

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of
DAVID GEISEN

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Docket No. IA-05-052

NRC STAFF'S PETITION FOR REVIEW OF LBP-09-24

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September 21, 2009

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INTRODUCTION

David Geisen was an employee at Davis-Besse Nuclear Power Station from 1988 until 2002 when the reactor vessel head corrosion cavity event occurred. On January 4, 2006, the NRC staff ("Staff") issued to Mr. Geisen an immediately effective Order prohibiting him from any involvement in NRC-licensed activities for a period of five years.¹ The Order was based on the Staff's determination that Mr. Geisen "engaged in deliberate misconduct by deliberately providing First Energy Nuclear Operating Company ("FENOC") and the NRC information that he knew was not complete or accurate in all material respects to the NRC, a violation of 10 CFR 50.5(a)(2)."² On January 19, 2006, a Grand Jury in the Northern District of Ohio returned a five-count criminal indictment against Mr. Geisen, predicated on essentially the same facts as the Order, for violating 18 U.S.C. §§ 1001 and 1002. He was convicted of three of the five

¹ Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-05-052 (Jan. 4, 2006) (ML053560094) ("Order" or "Enforcement Order").

² *Id.* at 14. Specifically, the Order set forth six instances in which Mr. Geisen deliberately provided materially incomplete or inaccurate information to the NRC: Serial Letters 2731, 2735 and 2744; an October 3, 2001 teleconference; an October 11, 2001 briefing to the Commissioners' technical assistants ("TAs"); and a November 9, 2001 Advisory Committee on Reactor Safeguards ("ACRS") meeting.

counts in the indictment and sentenced to three years probation with certain conditions, including a three-year prohibition from employment in the nuclear power industry.

A hearing was held before a three-judge Atomic Safety and Licensing Board (“Board”) in December 2008.³ On August 28, 2009, a Majority issued a 2-1 Initial Decision finding that the Staff failed to prove by a preponderance of the evidence that Mr. Geisen provided inaccurate and incomplete information to FENOC and the NRC and set aside the five-year employment ban imposed on Mr. Geisen.⁴ Chief Judge Hawkens dissented, finding that Mr. Geisen deliberately provided the NRC inaccurate and incomplete information in all six instances charged by the Staff, that the five-year employment ban was reasonable and should be sustained, and that collateral estoppel applied to the charges regarding Serial Letter 2744.⁵

Pursuant to 10 C.F.R. § 2.341(b)(2) and (4), the Staff hereby files its Petition for Review of the Initial Decision because it contained legal conclusions that were contrary to or without established precedent; raised substantial questions of law, policy, and

³ The NRC procedural history is summarized in *David Geisen*, LBP-09-24, 70 NRC ____ (slip op.) at 5-8 (Aug. 28, 2009) (“Majority” or “Initial Decision”) and *David Geisen*, Dissenting Opinion of Judge E. Roy Hawkens, LBP-09-24, 70 NRC ____ (slip op.) at 3-5 (Aug. 28, 2009) (“Dissent”).

⁴ One member of the Majority also indicated that he would be filing additional views on the immediate effectiveness of enforcement orders and adjudicatory delay in the near future that will be bound in the NRC Issuances after the Initial Decision and before the Dissent. Majority at 125, 145. The judge noted that his additional views “do not alter the nature of the essential judgments.” *Id.* This pronouncement to expect additional views at a later date is a cause of significant concern. Additional extra-procedural views will undoubtedly create confusion and controversy as to their meaning, applicability, and effect on the Initial Decision. The Commission should clearly state that all pertinent written views of a Board judge should be provided as part of the Initial Decision rather than in piecemeal fashion with some views reflected in the Initial Decision and some provided extra-procedurally at some unspecified future time to be bound in NRC Issuances.

⁵ The Staff moved for the Board to apply collateral estoppel from the guilty verdict and underlying facts of Counts 1, 3, and 4 in *U.S. v. Geisen* to conclusively establish the Staff’s charge that Mr. Geisen knowingly provided materially inaccurate and incomplete information to the NRC in Serial Letter 2744. See *generally* NRC Staff Motion for Collateral Estoppel (Nov. 17, 2008).

discretion; involved prejudicial procedural errors; and reflected findings of material fact that were clearly erroneous. The Staff submits that the Commission should grant this Petition, reverse LBP-09-24, and reinstate Mr. Geisen's five-year employment ban.

DISCUSSION

I. Standards Governing Petitions for Review

The Commission may take discretionary review of a licensing board's initial decision. 10 C.F.R. § 2.341(b)(1). In deciding whether to grant review, the Commission considers whether the petition raises a substantial question with respect to the following standards:

- (i) a finding of fact is clearly erroneous;
- (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;⁶
- (iii) the appeal raises a substantial and important question of law, policy, or discretion;⁷
- (iv) the proceeding involved a prejudicial procedural error;⁸ or
- (v) any other consideration the Commission determines to be in the public interest.

⁶ Commission review of a board's legal conclusions is *de novo*. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 190 (2004) ("TVA"). A petitioner must show an "error of law or abuse of discretion" by the board. *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006). The Commission will reverse a board's legal conclusions only "if they are 'a departure from or contrary to established law.'" *TVA*, CLI-04-24, 60 NRC at 190.

⁷ A "substantial question" can be a matter of "first impression regarding this agency's enforcement regulations and policies." *TVA*, CLI-03-9, 58 NRC 39, 44 (2003).

⁸ The Commission will grant relief for procedural errors that result in actual prejudice; *i.e.*, if the petitioner demonstrates that the board's procedural error had a substantial impact on the outcome of the proceeding. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984) (*citing Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983)).

10 C.F.R. § 2.341(b)(4). The burden is on the Staff, as petitioner, to demonstrate that Commission review is warranted.⁹

II. The Majority Opinion Reflects Substantial Legal and Procedural Errors

A. The Majority's Five-Factor Test and Knowledge Hierarchy are Without Governing Precedent, Contrary to Established Law, and Resulted in Prejudicial Procedural Error

The Commission has clearly stated that under the Administrative Procedure Act the appropriate evidentiary standard in enforcement cases is preponderance of the evidence, even in cases involving individual wrongdoing.¹⁰ Although the Majority stated that it evaluated the evidence based on the preponderance standard, Majority at 20 n.35, it actually required the Staff to meet a standard far higher than “more likely than not.” In this regard, the Majority relied extensively on five additional factors to establish the knowledge element of the deliberate misconduct rule (“Five Factors” or “Five Factor Test”):

(1) The wrongdoer must be an expert in the particular matter at issue;¹¹

(2) The wrongdoer must not be busy with other important matters during any relevant time period;¹²

(3) The matter at issue must be within the wrongdoer's job description and permanently assigned duties;¹³

⁹ See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 40441), CLI-94-6, 39 NRC 285, 297-98 (1994).

¹⁰ Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991).

¹¹ See, e.g., Majority at 25, 60, 86, 126, 133.

¹² See, e.g., Majority at 24, 57, 75, 88, 95, 96 n.147, 139 n.172, 141.

¹³ See, e.g., Majority at 12-13, 24, 60, 70, 88.

(4) The wrongdoer must not only read written communications concerning the matter at issue, but must also act upon or otherwise respond positively to the communication in a way that conforms to the Majority's "Knowledge Hierarchy";¹⁴ and

(5) The wrongdoer must have knowledge of not only the content of any relevant document, but also its context and implications.¹⁵

Requiring proof to satisfy these new standards,¹⁶ for which the Majority cited no legal precedent, renders it nearly impossible to establish that an individual acted deliberately.

The use of this Five Factor Test not only raises a question of first impression regarding the agency's enforcement regulations and policies,¹⁷ but also has significant policy implications. As testified to at the hearing, the NRC considers violations involving the integrity of an individual, such as lying, to be one of the more serious violations it encounters. Staff Ex. 1 at 39; Tr. 2018. With the Majority's new paradigm, however, even an admission of actual knowledge and deliberate action might not be enough to meet the 10 C.F.R. § 50.5 deliberate misconduct requirements if, for example, evidence showed the individual was busy with other important job matters or the pertinent matter was not within his job description. This would substantially erode the effectiveness of the NRC's enforcement program, which the Commission relies on to deter unlicensed individuals

¹⁴ See, e.g., Majority at 31-33.

¹⁵ See, e.g., Majority at 21, 32, 58, 64-65, 112.

¹⁶ Further, the Majority failed to provide support, such as expert testimony or a scientific treatise, for its Knowledge Hierarchy. The Staff submits that the Knowledge Hierarchy is not common knowledge appropriate for judicial notice but rather the Board's opinion on psychological factors influencing a person's later recall of information.

¹⁷ See TVA, CLI-03-9, 58 NRC 39, 44 (2003).

from deliberately failing to provide the NRC complete and accurate information. NRC Enforcement Policy. Staff Ex. 1 at 4.

Furthermore, the Board never alerted the parties that it would use these standards to evaluate the evidence against Mr. Geisen put forward by the Staff. Although “agencies are free to announce and develop rules in an adjudicatory setting,” there are limits: “when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust.”¹⁸ Contrary to this principle, the Majority applied its new standards for proving knowledge after the close of the record, without notice, without providing the Staff an opportunity to present evidence focusing on these standards, and then relied heavily on these standards in rendering its decision. In so doing, the Majority violated “general considerations of fairness”¹⁹ and committed prejudicial procedural error.

Even applying the Majority’s own Five Factors to determining state of mind, the Majority either evaluated them inconsistently or failed to properly consider evidence that would contradict them. For instance, on Factor 1, the expert requirement, the Majority variously stated that one need not be an expert to understand the seriousness of certain fundamental pieces of evidence, *see, e.g.*, Majority at 63, but excused Mr. Geisen from deliberate misconduct because it found he was not an expert. Meanwhile, this conclusion ignored the abundant evidence that Mr. Geisen was one of the most

¹⁸ *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *see also Alabama v. Shalala*, 124 F.Supp.2d 1250, 1263-64 (M.D. AL 2000).

¹⁹ *Puerto Rico*, 35 F.3d at 607 n.7.

knowledgeable people at Davis-Besse about nozzle-cracking.²⁰ On Factor 2, the Majority placed great emphasis on Mr. Geisen's alleged heavy workload in August and September 2001 with the INPO evaluation and preparing for the 13th Refueling Outage ("13RFO") to excuse him for approving information he already knew to be inaccurate or incomplete. See, e.g., Majority at 24, 57-58. While he may have been busy, the evidence does not suggest that Mr. Geisen would have turned his back on the nozzle cracking issue. He knew that the NRC was very concerned about the nozzle cracking issue. Tr. 1807. He also knew in the summer of 2001 that the NRC was likely to issue a Bulletin²¹ on the matter. Staff Ex. 71 at 1847. Finally, he knew that the issuance of a Bulletin was a significant event, not only for the NRC, but also for Davis-Besse. Tr. 1813, 1862.

On Factor 3, the Majority determined that because Mr. Geisen did not personally perform any of the inspections or actually perform the reactor pressure vessel ("RPV") head cleanings that he could not have the requisite knowledge of the state of the RPV head. See Majority at 126-27. This determination is clearly erroneous. The Majority acknowledged that Mr. Geisen served for several weeks as the engineering point of contact in Outage Central during 12RFO, but failed to place any significance on this fact.

²⁰ For instance, in April 2001, Mr. Geisen was scheduled to give a 30-minute presentation on Davis-Besse at a Framatome-sponsored "CRDM Nozzle and Weld Cracking Information Exchange Meeting," Staff Ex. 26; Mr. Geisen was the Davis-Besse representative on the Babcock & Wilcox Owners' Group Steering Committee, which was involved with the nozzle cracking issue at the time, Tr. 1804-05; and most importantly, in the spring of 2001, Mr. Geisen made presentations to senior management at Davis-Besse and also Commissioner Merrifield on circumferential cracking at Oconee Nuclear Station, Staff Ex. 71 at 1837-38.

²¹ The NRC issued Bulletin 2001-01, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles," ("Bulletin") on August 3, 2001, to all pressurized water reactor licensees to express the NRC's concern about the newly discovered circumferential cracking at Oconee Nuclear Station and alert addresses to what the NRC expected in response. Staff Ex. 8.

During his time in Outage Central, Mr. Geisen viewed the Red Photo,²² Staff Ex. 19 at 11-14, which he described as “ugly” and showing “an excessive amount of flange leakage.” Tr. 1620, 1844-45. Also, while in Outage Central, Mr. Geisen removed a mode restraint on restart on Condition Report (“CR”) 2000-1037, which he stated he read with care.²³ Tr. 1834. And, Mr. Geisen “played an important role in a decision to use a novel cleaning technique on the reactor vessel head” after he learned that Mr. Siemaszko’s initial cleaning effort to remove boron clumps had been unsuccessful. Majority at 62, 127; Tr. 1840. Each of these pieces of information came to him through his assigned duties, yet the Majority concluded that these responsibilities did not evidence the requisite knowledge.

On Factor 4, the Majority inconsistently applied its own Knowledge Hierarchy. In fact, the Majority found that Mr. Geisen had knowledge of the information in certain e-mails he read but did not act upon.²⁴ The Majority also made findings contrary to Mr. Geisen’s own testimony. While acknowledging that it was Mr. Geisen’s practice to read his e-mails and reply only to those needing action or a response, the Majority said that Mr. Geisen did not respond to critical e-mails and Trip Reports because they “were not directly related to [his] core duties as Manager of Design Basis Engineering.”

²² The so-called “Red Photo” actually refers to a series of photos of the as-found condition of the outside of the service structure from 12RFO. These photos, which show boric acid streaming out of the weep holes, were appended to CR 2000-0782, Staff Ex. 19.

²³ Condition Report 2000-1037 described the state of the RPV head during 12RFO as follows: there were “[l]arge deposits of boron . . . accumulated on the top of the insulation and on the Reactor Vessel Head” that were “‘lava like’ and originate from the ‘mouse holes’ and CRD flanges.” Staff Ex. 18 at 4. CR2000-1037 also specifically addressed the distinct possibility of nozzle leakage at Davis-Besse, the basis of the Bulletin. Staff Ex. 18 at 4.

²⁴ See e.g., Majority at 79 (“To the contrary, Mr. Geisen understood that past inspections had been completed For example, Mr. Goyal communicated this message when he reported in his August 17, 2001 e-mail that Davis-Besse conducted a good inspection in 1998.”).

Majority at 68, 70. Mr. Geisen, however, admitted that he did not respond to those communications because he already knew the information contained therein. *See, e.g.* Tr. 1633-35, 1856, 1860, 1862, 1870; Staff Ex. 71 at 1955. Despite Mr. Geisen's admissions that he knew the information, the Majority found that he did not.

On Factor 5, the Majority stated, for example, that it is not enough for Mr. Geisen to have known about the boron accumulation on the head; instead, he must have known about the "severity" of it. Majority at 27, 110, 132 n.168, 138, 139, 168. As previously indicated, Mr. Geisen was well aware of the severity of the boric acid accumulations on the head after, among other things, his time in Outage Central, and because of his knowledge of the nozzle cracking issue, he understood the implications.

In conclusion, even if the Five Factor Test were supportable and the parties were put on proper notice as to the new governing legal standards, the Staff met the standards, and the facts clearly support deliberate misconduct on the part of Mr. Geisen.

B. The Majority Erroneously Discounted Circumstantial Evidence Contrary to Established Law

The Majority explicitly stated that it afforded more weight to the absence of certain pieces of direct evidence than to the totality of circumstantial evidence. Majority at 28, 63 n.112, 131-32; *see* Dissent at 57 n.43. For instance, despite Mr. Geisen's own admissions and the overwhelming circumstantial evidence, it was central to the Majority's fact-finding that the Staff did not put on any witnesses to incriminate Mr. Geisen.²⁵ The Majority erroneously allowed that to outweigh the cumulative weight of direct and circumstantial evidence that illustrated Mr. Geisen's actual knowledge. This

²⁵ Majority at 27-28; *see also* Majority at 132 (discussing the significance of lack of direct testimonial evidence testimony).

weighing contradicts clearly established precedent that a plaintiff may prove his case, whether civil or criminal, using either direct or circumstantial evidence, and that circumstantial evidence has the same probative value as direct evidence.²⁶ Indeed, “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”²⁷ Therefore, the decision should be reversed because the Majority acted contrary to established law and in a manner that significantly affected the outcome of the proceeding.

C. The Majority’s Factual Determinations on Mr. Geisen’s Liability Rely in Part on Evidence Admitted During the Sanction Portion of the Hearing Resulting in Prejudicial Procedural Error

The Majority relied on statements contained in an Office of the Inspector General Semiannual Report to Congress (“Report”) as evidence Mr. Geisen did not acquire any relevant knowledge from his viewing of the Red Photo during his time in Outage Central. Majority at 64. The Report, however, was introduced by Mr. Geisen during the penalty phase of the hearing²⁸ solely to undermine the sanction determination process, not to establish facts contained within the Report. Tr. 2297-98. In anticipation of this very procedural error, the Staff repeatedly objected to the Report’s introduction, Tr. 2157,

²⁶ *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003); see also *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (“As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.”); *Doe v. U.S. Postal Serv.*, 317 F.3d 339, 343 (D.C. Cir. 2003) (the court “draw[s] no distinction between the probative value of direct and circumstantial evidence.”). Moreover, here, the Majority did not merely give direct evidence greater weight than circumstantial evidence, but rather gave greater weight to the *absence* of direct evidence. See Majority at 132-33; Dissent at 57 n.43.

²⁷ *Desert Palace*, 539 U.S. at 100 (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

²⁸ The enforcement hearing was bifurcated with the first four days, the liability phase of the hearing, consisting of testimony presented by the Staff to support the charges in the Enforcement Order and the final day, the sanction or penalty phase of the hearing, consisted of testimony presented by the Staff to support the five-year ban. Tr. 2157-59.

2204, 2296-97, but was overruled with the repeated assurance that the Board's "decision on Mr. Geisen's liability is based on the evidence [it] heard from Monday through Thursday [during the liability phase of the proceeding]." Tr. 2157; see *also* Tr. 2158-59. If the Staff had been on notice that evidence admitted during the penalty phase of the proceeding would be relied upon in adjudicating Mr. Geisen's liability, the Staff would have sought to rebut such evidence when it was admitted. Having been assured that the liability determination would be made without regard to evidence admitted in the penalty phase, the Staff acted accordingly and did not address that evidence as it related to the issue of liability. By inappropriately allowing the Report to be introduced for the purpose of determining liability, despite the Board's statements to the contrary, the Staff was prejudicially harmed by the Majority's action.

D. The Majority's Failure to Apply Collateral Estoppel is Contrary to Established Law and Raises a Substantial and Important Question Regarding Abuse of Discretion

1. Parklane's Broad Discretion Does Not Apply

The Majority declined to apply collateral estoppel because, under the "broad discretion" granted to district courts under *Parklane Hosiery Co. v. Shore*,²⁹ three discretionary factors "mandated" not applying it.³⁰ Majority at 36, 53. While *Parklane* did broaden the scope of permissible discretion, it did not change the bounds of discretion already established by NRC precedent that states "absent overriding competing public policy considerations . . . , an administrative agency is [not] free to withhold the

²⁹ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

³⁰ The Dissent found that all four elements of collateral estoppel were satisfied and that the Majority impermissibly exercised discretion in not applying collateral estoppel. Dissent at 5-7.

application of collateral estoppel as a discretionary matter.”³¹ Under NRC precedent, none of the factors the Majority rested on—(1) the pendency of the appeal of the criminal court judgment; (2) the questions over the equivalence of the “knowledge” standard; or (3) the possibility of an internally inconsistent jury verdict—amount to the type of overriding public policy consideration that bars the application of collateral estoppel,³² thus providing ground for Commission review of the Initial Decision. Therefore, because the Majority’s application of *Parklane* was contrary to established law, the Majority’s decision should be reversed.

2. Even Under a Broad Discretion Standard, the Majority Abused Its Discretion

a. The Majority’s Discretionary Factors Do Not Weigh Against the Application of Collateral Estoppel

Even if *Parklane*’s broad discretion applies, the Majority abused its discretion by only considering factors that weighed in favor of withholding collateral estoppel, evaluating those factors incorrectly, and not considering factors in favor of applying collateral estoppel.³³ For example, the Majority stated that Mr. Geisen’s pending criminal

³¹ *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 563-64 n.7 (1977). See also Dissent at 7 n.5; *U.S. Dep’t of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982).

³² *Clinch River*, CLI-82-23, 16 NRC at 420 (collateral estoppel “need not be applied by an administrative agency where there are overriding public policy interests that favor relitigation” like “the need for flexibility to implement new policy initiatives and the possibility of a more accurate decision through further proceedings.”); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 173 (2002) (the “correctness of the prior decision is not, however, a public policy factor upon which the application of the doctrine of collateral estoppel depends.”).

³³ All other boards applying or relying on *Parklane* considered all relevant factors. See *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), LBP-81-58, 14 NRC 1167 (1981); *Cleveland Electric Illuminating Co. et al.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 NRC 175 (1981); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563 (1979), *aff’d*, ALAB-575, 11 NRC 14 (1980).

appeal is the crucial discretionary factor for not applying collateral estoppel, “even if that doctrine otherwise appeared applicable.” Majority at 36-39. The Majority provided two general ways of addressing the collateral estoppel issue here: either (1) hold the Board proceeding in abeyance pending the outcome of the criminal appeal, or (2) apply collateral estoppel, and if the criminal appeal proves successful, resume the Board proceeding. But, the Majority summarily dismissed both options as creating delay that “block[s] the fair administration of justice.”³⁴ Majority at 36 n.60. While the Majority’s approach was plausible prior to the Board hearing, any concern about delay in the administration of justice was mooted by the Board hearing that fully litigated all issues. The application of collateral estoppel in this situation would have been, and continues to be, both straightforward and fair: apply collateral estoppel, determine the appropriate sanction, and should Mr. Geisen’s conviction be overturned on appeal, reinstate the Initial Decision. Therefore, the pendency of the criminal appeal should not have precluded collateral estoppel.

Further, the Majority substituted its determination of fact for that of the jury by deciding that: (1) there is insufficient evidence of deliberate ignorance and (2) there is also insufficient evidence of actual knowledge. The Majority therefore concluded that the jury convicted Mr. Geisen for some other, improper, reason. Majority at 46, 49. The basis for the Majority determination of fact is the apparent assumption that the jury failed to follow the district court’s instructions. Relying on this assumption constitutes clear

³⁴ The Majority rested heavily on a delay it says Mr. Geisen has “inexorably” and “inequitably” born in being banned from the nuclear industry. Majority at 38-39. However, the Majority overlooked Mr. Geisen’s having been indicted and convicted in federal court on three counts of making and concealing false statements to the NRC. Thus, any delay that Mr. Geisen experienced was not due to the NRC. Further, the Majority also ignored that Mr. Geisen chose not to challenge the immediate effectiveness of the Enforcement Order. Transcript of Oral Arguments at 68-69 (Apr. 11, 2006); see *also* Dissent at 7 n.5.

error.³⁵ Instead, the Majority should have examined the record of the criminal case “with realism and rationality” to determine whether a finding of guilt based on actual knowledge or deliberate ignorance is supported by evidence a reasonable jury could have accepted.³⁶ It is clear from a reading of the criminal record that a reasonable and rational jury would have found that the evidence demonstrated Mr. Geisen knowingly, with actual, positive knowledge, made material false statements to the NRC in Serial Letter 2744.³⁷ The Majority itself acknowledged that in this case, and presumably in the federal criminal trial, “there is no evidence presented that fits the ‘willful blindness/deliberate disregard’ fact pattern.” Majority at 45.³⁸ The 6th Circuit has stated that if there is insufficient evidence of deliberate ignorance, it must be concluded that the jury convicted on the basis of actual knowledge.”³⁹

Moreover, the Majority stated Mr. Geisen need only “raise a legitimate concern” that the jury verdict was tainted for the Board to decline to apply collateral estoppel. Majority at 47-48. This new, lenient discretionary standard that the Majority rested on is

³⁵ See *U.S. v. Stone*, 9 F.3d 934, 938-40 (11th Cir. 1993) (internal citations and quotations omitted) (“Few tenets are more fundamental to our jury trial system than the presumption that juries obey the court’s instructions. The crucial assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge. Indeed, the presumption that juries follow their instructions is necessary to any meaningful search for the reason behind a jury verdict. This presumption is, therefore, almost invariable. . . . [T]he presumption that juries follow their instructions is overcome only if there is an overwhelming probability that the jury will be unable to follow the court’s instructions . . . and a strong likelihood that the effect of the evidence would be devastating to the defendant.”).

³⁶ *Otherson v. Dep’t of Just., Immigr. & Naturalization Serv.*, 711 F.2d 267, 274 (D.C. Cir. 1983) (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)).

³⁷ See generally NRC Staff Motion for Collateral Estoppel at 5-25 (Nov. 17, 2008).

³⁸ It is important to note that Mr. Geisen argued during his criminal trial, his Acquittal Motion, and his Appeal that there was no evidence presented to support deliberate ignorance.

³⁹ *U.S. v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995) (“[t]o conclude otherwise . . . [one] would have to assume that the jury ignored the jury instructions.”).

partially attributed to information provided by Mr. Geisen's counsel regarding a post-trial discussion between counsel and the criminal trial jurors.⁴⁰ Majority at 46 n.86, 140-141. It is clear error to let an attorney's declarations of events as serious as this, that are not within the record and not properly the subject of judicial notice, influence a critical administrative adjudicatory decision.⁴¹

Finally, the Majority ignores entirely Appeal Board precedent that when considering the applicability of collateral estoppel, tribunals may not to look behind the decision rendered to determine "whether its findings of fact and conclusions of law were well founded;" "it is enough that the tribunal had jurisdiction to render its decision."⁴² Further, the "correctness of the prior decision is not . . . a public policy factor upon which the application of the doctrine of collateral estoppel depends."⁴³ As the Supreme Court succinctly put it:

Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. If separate indictments had been presented

⁴⁰ See Brief of David C. Geisen in Response to Board's Order Dated June 30, 2008 (July 7, 2008) at 2 (jury convicted Mr. Geisen based on deliberate ignorance "according to jurors' statements to the defense and prosecution lawyers following the verdict"); Transcript of Pre-Hearing Conference (July 21, 2008) at 651; Opposition of David C. Geisen to NRC Staff's Motion for Collateral Estoppel (Nov. 26, 2008) at 4-5 n.1 (jurors convicted Mr. Geisen because he "had an obligation to do a better job" and realize the misleading nature of the statements made to the NRC); David Geisen's Response to the Board's Questions (Feb. 9, 2009) at 6; Defendant's Memorandum in Aid of Sentencing (Apr. 25, 2008) at 10-11.

⁴¹ See *Yeager v. U.S.*, 129 S.Ct. 2360, 2368 (2009) ("The jury's deliberations are secret and not subject to outside examination. If there is to be an inquiry into what the jury decided, the 'evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration.' *Packet Co. v. Sickles*, 5 Wall. 580, 593, 18 L.Ed. 550 (1866); see also *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B.1785) (Lord Mansfield, C.J.) (refusing to rely on juror affidavits to impeach a verdict reached by a coin flip).").

⁴² *Davis-Besse*, ALAB-378, 5 NRC at 562-63.

⁴³ *PFS*, LBP-02-20, 56 NRC at 173.

against the defendant . . . , and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other.⁴⁴

Thus, there is no basis for the Majority's use of discretion here to decline application of collateral estoppel.

b. The Majority Failed to Consider Essential Discretionary Factors

The doctrine of collateral estoppel rests on three important considerations: the need for finality, the protection of one party from harassment by another,⁴⁵ and the conservation of judicial resources.⁴⁶ Clearly, had collateral estoppel been applied prior to the Board hearing, a vast amount of judicial and administrative resources would have been saved, but it is the need for finality and certainty in legal relations that overwhelms any other consideration. The proper application of collateral estoppel here would have "preserve[d] the acceptability of judicial dispute resolution against [the] corrosive disrespect that . . . follows [when] the same matter [is] twice litigated to inconsistent results."⁴⁷ It is those inconsistent results, as here where Mr. Geisen was convicted by a

⁴⁴ *Dunn v. U.S.*, 284 U.S. 390 (1932).

⁴⁵ This factor does not pertain to this proceeding because while generally "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does," *Parklane*, 439 U.S. at 329-30, those considerations are not applicable here. This is not the type of civil case where the NRC could have joined the criminal action against Mr. Geisen. Also, the NRC's action does not proliferate litigation; both the criminal and civil actions would have taken place, regardless of the results, without the use of collateral estoppel.

⁴⁶ *Clinch River*, CLI-82-23, 16 NRC at 420; see also *Comm. v. Sunnen*, 333 U.S. 591, 597 (1948).

⁴⁷ *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 330 (9th Cir. 1995).

jury in federal criminal court but cleared by the Majority, that can “undermine confidence in the judicial process.”⁴⁸ See Dissent at 2.

E. The Majority’s Finding on Factor 7 of the Sanction Determination Process is Without Governing Precedent

The Majority found that if Mr. Geisen engaged in deliberate misconduct, a five-year sanction might be mitigated by crediting Mr. Geisen for Factor 7 of the sanction determination process, which requires an enforcement panel to account for “[t]he attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.” Staff Ex. 1 at 41. According to the Majority, a rejection of wrongdoing but admission of “I could have done better” is sufficient to mitigate an individual’s sanction. Majority at 122. This reasoning, however, is contrary to the plain language of the factor, which requires an “admission of wrongdoing.” Further, there is no evidence in the record or legal precedent to support the Majority’s reading. See Tr. 2119. A Staff witness explained that this factor is essential to deterring future wrongdoing and ensuring others understand the importance of compliance. Tr. 2126. Failure to admit a deliberate, or willful in the case of a licensed operator, violation of the NRC’s rules and regulations cannot fulfill this factor’s underlying purpose in the enforcement process.

III. Material Factual Findings Were Clearly Erroneous

Although the Commission usually defers to a board’s finding of fact, especially in fact-intensive cases, deference is not appropriate when a board’s findings are “not even plausible in light of the record viewed in its entirety”⁴⁹ and when “there is strong reason to believe that in a particular case a board has overlooked or misunderstood important

⁴⁸ *Clements*, 69 F.3d at 330; see also Dissent at 7 n.5.

⁴⁹ *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC ____ (slip op.) (quoting *TVA*, CLI-04-24, 60 NRC at 189).

evidence.”⁵⁰ As discussed below, a number of the Majority’s material factual findings were clearly erroneous and had a substantial impact on the final outcome. For instance, with respect to the Majority’s central findings as to Mr. Geisen’s state of mind, the Majority found:

- (1) Although Mr. Geisen knew it was difficult to inspect the RPV head due to design limitations, inspection techniques, and boron accumulation, he did not think it was impossible and therefore provided complete and accurate information.
- (2) Although Mr. Geisen was specifically tasked with a number of integral aspects of Davis-Besse’s responses to the NRC beginning in early October 2001, he wasn’t *really* involved.
- (3) Although the Bulletin requested information about past inspections, Mr. Geisen thought it was concerned with future inspections.
- (4) Although the NRC was concerned with the as-found condition of the head, Mr. Geisen could not provide inaccurate information about past inspections because he thought the 12RFO as-left condition was clean.

Each of these rationalizations is easily shown to be erroneous by evidence reflecting that the Majority mischaracterized, overlooked, or ignored clear evidence of knowledge such that when the record is viewed in its entirety, the Majority’s findings are not even plausible. Indeed, as illustrated below, the record clearly shows that Mr. Geisen had specific, actual knowledge about the importance of thorough inspections to find indications of nozzle leakage and that Davis-Besse’s RPV head inspections were restricted due to access limitations and existing boron accumulation.

⁵⁰ *Id.*

A. Mr. Geisen Was Aware of the Bulletin's Requirements and Inspection Limitations

The Majority stated that the Staff failed to prove two key points: first, that Mr. Geisen knew Davis-Besse's inspection method was incapable of viewing some of the nozzles on the reactor vessel head and second, that he knew the boron accumulation on the RPV head was due to nozzle leakage. Majority at 26-27. Coincident with this Majority conclusion, the Majority found that, because Mr. Geisen thought that existing boron accumulation was from flange leakage and thought the Bulletin was concerned with limitations on future inspections, his forward-looking responses accurately reflected what he understood the NRC to be requesting. Majority at 25, 84-87.

Regarding Mr. Geisen's knowledge of inspection limitations, the Majority found that Mr. Geisen was only aware that the inspection technique "had its difficulties, but he was not aware that it physically precluded the ability to view all of the nozzles." Majority at 79. In fact, Mr. Geisen himself testified as follows:

Question: So going back again, the modification – you knew the modification had been in place since 1994. Correct?

Mr. Geisen: Correct.

Question: To cut access holes. And you knew the access holes were being requested in that modification because they couldn't get to the entire head using a camera on a stick through a weep hole. Isn't that correct?

Mr. Geisen: Correct.

Tr. 1958-59. The Majority skews this and other testimony to state "that in 2000 [Mr. Geisen] was not certain that a rigid stick was used to mount the camera and believed that a 'boroscope-type camera' was used instead, affording much greater flexibility."

Majority at 80.⁵¹ However, as Mr. Geisen himself testified at the hearing, since 2000 he knew there has been an ongoing modification request for larger access holes in the service structure because it was not possible to view the entire head using the camera-on-a-stick through the existing weep holes. Tr. 1557, 1958-59.⁵²

Regarding past boron accumulation and the Bulletin's requirements, Mr. Geisen testified that he understood that the Bulletin was requesting specific information on the scope and qualification requirements for the past four years' inspections.⁵³ Tr. 1820, 1827, 1878. During his criminal trial, Mr. Geisen specifically admitted to his deliberate misconduct in signing the Green Sheet for Serial Letter 2731 while knowing it omitted the very things the Bulletin requested:

Question: So you signed off on the greensheet. And you knew that boric acid from flanges was an impediment to inspection, and it doesn't say that there?

Mr. Geisen: That's correct.

Question: You knew that the limited access available through the mouse holes was an impediment, and 2731 does not say that?

Mr. Geisen: That's correct; it does not say that, only limited access.

⁵¹ *Contra* Tr. 1880 (the reason he was attempting to procure a rover for 13RFO was because he "didn't view the camera on a stick as even a viable option anymore" because "[i]t was too difficult . . . to get the camera up to the top of the head."); Tr. 616-1617.

⁵² As Design Basis Engineering Manager, a modification to cut access holes in the service structure was considered a design change to the plant, and thus a matter that was under his responsibility. Tr. 1801; *see also* Tr. 1887. Mr. Geisen was also responsible for approving the final design product that was purchased from Framatome. Tr. 1803.

⁵³ Section 1.d of the Bulletin required addresses to provide "a description of the VHP nozzle and RPV head inspections . . . that have been performed at your plant(s) in the past 4 years, and the findings. Include a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the RPV head for visual examinations." Staff Ex. 8 at 11 (emphasis added).

Question: And there's not discussion at all about the proposal to cut access ports into the service structure?

Mr. Geisen: No, it doesn't.

Staff Ex. 71 at 1972-73.

Question: When . . . the response, 2731, was sent to the NRC, it said the visual inspections would not be compromised, didn't it?

Mr. Geisen: That's correct.

Question: And you thought that was okay because you could always back it up with another kind of inspection?

Mr. Geisen: That's correct.

Staff Ex. 71 at 1986.

At the Board hearing, Mr. Geisen stated that he believed the Bulletin's requirement to conservatively assume that non-positively dispositioned leakage should be regarded as nozzle leakage, Staff Ex. 8 at 4, only applied to future inspections, not past inspections. Tr. 1823-1828. Even accepting his rationale, it does not alter the fact that Mr. Geisen knew the Bulletin was requesting specific information about the scope of past inspections. Tr. 1820, 1827, 1878. Therefore, whether Mr. Geisen thought this conservative approach applied to the past or future, he still signed the Green Sheets and provided information to the NRC that he knew was inaccurate and incomplete.

B. Mr. Geisen Viewed the Videotapes of Past Inspections in the Beginning of October 2001

The Majority found that "According to Mr. Geisen's uncontradicted testimony, and contrary to the Dissent's speculation . . . , at no time during the meeting with Mr. Geisen did Mr. Siemaszko play the video in running fashion."⁵⁴ Majority at 98; see *also* Majority

⁵⁴ However, the Majority did acknowledge that if Mr. Geisen *had* viewed the tapes "in running fashion in early October, [such] a viewing . . . would have tainted his conduct over the next month." Majority at 139-40.

at 75-76, 139-40. In fact, Mr. Geisen admitted viewing the videos in his Office of Investigations ("OI") testimony, taken only one year after the video review happened, which directly contradicted his testimony at hearing:

Senior Special Agent Ulie: Did you look at the '98 tapes when you were validating that table?

Mr. Geisen: I looked at some of them. I can't say that I looked at all of them. That's why I assigned it to Andrew in the first place. He was at this for a solid week, hour after hour. So there was no way that I looked at all 40 hours of tapes or whatever.

Staff Ex. 79 at 108-09. Although this line of questioning only dealt with the 1998 inspection, OI followed up later on the rest:

Senior Special Agent Ulie: We will come back to the documents, but I just wanted to ask, with respect to the video inspection tapes, you said you viewed last fall some of the video inspections.

Mr. Geisen: Portions, yes.

Senior Special Agent Ulie: All right. Do you recall which outages and which inspections, whether they were a head or flange?

Mr. Geisen: I didn't view any of the flange inspections. My reviews were directly of the head under the insulation.

Senior Special Agent Ulie: Okay.

Mr. Geisen: I had viewed portions of the '96, the 1998 and 2000 when I was reviewing it with Andrew to see how he looked at each one.

Senior Special Agent Ulie: Were they of the as-found or as left or both?

Mr. Geisen: These would all have been the as-found.

Senior Special Agent Ulie: Do you recall the time frame on that?

Mr. Geisen: It would have been early October.

Staff Ex. 79 at 144-45. At no time during the interview did Mr. Geisen state that his viewing was limited only to still frames of the digitized inspection videos; in fact, Mr. Geisen spoke freely about viewing the videos.⁵⁵ This incriminating testimony is clearly not speculation. To ignore Mr. Geisen's more credible contradictory OI testimony on such a critical piece of evidence is clear error.

C. Mr. Geisen Knew He Was Responsible for the Technical Accuracy of the Serial Letters

The Majority found that Mr. Geisen was "specifically not 'the FENOC manager responsible for ensuring the completeness and accuracy' of the content in Serial Letter 2731" and that his only role in the Green Sheet review was to look for inconsistencies with his department's knowledge or policies. Majority at 23; *see also* Majority at 17, 59. This finding is clearly erroneous since it contradicts the plain language of the Green Sheet, Staff Ex. 10 at 3, and Mr. Geisen's own testimony. Tr. 1902. Further, according to the Majority, because Mr. Geisen was not the responsible manager, he was not culpable for the materially incomplete and inaccurate representations contained in Serial Letter 2731. Dissent at 45. Under the Majority's reasoning, however, if the Majority found Mr. Geisen signed Serial Letter 2731 with knowledge as to the falsity of the statements contained therein, the NRC could not hold him accountable for this knowledge because another manager may have had greater responsibility.⁵⁶ To follow this rationale to its

⁵⁵ See *e.g.*, Staff Ex. 79 at 59 ("I received a briefing that said the head was clean, but I don't remember actually seeing that video of that until this past -- a year ago; Fall of 2001."); Staff Ex. 79 at 61 ("Correct, because I looked at some of these tapes last fall [Fall 2001]."); Staff Ex. 79 at 156 ("I looked at portions of the 1996 tape. I won't say that I looked at all of the 1996 tape.")

⁵⁶ While the Majority states authoritatively that Mr. Geisen was not the manager in charge of Serial Letter 2731's technical accuracy, it fails to state who would be the manager or director in charge. Looking to the Davis-Besse organization chart from 2001, Staff Ex. 70, it is unclear who the Majority would have considered appropriate, since Mr. Geisen also signed for Mr. Moffitt, the Technical Services Director who oversaw most of the individuals involved in Serial Letter 2731.

extreme, the NRC could never hold a knowledgeable individual accountable for an inaccurate and incomplete document as long as the individual could show someone with greater responsibility.

D. Mr. Geisen Knew His Statements to the TAs Were Inaccurate

The Majority concluded that Mr. Geisen was not responsible for inaccurate statements he made during the TA briefing⁵⁷ by finding that when the presentation slides were prepared: (1) “[o]thers in the room plainly knew more than Mr. Geisen on these matters” and (2) no one contradicted the information Mr. Geisen was using for the slides and presentation. Majority at 104. Not only does the Majority’s citation to the record offer no support for its proposition, these findings are directly contradicted by Mr. Geisen’s own testimony. Majority at 25. For example, Mr. Geisen testified that during the October 10th preparation session, he was the “scribe” for developing the slides on his laptop and that he believed he put in the information regarding past inspections because he was the most knowledgeable person there about inspections. Tr. 1924-25.

Further, the Majority found that Mr. Geisen did not provide the NRC inaccurate and incomplete information in the TA briefing because the information presented was not “contradictory to the general understanding [Mr. Geisen] had then of the facts at hand.” Majority at 104. This finding, however, is not supported by the evidence that, once again, includes Mr. Geisen’s own testimony. For instance, Slide 7 stated that all nozzles “were verified to be free” from boron. Staff Ex. 55. But, Mr. Geisen knew that Davis-Besse had not yet completed this verification because he was responsible for overseeing it. Tr. 1720-21, 1925; Staff Ex. 71 at 1910. In fact, Mr. Geisen testified he used only the

⁵⁷ On October 11, 2001, Mr. Geisen and other FENOC representatives met with the NRC Commissioners’ TAs to present a safety basis to allow operation of the Davis-Besse plant until 13RFO. Staff Ex. 77 at 4. During the meeting, Mr. Geisen and other FENOC representatives provided a slide presentation.

information contained in Serial Letter 2731 to create the slides, yet he acknowledged that Serial Letter 2731 contained no information to support those representations. Tr. 1925, 1928-29, 1943, 1944. Thus, as Mr. Geisen even admitted under questioning by the Board, he had no basis for the statements he presented in the slides.⁵⁸ This left the Board with only two rationales: either Mr. Geisen made up the information or he lied; both of which are violations of 10 C.F.R. § 50.5(a)(2). The Majority erroneously found neither.

CONCLUSION

As explained above, because the Initial Decision contained legal conclusions that were contrary to or without established precedent; raised substantial questions of law, policy, and discretion; involved prejudicial procedural errors; and reflected findings of material fact that were clearly erroneous, the Staff submits that the Commission should grant this Petition for Review, reverse LBP-09-24, and reinstate Mr. Geisen's five-year employment ban.

Respectfully submitted,

/RA/

Kimberly A. Sexton

Dated at Rockville, MD
this 21st day of September, 2009

⁵⁸ Mr. Geisen agreed with the Board he had no other source of information than Serial Letter 2731 for the TA briefing slides, not even conversations with people. He also agreed with the Board that he was "creating information." Tr. 1944.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of
DAVID GEISEN

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Docket No. IA-05-052
ASLBP No. 06-845-01-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S PETITION FOR REVIEW OF LBP-09-24," "NRC STAFF'S APPLICATION FOR A STAY OF THE EFFECTIVENESS OF LBP-09-24 PENDING COMMISSION REVIEW," and "NOTICE OF APPEARANCE" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 21st day of September, 2009.

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