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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)

SHIELDALLOY METALLURGICAL)
CORPORATION)

Docket No. 40-8948-MLA

(Request for Material License)
Amendment))

NRC STAFF RESPONSE
TO MICHAEL BRUCE GARDNER'S PETITION
FOR REVIEW OF LBP-99-12

Charles A. Barth
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March 25, 1999

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INTRODUCTION

On February 23, 1999, the Presiding Officer in the above captioned proceeding issued a Memorandum and Order (Denying Petition to Intervene), LBP-99-12, 49 NRC___, denying the request of Michael Bruce Gardner to intervene in Shieldalloy Metallurgical Corporation's request for an amendment to its Source Material License No. SUA-1507. The amendment request, if granted, would permit Shieldalloy to move slag from one location on its property to another location on the same property, thus consolidating on-site slag.

Michael Bruce Gardner on December 21, 1998, filed a letter (Gardner petition) requesting a hearing on behalf of unidentified "clients" to remedy unidentified harms which could result from granting the license amendment request. The Staff opposed the petition on the basis that no standing

to intervene was demonstrated and that no harm from the proposed amendment was alleged.¹ Shieldalloy opposed the petition on the basis that Mr. Gardner had no standing to intervene and that the concerns expressed in Mr. Gardner's December 31, 1998 letter did not relate to the subject matter of the requested license amendment.²

The Presiding Officer permitted Mr. Gardner to reply to the responses of the Staff and Shieldalloy, and he did so on February 5, 1999, in a document titled "Unnamed Citizens of Guernsey County's Joint Reply to Answers of NRC Staff and Shieldalloy Metallurgical Corporation to Request for Hearing" (Gardner Reply).

Having considered the filings of Mr. Gardner, the Staff, and Shieldalloy, the Presiding Officer on February 23, 1999, issued his Memorandum and Order (Denying Petition to Intervene). It is from that Order that Mr. Gardner seeks Commission review.³

BACKGROUND

The Shieldalloy site near Cambridge, Ohio, is the successor to a ferro-alloy production facility that produced slag as a byproduct. That slag had some slight radioactivity. Some of the slag was disbursed off site. Legal action was commenced against the owner of the property. Local property owners, the State of Ohio, and the Federal Courts were involved in a number of actions.

¹ NRC Staff Notice of Intent to Participate and NRC Staff Response to Request for Hearing Filed by Michael Bruce Gardner, dated January 11, 1999

² Answer to Michael Bruce Gardner Request for Hearing Regarding Docket No. 40-8948, Shieldalloy Metallurgical Corporation License Number SMB-1507 dated December 31, 1998.

³ Mr. Gardner filed an "Appeal Statement", dated March 5, 1999, with the Presiding Officer who referred it to the Commission. The Office of the Secretary docketed the "Appeal Statement" on March 15, 1999, from an envelope postmarked March 8, 1999.

Slag was recovered from off site and stored in containers at a temporary staging area on the Shieldalloy site. Shieldalloy applied for a license amendment which would permit them to move the slag in temporary containers on their site to another location on their site. That amendment request was noticed in the Federal Register, 63 Fed. Reg. 24976, November 24, 1998. The notice provided:

Pursuant to § 2.1205(a), any person whose interest may be affected by this proceeding may file a request for a hearing in accordance with § 2.1205(d).

Mr. Michael Bruce Gardner filed a letter dated December 21, 1998, with the Commission's Secretary alleging that he was acting on behalf of unknown persons whose interests may be affected by the proposed license amendment and requested an informal adjudicatory hearing on the proposed amendment. His request was opposed by the Staff and Shieldalloy, *see supra*.

DISCUSSION

1. Applicable Legal Standards

Pursuant to 10 C.F.R. § 2.1253,⁴ the standards governing the Commission's exercise of its discretion to grant or deny petitions to review a presiding officer's decisions are set forth in 10 C.F.R. § 2.786(b)(4)(i-v). In order to justify Commission review, the Petitioner must raise a "substantial question" regarding at least one of the following five areas of consideration: (1) whether a finding of material fact in the underlying decision is clearly erroneous;⁵ (2) whether a necessary

⁴ See *Babcock And Wilcox Company* (Pennsylvania Nuclear Services Operations), CLI-95-4, 41 NRC 248, 250-51 (1995).

⁵ To show that a factual finding in the PBL Decision was "clearly erroneous," Petitioners must show that the finding was "not even plausible in light of the record viewed in its entirety."

legal conclusion in that decision is without governing precedent, or departs from established law; (3) whether the Petitioners identify any substantial and important policy or legal questions; (4) whether the Petitioners identify any prejudicial procedural error in the proceeding to date; or (5) whether the Petitioners identify any other consideration which the Commission may deem to be in the public interest. *See* 10 C.F.R. § 2.786(b)(4)(i-v).

Under these standards, a petitioner has the burden "to raise questions that are sufficiently substantial to justify Commission review." *Babcock And Wilcox, supra*, 41 NRC at 251. To emphasize the discretionary nature of Commission review, the regulations provide that if a review petition is granted, the Commission itself will specify the issues to be briefed on appeal. *See* 10 C.F.R. § 2.786(d).

Mr. Gardner's "Appeal Statement" does not address or comply with the Commission's criteria for review discussed immediately *supra*. Instead, his "Appeal Statement" asserts five "Assignments of Error." None of these assignments shows that the Presiding Officer made an erroneous finding of fact that was material to the issue of standing. Mr. Gardner makes no showing that the Presiding Officer's Order is without precedent or departs from established law. No prejudicial procedural error is alleged by Mr. Gardner. The "Appeal Statement" is silent as to any consideration of public interest which would cause Commission review. Mr. Gardner's individual assignments of error are discussed briefly *infra*

Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995), *citing Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). *See also Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972) (a licensing board's factual findings may not be set aside simply because the appeal board might have found differently).

2. Mr. Gardner's case.

In pertinent part, the Atomic Energy Act states:

In any proceeding under this chapter for . . . amending of any license . . . the Commission shall grant a hearing upon the request of any *person* whose *interest* may be affected by the proceeding

42 USC § 2239 (a)(1)⁶. (Emphasis supplied). 10 C.F.R. § 2.1205(a) provides:

Any *person* whose *interest* may be affected by a proceeding for . . . amendment of a license . . . may file a request for a hearing.

(Emphasis supplied)

In the matter before the Commission, no known identifiable person has requested a hearing upon Shieldalloy's request for a license amendment.

The Supreme Court of the United States has recently iterated the

' . . . irreducible constitutional minimum' requirements for standing. The plaintiff must suffer an 'injury-in-fact' which is 'concrete and particularized and . . . actual or imminent, not conjectural or hypothetical, that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision.'

Bennett v. Spear, 520 U.S. ___, 117 S.Ct. 1154, 1163 (1997).

No particularized injury-in-fact is alleged to possibly occur to any person by Shieldalloy moving slag in temporary boxes on its property to another location on its property.

Both the Atomic Energy Act and Commission regulations require that there shall be an identified person whose interest may be affected in order to petition for commence an

⁶ Mr. Gardner has mis-quoted and miscited this section. See his Joint Reply to Staff and Shieldalloy Answers to Petition to intervene dated February 5, 1999 at 5 (electronic version).

administrative proceeding. The Supreme Court in *Bennett* iterates well- established criteria for judicial standing. In this proceeding, no person has petitioned to intervene, and no person's interest is alleged to be affected by moving slag from one location to another location on the licensee's site. The . Gardner petition dated December 21, 1998, as appropriately denied by the Presiding Officer is patently defective upon its face.

3. Assignment of Error No. 1

Mr. Gardner takes issue with the Presiding Officer, asserting that he, Gardner, only need *allege* damage. (Gardner Appeal at 2) There are several deficiencies in Mr. Gardner's position: 1) No damage to an identifiable person is alleged by Mr. Gardner resulting from moving slag from one location on the licensee's site to another see the Atomic Energy Act cited *supra*; and 2) The Supreme Court, in *Bennett*, requires more than the *ipsi dixit* statements of counsel regarding harm.

4. Assignment of Error No. 2

Mr. Gardner alleges that the Presiding Officer erred by requiring "a higher standard exists for persons represented by counsel." (Gardner Appeal at 2.) Again, there is the not insignificant deficiency in the Gardner petition that in this proceeding there are no persons represented by counsel. An inspection of the Order denying the petition discloses no "higher standard" requirement imposed by the Presiding Officer.

5. Assignment of Error No. 3

Without citation to the record or discussion of the underlying facts, Mr. Gardner asserts : "The ALJ erred in identifying only one specific factual assertion." The Presiding Officer's discussion of this matter is on pages 6 and 7 of his Order. He found that Mr. Gardner claimed "two

individuals who own property within a mile of the SMC facility known to contain radioactive slag” would not be permitted by the amendment to place their slag on the SMC facility. Order at 6. Gardner Reply dated February 5, 1999 at 14, electronic version. If there are other factual assertions in Mr. Gardner’s petition, the Staff has not found them. More important, Mr. Gardner’s “Appeal Statement” makes no showing that the Presiding Officer was in error in his analysis. The Order did state that it had no authority in passing upon the requested license amendment to require actions beyond the scope of the amendment. Order at 7. *See also Bennett v Spear* cited *supra*. No error was committed by the Presiding Officer in this regard.

6. Assignment of Error No. 4

Mr. Gardner assigns error that

“The ALJ brushed aside..allegation of economic injury, ostensibly because the claim was unlinked to the radiological harm”

(Gardner Appeal at 3.) “Brushed aside” suggests that the Presiding Officer sluffed over this issue.. Nothing is further from the truth. The Order denying intervenor status cites *International Uranium (USA) Corporation* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 264-65 (1998). As the Commission itself held, a petitioner who suffers only economic injury has no standing under the Atomic Energy Act or the National Environmental Protection Act. 48 NRC at 264. The Presiding Officer’s determination that the Gardner allegation of economic injury to unknown persons was insufficient to give his unknown persons standing was clearly appropriate.

7. Assignment of Error No. 5

Mr. Gardner further alleges that the Presiding Officer


demonstrated clear prejudice . . . by applying a double standard - one
for licensees and a different one for adversely affected persons

(Gardner Appeal at 3) is without merit.. It relates to filing a Notice of Appearance and has no
relation to the substance of the denial of intervenor standing.

CONCLUSION

As found by the Presiding Officer, the petitioner has identified no person who has petitioned
to intervene, and as a consequence, there is no demonstration that any harm could come to any
known identifiable person by moving a pile of slag from one place on the licensee's property to
another location on that same property. In no paper filed by Mr. Gardner does he even come close
to demonstrating that his unknown persons have standing to intervene in the license amendment
sought by Shieldalloy. Accordingly, Mr. Gardner's petition on behalf of unknown persons should
be denied.

Respectfully submitted,


Charles A. Barth
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 25th day of March 1999

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MICHAEL BRUCE GARDNER'S PETITION FOR REVIEW OF LBP-99-12" have been served on the following by deposit in the United States mail, first class; or as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 25th day of March 1999:

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A handwritten signature in cursive script, reading "Charles A. Barth", written over a horizontal line.

Charles A. Barth
Counsel for NRC Staff