

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

Before Administrative Judges:

Alan S. Rosenthal, Chairman  
E. Roy Hawkens  
Nicholas Tsoulfanidis

In the Matter of  
MATTINGLY TESTING SERVICE, INC.  
(Molt and Billings, Montana)

Docket No. 30-20836 EA  
ASLBP No. 10-905-02-EA-BD01  
October 6, 2010

MEMORANDUM AND ORDER

(Granting Hearing Requests, and Scheduling Telephone Prehearing Conference)

1. Until the NRC Staff revoked its materials license in a September 2, 2010 order, Mattingly Testing Services, Inc. (Mattingly) was authorized to possess, to store, and to use byproduct material and uranium in connection with its industrial radiography operations.<sup>1</sup> On the same day, the Staff issued a second order in which it barred Mark M. Ficek, president and owner of Mattingly, from further involvement in NRC-licensed activities for a period of seven years.<sup>2</sup>

The basis of the two orders was the Staff's determination that Mattingly and Mr. Ficek had violated several NRC regulations and orders, and that four of Mattingly's violations involved deliberate misconduct by Mr. Ficek.<sup>3</sup> Each order was made effective immediately, and each

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<sup>1</sup>Order Revoking License (Effective Immediately) EA-10-100 (Sept. 2, 2010) (ADAMS Accession No. ML102440234) [hereinafter Order Revoking License].

<sup>2</sup>Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-10-028 (Sept. 2, 2010) (ML102440353) [hereinafter Order Prohibiting Involvement].

<sup>3</sup>Order Revoking License at 4-12; Order Prohibiting Involvement at 9-10.

provided that persons adversely affected by it could request a hearing within twenty days of issuance.<sup>4</sup>

On September 22, Mr. Ficek requested a hearing on both orders.<sup>5</sup> He did not, however, challenge the immediate effectiveness provision of either order. On the same day, Dayna Thompson, identifying herself as “a representative of Mattingly Testing Services, Inc.,” moved to set aside the immediate effectiveness of the license-revocation order and additionally requested a hearing to consider whether that order should be sustained.<sup>6</sup>

This Atomic Safety and Licensing Board was established on September 27.<sup>7</sup> On the same day, the Staff responded to Ms. Thompson’s motion.<sup>8</sup> In an order entered earlier today, the Board denied the motion.<sup>9</sup> It agreed with the Staff both that (1) Ms. Thompson had failed to establish her entitlement to file the motion in either a representative or individual capacity; and (2) she had not met the regulatory requirements for seeking the lifting of the immediate effectiveness of an enforcement order.<sup>10</sup>

Given their adverse impact upon him, Mr. Ficek clearly has the requisite standing to challenge both orders. Accordingly, his hearing requests are hereby granted.

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<sup>4</sup>Order Revoking License at 12, 14; Order Prohibiting Involvement at 10-11.

<sup>5</sup>Ficek Request for Hearing on Order Revoking License (Sept. 22, 2010) (ML102670716); Ficek Request for Hearing on Order Prohibiting Involvement in NRC-Regulated Activities (Sept. 22, 2010) (ML102670711).

<sup>6</sup>Thompson Request for Hearing (Sept. 22, 2010) (ML102650636).

<sup>7</sup>Establishment of Atomic Safety and Licensing Board (Sept. 27, 2010).

<sup>8</sup>NRC Staff’s Response to Dayna Thompson’s Request To Set Aside the Immediate Effectiveness of Order Revoking License (Sept. 27, 2010) (ML102700652).

<sup>9</sup>Memorandum and Order Denying Dayna Thompson’s Request To Set Aside the Immediate Effectiveness of the Order Revoking License (Oct. 6, 2010).

<sup>10</sup>Id. at 2-3.

2. The Board will hold a prehearing conference by telephone on Wednesday, October 20, 2010, commencing at 1:00 PM EDT (11:00 AM MDT). It will address the following matters:

If Ms. Thompson desires to participate further in this proceeding as a party, she should be prepared at the telephone conference to explain in detail: (1) her association with Mattingly; (2) the basis, if any, of her authorization to represent Mattingly and/or Mr. Ficek in the proceeding; and (3) if asserting entitlement to participate in the proceedings in an individual capacity, the respect(s) in which her personal interests are or might be affected by the license-revocation order. Failing her participation in the telephone conference, the Board will assume that Ms. Thompson has no desire to play any further role in this proceeding and she thus will not be given party status.

For his part, Mr. Ficek will be expected to participate fully in the telephone conference, either personally or through counsel.<sup>11</sup> He, as well as Ms. Thompson if she elects to endeavor to establish an entitlement to continue to participate in the proceeding, should be prepared to provide the Board in detail with the following information: (1) what specific issues will be raised in challenging the two orders in question; and (2) what documentary and testimonial evidence is now available in support of his or her position on those issues.

During the telephone conference, the Board might also discuss with the participants other matters, including the scheduling of further proceedings. If any participant believes there are additional matters that should be taken up at the conference, he or she should so advise the Board no later than noon (EDT) on Thursday, October 14, 2010. In addition, by no later than

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<sup>11</sup>If he so chooses, Mr. Ficek is permitted to represent Mattingly and himself in this proceeding. Given, however, the gravity of the two orders under challenge, and the possible complexity of the issues to be resolved, he might be well-advised to obtain promptly the assistance of legal counsel.

noon (EDT) on Monday, October 18, 2010, each participant shall provide the Board, by Internet e-mail transmission, with the name or names of counsel (if any) who will participate in the conference.<sup>12</sup>

On or before Monday, October 18, parties should contact Hillary Cain, the Board's law clerk, at 301-415-7703 to obtain the telephone number and pass code for the Wednesday, October 20, prehearing telephone conference.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>13</sup>

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Alan S. Rosenthal, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 6, 2010

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<sup>12</sup>For this limited purpose, participants need not use the NRC's Electronic Information Exchange (EIE), but should instead send email messages directly to Judge Rosenthal (Rsnthl@verizon.net), Judge Hawkens (Roy.Hawkens@nrc.gov), Judge Tsoulfanidis (nucpower@sbcglobal.net), and Hillary Cain (Hillary.Cain@nrc.gov).

<sup>13</sup>Copies of this order were sent this date by the agency's E-Filing system to (1) Ms. Thompson; (2) Mr. Ficek; and (3) the NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
MARK M. FICEK, AND ) DOCKET NO. 30-20836-EA  
MATTINGLY TESTING SERVICES, INC. )  
(Molt and Billings, MT) )  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Board **MEMORANDUM AND ORDER (Granting Hearing Requests, and Scheduling Telephone Prehearing Conference)**, dated October 6, 2010, have been served upon the following persons by Electronic Information Exchange.

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MARK M. FICEK AND MATTINGLY TESTING SERVICES, INC. – Docket No. 30-20836-EA  
**MEMORANDUM AND ORDER (Granting Hearing Requests, and Scheduling  
Telephone Prehearing Conference)**

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[ Original signed by Linda D. Lewis ] \_\_\_\_\_  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 6<sup>th</sup> day of October 2010