

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

Before Administrative Judges:

Alex S. Karlin, Chairman
Michael M. Gibson
Dr. Gary S. Arnold

In the Matter of

JAMES CHAISSON

(Enforcement Action)

Docket No. IA-14-025-EA

ASLBP No. 14-932-02-EA-BD01

September 8, 2014

NOTICE OF HEARING AND INITIAL SCHEDULING ORDER

I. INTRODUCTION

This proceeding concerns a July 11, 2014 enforcement order issued by Patricia K. Holahan, Acting Director, Office of Enforcement of the U.S. Nuclear Regulatory Commission (Director) against Mr. James P. Chaisson.¹ The Director alleges that Mr. Chaisson failed to comply with certain provisions of a confirmatory order that the Director issued to him in 2012 (2012 Order). Id. at 42,058. Mr. Chaisson requested an “expedited hearing”² and filed an answer denying certain aspects of the 2014 Order.³ The Director filed an answer to Mr. Chaisson’s answer.⁴ The Director does not oppose Mr. Chaisson’s request for a hearing. Id.

Pursuant to 10 C.F.R. § 2.329(a), on August 26, 2014, this Board conducted the initial scheduling conference in this matter.⁵ Our purpose was to discuss the development of an initial

¹ In the Matter of James Chaisson, 79 Fed. Reg. 42,057 (July 18, 2014) (2014 Order).

² E-mail from James Chaisson to NRC Hearing Docket (July 18, 2014).

³ Request for Hearing Submitted by James Chaisson (Aug. 4, 2014) (Hearing Request).

⁴ NRC Staff Answer to Request for Hearing (Aug. 15, 2014) (Director’s Answer).

⁵ See Order (Scheduling Initial Prehearing Conference) (Aug. 14, 2014) (unpublished).

scheduling order (ISO) that would help achieve the just resolution of this dispute as efficiently and expeditiously as possible. The conference was conducted telephonically. The Director was represented in the conference by the NRC's Office of General Counsel. Mr. Chaisson participated without representation.⁶

During the initial scheduling conference, Mr. Chaisson withdrew his request that the hearing be expedited. Tr. at 27, 65-66. Mr. Chaisson's request for expedition was based on his concern that he would not be able to continue working if the 2014 Order went into effect before the hearing.⁷ However on August 14, 2014, the Director informed Mr. Chaisson that the 2014 Order "is not effective until the Atomic Safety and Licensing Board rules on your hearing." Director's Answer at 1 n.3. During the conference call, counsel for the Director confirmed that Mr. Chaisson's current responsibilities in his current job are not prohibited by the 2014 Order (because it is not in effect) or by the 2012 Order. Tr. at 25. On that basis, Mr. Chaisson withdrew his request to expedite the hearing. Tr. at 27, 65-66.

In addition, during the initial scheduling conference, the parties acknowledged that 10 C.F.R. Part 2, Subpart G (the regulations applicable to enforcement proceedings) govern this adjudication.⁸ Accordingly, this ISO is based, in part, on the Subpart G regulations.

⁶ Given that Mr. Chaisson is unrepresented, the Board will carefully scrutinize any agreement or consent by him purporting to waive or abandon any of his substantive or procedural rights. See Order (Scheduling Initial Prehearing Conference) (Aug. 14, 2014) (unpublished) at 4 n.5. We will look to see if any such consent or waiver is fully informed. Director's counsel should be especially scrupulous in informing Mr. Chaisson of the nature and extent of the rights that they might suggest that he waive or abandon. We also reminded counsel that their ethical duty of candor (e.g., their duty to disclose to this tribunal any relevant information and/or legal authority that is adverse to the Director's position) is especially important in cases such as this one, where the target of the government's enforcement action is not represented by counsel. See Model Rules of Professional Conduct R. 3.3(a)(3); 10 C.F.R. §§ 2.323(d) and 2.314.

⁷ E-mails from James Chaisson to NRC Hearing Docket (Aug 4, 2014, 17:14 EDT; Aug. 6, 2014).

⁸ Tr. at 38. See 10 C.F.R. § 2.310(b) ("Proceedings on enforcement matters must be conducted under the procedures of subpart G of this part, unless all parties agree [otherwise].")

II. NOTICE OF HEARING

The Board grants Mr. Chaisson's request for a hearing and, pursuant to 10 C.F.R. § 2.312, issues this notice of hearing. Indeed, Mr. Chaisson, who is the target of the Director's enforcement order, has the right to demand and receive, not merely request, a hearing. See 10 C.F.R. § 2.202(a)(3). The Board intends to conduct the hearing in Salt Lake City, Utah, at a time and place to be determined later. The hearing and this adjudication will be conducted under 10 C.F.R. Part 2, Subpart G.

III. IDENTIFICATION OF DISPUTED ISSUES

NRC regulations require that this ISO set forth "the issues or matters in controversy to be determined in the proceeding." 10 C.F.R. § 2.329(e). This is important because the scope and content of this adjudication, and the evidentiary hearing herein, are defined by the issues and matters that are disputed by the parties. For example, the scope of the mandatory disclosures that the parties must make under Subpart G is defined by the "disputed issues alleged with particularity in the pleadings." 10 C.F.R. §§ 2.704(a)(2), 2.709(a)(6). Likewise, the scope of discovery under Subpart G covers any matter "that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party." 10 C.F.R. § 2.705(b)(1).

Based on the written pleadings and the discussion during the initial prehearing conference, the issues and matters in controversy, as we see them now, are defined by the allegations in the Director's 2014 Order and the responses contained in Mr. Chaisson's emails, answer and statements during the conference.

A. The Director's allegations include the following:

1. Mr. Chaisson was employed from April 2009 through April 2010 as an area supervisor and lead radiographer for the Wyoming operations of Texas Gamma Ray, LLC (TGR), which, at that time, held a license issued by the NRC pursuant to 10 C.F.R. Part 34. The

license authorized TGR to conduct certain radiographic operations. 79 Fed. Reg. at 42,057.

2. On May 15, 2012, the NRC issued an order to Mr. Chaisson prohibiting him from engaging in NRC-licensed activities for a 3-year period. Id.
3. The May 15, 2012 order was based on NRC's claim that Mr. Chaisson "engaged in deliberate misconduct in violation of 10 C.F.R. § 30.10(a)(1). Specifically, the NRC concluded that Mr. Chaisson chose to store a radiographic exposure device at a facility he knew did not comply with applicable NRC security requirements and was not an authorized storage location under TGR's license." Id.
4. Mr. Chaisson requested alternative dispute resolution (ADR) concerning the May 15, 2012 order. Id. A mediation session was conducted on July 26, 2012. Id.
5. As a result of the ADR, Mr. Chaisson signed an "Agreement in Principal [sic] . . . in which he agreed to terms and conditions to be memorialized in a Confirmatory Order." Id.
6. On September 10, 2012, NRC issued a "Confirmatory Order based on the Agreement in Principal [sic]." Id. [This Confirmatory Order is referred to herein as the "2012 Order."]
7. Among other things, the 2012 Order prohibited Mr. Chaisson from engaging in NRC-licensed activities for an 18-month period, during which time he was required:
 - a. To complete a 40-hour formal training course designed for qualifying radiation safety officers;
 - b. To complete a 40-hour formal training course that meets or exceeds the requirements of 10 C.F.R. § 34.43; and
 - c. To submit an article to NRC "articulating the importance of compliance with NRC regulations and providing full and accurate information." Id. at 42,057-58.
8. On March 28, 2014, Mr. Chaisson contacted NRC to determine what kind of training would be acceptable to meet the requirements of the 2012 Order and on March 31,

2014, he requested a 6-month extension to fulfill the requirements of the 2012 Order. Id. at 42,058.

9. Contrary to the requirements of the 2012 Order, Mr. Chaisson failed to complete the two 40-hour training courses, and failed to submit the article to NRC within the 18-month period specified in the 2012 Order. Id.
 10. "Mr. Chaisson's actions [specified in the previous paragraph 9] constitute a violation of NRC requirements." Id.
 11. "Based on the deliberate misconduct on which the May 15, 2012, Order was based, and Mr. Chaisson's violation of the September 10, 2012 Confirmatory Order, I [the Director] lack the requisite reasonable assurance that Mr. Chaisson can be relied upon, at this time, to comply with the Commission's requirements and that the health and safety of the public will be protected if Mr. Chaisson were permitted at this time to be involved in NRC-licensed activities." Id.
 12. On the foregoing basis, the Director issued the 2014 Order.
- B. Mr. Chaisson's allegations include the following:
1. He did not deliberately violate any NRC requirements as alleged in the 2012 Order. E-mail from James Chaisson to NRC Hearing Docket (Aug. 4, 2014, 12:02 EDT).
 2. The 2012 Order does not accurately represent what he agreed to in the 2012 mediation process. Tr. at 43.
 3. He complied with the provision of the 2012 Order that required him to write and submit an article. Hearing Request.
 4. He attempted to comply with the provisions of the 2012 Order that required him to attend two 40-hour training courses, but circumstances beyond his control prevented him from doing so. Hearing Request.
 5. He requested that NRC grant him an extension for complying with the requirement of the 2012 Order that he attend two 40-hour training courses. 79 Fed. Reg. at 42,058.

6. He did not deliberately violate the 2012 Order. E-mail from James Chaisson to NRC Hearing Docket (Aug. 4, 2014, 12:02 EDT).
7. The sanctions proposed by the 2014 Order are inappropriate and excessive. Tr. at 41.
8. The 2014 Order should not have been issued and should not be sustained.⁹

C. Board Specification of Issues or Matters in Dispute

The Board concludes that the issues listed in Sections III.A and III.B are the “issues or matters in controversy to be determined in the proceeding.” 10 C.F.R. § 2.329(e). Thus, the scope of the mandatory disclosures, discovery, testimony, exhibits, and any other filings herein will include the foregoing issues and matters.

We note that during the initial prehearing conference, the Director took the position that the scope of the adjudication “should be limited to whether the 2014 Order was justified and appropriate.” Tr. at 41. For example, the Director argued that Mr. Chaisson should not be allowed to dispute whether the 2012 Order accurately reflects the mediated settlement because Mr. Chaisson signed an agreement in principle that covered these points. Tr. at 42. The Director also argued that Mr. Chaisson should not be allowed to dispute the original violations that formed the basis of the 2012 Order, i.e., whether, in 2009-2010, Mr. Chaisson deliberately violated NRC regulations. Tr. at 47. The Director argued that the current dispute should be limited to whether Mr. Chaisson violated the terms of the 2012 Order. Id.

We do not agree. First, Mr. Chaisson asserts that the 2012 Order does not accurately reflect what he agreed to in 2012. Tr. at 45. If Mr. Chaisson asserts that he did not agree to undergo the two 40 hour training courses and to submit an article to the NRC within 18 months, then he may present evidence to that effect. Likewise, if the Director (who has the burden of proof herein) has a written agreement in principle, signed by Mr. Chaisson, specifying that he

⁹ See Hearing Request; E-mails from James Chaisson to NRC Hearing Docket (July 18, 2014; Aug. 4, 2014, 12:02 EDT; Aug. 4, 2014, 17:14 EDT; Aug. 6, 2014).

agreed to those terms and conditions, then the Director may present such evidence at the hearing.¹⁰

Second, the 2014 Order explicitly states that the Director's findings and the sanctions she seeks to impose on Mr. Chaisson, are, in part, "[b]ased on the deliberate misconduct on which the May 15, 2012, Order was based." 79 Fed. Reg. at 42,058. Meanwhile, Mr. Chaisson disputes that he ever engaged in such deliberate misconduct. Tr. at 56-57. This issue is clearly within the scope of this proceeding. While this proceeding will not litigate the validity of the 2012 Order (Mr. Chaisson did not challenge that order in 2012),¹¹ the scope of the current proceeding definitely includes the appropriateness of the sanctions specified in the 2014 Order. The appropriateness of the sanctions in the 2014 Order is based, in significant part, on NRC's allegation that he engaged in deliberate misconduct in 2009-2010. This is an issue or matter in dispute in this case, and the Director and Mr. Chaisson are entitled to present evidence on it.

D. Clarification or Simplification of the Disputed Issues

The issues and matters in dispute that are listed in sections III.A and III.B above are subject to modification and adjustment. For example, during the prehearing conference, we encouraged the Director and Mr. Chaisson to communicate with each other to attempt to settle, clarify, or simplify the issues and matters in dispute. Tr. at 85-87. Pursuant to that discussion,

¹⁰ The issue - whether or not the 2012 Order accurately reflects what Mr. Chaisson agreed to - focuses on the final result of the mediation, not the various communications made by the parties or the mediator during the mediation process. Both parties may present evidence whether the 2012 Order accurately reflects the result of the mediation. But neither party will be allowed to present evidence concerning the back and forth communications that the parties exchanged during the mediation process. We are not going to rehash who said what to whom during the mediation. Likewise, the mediator may not be called as a witness in this proceeding. This comports with Rule 408 of the Federal Rules of Evidence, which states, in part: "Evidence of conduct or statements made in compromise negotiations is . . . not admissible."

¹¹ While we will allow Mr. Chaisson to use this adjudication to argue (and present evidence) that the 2012 Order is inaccurate (that is that it does not correctly reflect what he agreed to in 2012), we will not allow him to use this adjudication to argue that the 2012 Order is invalid or should be overturned. If he had wanted to challenge the validity of the 2012 Order, he should have done so in 2012.

Section IV.A of this order instructs the parties to consult with each other by September 30, 2014, and for the Director to submit a report to the Board concerning the results of that consultation by October 10, 2014. That consultation and report should include any jointly proposed modifications or adjustments to the matters listed in Sections III.A and III.B.

IV. SCHEDULE

In addition to the general deadlines and time frames applicable to proceedings under 10 C.F.R. Part 2, the Board establishes the following initial schedule for this matter.¹²

A. Initial Meeting of the Parties

NRC's Subpart G regulations specify that, as soon as practicable after the issuance of the ISO, the parties shall "meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures required by § 2.704, and to develop a proposed discovery plan." 10 C.F.R. § 2.705(f). In accordance with these regulations, the parties shall consult. In addition to the foregoing topics, they shall discuss whether either party claims that confidential or protected information is involved in this proceeding and whether a protective order may be necessary. Specifically,

1. By September 30, 2014, the Director and Mr. Chaisson shall consult (either in person or telephonically) to discuss the matters specified above; and
2. By October 10, 2014, the Director or her representative shall file a brief report with the Board reciting the results of the consultation. This report should
 - a. Identify any jointly proposed amendments, clarifications or simplifications to the issues and disputed matters listed in Sections III.A and III.B of this ISO;

¹² In any conflict between this ISO and the general rules of 10 C.F.R. Part 2 (including the model milestones set forth in 10 C.F.R. Part 2, Appendix B), the deadlines specified in the ISO shall govern.

- b. Include a proposed discovery plan that comports with the schedule and deadlines set forth in this ISO;
 - c. Specify if either party believes that a protective order is necessary and, if so, submit a proposed protective order;¹³ and
 - d. Specify if the parties wish to pursue settlement or to seek to have a Settlement Judge appointed pursuant to 10 C.F.R. § 2.338(b).
3. By October 17, 2014, Mr. Chaisson may file an answer to the report.
 4. Settlement is encouraged, but the parties should be aware that the fact that they are negotiating a possible settlement does not change any of the deadlines set forth in this ISO. See 10 C.F.R. § 2.338(f).

B. Mandatory Disclosures

NRC's Subpart G regulations specify that, unless the Board mandates otherwise, within 45 days of the ISO each party must automatically disclose to the other party certain information and documents. For example, within 45 days the NRC Enforcement Director must provide Mr. Chaisson with a copy of all NRC Staff documents that are "relevant to disputed issues alleged with particularity in the pleadings [i.e., listed in Sections III.A and III.B herein]." 10 C.F.R. § 2.709(a)(6)(i)(A). Likewise, within 45 days Mr. Chaisson must provide certain information and documents to the NRC Enforcement Director. See 10 C.F.R. § 2.704(a). That 45-day deadline, however, conflicts with the timing of the consultation mandated by 10 C.F.R. § 2.705(f) and discussed in Section IV.A above. Accordingly,

1. In lieu of the 45-day deadline, Mr. Chaisson and the Director shall make their initial mandatory disclosures to each other by November 4, 2014;
2. Mr. Chaisson and the Director shall update their mandatory disclosures monthly, on the second Wednesday of each month; and

¹³ See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-5, 73 NRC 131 (2011) for an example of a protective order.

3. The monthly updates shall continue until the Board issues its decision after the hearing.

C. Discovery

NRC's Subpart G regulations specify that, in addition to the mandatory disclosures specified above, and within certain constraints, Mr. Chaisson may pursue discovery against the Director. See 10 C.F.R. § 2.709 ("Discovery against NRC staff"). For example, Mr. Chaisson (a) may serve written questions (referred to as "interrogatories") on the Director, (b) must show that the answers to the interrogatories are necessary to a proper decision in this proceeding, and (c) ask the Board to direct the Director to answer those interrogatories. See 10 C.F.R. § 2.709(a)(2). If the Board agrees, it will instruct the Director to answer the interrogatories. In addition, Mr. Chaisson may require a member of the NRC Enforcement Director's staff to attend a prehearing meeting where he can require that staff member answer questions orally under oath (this is referred to as a "deposition"). See 10 C.F.R. §§ 2.709(a)(1), (3) and (4). Likewise, counsel for the Director may take the deposition of Mr. Chaisson or any other person, see 10 C.F.R. § 2.706(a); may file written interrogatories that Mr. Chaisson must answer, see 10 C.F.R. § 2.705(b); and may require him to provide the Director with a copy of any designated relevant document that is within his possession, custody or control, see 10 C.F.R. § 2.707(a). Neither party is required to pursue such discovery. However, any such discovery shall proceed as follows:

1. Such discovery may not begin until October 10, 2014 -- 10 days after Mr. Chaisson and the Director have held the consultation mandated by 10 C.F.R. § 2.705(f);¹⁴
2. Such discovery must be completed by January 15, 2015.

D. Motions for Summary Disposition

Given the factual nature of the issues and matters in dispute herein, the Board concludes that motions for summary disposition (and any other form of dispositive motion)

¹⁴ This is the same date on which the Director is to submit her report concerning the results of the consultation, including the submission of any jointly proposed discovery plan.

would be unproductive and would divert Mr. Chaisson and the Director from preparing adequately for the evidentiary hearing. Accordingly, no such motions may be filed.

E. Second Prehearing Conference

The Board contemplates that the prehearing filings that each party must make before the evidentiary hearing can occur will need to be filed by February 20, 2015, and that the evidentiary hearing will occur in mid to late March 2015. At the moment, however, we are not mandating those specific deadlines. Instead, the Board will hold a second prehearing conference before January 30, 2015. The purpose of the second prehearing conference will be to set a specific time, date, and location for the evidentiary hearing and to establish firm deadlines for the prehearing filings that the parties must make.

V. FIFTH AMENDMENT ISSUES

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that no person “shall be compelled in any criminal case to be a witness against himself.” The 2014 Order issued by the Director, and this adjudicatory proceeding, are administrative actions and do not constitute a criminal case. During the initial prehearing conference, however, counsel for the Director stated that there is a “potential” that a criminal case could arise concerning Mr. Chaisson’s alleged violations. Tr. at 91. Given that Mr. Chaisson has no legal representation, it is incumbent on NRC, and this Board, to be alert to such issues and to inform him of his right against self-incrimination in appropriate circumstances. Accordingly, and as ordered during the initial prehearing conference:

A. On September 10, 2014 the Director shall submit a brief to the Board that specifies:

1. Whether there is any potential that NRC will pursue criminal charges against Mr.

Chaisson;

2. Whether the NRC is aware that any other federal entity, such as the U.S. Department of Justice, is investigating this matter and/or may pursue criminal charges against Mr.

Chaisson;

3. Whether the Director or anyone on the NRC Staff has previously advised Mr. Chaisson of his Fifth Amendment right against self-incrimination, and if so, when and how;
 4. Whether the right against self-incrimination attaches or has attached to Mr. Chaisson in this proceeding;
 5. If so, when did it attach; and
 6. If so, how we should handle this issue and protect Mr. Chaisson's constitutional rights.
- B. On September 17, 2014, Mr. Chaisson may file an answer to the Director's report.

VI. CONCLUSION

This ISO is intended to promote the just resolution of this dispute as efficiently and expeditiously as possible. The deadlines set forth herein are firm, and will not be modified unless a party (in advance of the deadline) petitions this Board for a change and demonstrates to us that there is good cause for such a change. See 10 C.F.R. § 2.334(b). Appendix A provides a summary of the deadlines set forth in this ISO. The parties should note that settlement negotiations, while encouraged, will not delay this schedule unless the Board affirmatively grants such a delay.

Objections to this ISO must be filed by September 15, 2014. See 10 C.F.R. § 2.329(e).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Michael M. Gibson
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 8, 2014

APPENDIX A

IN THE MATTER OF JAMES CHAISSON: DEADLINES SPECIFIED IN INITIAL SCHEDULING ORDER

Deadline	Action	ISO Section
9/10/14	Director files brief concerning 5 th Amendment	ISO V.A
9/15/14	Either party may file objections to ISO	ISO VI
9/17/14	Chaisson may file response concerning 5 th Amendment	ISO V.B
9/30/14	Initial meeting or consultation of parties	ISO IV.A.1
10/10/14	Director files report of consultation	ISO IV.A.2
10/10/14	Parties can commence discovery	ISO IV.C.1
10/17/14	Chaisson may file response to Director's report	ISO IV.A.3
11/4/14	Parties make initial mandatory disclosures (to be updated monthly thereafter)	ISO IV.B1
1/15/15	End of discovery. Parties must complete discovery by this date	ISO IV.C.2
Before 1/30/15	Board conducts second prehearing conference with the parties to adjust and finalize plans for the hearing	ISO IV.E
2/20/15*	Each party files its Prehearing Submittals. (These submittals consist of the party's (a) statement of position, (b) written testimony, and (c) exhibits)	ISO IV.E
Mid to late March 2015*	Evidentiary hearing	ISO IV.E

* These dates are subject to change and will be discussed during the second prehearing conference.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Mr. James Chaisson) IA-14-025-EA
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **NOTICE OF HEARING AND INITIAL SCHEDULING ORDER (LBP-14-11)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of September, 2014