

I. The documents introduced by the Staff do not establish that Mr. Geisen knew his statements to the NRC were false

The Staff alleged Mr. Geisen possessed knowledge because he received emails and memoranda in the months prior to issuance of the Bulletin. But “knowledge” in this case is not awareness of specific facts at some point in time, it is an understanding that statements are false *at the time the statements are made* and the making of those statements with intent to deceive.

The majority of the documents cited by the Staff were emails and trip reports from Prasoon Goyal reporting on information he was picking up through his work on the B&W Steering Committee. Mr. Geisen was generally a carbon-copy recipient on the documents, as opposed to its main addressee, and none of the emails was marked “urgent” or “action needed.” Mr. Geisen did not reply to any of the emails. Perhaps most importantly, Mr. Goyal did not follow-up with Mr. Geisen about a single one of the emails or documents referenced by the Staff. The Staff’s suggestion that these emails or memoranda should have stood out to Mr. Geisen months later ignores the fact that during that time, Mr. Geisen was the director of a Design Basis Engineering group that included five supervisors, close to 40 other direct reports below those supervisors, and covered a range of activities that spanned the range of operations at Davis-Besse. Mr. Geisen received between 15 and 40 emails a day and while he presumes he reviewed the documents that show him as a recipient, he has no present recollection of many of them. In some instances, this is because the documents covered information he learned from other sources. In others, it is because the information was relevant to other engineers’ work and Mr. Geisen was included to keep him informed rather than seeking an action on his part.

One document cited by the Staff was reviewed and approved by Mr. Geisen -- a June 27, 2001 memorandum written by Mr. Goyal. The testimony and evidence surrounding that document illustrate the insufficiency of the evidence of Mr. Geisen’s knowledge.

Mr. Goyal did not speak to Mr. Geisen about the June 27, 2001 memorandum (Tr. 1195, 22; 1606, 20) and Mr. Geisen had no role in writing the memorandum (Tr. 1102, 25), which contained the following paragraph:

During 12th RFO at Davis-Besse (DB) the Reactor Vessel head inspection was performed in accordance with boron inspection walkdown as required by GL-88-05 and GL-97-01. Large boron leakage from a CRDM flange was observed. This leakage did not permit the detailed inspection of CRDM nozzles. The flange was repaired and the head was cleaned.

Staff Ex. 31 at 2.

That paragraph would have confirmed Mr. Geisen’s belief that the head had been cleaned during the 2000 outage. It would have confirmed Mr. Geisen’s belief that the deposits discovered during that outage was the result of flange leakage. It would have informed Mr. Geisen that the inspection was done in accordance with Davis-Besse’s boric acid corrosion

control program.² And it would have informed him that the deposits prevented an inspection of all of the CRDM nozzles prior to cleaning. None of this would have been remarkable given Mr. Geisen's previous knowledge of what Mr. Siemaszko found during 12RFO.

The Staff focuses on the description of the leakage as "large" presumably because two months later, Serial Letter 2731 contained the sentence "[i]nspection of the RPV head/nozzles area indicated *some* accumulation of boric acid deposits." Staff Ex. 9 at 3 (emphasis added). But the amount of boron found on the head in 2000 was never specifically quantified for Mr. Geisen. When Mr. Geisen approved Serial Letter 2731, he knew that Mr. Goyal and Mr. Siemaszko had already approved the accuracy of the document. Neither had come to him with any concerns about language in the Serial Letter (Tr. 1636, 8-17). To find that Mr. Geisen had "knowledge" of Serial Letter 2731's falsity based on the June 27 memorandum, the Staff would have to prove that Mr. Geisen (1) recalled that Mr. Goyal used the word "large" while reviewing the portion of 2731 using "some," (2) appreciated the difference between the two, (3) believed the NRC would be deceived by "some" rather than "large," and (4) approved the language with the intent the NRC would be deceived. No evidence or testimony supports any of those points.

II. Mr. Geisen's statements at various meetings do not establish that he knew the actual results of past inspections

The Staff introduced extensive evidence regarding statements Mr. Geisen made at various meetings with the NRC, presumably to suggest the statements somehow demonstrate Mr. Geisen's knowledge of the actual results of the past inspections. (Mr. Geisen stipulated to the inaccuracy of most, if not all, of the statements.) But the evidence showed that Mr. Geisen's statements were based upon information he collected from various sources. The Staff failed to produce evidence that Mr. Geisen was informed by any of those sources that statements he was making to the NRC were inaccurate or incomplete.

The October 3, 2001 telephone call provides a good example. According to the notes of Dale Miller, Mr. Geisen said during the call that in 2000 Davis-Besse conducted a 100% inspection of the head except for some areas near the center of the head that were precluded from inspection due to flange leakage. Staff Ex. 51. Notes taken by Allen Hiser and Melvin Holmberg during the same call reflect that the speaker said that there was boric acid interference on five to six nozzles. Staff Ex. 52.

Serial Letter 2731, which Mr. Geisen reviewed in the days just prior to the October 3, 2001 call, reported that "Framatome ... performed at 100% video inspection of CRDM flanges above the insulation" in April 2000 and identified five leaking CRDM flanges. Staff Ex. 9 at 3. It also reported that some boric acid deposits were located beneath the leaking flanges on the RPV head. Finally, it stated that recent review of the videotapes of that inspection "re-confirm[ed]" the indications of boron leakage were not similar to the indications at Oconee and were not indicative of nozzle leakage.

² Davis-Besse's Boric Acid Corrosion Control Program (BACCP) was developed in response to GL 88-05, "Boric Acid Corrosion of Carbon Steel Reactor Pressure Boundary Components in PWR Plants".

Serial Letter 2731 did not specify that the boric acid leakage obscured five to six nozzles. But the Staff's evidence reveals where Mr. Geisen likely gleaned that number. The day before the call, there were a number of preparation meetings held at Davis-Besse and Mr. Geisen participated in some of the meetings. Agendas for the meetings reflect discussions of the inspection and head cleanings in 1998 and 2000. Staff Ex. 47. The names associated with the discussions of those efforts are "McLaughlin/Siemaszko." McLaughlin is presumably Mark McLaughlin, the engineer in charge of preparations for the upcoming refueling outage. Siemaszko is presumably Andrew Siemaszko, the Systems Engineer who performed the 2000 inspection and cleaning. While Mr. Geisen has no present recollection of the preparation meetings or the October 3, 2001 call, it is a reasonable inference from the evidence that Mr. Geisen relayed information he learned during the October 2, 2001 preparation sessions from individuals with direct involvement in the activities at issue. The only other inferences are that Mr. Geisen conducted his own review of the tapes (an inference wholly without evidentiary support) or that Mr. Geisen pulled the numbers "five to six" out of thin air (an inference at odds with Mr. Geisen's character as witnessed by the Board and reputation as established by the testimony of his former boss, Steven Moffitt.)

III. John Martin's ambiguous and non-verbatim notes do not establish Mr. Geisen's knowledge of relevant facts at a particular time

The Staff's case rested heavily on the suggestion that Mr. Geisen told John ("Jack") Martin that he viewed inspection videotapes in August 2001. But Mr. Martin has no present recollection of the conversation with Mr. Geisen, and the evidence casts significant doubt on the accuracy on Mr. Martin's notes.

Mr. Martin spoke with Mr. Geisen in a brief conversation, not intended as part of a formal investigation, which focused on the issue of the cleaning of the RPV head in 2000. Mr. Martin was not focused on the Bulletin responses, representations in those responses, or any individual's review of the videotapes. He took handwritten notes during the interview, which were then typed by the site vice-president's secretary. Mr. Martin does not know what the secretary did with the notes after she typed them. He did not intend for his notes to be a verbatim transcript or to be used in a legal proceeding. Mr. Martin admitted that his handwriting was sometimes difficult to read, and also acknowledged that his typed notes contained typographical errors. Finally, Mr. Geisen was not given an opportunity to review Mr. Martin's notes after the interview.

The process is important because Mr. Martin's notes are ambiguous, at best, on what Mr. Geisen said during their conversation. Indeed, Kenneth O'Brien conceded as much. (Tr. 2186, 17) The relevant portion of the notes reads as follows: "I know became aware of it in reviewing the videos of the inspections while preparing for the NRC interactions in August, 2001." Staff Ex. 63. First, the pronoun that should appear between "know" and "became" at the start of the sentence is missing. Given that Mr. Geisen used the pronoun "we" a dozen times in the half-page of Mr. Martin's notes in the course of describing the station's collective actions, it is not clear which pronoun belongs in that gap. Second, the notes refer to the "NRC interactions." Mr. Martin did not follow-up with Mr. Geisen about what he meant by "interactions" but the

evidence showed Mr. Geisen had no interactions with the NRC until October 2001. Finally, the notes contain the phrase “reviewed the videotapes.” Mr. Martin did not follow-up with Mr. Geisen about what the review entailed, but Mr. Geisen testified about his review of frames from the video record with Mr. Siemaszko. It is uncontested that review occurred in October 2001.

The OI had an opportunity to resolve any ambiguities regarding these issues when it interviewed both Mr. Martin and Mr. Geisen within months of their conversation. But the OI investigators never asked Mr. Geisen about the statement Mr. Martin’s notes suggested he made. (Tr. 1703, 6) Nor did they ask Mr. Martin about what his Mr. Geisen said about reviewing the videotapes. Geisen Ex. 24. Indeed, the OI Report noted that Mr. Martin had provided no material information to the investigation. Geisen Ex. 23; see also Tr. 2174, 5. Yet, the Enforcement Panel considered it as important evidence of Mr. Geisen’s knowledge. Geisen Ex. 22. And the Staff relied on it in the Order against Mr. Geisen. The fact that OI would forego asking either Mr. Martin or Mr. Geisen about this critical piece of evidence and yet the Enforcement Panel would put its own spin on an ambiguous document should cause the Board to question the reliability of this critical piece of the Staff’s case. Indeed, the lack of integrity this one example demonstrates should cause the Board to question the reliability of the investigation *in toto*.

IV. The Enforcement Panel’s decision is not entitled to deference by the Board

The Staff called two witnesses to support the penalty imposed upon Mr. Geisen. The testimony of Mr. O’Brien provided the Board with insight into the process employed by the Enforcement Panel in summarily terminating Mr. Geisen’s career in the nuclear industry. We submit the process was fundamentally flawed and the Board should grant the Enforcement Panel’s judgment no deference in resolving either the question of whether Mr. Geisen engaged in deliberate misconduct or whether a five year ban is warranted in the event the Board finds he did.

For all of Mr. O’Brien’s repeated references to the Panel’s “holistic” approach and commitment to apply the NRC’s enforcement policy in a “repeatable” fashion, the following are but a few of the facts established during the day of testimony before the Board: (1) the OI report was based primarily on the work of three agents, (2) the OI report was the basis for the Enforcement Panel’s decision to impose a severe punishment on Mr. Geisen, (3) neither Mr. O’Brien nor any of the other “decision makers” spoke to those three agents prior to imposing a the punishment on Mr. Geisen, (4) neither Mr. O’Brien nor any of the other “decision makers” met with Mr. Geisen prior to imposing the punishment on Mr. Geisen, (5) Mr. O’Brien could not explain why Staff Ex. 49, the handwritten note of Dale Miller that “if NRC comes or sees our tapes we are wide open” was never investigated and reported on or otherwise analyzed by the Enforcement panel, (6) Mr. Goyal, who admitted lying to the NRC, was given a one year ban, (7) Theo Swim, who Mr. Goyal alleges knew about the failed head cleaning efforts and pressured him into removing language from the June 27, 2001 memorandum, received no punishment from the NRC whatsoever, (8) Mr. Miller, who wrote the above-referenced note, has settled his enforcement action with the Staff with an agreement to make speeches about lessons learned. We will brief these issues in greater detail in the final brief, but we submit the testimony offered by the Staff regarding the construction of the Order and its designated sanction failed to establish a credible and fair process or result.

V. Conclusion

We argued in opening that the Staff's case was based largely on hindsight. In our final brief, we will address that issue. For example, why did photographs in Serial Letter 2744 not alarm Dr. Hiser if, as he now claims, virtually identical images on the videotapes would have led to an immediate shutdown of Davis-Besse? Why did Melvin Holmberg spend 58 hours conducting a detailed video review using a definition of "acceptable" at odds with what Dr. Hiser's defined as sufficient by 2001 standards? Both testimonies suggested analysis affected by present knowledge of the corrosion cavity. We have withheld that discussion from this brief because, while important, those issues are not central to the true question before the Board: did David Geisen lie to the NRC? To that question, the answer was clear from the evidence. He did not. He ended up before the Board because of a flawed investigation intent on finding willful misconduct rather than finding facts. But the Board heard and carefully studied the testimony of the witnesses and the documentary evidence. There was no evidence that David Geisen knew that statements he made to the NRC were false. There was no evidence that he had a motive to conceal facts about the prior inspections. There was no evidence that Mr. Geisen intended to deceive the NRC. The Staff's case simply failed to prove the essential elements alleged in the Order. The Board should so find.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 23th day of December, 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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