

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 8980

DOCKETED 12/14/04

COMMISSIONERS:

SERVED 12/14/04

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

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

Docket No. 030-07710-CO

CLI-04-38

MEMORANDUM AND ORDER

This proceeding arises from Robert Farmer's challenge to a confirmatory order modifying the materials license of the State of Alaska Department of Transportation and Public Facilities (ADOT). The confirmatory order implemented an agreement between ADOT and the NRC staff settling an enforcement action. In CLI-04-26, we reversed a Licensing Board decision granting Farmer's intervention petition and admitting one of his contentions.¹ Farmer has moved for reconsideration of CLI-04-26. ADOT and the NRC Staff oppose Farmer's motion. We deny the motion.

"A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid."² Farmer has not demonstrated such an error.

¹See *State of Alaska Dept. of Transportation and Public Facilities (Confirmatory Order Modifying License)*, CLI-04-26, 60 NRC __ (Oct. 7, 2004).

²10 C.F.R. § 2.345(b). See *Louisiana Energy Services, L.P. (National Enrichment Facility)*, CLI-04-__, 60 NRC __ (Dec. 8, 2004), slip op. at 4 & nn. 11-12.

His two chief arguments for reconsideration are: (1) that the Commission “misstated the facts” when it said that the NRC staff understood ADOT’s conduct to be “deliberate;”³ and (2) that in finding no injury “traceable” to the Confirmatory Order the Commission disregarded Farmer’s claims of ongoing “egregious harassment” that, he says, “likely would be redressed” by a Board decision rescinding the order.⁴

The first argument, even if it were true, is not a ground for reconsideration because the Commission’s alleged factual error was not “material” to the Commission’s decision. The case actually turned on settled principles of standing deriving from a 1983 court decision, *Bellotti v. NRC*.⁵ The section of CLI-04-26 regarding the role of factual disputes in *Bellotti* cases was merely advisory, not necessary to the result, and could have been deleted without impairing the analytical foundations of the holding.⁶

Our precise holding in CLI-04-26 was:

[W]e address the question whether petitioners may obtain Licensing Board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient. 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.⁷

We reasoned that Farmer lacked standing under *Bellotti* because the Confirmatory Order required ADOT to take various whistleblower protection measures, and thus did not “adversely

³ See Motion for Reconsideration, at 3-7 (Oct. 18, 2004).

⁴ See *id.* at 8-9.

⁵ 725 F.2d 1380 (D.C. Cir. 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982). See CLI-04-26, 60 NRC at ___, slip op. at 5-10.

⁶ See *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 A.E.C. 491, 504 (1973).

⁷ CLI-04-26, 60 NRC at ___, slip op. at 5.

affect[]” Farmer because it actually “improve[d] the safety situation.”⁸ We characterized our standing determination as “dispositive of this case.”⁹

We offered our perspective on fact issues in confirmatory order cases only because a majority of the Board in LBP-04-16 had discussed at length possible discrepancies in the factual basis for the Confirmatory Order.¹⁰ We held that in such cases “a challenge to the facts themselves by a non-licensee is not cognizable.”¹¹ We added that, contrary to the Board’s view, we saw no “genuine dispute” on the question whether ADOT acted against Farmer “deliberately.”¹² We pointed to the Notice of Violation’s use of the term “retaliatory” – which, we said, meant that the NRC staff, like Farmer, “by definition” must have considered ADOT’s actions “deliberate.”¹³

Farmer, however, calls our attention to an NRC staff letter indicating that the staff in actuality “did *not* develop evidence that managers acted deliberately with respect to NRC’s requirements.”¹⁴ While this discrepancy suggests that we may have oversimplified the “deliberate” issue,¹⁵ our misunderstanding, if any, is inconsequential because it amounts to

⁸ *Id.* at ___, slip op. at 7.

⁹ *Id.* at ___, slip op. at 10.

¹⁰ See LBP-04-16, 60 NRC 99, 107-108, 114-116, 118 (2004). *Cf. Patel v. Sun Co., Inc.*, 141 F.3d 447, 462 (3d Cir. 1998) (language in decision responding to criticism from dissent about issues not directly before the court is *dictum*).

¹¹ CLI-04-26, 60 NRC at ___, slip op. at 11.

¹² *Id.* at ___, slip op. at 12-13.

¹³ *Id.* at ___, slip op. at 13.

¹⁴ Motion for Reconsideration, at 5, *quoting* Letter from Frank J. Congel, Director, NRC Office of Enforcement, to Billie P. Garde, Counsel for Petitioners at 1 (April 5, 2004) (emphasis supplied).

¹⁵ The NRC Staff has requested clarification of our rather loose use of the term

dicta.¹⁶ It does not undercut our core ruling in this case; namely, that under *Bellotti* Farmer lacks standing to obtain a hearing to challenge an NRC enforcement order out of a desire for more aggressive relief.

We also reject Farmer's second argument – that the Commission disregarded Farmer's injury. Harm to Farmer resulted from retaliatory conduct by ADOT; thus, his injury does not derive from the Confirmatory Order and does not give him standing to challenge it. The Commission fully considered Farmer's alleged injury before concluding that there was no cause and effect relationship between any injuries Farmer personally suffered and a Confirmatory Order that "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."¹⁷ The Confirmatory Order plainly enhances public safety and increases protection of the licensee's employees.

Throughout his petition for an NRC hearing Farmer based his standing argument on the concept that if the Confirmatory Order were rescinded, the Staff would necessarily impose stricter enforcement actions on ADOT. Similarly, Farmer's motion for reconsideration maintains that "appropriate" and "better" mitigative and protective action ultimately will emerge if the Board

¹⁵(...continued)

Reconsideration" at 4-5 n. 20 (Oct. 28, 2004). As we said in CLI-04-26, an action described as "retaliatory" is by definition "deliberately" taken against the object of the action. Our discussion in CLI-04-26 addressed deliberateness in this sense to show that the NRC staff was aware of the underlying factual allegations and their seriousness. See CLI-04-26, 60 NRC at ___, slip op. at 12-14. By contrast, violations of NRC whistleblower regulations are, in NRC parlance, "deliberate" when the retaliator *knows* that the conduct is contrary to an NRC regulatory requirement. Farmer apparently disputes the NRC staff letter stating that ADOT's actions were not "deliberate" in this second sense. But, as we stated in CLI-04-26, "allowing a petitioner to attack a confirmatory order in the guise of a factual dispute would effectively permit an end run around *Bellotti*." *Id.* at ___, slip op. at 11.

¹⁶ We introduced our brief factual discussion with the statement, "while we need not decide this issue . . ." CLI-04-26, 60 NRC at ___, slip op. at 12.

¹⁷CLI-04-26, 60 NRC at ___, slip op. at 9.

rescinds the Confirmatory Order.¹⁸ At bottom, Farmer's reconsideration petition simply reargues his position that the Confirmatory Order is not strict enough and did not take account of the ADOT's allegedly deliberate disregard of regulatory requirements. But *Bellotti*, a long-standing precedent, prescribes a contrary rule – a hearing petitioner like Farmer may not seek enhanced enforcement actions by raising factual or remedial questions. Under *Bellotti* the NRC may exclude claims for more extensive enforcement relief.

For the foregoing reasons, we deny Farmer's motion for reconsideration of LBP-04-26.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 2004.

¹⁸ See Motion for Reconsideration, at 7.