we should be discussing here today. To then
3 put the phone on mute and discuss with my colleagues,
4 from our standpoint, what if anything further needs to
5 be done today, and then get back on the line with you.
6 We wouldn't ring off. We'd just put you on mute for
7 a few moments.

8 But first, Ms. Clark, are there other
9 matters that you would wish to discuss today, at this
10 status conference?

11 MS. CLARK: No your Honor.

12 JUDGE MCDADE: Ms. Garde, any other matters
13 or any comments on any of the things that I've said
14 during the course of the status conference so far?

15 MS. GARDE: I have no other matters, judge.
16 I think you've correctly identified the parameters in
17 the situation the case is in.

18 JUDGE MCDADE: Okay. I'm going to put you
19 on mute right now, and one of the things I would also
20 ask you to take into consideration or to be thinking
21 about while I'm discussing this with my colleagues is
22 just when you think would be appropriate for the next
23 status conference in this. I don't think we need to
24 move ahead immediately, but at the same period of
25 time, I don't want to let this linger. I just want to

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1 make sure that to the degree that we can move it
2 forward, it does. So please just while we're doing
3 this, consider when you think might be an appropriate
4 time interval before the next status conference.

5 Okay, if we can go onto mute.

6 (Whereupon, the above-entitled matter went
7 off the record briefly).

8 JUDGE MCDADE: This is Judge McDade. Is
9 the staff and Ms. Garde on the line?

10 MS. GARDE: Yes.

11 MS. CLARK: The staff's on the line.

12 JUDGE MCDADE: Okay, Ms. Clark, Ms. Garde,
13 you're on the line?

14 MS. GARDE: Yes, I'm on the line, judge.

15 MS. CLARK: Yes, this is Lisa Clark.

16 JUDGE MCDADE: Okay, we did not come up
17 with any other matters to be discussed at this
18 particular status conference. While we were
19 discussing it among ourselves, did the staff come up
20 with anything else to be resolved here today?

21 MS. CLARK: Your Honor, this is Lisa Clark.
22 We did not come up with any additional issues.

23 JUDGE MCDADE: Okay, Ms. Garde?

24 MS. GARDE: No judge, I did not.

25 JUDGE MCDADE: Okay. What I would like to

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1 do is to schedule a status conference. My first
2 thought on this matter would be to set it
3 approximately two months from now. My thought being
4 is at that point in time, that should give you
5 adequate time to discuss the possibility of
6 settlement, and in the event that you are not able to
7 reach a settlement, an opportunity to discuss the
8 issues and narrow those issues. And also by that
9 point in time, I would anticipate that we would have
10 at least a scheduling order from the 6th circuit.

11 We would have some idea of when this
12 matter is going to be brief and argued to the 6th
13 circuit. Ms. Clark, what is the staff's view as far
14 as that duration? Do you believe that's too long or
15 too short?

16 MS. CLARK: I think sixty days is an
17 appropriate time frame, and I expect that we should at
18 least have an outcome of our settlement negotiations
19 by then.

20 JUDGE MCDADE: Okay, Ms. Garde, what's your
21 view?

22 MS. GARDE: I agree. I think that's a good
23 time frame for us to both explore a settlement, and if
24 we can't do it, we probably can get it done by then.
25 And also I think that if not, we will have the

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1 scheduling order by then.

2 JUDGE MCDADE: And what I would propose is
3 not to set a specific time and date right now, but as
4 we get closer to the sixty days, to check people's
5 schedules, and again, do it by a telephone conference
6 like this, and again that I would anticipate would
7 take no more than half an hour. I would ask, however,
8 in the even that you have -- are able to reach a
9 settlement in this matter, there's no need to wait
10 until the conclusion of the sixty day period and to
11 schedule another status conference.

12 I would ask that if you do reach a
13 settlement, to notify us immediately so that we can
14 resolve this matter.

15 MS. GARDE: Of course.

16 JUDGE MCDADE: Okay, anything further Ms.
17 Clark?

18 MS. CLARK: Not from the staff.

19 MS. GARDE: And not from Mr. Siemaszko.

20 JUDGE HAWKENS: Ms. Clark, this is Judge
21 Hawkens. Ms. Garde's tentative views were if a
22 settlement was not reached, it would be in her
23 client's interest to wait until the 6th circuit
24 renders a decision on her appeal. Assuming that that
25 were to remain her position, and assuming you were not

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1 able to reach a settlement, what's your initial
2 reaction to that position? Would you -- without
3 setting in stone right now -- be willing to defer to
4 that, or would you be anxious to go forward with this
5 matter?

6 MS. CLARK: Your Honor, I really would have
7 to check with the staff to see their preferences. One
8 thing I can say is I don't think it would be necessary
9 to wait.

10 JUDGE HAWKENS: Okay. But that's something
11 we can be thinking about and discuss at the next
12 status conference.

13 MS. CLARK: Yes.

14 JUDGE MCDADE: Okay, anything further for
15 now? Judge Hawkens?

16 JUDGE HAWKENS: No.

17 JUDGE MCDADE: Ms. Clark?

18 MS. CLARK: No, your Honor.

19 JUDGE MCDADE: Ms. Garde?

20 MS. GARDE: No, your Honor.

21 JUDGE MCDADE: Okay, from the stand point
22 of the court reporter, I don't think, unlike most of
23 our conferences and hearings, we've used any
24 particularly scientific language here. I take it you
25 don't need anybody to stay on the line with spellings

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1 of anything?

2 THE COURT REPORTER: No, your Honor. Thank
3 you.

4 JUDGE MCDADE: Okay, in that case, then,
5 the status conference will be terminated, and we will
6 issue an order setting another status conference in
7 approximately sixty days. Thank you.

8 MS. GARDE: Thank you very much.

9 (Whereupon, the above-entitled matter was
10 concluded at 2:28 p.m.)

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CERTIFICATE

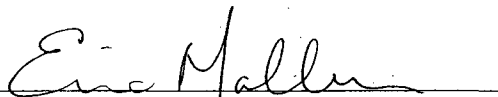
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before the United States Nuclear Regulatory Commission
in the matter of: Andrew Siemaszko

Name of Proceeding: Status Conference

Docket Number: IA-05-021-EA

Location: (telephone conference)

were held as herein appears, and that this is the
original transcript thereof for the file of the United
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