

RAS-C-99

Hearing Docket

From: Shahram Ghasemian
Sent: Wednesday, January 07, 2009 5:17 PM
To: Mike Farrar; Roy Hawkens; nicholas.trikourus@nrc.gov
Cc: Karen Valloch; Johanna Thibault; Hearing Docket; Lisa Clark; Kimberly Sexton; Hibey, Richard; Wise, Andrew; Shahram Ghasemian
Subject: RE: Briefing of Additional Issues in Geisen Proceeding

Your Honors,

Counsel for the Staff accepts the Board's offer to file a supplemental brief on January 30, 2009 consistent with the Board's email below.

Respectfully,
Shahram Ghasemian
Counsel for NRC Staff

DOCKETED
USNRC

January 8, 2008 (8:30am)

From: Mike Farrar
Sent: Wednesday, December 31, 2008 10:42 AM
To: Kimberly Sexton; Shahram Ghasemian; Lisa Clark; Hibey, Richard; Wise, Andrew
Cc: Karen Valloch; Johanna Thibault; Hearing Docket
Subject: Briefing of Additional Issues in Geisen Proceeding

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

To Counsel:

The Geisen Board wishes to have the parties include in their upcoming briefs, if they were not already planning to do so, a discussion of the questions listed below. In preparing their briefs, they should bear the following in mind:

- a. The inclusion of each of these questions reflects only that at least one Board member thinks that a particular issue might be relevant to the disposition of the matters before us. You are free to argue that the theory embodied in the question is not relevant or applicable, but only in conjunction with a discussion of the substance of the question/theory.
- b. We would prefer that these discussions be included in the briefs now in preparation. Given the timeframes involved, however, the Staff may at its option notify the Board and opposing counsel that it wishes instead to file a supplemental brief addressing these matters on Friday, January 30 (the due date of the main brief for Mr. Geisen). In that event, Mr. Geisen's response to the supplemental brief will be due Wednesday, February 11.
- c. We would ordinarily have transmitted these questions by way of a more formal Order, but thought it important to use this informal method in order to put the gist of the questions before the parties at an early opportunity. To the extent the questions are not fully developed or thoroughly researched, we have confidence in counsel's ability to respond to their essence, relying upon appropriate precedent.
- d. This email will be included in the official hearing docket.

Question 1. Collateral Estoppel

The NRC Staff's Order of January 4, 2006, sanctioned Mr. Geisen because it concluded (p. 14) that he "engaged in deliberate misconduct by deliberately providing . . . information that he knew was not complete or accurate in all material respects to the NRC"

In its motion addressing the applicability of collateral estoppel, the NRC Staff stated that it "acknowledge[d] that the 6th Circuit's deliberate ignorance instruction does not meet the NRC's deliberate misconduct standard, and instead would be classified as careless disregard" (NRC Staff Motion for Collateral Estoppel at 23 (Nov. 17, 2008)).

TEMPLATE=SEC4-036

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The parties are to address the issue of whether a conviction under the Sixth Circuit's deliberate ignorance instruction would provide a basis for collateral estoppel. The parties' briefs should include a discussion of the following:

- i. Whether a conviction under the deliberate ignorance instruction satisfies the NRC Staff's deliberate misconduct standard, because pursuant to the instruction, a conviction would indicate that the jury found the defendant "knew that the submissions and presentations to the NRC concealed material facts or included false statements."
- ii. Whether a conviction under the deliberate ignorance instruction precludes the conclusion that the jury found the defendant guilty of careless disregard, because the instruction stated that "carelessness, or negligence, or foolishness is not enough to convict," but rather the jury must be "convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements." Cf. United States v. Mari, 47 F.3d 782, 785-86 (6th Cir. 1995) (holding that the express terms of the Sixth Circuit Pattern Jury Instruction foreclose the possibility that a jury will convict a defendant based on what he should have known rather than on what he did know).
- iii. Even assuming that a conviction under the Sixth Circuit's deliberate indifference instruction would provide a basis for collateral estoppel, whether the NRC Staff has waived such an argument based on its representation (mentioned above) in its November 17 Motion. But cf. Brief of David C. Geisen in Response to Board's Order Dated June 30, 2008 at 4 (July 7, 2008) ("While [Mr. Geisen] 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.").

Question 2. Due Process / Arbitrariness.

During the hearing, the Board heard from two witnesses in support of the penalty the NRC imposed upon Mr. Geisen. Testimony by these two witnesses enlightened the Board as to the process employed by the Enforcement Panel in making its determination to charge Mr. Geisen and to bar him from the nuclear industry in a manner that was effective immediately. Disclosure of the nature of this process, and of a number of steps employed or not employed along the way, prompted questions regarding the possible arbitrariness of the investigatory and enforcement processes that led to the charges and to the penalty imposed upon Mr. Geisen by the NRC. The supplemental briefing in this regard should cover the following issues:

- i. Whether the process employed by the Enforcement Panel was fundamentally flawed in such a manner that violated Mr. Geisen's due process rights. See Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (touchstone of due process is protection of the individual against arbitrary action of government); see also Hensley v. Wilson, 850 F.2d 269, 276-77 (6th Cir. 1988) (where decider relied strictly on investigator's statement without making any determination for itself, "it cannot be said that the committee has made reasoned choices about the truth of the information provided to it, as minimum due process requires it to do."), and see Kyle v. Hanberry, 677 F.2d 1386, 1389 (11th Cir. 1982) ("to make a decision based on the factual evidence presented, part of a disciplinary committee's task must be to make a bona fide evaluation of the credibility and reliability of that evidence" without which an arbitrary determination would result).
- ii. Whether the immediacy of the penalty imposed by the Enforcement Order raises procedural due process concerns under the Supreme Court's balancing test in Mathews v. Eldridge, 424 U.S. 319 (1976) (fundamental requirement of due process is an opportunity to be heard at a meaningful time in a meaningful way). Compare Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (professor, who had no tenure rights to continued employment, was not deprived of "liberty" when he was not rehired but remained as free as before to seek another employment opportunity) with Goldberg v. Kelly, 397 U.S. 254 (1970) (procedural due process requires a pretermination evidentiary hearing be held when deprivation of Constitutional interests occurs).
- iii. Whether, even if individual steps in a process appear to be permissible, the overall impact of the totality of their shortcomings can nonetheless be deemed arbitrary. See Steel Tank Barge H1651 v. United States, 272 F. Supp. 658 (E.D.La. 1967).

The Board appreciates the additional effort the parties are hereby being called upon to make.

Michael C. Farrar
Chairman, for the
Geisen Licensing Board