

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD PANEL

'99 MAR -8 P2:27

Before Presiding Officer:
G. Paul Bollwerk, III, Administrative Judge

Special Assistant:
Thomas D. Murphy, Administrative Judge

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of

SHIELDALLOY METALLURGICAL CORP.

(Cambridge, Ohio Facility)

Docket No. 40-8948-MLA

ASLBP No. 99-760-03-MLA

March 8, 1999

SERVED MAR - 8 1999

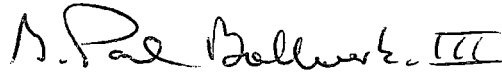
MEMORANDUM
(Referring Appeal Statement
to the Commission)

Acting on behalf of unnamed citizens of Guernsey County, Ohio, on March 6, 1999, attorney Michael Bruce Gardner filed with the Presiding Officer an appeal statement with respect to the Presiding Officer's February 23, 1999, memorandum and order dismissing a December 21, 1998 hearing petition. See LBP-99-12, 49 NRC __ (Feb. 23, 1999). With this memorandum, the Presiding Officer refers that appeal statement to the Commission, which has jurisdiction over the appeal. See 10 C.F.R. § 2.1205(o). A copy of the appeal statement, reproduced from the electronic version received by e-mail on March 5, 1999, is included as Attachment 1.

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Further pleadings relating to this appeal should be filed with the Commission,¹ although copies should be sent to the Presiding Officer and the Special Assistant.

BY THE PRESIDING OFFICER²



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 8, 1999

¹ In making this referral, the Presiding Officer notes that the date by which any appeal of the February 23 dismissal order must be filed (i.e., mailed) is Wednesday, March 10, 1999, as stated in the order. See LBP-99-12, 49 NRC at ___ (slip op. at 10). Under NRC rules, absent a directive by a Presiding Officer or the Commission setting a date certain for a filing, a participant is permitted to add five days to the date the filing otherwise would be due if the pleading or issuance to which the participant is responding is served by regular mail. See 10 C.F.R. § 2.1203(d). In this instance, although the Presiding Officer provided an electronic copy of the February 23 issuance to the participants that same day, the decision was officially served by the Office of the Secretary by regular mail on that date. Accordingly, because the Presiding Officer lacks the authority to change an appeal filing deadline and no other specific date was set by the Commission for this appeal, under operation of the rules, the ten days for taking an appeal has an additional five days added, making any appeal statement due on March 10.

² Copies of this memorandum and order were sent this date to counsel for applicant Shieldalloy Metallurgical Company and to counsel Michael Bruce Gardner by Internet e-mail transmission; and to counsel for the staff by e-mail through the agency's wide area network system.

ATTACHMENT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Presiding Officer:
G. Paul Bollwerk, III, Administrative Judge

Special Assistant:
Thomas D. Murphy, Administrative Judge

In the Matter of) Docket No. 40-8948-MLA
)
SHIELDALLOY METALLURGICAL CORP.) ASLBP No. 99-760-03-MLA
)
(Cambridge, Ohio Facility)) March 5, 1999

UNNAMED CITIZENS OF GUERNSEY COUNTY'S APPEAL STATEMENT

The unnamed citizens of Guernsey County, Ohio, ("Citizens") by and through counsel, succinctly set out their appeal statement, as follows:

I. Introduction

On February 23, 1999, NRC's administrative law judge ("ALJ") issued his memorandum and order ("Order") denying Citizens' request for a public hearing. The ALJ's order explicitly advises counsel for Citizens to enter a notice of appearance conforming the requirements of 10 C.F.R. §2.713(b) if counsel for Citizens' seeks to appeal the ALJ's dismissal determination." Order p. 9, ¶2, n.5. Citizens attach a conforming notice of appearance.

II. Assignments of Error

A. The ALJ erred in concluding that petitioners lack standing to request the hearing.

1. The ALJ erred in concluding that petitioners request for hearing must establish the factual predicates for the various elements of a request for hearing

The ALJ's analysis of Citizens' request for hearing and joint reply to staff and licensees answers is that when individuals seek to intervene "...that person *must establish*..." three prerequisites. Order, p.5 [emphasis added]. To the extent the ALJ correctly sets forth these legal prerequisites, Citizens argue that their request for hearing need only *allege* that they will suffer a distinct and palpable injury, fairly traceable to the proposed action that is likely to be redressed by a favorable decision. Citizens' request petition adequately makes any necessary prerequisite allegation.

2. The ALJ erred in concluding that a higher standard exists for persons represented by counsel in requesting an informal hearing must contain a verified claim by affidavit.

The ALJ found Citizens' request for hearing deficient in that it contained no verified claim of the injuries alleged. Order, p. 6, n.2. The ALJ concludes that where persons requesting a hearing have legal representation, it is generally necessary for the individual to set forth any factual claims in a sworn affidavit. *Id.* Citizens do not deny that their request for hearing was not verified by affidavit. Citizens allege error in the conclusion that an affidavit verifying the factual basis of their request for hearing is a necessary element of the request. Citizens note that neither the notice of opportunity for hearing nor the applicable sections of the NRC's informal adjudication hearing procedures require an affidavit or a verified request. Citizens further note that none of the parties raised this objection to the request for hearing.

3. The ALJ erred in identifying only one specific factual assertion.

The ALJ's analysis notes that Citizens "... make various claims about purported injuries..." but only addressed one as a specific factual assertion. Citizens argue that there is no legal

distinction their other claims of purported injury and the factual assertion the ALJ chose to analyze. All of Citizens' claims of purported injury deserve the same careful analysis applied by the ALJ. Citizens' alleged injuries are traceable to the MLA and are redressable by a favorable decision.

4. The ALJ erred in putting aside Citizens' economic interests adversely affected by the proposed MLA, by concluding that denying the MLA will not redress the alleged injury.

The ALJ brushed aside one of Citizens' allegation of economic injury, ostensibly because the claim was unlinked to the radiologic harm, to conclude that denying the MLA will not redress the alleged injury. Order, p.7. This is a conclusion on the merits of Citizens' request for hearing without even being afforded the opportunity to present evidence or discover how denial of the MLA might redress all of Citizens' alleged injuries, not just the economic injury. Further, Citizens argue that it is within the presiding officer's authority to modify the license amendment so as to redress Citizens' alleged economic injury.

5. The ALJ's plainly erred in identifying deficiencies in the request for hearing.

The ALJ demonstrated clear prejudice with respect to the notice of appearance by applying a double standard – one for licensees and a different one for adversely affected persons. Citizens note that Counsel for Shieldalloy's notice of appearance was belatedly served on January 20, 1999, without so much as leave to plead. (attachment 1) The ALJ apparently had no problem with the licensee's late notice of appearance, notwithstanding the January 11, 1999 deadline. Unfortunately, Citizens were deprived of the same deference shown by the ALJ to the licensee. The ALJ denied Citizens' petition while in the same breath admonishes Citizens'

counsel for failing to submit a timely notice of appearance. Order, p.9, n.5. (". . . up to this point [Citizens' counsel] has failed to do so."). Although expressed in a footnote, the ALJ's determination expresses patent prejudice towards Citizens' petition. Id. (". . . the petition is suspect. . . " ¹ Id. The ALJ was apparently suspicious ". . . because of considerable uncertainty about [Citizens' counsel's] role relative to the petition ." Id. Instead of attempting to resolve his uncertainty with due respect of Citizens' petition, the ALJ defiantly declares his firm belief that he issued an ". . . explicit directive to enter a notice of appearance . . . which would include a statement identifying who exactly whom [Citizens' counsel] is representing." Id.

The ALJ's Order refers to and interprets the ALJ's initial prehearing order however it does not quote the pertinent part in whole or in context. Id. As a starting point, Citizens publish the pertinent passage from the ALJ's initial prehearing order:

II. Administrative Matters

A. Notice of Appearance

If they have not already done so, on or before Monday, January 11, 1999, each counsel or representative for each participant shall file a notice of appearance complying with the requirements of 10 C.F.R. §2.713(b). In each notice of appearance, besides providing a business address, telephone number, if an attorney or representative has a facsimile number and/or an Internet e-mail address, the attorney or representative should provide that information as well. Counsel who have already submitted a notice of appearance that does not provide facsimile or e-mail information should file a supplemental statement with that information.

At first blush, or even on closer inspection, there is no explicit directive that Citizens' counsel file a notice of appearance identifying exactly whom he is representing. A second look reveal that the section is titled notice of appearance and for all practical purposes indicates what

¹ What should be more suspect is how counsel for Shieldalloy's name appeared on the distribution of the ALJ's initial prehearing order more than two weeks before entering an appearance. See, attachment 2.

is important in this regard to the ALJ. There is nothing explicit or express in the prehearing order concerning the identification of parties.

The initial prehearing order went unpublished for good reason – it is a loaded device designed to snare the unwary public. *Id.* (citing, Presiding Officer Memorandum and Order, January 4, 1999 at 2-3 (*unpublished*)). Further, it does not conform to the ALJ's aforementioned findings of fact and self-serving conclusions of law regarding the initial prehearing order and notice of appearance. *Id.*

The NRC has long maintained the reprehensible stance, when it suits its licensees (even those with expired licenses), that where "personal privacy information is necessary, such information shall be contained in a separate attachment which *will* be withheld from public disclosure. . . ." pursuant 10 CFR §2.790(b). PDR ADOCK 04007397 BRS ACN #9601020230 951221(attached).¹ If NRC believes it is okay to shield the identity of owners of property containing its licensee's unlicensed source material on it, how can the ALJ take an inconsistent position on Citizens' hearing request? Why are Citizens subject to this prejudicial treatment?

On closer inspection, the pertinent prehearing order subsection, describes in intricate detail what is important to the ALJ in performing his duties;

- Business address
- Telephone number
- Facsimile or e-mail address.

In fact the pertinent subsection even tells someone what to do if one has already submitted a nonconforming notice of appearance without a facsimile or e-mail information.

¹ §2.790 contains no exemption from Public Disclosure for personal privacy information of the type suggested by NRC's letter to Cyprus Foote Mineral.

What is glaringly absent from the so-called explicit directive, is even the vaguest hint of the need for Citizens' counsel to identify his clients, much less his clients' authorization as otherwise held by the ALJ. Instead of simply asking for Citizens' identity, the ALJ simply dispenses with the need by dismissing the petition. Order, p.9, ¶2, n.5. [wherein Citizens' counsel is admonished via self-serving interpretations of the ALJ's prehearing order].

IV. Supplement

Citizens noted that the ALJ's order advises that Citizens have ten days to appeal the decision or March 10, 1999. Order, p.10. Citizens belatedly noted that ten day from the entry of February 23, 1999 is actually five days sooner or about March 5, 1999, today. Citizens request leave to supplement this notice and further request excuse for lack of proofreading this first notice of appeal in the interest of getting it filed in a timely manner.

Respectfully Submitted,

Counsel for Unnamed Citizens of Guernsey
County Ohio

Date: 1/4/99 3:10:15 PM Eastern Standard
 Time

 From: GPB@nrc.gov (G Paul Bollwerk)

 To: MBGattylaw@aol.com, cab@nrc.gov,
David.Berz@weil.com

 CC: HEARINGDOCKET@nrc.gov,
 JMC3@nrsmtp.nrc.gov

 File: 010499mo.wpd (39821 bytes)

 DL Time (TCP/IP): < 1 minute

The attached WordPerfect 6/7/8 file is a memorandum and order issued by the Presiding Officer today in the Shieldalloy Metallurgical Corp. proceeding.

 Please acknowledge receipt of this e-mail message and the attached file by return e-mail message.

 Thank you.

----- Headers -----

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 Received: from rly-zd05.mx.aol.com (rly-zd05.mail.aol.com [172.31.33.229]) by
 air17.mail.aol.com (v55.5) with SMTP; Mon, 04 Jan 1999 15:08:59 -0500

 Received: from igate.nrc.gov (igate.nrc.gov [148.184.176.31])

 by rly-zd05.mx.aol.com
 (8.8.8/8.8.5/AOL-4.0.0)

 with ESMTTP id PAA12620 for
 <MBGattylaw@aol.com>;

 Mon, 4 Jan 1999 15:08:57 -0500
 (EST)

 Received: from nrc.gov

 by smtp-gateway SMTP id PAA28262

 for <MBGattylaw@aol.com>; Mon, 4 Jan

1999 15:09:28 -0500 (EST)

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1999 15:06:02 -0500

 Message-Id: <s690d8da.029@nrsmtp.nrc.gov>

 X-Mailer: Novell GroupWise 4.1

 Date: Mon, 04 Jan 1999 15:05:46 -0500

 From: G Paul Bollwerk <GPB@nrc.gov>

 To: MBGattylaw@aol.com, cab@nrc.gov, David.Berz@weil.com

 Cc: HEARINGDOCKET@nrc.gov, JMC3@nrsmtp.nrc.gov

 Subject: Presiding Officer Memorandum and Order

 Mime-Version: 1.0

 Content-Type: multipart/mixed; boundary="=_EABD403A.781960BC"

 </HTML>

Attachment 2

Date: 1/20/99 5:59:46 PM Eastern Standard
Time

From: david.berz@weil.com

To: MBGAttyLaw@aol.com

you should be getting the service copy of my appearance shortly.

*****NOTE*****

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air06.mail.aol.com (v56.24) with SMTP; Wed, 20 Jan 1999 17:59:41 -0500

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by relay30.mx.aol.com

(8.8.8/8.8.5/AOL-4.0.0)

with ESMTTP id RAA20745 for

<MBGAttyLaw@aol.com>;

Wed, 20 Jan 1999 17:59:18 -0500

(EST)

From: david.berz@weil.com

Received: from [38.228.47.4] (helo=[38.228.47.4])

by relay3.smtp.psi.net with smtp

(Exim 1.90 #1)

for MBGAttyLaw@aol.com

id 1036aj-0007Yg-00; Wed, 20 Jan

1999 17:59:17 -0500

Received: by smtp-ny01.weil.com(Lotus SMTP MTA v4.6.2 (693.3 8-11-1998)) id
852566FF.007E53C6 ; Wed, 20 Jan 1999 17:59:49 -0500

X-Lotus-FromDomain: WGM

To: MBGAttyLaw@aol.com

Message-ID: <852566FF.007E5291.00@smtp-ny01.weil.com>

Date: Wed, 20 Jan 1999 18:00:37 -0500

Subject: Re: Fwd: Shieldalloy

Mime-Version: 1.0

Content-type: text/plain; charset=us-ascii

Content-Disposition: inline

Certificate of Service

Pursuant to §II.B.1.g and §II.B.1.d of the initial prehearing order, copies of the foregoing notice of appeal and notice of appearance were served on the presiding officer, the administrative assistant, the office of the secretary, counsel for the Staff and counsel for Shieldalloy Metallurgical Corporation via email at approximately 11:59 p.m. on 5 March 1999 and by regular mail on 6 March 1999, at the addresses shown below:

Administrative Judge
G. Paul Bollwerk, III, Presiding Officer
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Counsel for Unnamed Citizens of Guernsey
County Ohio

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SHIELDALLOY METALLURGICAL CORP.
Cambridge, Ohio
(Request for Materials License
Amendment)

Docket No.(s) 40-8948-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMO REF'G APPEAL STMT TO COMM have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
G. Paul Bollwerk, III
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U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
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Washington, DC 20555

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Michael Bruce Gardner, Esq.
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James P. Valenti
Shieldalloy Metallurgical Corporation
West Boulevard
P.O. Box 768
Newfield, NJ 08344

Dated at Rockville, Md. this
8 day of March 1999

Adrian T. Byrdson
Office of the Secretary of the Commission