

RAS 10524

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

DOCKETED 09/29/05

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Before Administrative Judges:

Lawrence G. McDade, Chairman
E. Roy Hawkens
Dr. Peter S. Lam

In the Matter of

ANDREW SIEMASZKO

Docket No. IA-05-021-EA

ASLBP No. 05-839-02-EA

September 29, 2005

MEMORANDUM AND ORDER

(Granting The NRC Staff's Motion For A Stay Of This Proceeding Until November 30, 2005)

On May 17, 2005, the NRC Staff submitted a motion seeking a 120-day delay of this enforcement proceeding. According to its motion, the Staff made this request because the facts underlying this proceeding constitute the grist for an ongoing criminal investigation in the Northern District of Ohio. The Staff – relying on an affidavit provided by a Department of Justice attorney who was participating in the criminal investigation (Affidavit of Thomas T. Ballantine (May 17, 2005))¹ – represented that a 120-day delay would allow the criminal investigation (i.e., the grand jury proceeding) to be completed without the adverse interference that might result if Mr. Siemaszko availed himself of the broad discovery permitted under the NRC rules in an enforcement proceeding. Mr. Siemaszko opposed the Staff's motion on the ground that he has a strong interest

¹ The NRC Staff, with the concurrence of the Department of Justice, placed Mr. Ballantine's affidavit in the public domain, because Mr. Ballantine "stated that everything in the affidavit was based on material gathered prior to the convening of the grand jury. And his expectation was that it would be a public document" (Transcript of Pre-Hearing Conference at 47 (June 16, 2005)). Mr. Siemaszko agreed that the affidavit ought not be under seal (id. at 47-48).

in the prompt resolution of this proceeding which, he contends, will exonerate him and thereby remove a significant impediment to his future employment in the nuclear industry.²

On July 22, 2005, this Board issued an unpublished Memorandum And Order that granted the NRC Staff's request for a 120-day delay of this enforcement proceeding. As amended by an unpublished Order issued on August 11, 2005, we directed that – absent a subsequent Order from this Board – on September 19, 2005, the Staff would produce the documents specified in 10 C.F.R. § 2.336(b), and the timing for all other discovery milestones would be keyed to that date. We likewise directed Mr. Siemaszko to make his initial disclosures pursuant to 10 C.F.R. § 2.704(a) on or before September 19, 2005.³

In our Order And Memorandum of July 22nd, we also observed that, given Mr. Siemaszko's strong interest in the speedy resolution of this proceeding, we would be disinclined to grant any further delays absent compelling reasons. We acknowledged, however, that the public has a vital interest in the vigorous pursuit of criminal investigations and prosecutions, and we identified those factors that typically have warranted a delay of an administrative proceeding on the ground that it might interfere with, or jeopardize, an ongoing criminal proceeding; namely, the potential for witness intimidation, perjury, or the manufacture of evidence by the defendant. We stated that unless the Staff demonstrated the existence of such factors, we would be reluctant to grant further delays.

On August 19, 2005, the Staff submitted a second motion to delay this proceeding. The Staff requested a 77-day delay, to and including November 30, 2005, when, according to the Staff's motion, the grand jury deliberations would likely be finished. The Staff accompanied this request

² On April 21, 2005, the Staff issued an enforcement order that prohibits Mr. Siemaszko from any involvement in NRC-licensed activities for a period for five years from the effective date of the order. The enforcement order will not become effective until *after* Mr. Siemaszko's challenge is fully adjudicated or, alternatively, *after* he withdraws the challenge.

³ On September 15, 2005, we granted a temporary stay of discovery to maintain the status quo so that we could more fully consider the other matters that are before the Board.

with a sealed affidavit from Mr. Ballantine, which averred that a further delay of the enforcement action was necessary to preserve the integrity of the grand jury proceeding (Affidavit of Thomas T. Ballantine (Aug. 18, 2005)).⁴ Mr. Siemaszko opposed the requested delay.

Because we found Mr. Ballantine's assertions in his affidavit of August 18, 2005, about the putative need for a further delay to be couched in vague generalities, we held a telephonic pre-hearing conference on August 30, 2005, to hear further from the parties on this matter and, in particular, to give the Staff the opportunity to identify with greater specificity the nature and scope of the harm that would befall the Government if the Staff's motion for a second delay were denied. Shortly after this conference, the Staff filed another sealed affidavit from Mr. Ballantine that addressed – with somewhat greater specificity than was present in the second Ballantine affidavit – how the grand jury deliberations might be jeopardized if we denied the Staff's second request for a delay (Affidavit of Thomas T. Ballantine (Sept. 8, 2005)).⁵

Analysis

In Oncology Services Corp., CLI-93-17, 38 NRC 44, 50 (1993), the Commission instructed that “whether a delay [in an enforcement proceeding] is reasonable depends on the facts of a particular case and requires a balancing of the competing interests.” The factors to be assayed when conducting the balancing test are (38 NRC at 50-51): (1) the length of delay; (2) the reason

⁴ The Staff represented that it placed the Ballantine affidavit of August 18, 2005 under seal pursuant to the Commission's policy on Investigations, Inspections, and Adjudicatory Proceedings. The Staff expressed its willingness to release the affidavit to Mr. Siemaszko if he signed a confidentiality and non-disclosure agreement drafted by the Staff. Because Mr. Siemaszko refused to sign the agreement, he has not seen the August 18th affidavit. See Transcript of Pre-Hearing Conference at 5-8 (Aug. 30, 2005).

⁵ Because Mr. Siemaszko has not yet signed the confidentiality and non-disclosure agreement drafted by the Staff (supra note 4), he has not seen the September 8th affidavit. At the pre-hearing conference, the parties represented that they would attempt to draft a mutually agreeable non-disclosure agreement that would enable Mr. Siemaszko to review the sealed Ballantine affidavits (Transcript of Pre-Hearing Conference at 53-54 (Aug. 30, 2005)). We have been advised that the parties did not reach agreement. Accordingly, each party has presented to the Board a draft protective order for our consideration.

for delay; (3) the petitioner's timely assertion of its right to a hearing; (4) the prejudice to the petitioner; and (5) the risk that the petitioner would suffer an erroneous deprivation.

Applying that balancing test here, we conclude that the scales tip in favor of granting the Staff's request for a second delay in this enforcement proceeding.

The first factor – the length of delay – weighs heavily in favor of the Staff. In our judgment, the length of the sought-after delay – 77 days, to and including November 30, 2005 – is sensible and reasonable. At the end of this period, we are told, the grand jury deliberations should be finished. If the grand jury returns no indictments, there is no reason why this proceeding cannot go forward with dispatch. If the grand jury indicts individuals other than Mr. Siemaszko, the Staff represents that “it will be easy for us to proceed [in this enforcement proceeding] with some sort of protective order” (Transcript of Prehearing Conference at 44 (Aug. 30, 2005)). Finally, if the grand jury indicts Mr. Siemaszko, we would be presented with a materially changed circumstance that would justify soliciting input from the parties regarding how they wish to proceed.⁶ The salient point is that – given the pendency of grand jury deliberations that should be finished by the end of November, and given the fact that the outcome of these deliberations will likely have a material impact on the procedural course of this proceeding – the length of the delay sought by the Staff is reasonable and, in the totality of circumstances, weighs heavily in favor of the Staff.

The second factor – the reason for delay – likewise weighs in favor of the Staff. Because Mr. Ballantine's affidavits of August and September are under seal, we are foreclosed from providing a fact-intensive analysis on this factor. However, in our Memorandum And Order of July

⁶ For example, a petitioner in Mr. Siemaszko's position might elect to withdraw his challenge to an enforcement order in the face of an indictment based on substantially identical facts. Alternatively, even if – in the face of an indictment – a petitioner in Mr. Siemaszko's position elected to go forward with his challenge to an enforcement order, the adverse impact of the indictment on the petitioner's ability to obtain employment in the nuclear industry may wholly eclipse the adverse impact of the enforcement order on his ability to obtain such employment. If so, the strength of the petitioner's objection to further delays of the administrative proceeding would be substantially weakened.

22, 2005, granting the Staff's first request for a delay, we acknowledged that Mr. Siemaszko has a strong interest in a prompt hearing. We therefore informed the Staff that it would have to provide compelling reasons if it wished to receive any additional delays, and we noted that the factors that usually justify such delays include a potential for witness intimidation, perjury, or the manufacture of evidence. Suffice it to say that we are satisfied – based on Mr. Ballantine's affidavit of September 8, 2005 – that the Government has demonstrated the need for a further delay to preserve the integrity of the grand jury process.⁷

The third factor – petitioner's timely assertion of its right to a hearing – weighs in Mr. Siemaszko's favor, because he requested a hearing promptly after the Staff issued the enforcement order. We view this factor, however, in the nature of required compliance with procedural requirements that does not weigh heavily on the scales in this case.

The fourth factor – the prejudice to petitioner – includes two components: (1) the prejudice to Mr. Siemaszko's ability to litigate the charges in the enforcement order, and (2) the prejudice to his interest in obtaining employment in the nuclear industry. As to the first component, we perceive no cognizable prejudice to Mr. Siemaszko's ability to litigate the enforcement order if we grant the Staff's modest request for a 77-day delay. The second component, however, weighs in Mr. Siemaszko's favor, because – as we stated in our decision of July 22, 2005 – until this enforcement proceeding is concluded, "Mr. Siemaszko is, de facto, unemployable in the nuclear industry and, as a result he suffers a significant diminution in his earning capacity every day until this matter is resolved." We nevertheless observe that it is likely that other significant determinants, aside from

⁷ Representations of a federal criminal prosecutor in this context are entitled to deference and ordinarily should not be second-guessed. This is not to say, however, that we will blindly defer to broad assertions that are not grounded in fact. It is the Staff's responsibility – if it wishes to stay an enforcement proceeding pending the completion of a criminal proceeding – to ensure that the affidavits it submits are sufficiently specific to allow a Board to perform a meaningful balancing test. Mr. Ballantine's affidavit of August 18, 2005 did *not* contain the degree of specificity that we expect the Staff to provide at this juncture in this type of case.

the enforcement order, are also operating to reduce Mr. Siemaszko's employment prospects in the nuclear industry, including (1) his discharge by FirstEnergy Nuclear Operating Company (FENOC) *prior to* the Staff's issuance of the enforcement order, (2) the intense press coverage of Mr. Siemaszko's alleged conduct at FENOC that gave rise to the enforcement order, and (3) the press coverage of the pending grand jury proceeding. Given the existence of these other determinants that adversely affect Mr. Siemaszko's ability to obtain employment in the nuclear industry, we find that the fourth factor weighs only moderately in his favor.

Finally, the fifth factor – the risk that the petitioner would suffer an erroneous deprivation – favors the Staff. The enforcement order barring Mr. Siemaszko from involvement in NRC-licensed activities for five years is not immediately effective; it does not become effective, if at all, until *after* its validity has affirmed in a final adjudicative order or, alternatively, after Mr. Siemaszko withdraws his challenge. Accordingly, as a matter of law, Mr. Siemaszko has not been deprived of anything, much less deprived of anything erroneously.⁸

On balance, we conclude that – given the length of the requested delay, the Government interest underlying the requested delay, and the fact that Mr. Siemaszko is not legally foreclosed from obtaining employment in the nuclear industry – the scale tips in favor of the Staff. Accordingly, we grant the Staff's request for a second delay. We direct the Staff to submit a status report on or before December 1, 2005, that includes (1) the status of the criminal investigation, and (2) a proposed course of action and schedule detailing how this case should proceed. Prior to submitting its proposed course of action, the Staff is directed to contact Mr. Siemaszko's counsel and attempt to formulate a proposed plan and schedule that is agreeable to both parties. If the parties

⁸ Although the enforcement order is not immediately effective and, hence, does not – as a matter of law – prohibit Mr. Siemaszko from obtaining employment in the nuclear industry, we recognize its detrimental impact on his employment prospects. However, as discussed *supra* in text, the adverse affect of the order must be assessed in light of the other significant determinants that adversely affect his employment prospects.

are unable to reach agreement on this matter, counsel for Mr. Siemaszco shall, on or before December 5, 2005, submit a status report that includes their proposed course of action and schedule detailing how this case should proceed.

If either party has any objection to any aspect of this Order such objection shall be served electronically and filed with the Board no later than October 7, 2005.

IT IS SO ORDERED.⁹

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. ROY HAWKENS
Administrative Judge

/RA/

PETER S. LAM
Administrative Judge

Rockville, Maryland
September 29, 2005

⁹ Copies of this order were sent this date by Internet e-mail transmission to: (1) counsel for Mr. Siemaszko, (2) counsel for the NRC Staff, (3) David Lochbaum, Union of Concerned Scientists, and (4) Sandy Buchanan, Ohio Citizen Action.

Separate Statement of Judge McDade:

I would not have granted the Staff's Motion for a Stay. Instead, I would have directed that the general discovery mandated by 10 C.F.R. § 2.336(b) be provided to Mr. Siemaszko as scheduled, subject to a protective order which would restrict the dissemination of this material to Mr. Siemaszko and his attorneys. I would have then scheduled a Prehearing Conference for on or about December 1, 2005, in order to update the record, and to determine whether restrictions on the dissemination of the discovery materials should continue. In reaching that conclusion, I do not disagree with the mode of analysis articulated by the majority of the Board. I do, however, weigh the facts somewhat differently than do my colleagues. The rationale behind my view is summarized in the remainder of my statement which will be furnished to the litigants at this time. I am directing, however, that the remainder of my statement be filed under seal at this time and that it remain under seal until November 30, 2005, by which time the grand jury should have completed its investigation. At that time, absent an additional order from the Board, the remainder of my separate statement will be transferred to the public record.

/RA/

LAWRENCE G. McDADE
Administrative Judge

Rockville, Maryland
September 29, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
ANDREW SIEMASZKO) Docket No. IA-05-021
)
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING THE NRC STAFF'S MOTION FOR A STAY OF THIS PROCEEDING UNTIL NOVEMBER 30, 2005) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of September 2005