

July 7, 2008 (9:58am)

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD

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

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

**BRIEF OF DAVID C. GEISEN
IN RESPONSE TO BOARD'S ORDER DATED JUNE 30, 2008**

On June 30, 2008, the Board issued an Order in response to Mr. Geisen's June 24, 2008, letter. In the Order, the Board sought Mr. Geisen's position on a number of issues relating to the above-captioned proceeding in light of the recent resolution of Mr. Geisen's criminal trial in the United States District Court for the Northern District of Ohio. This brief will seek to respond to each of the Board's questions in the order in which the Board set them forth.

1. Relief sought by Mr. Geisen:

On January 4, 2006, the Staff issued to Mr. Geisen an Order prohibiting him from any involvement in NRC licensed activity for a period of five years. The Staff made that Order immediately effective and it resulted in Mr. Geisen's termination from his employment at Kewanee Nuclear Power Plant. That termination marked the interruption of a twenty-five year career in nuclear energy that included six years in the United States Navy. The allegations in the

Order constituted the first time Mr. Geisen had been accused of misconduct or dishonesty in the commission of his work.

Two and half years have passed since the Staff issued the Order. The relief that Mr. Geisen seeks is a reduction of the duration of the ban imposed upon him from five years to two and one-half years with credit for the time that he has been disabled from work in the industry.

As the Board properly notes, Mr. Geisen was found guilty and is serving a sentence in a parallel criminal proceeding in the District Court in Ohio. (Mr. Geisen was convicted on three counts of False Statements and acquitted on two others.) That case is on appeal to the United States Court of Appeals for the Sixth Circuit and the primary issues on that appeal will include the propriety of a jury instruction that allowed the jury to consider whether Mr. Geisen "willfully blinded" himself to the inaccuracy of statements made to the NRC (a theory for which Mr. Geisen contends there was no evidentiary basis but upon which the jury convicted according to jurors' statements to the defense and prosecution lawyers following the verdict), the sufficiency of the evidence on requisite elements including knowledge and intent, and the significance of the government's failure to prove the NRC's reliance on statements made by Davis-Besse. While Mr. Geisen believes strongly in the merit of these issues on appeal, the existence of that appeal should not impair the Board's ability to consider and resolve the remaining issues in this proceeding. Mr. Geisen does not seek to relitigate the factual issues that formed the basis for the Order or which were the subject of the parallel litigation. The Board has for its consideration the trial and sentencing transcripts developed through that proceeding and can make its relevant determinations without any further discovery, as discussed further below.

2. Whether there has been an “outcome” to the criminal case, as that term would be understood in relation to the principles the Commission was furthering when it issued the stay.

On February 1, 2007, the Commission stayed this proceeding at the request of the Staff and the United States Department of Justice. CLI-07-06; 65 NRC 112. The Staff's request, which included a six-page affidavit from DOJ Trial Attorney Richard Poole, was based upon claims that proceeding with its case would prejudice the DOJ's criminal prosecution by allowing Mr. Geisen access to information and witnesses that the Federal Rules of Criminal Procedure would normally disallow. See, NRC Staff Motion for Stay of Proceeding (January 8, 2007). The Commission cited that prospect, as well as logistical obstacles an enforcement hearing might pose to the DOJ's efforts to prepare its witnesses for trial. 65 NRC at 115-119.

The Board has asked whether “with an appeal pending, [there has] been an “outcome” to the criminal case, as that term would be understood in relation to the principles the Commission was furthering when it issued the stay.” Order at 2. Mr. Geisen submits the answer to that question is clearly yes. The criminal trial has now occurred, and the witnesses the DOJ sought to sequester in advance of that trial have now testified. More importantly, however, those individuals will not be involved in the resolution of this proceeding because Mr. Geisen will not seek discovery on the factual merits of the Staff's Order or seek to relitigate factual issues upon which those witnesses might have knowledge. Simply, the interests that drove the Commission's Order are no longer applicable because the trial stage of the District Court case is complete.

3. Should a decision on the preceding issue be made in the first instance by this Board, or is it within the exclusive purview of the Commission.

The Commission did state, in its February 1, 2007, Order, that “if circumstances change significantly” it was amenable to considering a motion from Mr. Geisen to lift ... [the] abeyance” it imposed. 65 NRC at 121. It appears clear from the Commission's Order, however, that the

abeyance was granted for the purpose of protecting interests of the DOJ before the criminal trial and that, as such, it necessarily expired once the trial was concluded. 65 NRC 112, *passim*. The Commission's statement regarding changed circumstances followed its discussion of the interests of the DOJ, Staff, and Mr. Geisen as they aligned *before the criminal trial* that was then scheduled to begin April 16, 2007. *Id.* at 116-117, 119. None of the concerns articulated by the Commission -- discovery imbalance, logistical complications, and testimonial inconsistencies -- apply once the criminal trial is concluded. The Commission did not articulate an intent to maintain exclusive purview over this issue following the conclusion of the criminal trial, and the Board should not read in such an intent from the Commission's language.

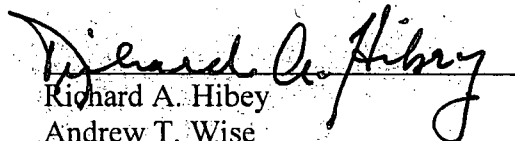
4. The impact, if any, of the doctrine of collateral estoppel given the outcome of Mr. Geisen's criminal trial.

This issue would be the subject of extensive briefing and argument if Mr. Geisen were seeking to relitigate the factual issues that were the subject of the criminal trial. While he does not concede the issue of whether he knowingly made false statements to the NRC, he does recognize that the conviction removes that issue from the Board's consideration. In order to fully comprehend the meaning and weight of the verdict, it is important for the Board to consider the findings and conclusions of the jurors and the trial judge as memorialized in the parties' sentencing memoranda and the sentencing transcript. But given the verdict, Mr. Geisen does not intend to contest factual liability upon resumption of this case, merely the reasonableness of the punishment imposed.

5. What remains to be done to prepare for an evidentiary hearing and the number of witnesses and estimated length of that hearing.

Given Mr. Geisen's position as set forth above, preparation for a dispositive hearing should be brief and should not include any further depositions or written discovery. The Board (and the Staff) will have available to it the above-referenced sentencing materials. Counsel will make arrangements to provide the transcript from the criminal trial if the Board and Staff wishes to review those materials. We do not intend to call any witnesses at the hearing given the absence of any factual issues for resolution. It is difficult to imagine that the hearing would take more than a single day to complete, as the majority of the discussion will focus on whether a five-year ban from licensed activity is a fair and justifiable punishment given the Staff's treatment of similarly-situated individuals and Mr. Geisen's history of exemplary work.

Respectfully Submitted,


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Dated: July 7, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 7th day of July, 2008, true and genuine copies of the foregoing were served on the following persons by electronic mail and, as indicated with an (*), first-class mail, postage prepaid:

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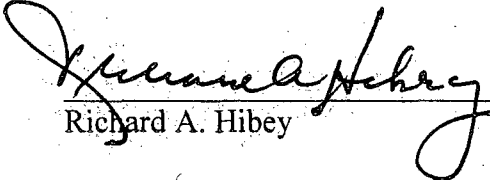
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