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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of	)	Docket No. IA-05-052
DAVID GEISEN	)	ASLBP No. 06-845-01-EA

OPPOSITION OF DAVID GEISEN
TO NRC STAFF'S MOTION FOR STAY OF PROCEEDING

Introduction

NRC Staff ("Staff") has moved the Board for a third time, and second time at the behest of the Department of Justice (DOJ), to stay the proceeding in this case -- a case that it initiated. The Staff's latest Motion for Stay of Proceeding ("Motion") largely re-raises arguments already rejected by the Board and ignores the reasoning set forth by the Board in multiple orders. It includes an "affidavit" from DOJ attorney Richard Poole that is nothing more than a re-cap of rejected legal arguments, speciously arguing it is based upon "changed" circumstances. Motion at 6. The Board has carefully considered the Staff's arguments and has rejected them. It should do so again.

Argument

Presumably, in order to justify the filing of yet another motion to stay this proceeding, the Staff argues that "[s]ince the time of the Staff's First Stay Request, circumstances involving this proceeding have changed which substantially impact the weight afforded the five *Oncology*

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factors." Motion at 6. This is simply untrue. The Staff fails to articulate a single circumstance not either present at the time of the Board's previous rulings or expressly anticipated and considered by the Board in reaching its earlier rulings.

In an effort to generate substance in support of a recycled (and denied) motion, the Staff submits an "affidavit" of Richard Poole. However, Poole's submission is little more than a position paper that rehashes arguments the Board (and the Commission) considered and rejected. It is essentially devoid of detailed and case-specific facts that evidence undue harm to the criminal case. *See Memorandum and Order*, LBP-06-13 (May 19, 2006)("May 19, 2006 Order") at 7, 15; *Memorandum and Order*, CLI-06-19 (July 26, 2006) at 6. Except for a single paragraph discussed at length below, the Poole "affidavit" is little more than a recapitulation of the Staff's previous arguments for a stay. Taken together, the Motion and the Poole Affidavit offer little in the way of new argument for the Board to consider.

Informational advantage

The Staff and Mr. Poole again allege Mr. Geisen has an "informational advantage" over the government. Motion at 4, 6, 9, 10, Poole affidavit at 2-3. This issue has been the subject of extensive briefing and discussion in the previous pleadings and past hearings, and the Board has clearly rejected this argument with good reason. May 19, 2006 Order at 33; November 14, 2006 Hearing Transcript at 342; *see also Opposition of David Geisen to NRC Staff Motion for Stay or Proceeding or in the Alternative for a Preclusion Order* (November 2, 2006) at 13-14. Undersigned counsel will not waste the Board's time and attention with further discussion of this point, but in the event Mr. Poole does appear before the Board as requested, January 9, 2007 Order at 2, and reiterates his claim that Mr. Geisen would gain a "lopsided discovery advantage" if depositions were to proceed in this enforcement proceeding, he should be asked to detail the

number of proffer sessions, witness conferences, and meetings with individuals' counsel the prosecutors have conducted during the pre-indictment investigation of this case -- the substance and contents of which remain unknown to Mr. Geisen.

Fifth Amendment invocations

The Staff and Mr. Poole also complain that individuals who are currently the subject of criminal indictment have exercised their Constitutional right against self-incrimination. Motion at 8, Poole affidavit at 4-5. That indicted individuals would elect to invoke their Fifth Amendment rights has also been the subject of extensive argument and Board consideration, and also is far from a "changed circumstance." May 19, 2006 Order at 13 n.45; 14; 34 n.109; 35 n.112; *see also* Geisen *Opposition* (November 2, 2006) at 2-5. As has been previously discussed, the Staff chose to make the Order against Mr. Geisen immediately effective. It did so with an understanding that criminal indictments of Mr. Geisen and others were imminent. To the extent that "altogether-legitimate" Fifth Amendment invocations, January 8, 2007 Order, now prevent the Staff from discovery of Mr. Geisen's statements in the case the Staff initiated, it should not be heard to complain about its predicament; the Staff brought that on itself.

Unfair discovery through the civil case

The Staff again complains that Mr. Geisen will "obtain discovery he would not be entitled to in a criminal case" through deposition and hearing testimony. Motion at 8. Of course, the Board addressed this identical argument from the Staff at length in denying the Staff's first request for a Stay.[1] May 19, 2006 Order at 28-36. Mr. Poole's treatment of this issue in his affidavit is even more surprising, for he spends close to two full pages arguing for the supremacy

[1] The Staff conveniently ignores the fact the depositions that the DOJ are concerned about were noticed for taking *by the Staff*, Poole affidavit at 2.

of the criminal case based upon *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962) and related cases. Either Mr. Poole failed to read the Board's May 19, 2006 Order or he chose to ignore the comprehensive analysis the Board set forth therein. Specifically, the Board recognized that "it is important to consider which party initiated the civil action and which party is seeking relief from its going forward." May 19, 2006 Order at 14 (citing *Campbell v. Eastland*)(emphasis in original); *see also Id.* at 31-36. Mr. Poole, after discussing *Campbell*, cites and discusses another case in which a court stayed a civil case also filed by a criminal defendant (not the case here) in order to circumvent the limitations on discovery imposed in criminal proceedings. Poole Affidavit at 4, discussing *Benevolence Intern. Foundation v. Ashcroft*, 200 F.Supp.2d 935 (N.D. Ill. 2002). Mr. Geisen does not contest the general proposition that a criminal defendant should not be allowed to initiate a civil proceeding in order to use liberal civil discovery procedures to gather evidence to which he might not be entitled under the more restrictive criminal rules. But this Board has already recognized that such considerations are not present in this case, where the Staff imposed a pre-hearing debarment upon Mr. Geisen through the initiation of a civil case that continues to run parallel to the criminal case. Given the Board's extensive consideration of this issue, and indeed the specific cases cited by Mr. Poole, it is astonishing to be confronting this meritless argument yet again.

Grand Jury secrecy

Finally, the Staff claims to be disadvantaged because of the grand jury secrecy requirements. Motion at 9. But the Board discussed grand jury issues at length with the parties *and with Mr. Poole* at a recent hearing, November 14, 2006 Hearing Transcript at 311-338, and

refused to stay the proceedings on those grounds.[2] And while it is true undersigned counsel is in possession of grand jury transcripts as a result of the government's compliance with the open-file discovery rules governing the criminal case[3] the District Court's protection order bars us from introducing or referencing those transcripts in the enforcement proceeding, either as affirmative evidence or as impeachment evidence should a witness contradict his grand jury testimony either at deposition or at the hearing. Therefore, any "advantage" gained through possession of those materials is minimal.

The Staff, and Mr. Poole, do present a novel spin on the grand jury secrecy issue, arguing that the Staff may "in unknowing error, elicit incomplete or inaccurate testimony from witnesses..." and that "due to grand jury secrecy requirements, DOJ would be unable to advise the Staff when and in what manner to correct" testimony elicited during depositions and the hearing." Motion at 8. As a result, the prosecutors will be "unable to protect their interests through asserting objections, redirecting or correcting testimony" of witnesses "important to the criminal prosecution." *Id.* Mr. Poole goes a step further and argues "Mr. Geisen's criminal defense counsel will have the opportunity to create a potentially incomplete and misleading record before the Board using their lopsided informational advantage, and then to use that record at the criminal trial." Poole Affidavit at 5. These are extraordinary statements.

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[2] It is noteworthy that DoJ was present for the entirety of that November 14, 2006 hearing, including the Board's announcement of its ruling denying the Staff's motion to stay, yet chose not to seek the Staff's appeal of the Board's decision to the Commission and waited for close to two months to have the Staff file the instant motion for a stay of the proceedings.

[3] Mr. Poole correctly notes that the prosecution team cannot legally provide those transcripts to the NRC Staff, absent a court order. Poole Affidavit at 3. What he fails to mention is that the prosecution team could, if it saw fit, seek an order from the District Court allowing for disclosure of the grand jury transcripts to the Staff upon a showing of particularized need. Fed. R. Crim. Proc. 6(e)(3)(E)(i). The prosecution team has, for strategic reasons, not sought such an order from the District Court. It is disingenuous for the government to decry an artificial "informational advantage" while electing not to seek relief from the court to mitigate its alleged disadvantage.

First, the Staff's concession that it may unknowingly elicit inaccurate testimony from witnesses suggests that despite having issued an immediately-effective order barring Mr. Geisen from employment in his chosen profession and branding him a threat to public health and safety, the Staff still does not know the basic contours of its own case. Any testimony adduced from witnesses in the enforcement proceeding should be narrowly focused. The Staff has been fully appraised of Mr. Geisen's simple and non-technical defense: he did not knowingly or deliberately present materially false information to the NRC in connection with First Energy Nuclear Operating Company's written response to Bulletin 2001-01 or its oral communications with the NRC relating to those written responses. *See David Geisen's Opposition to the NRC Staff's Motion for Preclusion of Claims and Defenses Not Advanced Specifically in Discovery* at 4 (December 29, 2006). The Staff has investigated this matter for four years. Presumably, it has reviewed the relevant documents relating to various potential witnesses. It will have an opportunity to depose individuals of its choosing and to elect which witnesses to present to the Board at the hearing in an attempt to meet its burden of proof. The suggestion that the Staff will unwittingly create an inaccurate factual record that will somehow handcuff the prosecution team at the criminal trial is bizarre, to say the least, and dangerous. In the name of due process, great harm to Mr. Geisen is about to be compounded if this is what the enforcement case is expected by the government to yield.

Clearly, the real concern of the Staff, and more immediately of Mr. Poole, is that witnesses who testify in the enforcement proceeding might give testimony that contradicts that which the prosecution team hopes to elicit at the criminal trial. Poole Affidavit at 3 ("the Staff's theory of the case and approach to it may differ from the Department of Justice [and] [t]he resulting record of each witness's testimony will certainly contain differences from the testimony

elicited at the criminal trial.") If that happens, it will be because witnesses recall factual events that are inconsistent with the allegations in the Order regarding Mr. Geisen. Indeed, undersigned counsel fully expect that much of the witness testimony adduced in discovery and presented at the hearing in this matter will show that Mr. Geisen did not, in fact, knowingly and deliberately present materially false information to the NRC. That is, however, not a concern that the Board should resolve by denying Mr. Geisen his right to an expedited hearing. There remains no credible suggestion that allowing the enforcement case to proceed would result in the tainting of evidence, the intimidation of witnesses, or the suborning of perjury. *See* May 19, 2006 Order at 26-31. Witnesses providing sworn testimony that contradicts the government's theory of the case are simply not a valid reason to stay a proceeding.

The Staff complains the DOJ prosecution team will be "unable to protect their interests through asserting objections, redirecting or correcting testimony [in the enforcement proceeding.]" Motion at 8. This argument also lacks logical relevance to the issue before the Board. Of course, the Staff will be involved in the taking and presentation of any testimony and if there are objections to be made or ambiguities to be resolved, the Staff is able to perform those functions.[4] Indeed, both the Staff and Mr. Poole have noted the similarities between the facts and issues involved in the enforcement proceeding and the criminal case. Motion at 1-2 ("[t]he Staff Order and the criminal indictment concern facts and issues which are inextricably

[4] It is ironic that the government suggests to the Board that it should give deference to a Grand Jury indictment yet complains about the prosecution team's inability to "protect their interests" during the establishment of the record in this enforcement proceeding. Of course, a Grand Jury hears from witnesses only in the presence of the prosecutor and the court reporter, and without any input or challenge from the accused or a lawyer on his behalf. In this case, as represented to the Board at the November 14, 2006 hearing, the Grand Jury that returned the indictment against Mr. Geisen heard from only one live witness -- an investigative agent of the NRC. In such circumstance, the Board should look critically upon Mr. Poole's suggestion that "an amount of deference is appropriate." November 14, 2006 Hearing Transcript, 323-324, 363.

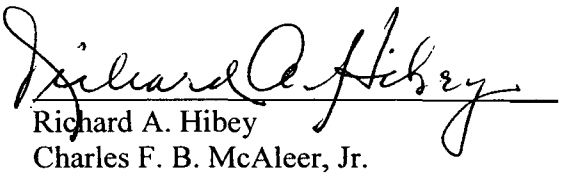
intertwined."); Poole Affidavit at 2 ("I understand that the conduct alleged in the Indictment also forms the basis for the above-captioned proceeding.") The suggestion that somehow Mr. Geisen's counsel will create a "incomplete and misleading record before the Board," Poole Affidavit at 5, is both unfounded and nonsensical.

In sum, the Poole Affidavit provides the Board with no more "detailed and specific reasons demonstrating some type of cognizable harm" than did the Ballantine Affidavit that accompanied the Staff's first request for a stay of this proceeding. May 19, 2006 Order at 15 (emphasis in original).

Conclusion

The Board has carefully and exhaustively considered each of the Staff's multiple motions to stay this enforcement action. It has sought to craft creative solutions responsive to the unusual circumstances of this particular case. The Staff continues to advance arguments solely designed to delay a proceeding it initiated in order to prolong an unwarranted sanction it made immediately effective. The Board should deny this latest Motion for the many reasons it articulated in denying the previous identical requests.

Respectfully Submitted,



Richard A. Hibey
Charles F. B. McAleer, Jr.
Andrew T. Wise
Matthew T. Reinhard
MILLER & CHEVALIER CHARTERED
655 15TH Street, N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Counsel for David Geisen

Dated: January 10, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 10th day of January, 2007, copies of the foregoing were served on the following persons by first-class mail, postage prepaid, as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**):

Michael C. Farrar * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: mcf@nrc.gov

E. Roy Hawkens * **
Chief Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

E-mail: erh@nrc.gov
Nicholas G. Trikouros * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: ngt@nrc.gov

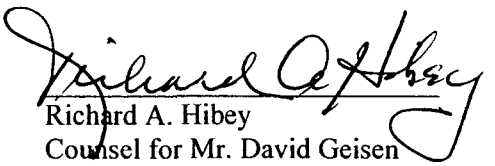
Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Margaret Parish * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: map4@nrc.gov

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-Mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555

Lisa Clark * **
LBC@nrc.gov
Michael A. Spencer
MAS8@nrc.gov
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, DC 20555-0001



Richard A. Hibey
Counsel for Mr. David Geisen