

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/17/08

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

SERVED 07/17/08

In the Matter of

DAVID GEISEN

Docket No. IA-05-052

ASLBP No. 06-845-01-EA

July 17, 2008

NOTICE AND ORDER
(Regarding Conference Call)

On June 30, 2008, the Board issued an order in response to Mr. Geisen's request to move forward instanter with his challenge to the Staff's enforcement ruling in the wake of the recent outcome of his criminal trial in the United States District Court for the Northern District of Ohio.¹ In that order, the Board directed the parties to inform us of their position on a number of threshold issues. Cogent, concise and thoughtful memoranda were promptly filed by Mr. Geisen and the Staff on July 7 and July 14, respectively.² Both parties agreed therein, inter alia, that it was appropriate for the Board to move forward at this time.

Confirming the informal notice provided to the parties by email on the afternoon of Tuesday, July 15, the Board is convening a conference call, to be held Monday, July 21, 2008, at 9:30 A.M. The purpose of the call is to discuss the ramifications of some of the positions taken by the parties in order to determine in what manner and at what pace to move forward with the proceeding. The information needed to connect to this call, which is expected to last some 90 minutes, will be provided in the email transmitting this Order to all counsel.

¹ See Licensing Board Order (Calling for Briefs) (June 30, 2008).

² In response to the Board's informal inquiry, Mr. Geisen indicated he would not be exercising the opportunity to file a reply memorandum, which would have been due today.

To enhance the effectiveness of the conference call, and to provide us the information needed to establish a schedule for moving forward, the Board requests the parties to be prepared to address the issues described below, in addition to those that are self-evident follow-ons from the parties' memoranda:

A. Mr. Geisen has indicated that the relief he 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." Brief of David C. Geisen in Response to Board's Order Dated June 30, 2008 at 2 (July 7, 2008) [July 7 Geisen Brief]. In this regard, Mr. Geisen stated that he "does not intend to contest factual liability upon resumption of this case, merely the reasonableness of the punishment imposed." Id. at 4. He has also indicated that he would be willing to provide the "transcript from the criminal trial" if desired. Id. at 5.

If that were to be the agreed-upon approach:

1. In the interest of efficiency, should the Board be provided the Transcript before the hearing begins, so that we can become familiar with it in advance? If so, at what point and under what conditions should that be done?
2. From what source would the Board derive the underlying "uncontested facts" (our paraphrase) upon which to determine "the reasonableness of the punishment imposed"? Possible sources include, but may not be limited to: (I) our own reading of the Transcript; or (ii) the precise language of the counts of the Indictment upon which a conviction was obtained.
3. What are the legal and/or practical distinctions, if any, between applying a collateral estoppel theory and allowing Mr. Geisen to waive the opportunity to contest factual liability? If Mr. Geisen were later to prevail on appeal, what impact would that have on the administrative proceeding?
4. What standard is the Board to employ in determining "the reasonableness of the punishment imposed" in light of the "uncontested facts"? Possible standards include, but may not be limited to: (I) conducting a de novo analysis; or (ii) affording the Staff-imposed punishment some measure of deference by upholding it unless it is found to run afoul of standards such as "arbitrary or capricious," "clearly erroneous," or "abuse of discretion." Cf., e.g., In Re Atlantic Research Corporation, ALAB-594, 11 NRC 841, 847-49 (1980), addressing the somewhat different subject of the appropriateness of the amount of a civil monetary penalty.

B. The Staff's Enforcement Order of January 4, 2006, prohibits Mr. Geisen's "involvement in all NRC-licensed activities for a period of five years."³ The sentence imposed by the district judge included Mr. Geisen's debarment "from employment with the Nuclear Power Industry" during his three-year probationary period.⁴ In any event, the fact of Mr. Geisen's felony conviction, independent of any judicially or agency-imposed debarment, could have an impact on his ability to pass the investigations or to obtain the clearances required before entering certain types of employment, whether of the nature described above or otherwise.

As the Board sets about determining, under whatever standard is appropriate, "the reasonableness of the punishment imposed," does it need to bear in mind matters such as the following:

1. Is there any essential or practical difference between the terms of the agency's and the court's debarment in terms of the types of companies or facilities (e.g., vendors, utilities, consultants) for whom Mr. Geisen may work, the type of responsibilities he can hold, or the level of supervisory oversight of his activities?
2. What is the additional practical impact, if any, of the fact of his felony conviction on his employment opportunities in the areas referred to in B.1 and elsewhere?

C. Mr. Geisen indicated he would likely be calling no witnesses, while the Staff indicated it might call "two or three."⁵ If the Board believed that some clarification of the record were needed, would it be appropriate (given the somewhat peculiar nature of this administrative

³ Order (Effective Immediately) Prohibiting Involvement in NRC-Licensed Activities (NRC Special Investigation Report No. 50-346/2002-08 (DRS)) (NRC Investigation Report No. 3-2002-006) at 1 (Jan. 4, 2006) (emphasis added).

⁴ Judgment in United States v. David Geisen, # 3:06cr712-01 (N.D. Ohio, May 2, 2008), at 3 (emphasis added).

⁵ July 7 Geisen Brief at 5; NRC Staff Response to Board's Order Calling for Briefs at 6 (July 14, 2008).

proceeding in terms of its collateral estoppel overtones, and the pendency of the appeal of the criminal conviction) for it to seek to question Mr. Geisen?

The fact that the Board has asked the above questions should not be taken as indicating any decision on its part as to how to proceed after the conference call. Rather, it is being done to give counsel an opportunity to prepare to answer the questions and thus to make the conference call a more efficient vehicle for determining how to move forward. Counsel are free to include, as part of their answers or otherwise, any views they may have as to other approaches to the matters underlying the Board's questions, and to raise other questions themselves.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

By Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 17, 2008

Copies of this Notice and Order were sent this date by e-mail transmission to counsel for Mr. Geisen and for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
DAVID GEISEN

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Docket No. IA-05-052

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB NOTICE AND ORDER (REGARDING CONFERENCE CALL) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland
this 17th day of July 2008