

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 10/07/04**

COMMISSIONERS

**SERVED 10/07/04**

Nils J. Diaz  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )  
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STATE OF ALASKA DEPARTMENT OF )  
TRANSPORTATION AND PUBLIC )  
FACILITIES )  
 )  
(Confirmatory Order Modifying License) )  
\_\_\_\_\_ )

Docket No. 030-07710-CO

**CLI-04-26**

**MEMORANDUM AND ORDER**

This proceeding arises from a challenge to a confirmatory order modifying the materials license of the State of Alaska Department of Transportation and Public Facilities (“ADOT”). A split Licensing Board, with Judge Bollwerk dissenting, granted the intervention petition of Robert Farmer, and the NRC Staff and ADOT appealed that decision. We agree with Judge Bollwerk’s dissent and reverse the Board’s order.

**I. BACKGROUND**

ADOT holds an NRC license to possess and use certain licensed material in portable gauging devices. On March 15, 2004, the NRC Staff simultaneously issued a Notice of Violation<sup>1</sup> and a Confirmatory Order Modifying License (Effective Immediately)<sup>2</sup> to ADOT. The Notice of Violation listed 12 discriminatory actions ADOT allegedly took against Farmer, the

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<sup>1</sup> See Notice of Violation (EA-03-126) (Mar. 15, 2004).

<sup>2</sup> See “In the Matter of State of Alaska Department of Transportation & Public Facilities, Anchorage, AK Confirmatory Order Modifying License, (Effective Immediately),” 69 Fed. Reg. 13,594 (Mar. 23, 2004) (“Confirmatory Order”).

Statewide Radiation Safety Officer, between 1999 and 2002 in retaliation for his raising safety concerns about radiation exposures to ADOT employees. The Staff found the violation to be “Severity Level II,” or moderately significant.<sup>3</sup> Rather than contest the NRC Staff’s enforcement action, ADOT agreed to a Confirmatory Order requiring ADOT to take actions to ensure compliance with 10 C.F.R. § 30.7, the Commission’s rule regarding employee protection from discrimination for engaging in certain protected activities.<sup>4</sup> To ensure that ADOT has established and will maintain a Safety Conscious Work Environment, the Confirmatory Order required ADOT to take a variety of planning and training actions which focus on three goals:

(1) ensuring that ADOT[]’s internal policies and procedures establish and will support a Safety Conscious Work Environment by providing for a review of these policies and procedures by individuals who are independent of ADOT[] and who have subject-matter expertise; (2) developing a plan to conduct training of ADOT[] employees and their supervisors and managers on NRC’s Employee Protection regulations and on establishing a Safety Conscious Work Environment; and (3) developing a long-term plan for maintaining a Safety Conscious Work Environment that includes culture surveys and annual refresher training.<sup>5</sup>

Pursuant to 10 C.F.R. § 2.202,<sup>6</sup> the Commission invited any person adversely affected by the Confirmatory Order to request a hearing within 20 days and limited the issue to be

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<sup>3</sup>The designation Severity Level I is given to the most significant violations and Severity Level IV to the least significant.

<sup>4</sup>The so-called “whistleblower” rule describes protected activities as including, but not limited to the following: (i) providing the Commission or the employer information about alleged violations related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act; (ii) refusing to engage in any practice made unlawful by those two statutes; (iii) requesting the Commission to institute action against the employer for the enforcement of these requirements; . . . (v) assisting or participating in (or being about to assist or participate in) these activities. See 10 C.F.R. § 30.7(a)(1). A violation by a Commission licensee may be grounds for “(1) Denial, revocation, or suspension of the license. (2) Imposition of a civil penalty on the licensee . . . (3) Other enforcement action.” 10 C.F.R. § 30.7(c).

<sup>5</sup>69 Fed. Reg. at 13,595.

<sup>6</sup>NRC’s new adjudicatory rules, which became effective on February 13, 2004, apply to this proceeding. See “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004).

considered at such a hearing to “whether this Confirmatory Order should be sustained.”<sup>7</sup> Farmer and the Alaska Forum for Environmental Responsibility (AFER) filed a joint petition requesting a hearing; both ADOT and the NRC Staff opposed the petition. The Licensing Board unanimously denied the petition as to AFER, but a majority of the Board granted the petition as to Farmer and admitted one of his contentions.<sup>8</sup>

In his request for hearing, Farmer asked that the Confirmatory Order not be sustained because he believes that it does not address his interests or protect the public health and safety from further harm.<sup>9</sup> Farmer argued that “should the agreed-upon Confirmatory Order be rescinded, the Notice of Violation will revert to the posture in which the Licensee must respond to the Violations in a manner appropriate to remedy the findings.”<sup>10</sup> Farmer sought to replace or supplement the order with civil penalties and enforcement actions against individual managers. Specifically, his Contention 1 states:

The agreed upon Confirmatory Order should not be sustained since, even if fully implemented, it does not provide reasonable assurance to the Commission that the health and safety of the public will be protected, in that the Order does not address the illegal retaliatory actions and behaviors of Licensee managers, the failure of the managers to address employee concerns about safety and compliance, the consequences of those behaviors on the remainder of the workforce, and the impact of Licensee management on the freedom of employees to raise concerns without fear of reprisals.<sup>11</sup>

Farmer also contests the factual basis of the Confirmatory Order. His Contention 2 states:

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<sup>7</sup>69 Fed. Reg. at 13,596.

<sup>8</sup>See *State of Alaska Department of Transportation and Public Facilities (Confirmatory Order Modifying License)*, LBP-04-16, 60 NRC \_\_ (July 29, 2004).

<sup>9</sup>“Request for Hearing” at 1 (Apr. 9, 2004).

<sup>10</sup>*Id.* at 9.

<sup>11</sup>*Id.* at 10.

The agreed upon Confirmatory Order should not be sustained since it is not based upon an accurate assessment and analysis of all the facts available to the Commission, or on a correct interpretation and application of the legal requirements of 10 C.F.R. 30.7 and/or the May 14, 1996 Policy Statement, *Freedom of Employees in the Nuclear Industry to Raise Safety Concerns*, 61 FR 24336.<sup>12</sup>

The majority of the Board found Farmer to have standing and admitted Contention 2 as raising a legitimate factual question for hearing.<sup>13</sup> The Board rejected Contention 1 as inconsistent with *Bellotti v. NRC*,<sup>14</sup> where the Court of Appeals upheld an NRC practice not to permit intervenors to seek enforcement relief more extensive than what the NRC Staff had ordered.<sup>15</sup> In dissent, Judge Bollwerk argued that *Bellotti* bars Contention 2 as well because, at bottom, Farmer seeks additional enforcement relief.<sup>16</sup>

On appeal the Staff argues that the Board's ruling was legally incorrect and will result in an improper exercise of Board power over enforcement actions which are within the discretion of the Staff. For its part, ADOT quotes the dissenting opinion and says the Confirmatory Order requires "additional or better safety measures' that relate to the subject matter of Farmer's concerns about employee protection, which . . . seemingly ends further adjudicatory inquiry regarding the order's sufficiency.<sup>17</sup> ADOT also points to its aggressive implementation of the terms of the Confirmatory Order and maintains that the Board's decision will have a negative

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<sup>12</sup>*Id.*

<sup>13</sup>LBP-04-16, 60 NRC at \_\_\_, slip op. at 21-22.

<sup>14</sup>*Id.*, slip op. at 17, 20-21.

<sup>15</sup>725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

<sup>16</sup>LBP-04-16, 60 NRC at \_\_\_, slip op. at 25-28.

<sup>17</sup>"Licensee's Notice of Appeal of 'Memorandum and Order (Ruling on Request for Hearing),' LBP-04-16, of July 30, 2004" at 6 (Aug. 18, 2004), quoting LBP-04-16, 60 NRC \_\_\_, slip op. at 27 (Bollwerk, J. dissenting).

impact on other licensees' agreeing to confirmatory orders to resolve inspection and enforcement matters.

## II. DISCUSSION

For the third time this year we address the question whether petitioners may obtain Licensing Board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient.<sup>18</sup> The answer, under a longstanding Commission policy upheld in *Bellotti v. NRC*, is no. The only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening. As the court said in *Bellotti*, allowing NRC hearings on claims for stronger enforcement remedies risks “turning focused regulatory proceedings into amorphous public extravaganzas.”<sup>19</sup> Thus, despite creative pleading, Farmer’s bottom-line grievance in this case – that the NRC Staff enforcement order did not take account of the seriousness of ADOT’s violation – cannot surmount the *Bellotti* hurdle. As we explain below, *Bellotti* means that Farmer lacks “standing” to seek a hearing and also lacks admissible contentions.

### A. Standing

To obtain a hearing, a petitioner must demonstrate “an interest affected by the proceeding”<sup>20</sup> – *i.e.*, standing – and submit at least one admissible contention.<sup>21</sup> To establish standing, a petitioner must show: “(1) an ‘injury in fact’ (2) that is fairly traceable to the

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<sup>18</sup> The other two decisions came in the *Maine Yankee* and *Davis-Besse* enforcement proceedings. See notes 21 & 22, *infra*.

<sup>19</sup> *Bellotti*, 725 F.2d at 1382.

<sup>20</sup> Atomic Energy Act, § 189a, 42 U.S.C. § 2239(a). See generally *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

<sup>21</sup> See *FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1)*, CLI-04-23, 60 NRC \_\_, \_\_, slip op. at 4 (Aug. 17, 2004).

challenged action and (3) is likely to be redressed by a favorable decision.”<sup>22</sup> If the petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of standing.

For an enforcement order, the threshold question -- related to both standing and admissibility of contentions -- is whether the hearing request is within the scope of the proceeding as outlined in the order.<sup>23</sup> The Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question whether the order should be sustained.<sup>24</sup> Thus, the only matters at issue in this proceeding are the measures listed in the enforcement order to promote, evaluate, and maintain a Safety Conscious Work Environment. The Board recognized that Contention 1 in reality seeks additional measures as a substitute for those imposed by the Staff; thus, the Board properly rejected it under the *Bellotti* doctrine.<sup>25</sup> The rationale underlying *Bellotti* is that, when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation.

In both of Farmer’s contentions, but most obviously in Contention 1, Farmer seeks rescission of the order because he speculates that other remedies would be more effective. This is really a request to impose either different or additional enforcement measures -- in

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<sup>22</sup>*Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station)*, CLI-04-05, 59 NRC 52, 57 n.16 (2004), citing *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 71-72 (1994)

<sup>23</sup>See *Davis Besse*, CLI-04-23, 60 NRC at \_\_\_, slip op. at 4.

<sup>24</sup>See *Bellotti*, 725 F.2d at 1381. See also *Maine Yankee; FirstEnergy; Public Serv. Co. of Indiana (Marble Hill Nuclear Generation Station, Units 1 and 2)*, CLI-80-10, 11 NRC 438 (1980).

<sup>25</sup>*Bellotti*, 725 F.2d at 1381. The Commission’s power to define the scope of a proceeding will lead to denial of intervention only when the Commission requires additional or better safety measures. *Id.* at 1383.

contravention of Commission doctrine in enforcement actions, as approved in *Bellotti*. Although Farmer says he is not seeking a harsher penalty against ADOT, that is precisely what he wants. He does not claim that the provisions of the Confirmatory Order, as far as they go, are unwarranted or should be relaxed.<sup>26</sup> Nor does he claim the corrective measures outlined in the Confirmatory Order are themselves detrimental to the public health and safety.

The Board majority erred when it stated that Farmer's injury was traceable to the Confirmatory Order and, on that basis, found him to have standing. Farmer's position immediately after the requested rescission of the Confirmatory Order would *not* be improved, for the situation would revert to what it was before the order. To decide whether the order should be upheld, the pertinent time contrast is between the petitioner's position with and without the order in question -- not between the disputed order and a hypothetical substitute order, whether or not that substitute order be, in Farmer's estimation, an improvement.<sup>27</sup> A petitioner like Farmer simply is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order.<sup>28</sup>

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<sup>26</sup>See *Davis-Besse*, CLI-04-23, 60 NRC at \_\_\_, slip op. at 5, citing *Maine Yankee*, CLI-04-05, 59 NRC at 384.

<sup>27</sup>Indeed, it is not self-evident that retracting the Confirmatory Order, as Farmer demands, would inevitably lead to strengthened sanctions against ADOT and thus redress Farmer's alleged injuries.

<sup>28</sup>In practicality it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That's because such orders presumably enhance rather than diminish public safety. Nevertheless, the notice of opportunity for hearing provides the public a "safety valve" because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation. Such an order remains open to challenge. See *Bellotti*, 725 F.2d at 1383. As Judge Bollwerk stated in his dissent:

[A] challenge to an order based on the premise that its terms, if carried out, would be affirmatively contrary to the public health and safety (as opposed to being deficient because it does not impose other or additional measures) would be one that seemingly would fall within the scope of a proceeding as envisioned under *Bellotti*.

(continued...)

The Confirmatory Order at issue in this proceeding mandates numerous actions for ADOT to take to ensure a Safety Conscious Work Environment. These actions, including independent policy review, training, and a plan for assuring compliance with Section 30.7, cannot conceivably cause Farmer to suffer any injury. And without any injury *attributable to the Confirmatory Order*, Farmer does not have standing in this proceeding.<sup>29</sup>

That the corrective measures outlined in the Confirmatory Order do not improve Farmer's personal situation does not provide grounds to rescind the Confirmatory Order. Farmer apparently is disappointed that the same ADOT management "remains at the helm,"<sup>30</sup> and he is dissatisfied with "resolution of the retaliation findings based strictly on future preventive measures."<sup>31</sup> But NRC's role, as outlined in Section 30.7, is to procure corrective action for the licensee's program, and by example, other licensees' programs, not to provide redress for the whistleblower.<sup>32</sup> Although Farmer appears to have been a victim of retaliatory misbehavior, and understandably focuses on his personal grievances, our charter does not include providing a personal remedy.<sup>33</sup> Farmer's situation is analogous to that of a crime victim who, dissatisfied with a plea bargain between the government and the accused, lacks standing

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<sup>28</sup>(...continued)  
LBP-04-16, 60 NRC at \_\_\_, slip op. at 27 n.4.

<sup>29</sup>See *Maine Yankee*, CLI-04-05, 59 NRC at 57 n.16.

<sup>30</sup>"Petitioner's Opposition to the Appeals of the Atomic Safety and Licensing Board's Order of July 29, 2004" at 2 (Aug. 30, 2003).

<sup>31</sup>*Id.* at 6

<sup>32</sup>"A violation [constituting discrimination] by a licensee . . . may be grounds for -- (1) Denial, revocation, or suspension of the license. (2) Imposition of a civil penalty on the licensee . . . . (3) Other enforcement action." 10 C.F.R. § 30.7(c).

<sup>33</sup>The Atomic Energy Act gave the Commission authority to take action against licensees but did not include a personal remedy for employees who experience discrimination. See 42 U.S.C. § 2011 *et seq.*



to insist that the prosecutors seek a harsher punishment for the wrongdoer.<sup>34</sup> And, continuing the parallel, just as the crime victim can seek redress through a civil suit, Farmer has civil remedies available through the Department of Labor.<sup>35</sup> In evaluating whether to pursue enforcement relief, and in considering various enforcement remedies, the NRC Staff acts like a prosecutor. Our adjudicatory process is not an appropriate forum for petitioners like Farmer to second guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings.<sup>36</sup>

We do not dispute that Farmer suffered injury, but that injury arose from the licensee's behavior between 1999 and 2002, as outlined in the Notice of Violation. The injury is not related to the Confirmatory Order, which directly addresses ADOT's wrongful behavior by mandating a program designed to alter the Safety Conscious Work Environment favorably and prevent similar injuries in the future. The program initially provides for outside review of the licensee's program and extensive training of the licensee's managers and employees. It also dictates that the licensee submit a long-term plan for maintaining a Safety Conscious Work Environment and request a specific license amendment to require that the long-term plan be maintained and implemented. The critical concept here is that, with the Confirmatory Order in place, ADOT's employees undoubtedly have considerably more whistleblower protection than without it. Accordingly, Farmer does not have standing to contest the order.

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<sup>34</sup>See *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”) See also *Doyle v. Oklahoma Bar Ass’n*, 998 F.2d 1559, 1566-67 (10<sup>th</sup> Cir. 1993).

<sup>35</sup>Section 30.7(b) steers Farmer to his possible individual remedy for the discrimination through an administrative proceeding in the Department of Labor. Also, if Farmer believes the Confirmatory Order does not go far enough to remedy the whistleblower situation at ADOT, he can file a petition with the NRC under 10 C.F.R. § 2.206. That section provides that “any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.” 10 C.F.R. § 2.206(a).

<sup>36</sup>See generally *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Our holding that Farmer does not have standing is dispositive of this case. The Board majority, however, thought it significant that Farmer had alleged factual discrepancies in the NRC Staff's order. Below, we briefly discuss that question.

**B. The Role of Factual Disputes in *Bellotti* Cases**

The Board majority perceived Contention 2 as raising a proper challenge to the Staff's assessment and analysis of the facts underlying the issuance of the Confirmatory Order. According to the Board, with a proper verification and analysis of the facts -- obtainable only if the Confirmatory Order is not sustained -- the Staff may well end up ordering more aggressive enforcement relief than the measures in the March 15 Confirmatory Order. This possibility, says the Board, supports Farmer's standing and requires a hearing on Contention 2 (raising factual disputes).

The Board erroneously based its conclusion on language in our recent *Maine Yankee* decision, which also rested on *Bellotti*. We stated in *Maine Yankee* that the Commission has authority to limit the issues in enforcement proceedings to "whether the facts as stated in the order are true and whether the remedy selected is supported by those facts."<sup>37</sup> The first portion of this language, carried over in our jurisprudence from *Marble Hill* to *Bellotti* to *Maine Yankee*, is inapplicable to a proceeding on a confirmatory order. Unlike the instant case, *Maine Yankee*, *Bellotti*, and *Marble Hill* were enforcement proceedings that were still contestable by the licensees at the time of publication of the notice of hearing. Thus, those three licensees could have contested the Staff's factual findings and/or the sanction(s) the Staff imposed to address their respective factual situations.<sup>38</sup> Here, however, ADOT had already agreed to the

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<sup>37</sup>*Maine Yankee*, CLI-04-05, 59 NRC at 56, citing *Bellotti*.

<sup>38</sup>In that event, a petitioner who *supports* the order could have standing. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994).

enforcement order by the time the notice of hearing was published. In such a case, a challenge to the facts themselves by a non-licensee is not cognizable.

The critical inquiry under *Bellotti* in a proceeding on a confirmatory order is whether the order improves the licensee's health and safety conditions. If it does, no hearing is appropriate. As Judge Bollwerk pointed out in his dissent, allowing a petitioner to attack a confirmatory order under the guise of a factual dispute would effectively permit an end run around *Bellotti*.<sup>39</sup> Also, to allow third parties to contest enforcement settlements at hearings would undercut our salutary policy favoring enforcement settlements. "Such a policy would be thwarted if licensees which consented to enforcement actions were routinely subjected to formal proceedings, possibly leading to more severe or different enforcement actions."<sup>40</sup>

The NRC Staff has considerable latitude in choosing enforcement weapons, and Farmer's (or the Board's) disapproval of the remedy the Staff selected does not justify reopening an enforcement proceeding.<sup>41</sup> Farmer's position violates the tenets of *Bellotti* no less than a direct request for additional or better safety measures, for his concerns are well beyond the scope of the hearing. As the Staff pointed out in its brief:

In effect, the Board's decision is an attempt to void the Staff's discretion to select the enforcement action which, in its judgment, best fits the violation (i.e., orders modifying licenses, notices of violation, civil penalties, orders to individuals, or

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<sup>39</sup>LBP-04-16, 60 NRC at \_\_\_, slip op. at 24-28.

<sup>40</sup>*Marble Hill*, CLI-80-10, 11 NRC at 441.

<sup>41</sup>See generally *Heckler v. Chaney*, 470 U.S. 821 (1985) (agency's decision not to take the requested enforcement action was not subject to judicial review); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 170 (2d Cir. 2004) (The *Chaney* presumption "avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes." (quoting *N. Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003)); *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413 (1958) ("[T]he [agency] alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.")

any combination thereof) which best addresses the root cause of the violation, and which best protects the public health and safety.<sup>42</sup>

What's more, while we need not decide this issue, the record on its face shows that Farmer's claim of a factual dispute is illusory. To be sure, the Notice of Violation sets out a disturbing array of 12 retaliatory actions ADOT allegedly took over a three-year period against Farmer, the Statewide Radiation Safety Officer (SRSO), for raising safety concerns regarding radiation exposures to ADOT employees.<sup>43</sup> But Farmer does not dispute any of these Staff findings of fact. Rather, he disagrees with the penalty the Staff chose because he believes the Staff failed to take account of an additional fact -- the deliberateness of the discrimination against him. The Board, too, apparently believed that the Staff had made a finding that there was no deliberate or willful discrimination.<sup>44</sup> Indeed, the Board went so far as to say that the "sole explanation" for the penalty the Staff chose is lack of deliberateness, and that the

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<sup>42</sup>"NRC Staff's Notice of Appeal of Licensing Board Order of July 29, 2004 and Accompanying Brief" at 8 (Aug. 18, 2004).

<sup>43</sup>The retaliatory actions were:

In September 1999 a three month extension of the SRSO's probationary period; unacceptable ratings in performance appraisals for the periods 4/16/99 to 10/16/99, 1/16/00 to 1/15/01 and 1/16/01 to 1/5/02; denial of a merit increase for the year 2000; verbal admonitions by the SRSO's supervisor in September 1999 for breaking the chain of command and in November 2000 in connection with an evaluation of radiation exposure to Subject A; direction by the SRSO's supervisor in February 2000 to cease performance of radiation safety duties; a November 15, 2000, Letter of Expectation; an August 25, 2001, Letter of Instruction; direction by the SRSO's supervisor in November 2001 to sign a letter to the NRC stating that the SRSO's report of a radiation exposure beyond NRC limits was in error; in April 2002, a direction by the SRSO's supervisor to limit radiation safety duties to 8% of the SRSO's time; a May 7, 2002 Letter of Reprimand; denial of the SRSO's requests for radiation safety officer-related training; and in September 2002 directing the SRSO to provide confidential correspondence between the SRSO and the NRC.

Notice of Violation at 1.

<sup>44</sup>CLI-04-16, 60 NRC at \_\_\_, slip op. at 22.

“lynchpin [*sic*] fact” underlying the Staff’s Confirmatory Order and the justification for not imposing a civil penalty is that the licensee’s actions were a result of ignorance.<sup>45</sup> But the Notice of Violation on its face belies the notion that the Staff did not view ADOT’s actions toward Farmer as deliberate.<sup>46</sup> Actions that are described as “retaliatory,” as the Staff labeled them, are by definition deliberate.<sup>47</sup> Thus, even if “fact disputes” justified a departure from the *Bellotti* doctrine, there is no genuine dispute here over the “deliberate” issue.

It is also far from clear that the Staff’s chosen remedy was inappropriate. The Staff chose a remedy designed to educate the licensee and prevent future retaliation against whistleblowers. This remedy is undeniably related to the asserted facts; moreover, the sanctions the Staff chose are appropriate even in a case of deliberate discrimination.<sup>48</sup> The precise enforcement sanction to impose is within the Staff’s sound discretion, and it was wrong for the Board in effect to try to supervise the Staff’s actions.<sup>49</sup> Judge Bollwerk’s dissent summarized this principle well:

In the enforcement arena, given the breadth of possibilities that are open to the staff in framing an order addressing identified health and safety problems associated with an agency licensee’s activities, there also resides with the staff an obligation to ensure that in issuing such a directive it crafts measures that will

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<sup>45</sup>*Id.*, slip op. at 9.

<sup>46</sup>See note 43.

<sup>47</sup>Although the Board referred to a Staff *finding* that there was no deliberate or willful discrimination, neither the Notice of Violation nor the Confirmatory Order mentions deliberateness, or lack of deliberateness, in the violations. See LBP-04-\_\_\_, slip op. at 22. As noted above, these documents list the numerous violations and call them “retaliatory.”

<sup>48</sup>See 10 C.F.R. § 30.10, which addresses deliberate misconduct. A person who violates Section 30.10(a) is, just like ADOT for its violation of Section 30.7, subject to an enforcement action in accordance with the procedures in 10 C.F.R. Part 2, Subpart B. This includes Section 30.7(c)’s list of possible sanctions. See note 26.

<sup>49</sup>See *Advanced Medical Systems, Inc.* (One Factory Roy, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 312 (1994); *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC 22, 34 n.5 (1994).

directly and promptly address the problem identified. Under *Bellotti*, however, whether the staff carries out this responsibility to the degree a petitioner believes is warranted is not a matter within the ambit of a Licensing Board.<sup>50</sup>

### III. CONCLUSION

As in our recent *Maine Yankee* and *Davis-Besse* cases, the petitioner here seeks additional measures beyond those set out in the disputed Confirmatory Order. Further, rescission of the order would neither improve his position nor alleviate his concerns about the work environment at ADOT. Therefore, under *Bellotti*, we *reverse* the Board majority's decision to grant Farmer a hearing, and we *terminate* this proceeding.<sup>51</sup>

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 7<sup>th</sup> day of October, 2004

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<sup>50</sup>LBP-04-16, 60 NRC at \_\_\_, slip op. at 28.

<sup>51</sup>We also terminate the housekeeping stay that we entered in this case on August 16, 2004.