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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 Hawkens
Nicholas G. Trikouros

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

**POST-TRIAL BRIEF OF DAVID GEISEN
WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

David Geisen, through undersigned counsel, respectfully submits the following post-trial brief, along with proposed findings of fact and conclusions of law. He reserves the right to respond to the Staff's forthcoming brief regarding collateral estoppel and due process issues identified in the Board's December 31, 2008 email on February 11, 2009. Mr. Geisen requests that the Board schedule final arguments once it has received completed briefing on all of the relevant issues.

Preface

In its January 4, 2006 Order immediately barring Mr. Geisen from involvement in licensed activity, the NRC Staff alleged that Mr. Geisen committed deliberate misconduct. It asserted he made, or allowed to be made, statements he knew to be false and did so with the intent to deceive the NRC. As we repeatedly argued throughout this proceeding, it is not enough for the Staff to show that Mr. Geisen was aware of specific facts at some point in time. Instead,

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it was the Staff's burden to show Mr. Geisen understood his statements were false when the statements were made.

The Staff has not made that showing.

There is a flaw in the Staff's analysis of the evidence: it lies in the confusion between inference and imputation. An inference is a conclusion obtained from the connectivity of discrete facts, the sum of which is greater than any one fact in the array. An imputation results from the collection of information which in its gathered (not necessarily connected) form, is attributed to another by reason of that party's superior authority and regardless of any action by that party with respect thereto. Thus, the acts of an agent, within the scope of his authority are imputed to the principal even if the principal was in another hemisphere and totally ignorant of what his agent did.

Here, the Staff has collected a number of e-mails and memoranda from Mr. Goyal on many of which Mr. Geisen is a carbon copy recipient. They stretch over a period of a year. They are unaccompanied by any evidence of action or knowing inaction on the part of Mr. Geisen. In addition, there is no evidence during this time of conversation between Mr. Goyal and Mr. Geisen regarding the subject of the condition of the Davis-Besse reactor vessel head, its cleanliness or its inspectability. While it may be inferred Mr. Geisen was recipient of these communications, it does not follow he had a complete knowledge and recollection of these messages at the critical moment when he signed the Greensheet for Serial Letter 2731.

While this is precisely the Staff's argument in support of its contention Mr. Geisen knowingly and deliberately lied to the NRC, in truth and in fact the Staff reaches this conclusion through imputing to him complete knowledge of the content of these messages and memos at the time he signed off on 2731 and thereafter. What the Staff has done is to lump together these

communications and attributed the content of all to Mr. Geisen's knowledge and labels his statements as being made as a result therefrom.

This methodology of making full use of imputation leading to vicarious liability is suited to the kind of cases routinely inhabiting the dockets of NRC Licensing Boards. Data-filled information attributed to nuclear power companies provide ample logic for conclusions respecting the safe operation of the nation's nuclear power plants. This type of fact analysis supports the application of the nation's nuclear policy in a regulatory setting. Imputation is a process that avoids hair-splitting distinctions to arrive at a policy supported conclusion. It will hold in for accountability the headquarters of a company that is many miles from the site where a violation of regulations has occurred. Therefore, FENOC's liability for the systemic failures at Davis-Besse is easily understood: the failures regarding cleaning, inspection, and disclosures are Davis-Besse's and so imputed to FENOC.

Here the question of Mr. Geisen's liability is individualized. As between inference and imputation, due process commands his guilt be established through proven evidence, evidence that in turn, if necessary, gives rise to an inference regarding Mr. Geisen's conduct. This is especially the case where the elements of the offense being charged are Mr. Geisen's actual knowledge of the truth and his intention to lie to NRC about it.

To indulge in imputation is to eviscerate the requirement of proving a case against the person of Mr. Geisen for intentional deliberate misconduct. Instead, analysis of the facts enters the dangerous territory of equating negligent behavior with intentional wrongdoing. This is not a case of what Mr. Geisen should have known but what in fact he knew and intended when he signed off on serial letters or spoke with NRC officials.

To infer from facts to establish knowledge and intent at the time of an alleged wrongful act is a far cry from imputing knowledge and intent when an individual as distinguished from an inanimate entity's liability is being determined.

The Staff's Attachment 1, offered to reveal a record of NRC's punishment of egregious behavior is instructive for other reasons. Fifty cases where five year bans were imposed. From that total, three cases involving the incident at Davis-Besse are excluded. In 44 of the remaining 47 cases, the summaries offered on the spreadsheet report direct, non-circumstantial evidence of intentional misconduct. These cases are replete with confessions, concealment of prior criminal convictions or criminal history, using surrogate urine samples, discrimination, altering computer codes in order to rig random testing for fitness, conversion of government property, stealing copies of NRC examinations, destruction of records, unsafe practice of radiography, failure to maintain licensed material safely, compromising safety of employees, covering up illegal drug use, failure to train employees in radiation protection, falsifying personnel certification summaries, permitting unqualified personnel to conduct nuclear medical tests, and theft of licensed material.

In these instances, the summaries report evidence of guilt that was direct and of circumstantial evidence that permitted inferences to be drawn consistent with the hypothesis of guilt. In no case, is guilt imputed by attributing the conduct of others to the individual offender. In each instance the record offered by the Staff in Attachment 1 supports the conclusion that the offender was a knowing and intentional malefactor.

Not so here.

Finally, the investigation underlying the Staff's Order was fundamentally flawed. It was, from the start, a gotcha exercise rather than a search for answers. The Office of Investigations

had timely opportunities to resolve questions while memories were fresh and ignored those opportunities. The Staff had occasion to afford Mr. Geisen a chance to address outstanding issues prior to issuing the Order which effectively ended a 20-year unblemished career and opted to proceed without speaking either to Mr. Geisen or to anyone involved in his earlier interview. The result is a case based on selective and unfair cherry-picking from documents sent to Mr. Geisen (often as a carbon copy recipient along with dozens of others) and the hindsight condemnation of NRC employees. It is not based on reliable evidence and it should not be sustained by the Board.

Proposed Findings of Fact and Conclusions of Law

1. On January 4, 2006, the NRC Staff (“Staff”) issued an Order (Effective Immediately) Prohibiting Involvement in NRC-Licensed Activities to David Geisen (“Order”). The Order alleged that Mr. Geisen engaged in deliberate misconduct, as defined in 10 C.F.R. § 50.5, by deliberately providing incomplete and inaccurate information to the NRC in connection with responses and communications of his former employer, Davis-Besse Nuclear Power Station (“Davis-Besse”), to the NRC regarding NRC Bulletin 2001-01, Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles, (“the Bulletin”).

2. Mr. Geisen answered the Order and demanded an expedited hearing in February 2006. After repeated the Board denied repeated Staff motions to stay the proceeding at the request of the Department of Justice, the Commission stayed the case in January of 2007.

3. After resolution of Mr. Geisen’s criminal case, in which the jury convicted him on three counts and acquitted on two others, an evidentiary hearing was held before the Board from December 8 – 12, 2008. The parties filed preliminary briefs setting forth arguments about the sufficiency of the Staff’s proof on December 23 and 24, 2008.

Bulletin 2001-01 and Davis-Besse's initial response

4. The Bulletin was issued by the NRC on August 3, 2001 to all holders of operating licenses for pressurized water nuclear power reactors. Staff Ex. 8. It sought information related to the structural integrity and past inspections of a plant's reactor pressure vessel head penetration (VHP) nozzles and the plant's basis for concluding that future inspections would ensure compliance with applicable regulatory requirements. *Id.* Licensees were requested to provide the NRC responses to a set of questions set forth in the Bulletin within 30 days. *Id.*

5. Davis-Besse's initial response to the Bulletin (Serial Letter 2731) was drafted by a group of engineers whose efforts were coordinated by Rodney Cook, a consultant working with the Licensing Group (also referred to as "Regulatory Affairs"). Tr. 1123-1124. David Geisen was not part of that group and had no involvement in the drafting of Serial Letter 2731. Tr. 1123; Staff Ex. 71 at 1861; Staff Ex. 74 at 1276.

6. Prasoon Goyal, Andrew Siemaszko, and Rodney Cook were assigned to draft a response to item 1.d, which requested a description of a plant's nozzle and head inspections during the past four years including a description of any limitations, structural or otherwise, on those inspections. Staff Ex. 8; Tr. 1124.

7. Mr. Goyal, a Senior Mechanical Engineer, was the plant expert on circumferential cracking issues. Tr. 1595; Staff Ex. 75 at 1273. He was a member of the B&W Owner's Group Materials Committee, which dealt with nozzle crack issues. Tr. 1018-19. He was involved in conducting the 1996 RPV head inspection. Tr. 1023. He also reviewed and dispositioned a condition report related to the 1998 PRV head inspection, which was performed by Peter Mainhardt. Tr. 1061-62. In connection with those actions, Mr. Goyal reviewed, in July 1998, a videotape of the inspection performed by Mr. Mainhardt. Tr. 1062-63.

8. Mr. Siemaszko, an engineer in the Systems Engineering group, participated in the inspection and cleaning of the RPV head in 2000. Staff Ex. 18, 19. When the Bulletin was issued and Serial Letter 2731 was submitted, Mr. Siemaszko had primary responsibility for the head. Tr. 1692.

9. Between August 8, 2001 and August 27, 2001, Mr. Goyal, Mr. Siemaszko and others involved in the drafting of Serial Letter 2731 exchanged multiple versions of potential responses and developed specific language for inclusion in Serial Letter 2731. Geisen Ex. 1-11. Mr. Geisen did not receive those emails or review drafts of Serial Letter 2731, nor was he included in any discussions regarding the accuracy of language included in the drafts. Geisen Ex. 1-11; Tr. 1129-30; Tr. 1636-38. He was not informed of any disagreements or concerns about the content of the response. Tr. 1637-38. Mr. Geisen's first involvement with Serial Letter 2731 occurred when he read a final draft of the document for Green Sheet review on August 28, 2001. Tr. 1638.

10. Mr. Geisen's supervisor, Director of Engineering Steven Moffitt, did not expect Mr. Geisen to be involved in wording of the drafts of Serial Letter 2731. Staff Ex. 74 at 1276. To the contrary, Mr. Moffitt expected his managers to focus on big picture issues and to avoid preoccupation with details. *Id.* at 1276-77.

11. While Messers. Cook, Goyal, Siemaszko, and others were drafting Serial Letter 2731, Mr. Geisen was occupied with duties relating to his job as Manager, Design Basis Engineering. Those duties included preparation for a critical, upcoming Institute of Nuclear Power Operations (INPO) evaluation, Tr. 1621-29, and oversight of modification preparations for the upcoming refueling outage. *Id.*, Staff Ex. 71 at 1860-61.

12. Mr. Geisen signed the Green Sheet for Serial Letter 2731 both as Manager, Design Basis Engineering and on behalf of his Director, Steven Moffitt. Tr. 1639. He signed as Manager, Design Basis Engineering on August 28, 2001. Staff Ex. 10. Before he signed off as Manager, Design Basis Engineering, Mr. Geisen read the document to ensure it made sense to what he knew and verified that the appropriate individual contributors had reviewed, agreed, and signed off on the document. Tr. 1639-40; Staff Ex. 71 at 1861-62. Mr. Geisen signed off on behalf of Mr. Moffitt on August 30, 2001. Staff Ex. 10. When he signed off on behalf of Mr. Moffitt, Mr. Geisen verified that the appropriate managers that report to Mr. Moffitt had reviewed and approved the document. Tr. 1640. When he signed the Green Sheet, Mr. Geisen did not have a sense Serial Letter 2731 was inaccurate, misleading, false, or unfounded. Tr. 1640-41.

Mr. Geisen's roles at Davis-Besse and exposure to issues related to the cleaning and inspection of the RPV head

13. The Staff argues that Mr. Geisen's positions at Davis-Besse and participation on certain committees prove he "knew" representations made in Serial Letter 2731 were false. The evidence does not support that argument.

14. Mr. Geisen began work at Davis-Besse in 1988 as a systems engineer in the Mechanical Systems Group. Tr. 1539. In 1994, he entered the Senior Reactor Operator training program. Tr. 1539. In 1996, he became a Supervisor in the Electrical and Controls Group within Systems Engineering. Tr. 1540-41. In March 2000, Mr. Geisen was promoted to the position of Manager, Design Basis Engineering.

15. In his various roles, Mr. Geisen was not involved or associated with work on the RPV head or the nozzles. Tr. 1541, 1546, 1560.

16. The head inspection and cleaning was normally performed during refueling outages that occurred at two year intervals. During the refueling outages in 1994, 1996, 1998, and 2000, Mr. Geisen had specific responsibilities unrelated to the head inspection and cleaning. From the beginning of his work at Davis-Besse, Mr. Geisen was assigned to focus on the plant's reactor coolant pumps and that assignment occupied his attention during the outages in 1996 and 1998. Tr. 1539, 1541-42, 1545-46. In 2000, following his promotion to Manager, Design Basis Engineer, Mr. Geisen's focus was on correcting the past failures of the Design Basis Group regarding timely implementation of modifications during outages. Tr. 1558-60. None of the modifications on which Mr. Geisen was focused during the 2000 outage had to do with the inspections or cleaning of the head. Tr. 1560.

17. During the second half of the 2000 outage, Mr. Geisen relieved one of his engineers, Theo Swim, in Outage Central. Tr. 1560. While there, Mr. Geisen participated in a 15-20 minute discussion regarding a permissible cleaning method when Andrew Siemaszko reported that his initial cleaning effort was unsuccessful. Tr. 1565-69. Mr. Geisen authorized the use of hot water to clean the head, and believed, based upon information he received, that the use of water had successfully cleaned the head. Tr. 1585-86, Geisen Ex. 18.

18. Around that same time, Mr. Geisen saw photographs of the RPV head prior to the cleaning, that showed what he believed to be flange leakage running out of the weepholes. Tr. 1569. The Staff elicited testimony from various witnesses that the photographs, referred to during the hearing as the "red photos", should have caused the engineers at Davis-Besse concern that there was a safety issue developing on the RPV head area. Tr. 1289; 1472-74. Mr. Geisen has testified that, with the benefit of hindsight, he believes he should have been more alarmed by the photographs. Tr. 1569; Staff Ex. 71 at 1833; Staff Ex. 79 at 54-55. But at the time, Mr.

Geisen believed that boron was coming from historically-leaking flanges that were to be repaired. Tr. 1570. He also believed the head was successfully cleaned. Tr. 1585-86. The fact that those believes were wrong does not establish that Mr. Geisen “knew” later statements were false.

19. As Design Basis Engineering Manager, Mr. Geisen supervised approximately 42 employees spread across five main groups. Tr. 1553. The groups worked on issues ranging from nuclear calculations and mechanical design through computer engineering and procurement. Tr. 1549-1554.

20. When he became Design Basis Engineering Manager, Mr. Geisen joined the B&W Steering Committee. The Steering Committee evaluated project proposals from various industry working groups and developed funds for worthy projects. Tr. 1021, 1590. General issues regarding circumferential nozzle cracking and specific information about other plants, including Oconee, came before the Steering Committee, and Mr. Geisen, in late 2000 and early 2001. Tr. 1591-93. However, Mr. Geisen’s work on the Steering Committee did not expose him to specific knowledge about Davis-Besse’s past inspection and cleaning history. Tr. 1593.

21. Mr. Geisen also joined the Correction Action Review Board (CARB) when he became Design Basis Engineering Manager. Tr. 1544. The CARB reviewed Condition Reports submitted by plant engineers. Tr. 1022. During the hearing, the Staff presented extensive testimony about a Condition Report written by Prasoon Goyal after Mr. Goyal conducted the 1996 inspection (PCAQR 96-0551, Staff Ex. 16) and a Condition Report written by Prasoon Goyal and Peter Mainhardt after Mr. Mainhardt conducted the 1998 inspection (CR 98-0767, Staff Ex. 17). Neither of those Condition Reports came before the CARB after Mr. Geisen

joined the Board in 2000 and Mr. Geisen did not see either report before the spring of 2002. Tr. 1544-45.

22. Mr. Geisen also became a member of the Project Review Board (PRB) when he became Design Basis Engineering Manager. The PRB reviewed and funded plant projects. Tr. 1556. The Staff presented extensive testimony about a proposed modification to cut access holes in the service structure. Staff Ex. 72; Tr. 1054-1060. It introduced minutes of a PRB meeting in which the proposed modification was discussed and delayed. *Id.* Mr. Geisen was not on the PRB at the time of that meeting and was not involved in the discussion regarding the proposed modification. Staff Ex. 72; Tr. 1058; 1556.

23. The evidence presented demonstrates that, at the time Mr. Geisen reviewed and signed Serial Letter 2731, he had a general understanding of issues relevant to the information provided to the NRC. He was not, however, the plant expert on the subjects, nor had he been involved in the resolution of the issues. For example, Mr. Geisen was aware that the configuration of the head and service structure presented some obstacles to cleaning, but also believed that the 2000 cleaning effort had been successful by employing an alternative means (i.e. water). He understood the plant had a history of flange leakage resulting in boron deposits on the head, but also believed the flanges were routinely repaired and the deposits had been cleared. And he believed that engineers from Systems Engineering, including Andrew Siemaszko, and from his own group, including Prasoon Goyal, were involved in working on the relevant issues.

Mr. Geisen's receipt of emails, trip reports, and memoranda

24. The Staff argues that Mr. Geisen's receipt of emails, trip reports, and memoranda in the nine-months prior to the issuance of the Bulletin demonstrate that he "knew"

representations made in Serial Letter 2731 were false. The Staff's theory is based on an imputation of knowledge to Mr. Geisen from those prior documents. The evidence does not support the Staff's argument. Instead, the context and circumstances of the various emails, trip reports, and memoranda demonstrate the fundamental unfairness of seeking to impute knowledge to Mr. Geisen from those documents.

25. When Mr. Geisen became Manager, Design Basis Engineering, Prasoan Goyal was a design engineer working under Theo Swim, the supervisor of the mechanical design group. Tr. 1554-55. Mr. Geisen had no prior interactions with Mr. Goyal. Tr. 1555.

26. In his role as Manager, Design Basis Engineering, Mr. Geisen received emails and trip reports from engineers in his reporting chain. He received between 15 and 40 emails per day, with approximately one-third of those coming from people that directly reported to him. Tr. 1596. He received an average of three to four trip reports per month. Tr. 1600. Mr. Geisen had a policy with those who reported to him that if an email or memo had particular urgency or importance it was to be marked "action needed", "action requested", or something similar. Tr. 1596. Otherwise, Mr. Geisen assumed that the document was sent to him for informational purposes. Tr. 1596.

27. In the nine-month period prior to the issuance of the Bulletin, Mr. Goyal attended meetings and participated in industry discussions regarding the issue of circumferential cracking. Tr. 1595. He sent emails and trip reports to Andrew Siemaszko, the Systems Engineer assigned to the RPV head, and/or Theo Swim, his supervisor, regarding those meetings and discussions. Staff Ex. 21-24, 28, 30, 32-33. Mr. Geisen was carbon copied on the emails and trip reports, but was never the primary recipient. Id.

28. Mr. Goyal also wrote a memorandum in June 2001 titled “Mode 5 Reactor Vessel Head Inspection Recommendation.” Staff Ex. 31. That memorandum was reviewed by Mr. Goyal’s supervisor, Mr. Swim, and approved by Mr. Geisen. Id., Tr. 1099.

29. None of the emails, trip reports, or memoranda was marked “action needed”, “actions requested”, or “urgent”. Staff Ex. 21-24, 28, 30, 32-33. There is no evidence that Mr. Goyal spoke to Mr. Geisen about any of the documents or that Mr. Geisen responded to any of Mr. Goyal’s emails or trip reports. Tr. 1076, 1112, 1597, 1600, 1602, 1610, 1613. With respect to the June 2001 memo, Mr. Geisen did not help Mr. Goyal write it, Tr. 1102-03, and Mr. Goyal did not discuss it with Mr. Geisen. Tr. 1105, 1607.

30. The issues discussed in the documents – RPV head cleaning and inspections, nozzle cracking, and the findings at Oconee – were not related to Mr. Geisen’s core duties as Manager, Design Basis Engineering. See, Tr. 1549-53 (Geisen description of job duties.) To the extent that the documents reflected the work of one of his engineers, Mr. Geisen understood the documents to be informational in nature, and not communications seeking action on his part. Tr. 1596.

31. The documents largely confirmed Mr. Geisen’s general understanding of the past history of the flange leakage and challenges facing engineers conducting head inspections and cleaning. Tr. 1608, 1610, 1614-16, 1634-35. More importantly, the conclusions Mr. Geisen reasonably took from the documents were not contradicted by the statements Mr. Geisen reviewed (but did not write) in Serial Letter 2731.

32. For example, many of Mr. Goyal’s emails and trip reports concerned the findings at Oconee. Staff Ex. 21-24, 28, 30, 33. Mr. Geisen received much of the same information through briefings provided to the B&W Steering Committee. Tr. 1600. He understood,

therefore, that Oconee found small deposits resembling “popcorn” and the Oconee engineers believed their discovery was due, in part, to the fact that Oconee had a clean head. *Id.* Nothing in Serial Letter 2731 suggested that Davis-Besse had a head comparable to Oconee’s. Staff Ex. 9. In fact, the Serial Letter disclosed that boron had been found in 1998 and 2000. *Id.* at Attachment 1, 2-3 of 19.

33. Mr. Goyal’s emails, trip reports, and memoranda also referenced boron deposits discovered at Davis-Besse and believed to be from leaking nozzle flanges. Staff Ex. 32, 39. Mr. Geisen was generally familiar with these findings as well. He knew, based on his presence in Outage Central during the 2000 outage, that Davis-Besse discovered significant flange leakage in 2000. Tr. 1569. He also believed the head had been cleaned successfully and that the flanges that caused the deposits had been repaired. One clear source of that belief was Mr. Goyal’s June 27, 2001 memorandum, which read:

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.

34. Mr. Goyal testified that he included this statement, which he knew to be false, at the request of his supervisor, Theo Swim. Tr. 1104-1107. He admitted that he did not tell Mr. Swim’s he could not include the language, despite knowing it was false. Tr. 1106. Most importantly to this proceeding, Mr. Goyal also testified that he Mr. Geisen was not aware of the change to the letter. Tr. 1107.

35. The Staff also highlighted Mr. Goyal’s August 17, 2001 email to Steven Fyfitch at Framatome, on which Mr. Geisen was a carbon copy recipient. Staff Ex. 39. In that email, Mr. Goyal asked “[i]s it possible to go back to 1998 that is when a good head exam was done

with no nozzle leakage. (meaning not taking any credit for 2000 inspection).” *Id.* Mr. Geisen testified having no recollection of talking to Mr. Goyal about the email, Tr. 1634, but explained the sentence would have told him the 2000 inspection was affected by leakage (a fact known to Mr. Geisen) and that the 1998 inspection was “good”, i.e. not affected by flange leakage. Tr. 1634. Neither of those statements contradicted Mr. Geisen’s general understanding as of August 17, 2001. More importantly, neither contradicted information Mr. Geisen later reviewed in Serial Letter 2731. See, Staff Ex. 9 at page 3 of 19 (“April 2000 Inspection Results (12RFO) ... Inspection of the RPV head/nozzles area indicated some accumulation of boric acid deposits.”)

36. Mr. Goyal’s emails, trip reports, and memoranda also noted the difficulty of completing inspections and cleanings through the existing weepholes and advocated cutting access holes in the head. Staff Ex. 33, 36. The Staff argues that Mr. Geisen therefore “knew” the configuration of the head *precluded* a complete inspection and cleaning. That argument is not supported by the record.

37. Mr. Geisen believed the 2000 cleaning effort had been successful, notwithstanding the challenges presented by the configuration of the head. Tr. 1585-86.

38. Mr. Geisen also believed past inspections had been completed, notwithstanding the challenges presented by the structural configuration of the head. Tr. 1616. Notably, Mr. Goyal communicated this message when he reported in his August 17, 2001 email that Davis-Besse conducted a good inspection in 1998. Staff Ex. 39.

39. Mr. Goyal reported in his August 17, 2001 email that Davis-Besse “will be performing a 100% qualified visual examination in the next outage April 2002.” Staff Ex. 39. Notably, Mr. Goyal made the same representation in an August 11, 2001 email to Mr. Geisen.

Staff Ex. 36 (“It was agreed that the response will include a commitment to perform a 100% qualified visual examination of all the nozzles during 13thRFO.”)

40. Mr. Geisen also understood that arrangements had been made to secure a “rover” for use in the upcoming inspection, which was the responsibility of Mark McLaughlin, to overcome the structural challenges. Tr. 1602-03, 1613-16; Staff Ex. 71 at 1854.

41. This knowledge formed the basis for Mr. Geisen’s understanding of the language in Serial Letter 2731 regarding Davis-Besse’s plans for the 2002 inspections. Staff Ex. 9, at 4-5 of 19.

42. Mr. Geisen has conceded that information in Serial Letter 2731 proved inaccurate. Staff Ex. 77. The issue before the Board, however, is whether Mr. Geisen knew it was inaccurate when he signed the Green Sheet for Serial Letter 2731. The suggestion that Mr. Geisen knew of inaccuracies in Serial Letter 2731 given the evidence cited above ignores the context of communications and grossly exaggerates the impact those communications had on Mr. Geisen. It would be unfair to impute to Mr. Geisen the level of knowledge the Staff suggests from those events and documents, and the Board declines to do so.

Mr. Geisen’s interview with John Martin

43. The Staff argues Mr. Geisen viewed videotapes of the past inspections in August 2001. The sole support for that argument is a half-page of notes typed by a Davis-Besse secretary following an interview of Mr. Geisen by John (“Jack”) Martin in March 2002. The circumstances of Mr. Martin’s conversation with Mr. Geisen, the quality of notes and the process by which they were created, and the circumstances surrounding Mr. Geisen’s alleged statement all undercut the Staff’s argument that Mr. Geisen viewed tapes of the past inspections in August 2001.

44. Mr. Martin owns a nuclear consulting business and was asked to conduct an evaluation of management and organization issues at Davis-Besse following the discovery of the head cavity in March 2002. Tr. 1474-75.

45. Mr. Martin's review was not intended to be a formal investigation. Tr. 1491. Instead, it was a survey focused on the issue of who knew boric acid was left on the head after the 2000 inspection. Tr. 1481, 1491. The focus was not on Davis-Besse's Bulletin responses, representations in those responses, or any individual's review of the videotapes. Tr. 1481, 1489. Mr. Martin interviewed approximately 15 people over a one week period and has no present recollection of his interview of Mr. Geisen apart from his review of the notes made from the interview. Tr. 1478, 1480.

46. During his interviews, Mr. Martin handwrote notes. Tr. 1484. He did not intend for his notes to be a verbatim transcript, nor did he intend for his notes to be used in a legal proceeding. *Id.* After interviews were completed, Mr. Martin gave his handwritten notes to the site vice-president's secretary. *Id.* He admitted that his handwriting was sometimes difficult to read, even for him. Tr. 1503. Mr. Martin presumes that the secretary gave him his handwritten notes back with the typed notes, but he doesn't recall. Tr. 1495. He presumes the secretary shredded the handwritten notes because he had no use for them. Tr. 1494-95. Mr. Geisen was not given an opportunity to review the typed notes after the interview. Tr. 1491.

47. Mr. Martin testified that he presumes that he reviewed the typed notes against his handwritten notes because that was his general practice, Tr. 1502-03, but admitted that he can't remember the details of what he did after the secretary typed his notes. Tr. 1485. The typed notes from the interview contain typographical errors, as Mr. Martin acknowledged. Tr. 1503.

Indeed, the two-sentence paragraph of interest in this proceeding contains two errors. The paragraph reads:

I know [*pronoun missing*] became aware of it in reviewing the videos of the inspections while preparing for the NRC interactions in August, 2001. At that point, I was disappointed but not *worded* since we all had a conviction that there wasn't a problem with boric acid corrosion on a 600°F Head.

Staff Ex. 63 (errors in italics). These errors suggest that if Mr. Martin did review the typed notes, he did not do so closely.

48. Mr. Martin did not follow-up with Mr. Geisen about what he meant by "interactions." Tr. 1494. However, there is no evidence Mr. Geisen had any interactions with the NRC until the teleconference of October 2001.

49. Mr. Martin also did not focus on the date "August 2001." This is not surprising given that the focus of Mr. Martin's interview was not on issues related to the Bulletin response or any individual's review of the videotapes. Tr. 1489. But the issue is now relevant given the use the Staff asks the Board to make of the typed notes from the interview.

50. It is uncontested that Mr. Geisen was occupied through August 2001 by preparations for INPO and the design modification requests for the upcoming outage. Tr. 1623-25, Staff Ex. 71 at 1860-61. The evidence also shows Mr. Geisen had no involvement in the drafting of Serial Letter 2731. Mr. Goyal testified that systems engineers would normally have the inspection tapes and that Mr. Geisen did not ask him about viewing the tapes in August 2001. Tr. 1160-61. Mr. Moffitt testified that it was his understanding that the "re-review" of videotapes referenced in Serial Letter 2731 was not a reference to Mr. Geisen. Staff Ex. 74 at 1281. Combined, the evidence does not support the argument that Mr. Geisen viewed the videos of past inspections in August 2001.

51. Finally, Mr. Martin did not follow-up with Mr. Geisen about what he meant by “reviewing the videos.” Tr. 1494. Mr. Geisen testified that he reviewed still-frames from the videos with Mr. Siemaszko in October 2001. Tr. 1696. Mr. Martin’s notes do not support an inference that Mr. Geisen’s reference to having “reviewed the videos” was a reference to an event distinct from that session with Mr. Siemaszko.

52. The Board notes that the Office of Investigations had an opportunity to clarify this issue close in time to the Martin-Geisen conversation. In October 2002, OI agents interviewed Mr. Martin and, two weeks later, Mr. Geisen. Tr. 2175; Staff Ex. 79. The OI had Mr. Martin’s notes. Geisen Ex. 24, Tr. 2176-77.¹ Presumably, recollections of the conversation were fresher in the minds of Mr. Martin and Mr. Geisen then, seven months after the conversation, than in December 2008, six-and-a-half years after the conversation. The agents chose, however, not to ask Mr. Martin or Mr. Geisen about conversation. Tr. 1702-03.

53. Mr. Martin’s notes are ambiguous, at best, on what Mr. Geisen said during their conversation. That point was conceded by Mr. O’Brien. Tr. 2186. The Staff’s request that the Board now construe the vague and internally-contradictory notes against Mr. Geisen is unwarranted.

Events through the October 3, 2001 teleconference

54. After Mr. Geisen signed the Greensheet as Design Basis Engineering Manager, Mr. Goyal sent an email to Andrew Siemaszko, Mark McLaughlin, Rodney Cook, and Dale

¹ Kenneth O’Brien professed ignorance as to whether OI discussed the interviews with Mr. Martin and whether Mr. Geisen was asked about the Martin interview by OI. Tr. 2178-2186. This ignorance did not dissuade Mr. O’Brien from offering a wholly speculative opinion – twice – on what the Martin notes *might* mean. Tr. 2185, 2186; 2227-28. The Board finds that the evidence establishes that OI had the typed notes from Mr. Martin’s interviews at the time it conducted its interview with him, notwithstanding Mr. O’Brien’s failure of knowledge.

Miller that included the sentence “[w]e do not say anywhere in our response to the bulletin that inspection thru the mouse holes creates an impediment for 100% visual examination. (management need to know this).” Staff Ex. 42. Mr. Goyal did not copy Mr. Geisen on this email, nor did he speak with Mr. Geisen about his concern. Tr. 1169-70, 1644.

55. During the month of September, Mr. Geisen’s time and attention was split between the INPO site visit and the completion of preparation of design modifications for 13RFO. Tr. 1623-25, 1646; Staff Ex. 71 at 1860-61. Mr. Geisen’s next involvement with the Bulletin occurred on September 28, 2001. Tr. 1644.

56. On September 28, 2001, Guy Campbell, the site vice-president, learned that president of First Energy Nuclear Operating Company had received a telephone call from Brian Sheron at the NRC expressing the view that Davis-Besse should shut-down. Tr. 1645. Guy Campbell pulled David Lockwood, Director of Regulatory Affairs, and Mr. Moffitt, Director of Engineering out of an INPO audit exit meeting to discuss the call. Tr. 1670. Mr. Moffitt returned to the meeting and designated Mr. Geisen to get involved in his stead because Mr. Moffitt was the peer evaluator for INPO and was forced to complete the INPO debrief. Tr. 1644-45, 1670-71.

57. Mr. Lockwood was assigned the lead at setting up a conference call with the NRC to determine the basis for the NRC’s concern. Tr. 1645. That call was held on October 3, 2001. Staff Ex. 51, 52, Tr. 1647. Mr. Geisen did not have a defined role for that call, but attended preparation meetings and reviewed documents in advance of the call. Tr. 1646-47.

58. In the course of that preparation, Mr. Geisen reviewed Serial Letter 2731. Tr. 1647. During that review, nothing in the letter caught Mr. Geisen’s attention or struck him as untrue. Tr. 1647. Serial Letter 2731 reported that “Framatome ... performed a 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. Id. 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. Id.

59. In the preparation meetings that Mr. Geisen attended, no participant expressed concern about the accuracy of Serial Letter 2731. Tr. 1647. Agendas and notes from those preparation meetings reflect that Mr. Goyal was in attendance for some of the meetings. Staff Ex. 47, 48.

60. A handwritten note on a page titled “Discussion Agenda” reads “concerned that we don’t have a frame by frame review. Why not? If NRC comes or sees our tapes we are wide open.” Staff Ex. 47 (Bates NRC017-1259). At the hearing, the Staff represented that it did not know who wrote the note. Tr. 1660-61. It reported, after consultation with the Office of Investigations, that the note was written by Dale Miller.² Tr. 1800. Mr. Geisen had no recollection of hearing such a concern articulated at the preparation meetings he attended, and testified that such a statement would have caught his attention because it would have communicated that Davis-Besse had problems. Tr. 1651-52.

61. 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.” Mark McLaughlin was the engineer in charge of preparations for the

² Remarkably, the Board learned nothing more from the Staff about this seemingly important handwritten note. During his testimony, Kenneth O’Brien had no further insight, other than to resist counsel for Mr. Geisen’s suggestion that the OI’s apparent failure to follow-up on this issue was a “flaw in the fact finding of this investigation.” Tr. 2187-2192.

upcoming refueling outage. Tr. 833. Andrew Siemaszko performed the 2000 inspection and cleaning. Staff Ex. 18, 19.

62. The teleconference was held on October 3, 2001. 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. Mr. Geisen has no recollection of making comments but stipulated before the hearing that he has no reason to believe that Mr. Miller's notes are inaccurate. Tr. 1652.

63. Assuming Mr. Miller's attribution of the comments to Mr. Geisen is correct, it is clear that Mr. Geisen did not say Davis-Besse had seen every nozzle during the 2000 inspection. Mr. Moffitt, who participated on the teleconference, testified that Mr. Geisen "absolutely" did not say the entire head and all of the nozzles had been inspected and knows this because he would have known such a statement to be incorrect. Staff Ex. 74 at 1284. 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. 52.³

64. Serial Letter 2731 did not specify that the boric acid leakage obscured "five to six" nozzles but instead reported "some accumulation of boric acid deposits" on the RPV head/nozzles. Staff Ex. 9. It is a reasonable inference that Mr. Geisen, in reporting that five or six nozzles were obscured, was relaying information he learned during the October 2, 2001 preparation sessions from individuals with direct involvement in the activities at issue. There is

³ On direct, Dr. Hiser testified that Davis-Besse reported that 100 percent of the head was inspected, which he took to mean the entire head was observed. Tr. 1245-46. His own notes read "100% inspection of head" followed immediately by the line "boric acid interferences on some nozzles – 5-6 nozzles." Staff Ex. 52. Given the content of his contemporaneous notes, Dr. Hiser's present recollection appears to be mistaken.

no credible evidence that Mr. Geisen conducted his own review of the tapes and the Board rejects the inference that Mr. Geisen simply invented the numbers “five to six” out of whole cloth. Such an inference stands in odds with the Board’s judgment of Mr. Geisen’s character as evidenced by his testimony, work history, and the unequivocal testimony of his direct supervisor of over two years, Mr. Moffitt. Staff Ex. 74 at 1265-66.

65. Mr. Geisen testified that if he spoke the words “100 percent inspection except for 5 or 6 nozzles” it would have been his intention to communicate that Davis-Besse had attempted to conduct a whole head inspection⁴ rather than a sample-type inspection. Tr. 1667.

66. It is noteworthy that Framatome, who conducted the inspection, had three representatives on the call. Staff Ex. 50 (Bates NRC001-0573). Mr. Geisen testified at the hearing that he would have expected one of the Framatome representatives to have spoken up if he misspoke substantially about something with which they were familiar. Tr. 1665.

67. The evidence about the October 3, 2001 teleconference does not support the Staff’s argument that Mr. Geisen engaged in deliberate misconduct by making statements he knew to be inaccurate and incomplete. There remain significant questions about why the individuals who performed the inspections, Mr. Goyal, Mr. Mainhardt, and Mr. Siemaszko, were not present to speak to the issues. See, Tr. 1668-1670. There also remain unresolved issues regarding the significance and source of Mr. Miller’s notes reflecting a concern that Davis-Besse

⁴ There were numerous instances in which Davis-Besse reported a “100% inspection” or “whole head inspection” or “entire head inspection” was conducted. In each case, that phrase was modified by presentation of other data. For example, on October 3, 2001, Mr. Geisen’s “100% inspection” sentence contained the caveat except for 5 or 6 nozzles precluded by flange leakage. Serial Letter 2735 reported a “whole head visual inspection” and that “the entire head was inspected” in 1996 but qualified those statements with the report that in 1996 “65 of 69 nozzles were viewed.” Staff Ex. 11. In determining whether Mr. Geisen knowingly made inaccurate statements and intended to deceive the NRC, the Board must consider the full context of the statements and cannot focus only on one portion to the exclusion of other language contained in the same communication.

would be “wide open” if the NRC saw the tapes. But the Staff has not introduced any evidence that Mr. Geisen was a party to conversations wherein Mr. Miller or any other individual expressed those concerns nor has the Staff introduced any evidence that Mr. Geisen knew his statements to be false or made them with the intent to deceive the NRC.

Assignments after October 3, 2001 teleconference

68. After the October 3, 2001 teleconference, Mr. Geisen was tasked with overseeing two projects. Tr. 1690 The first project was the development of the crack growth rate model by Davis-Besse’s probabilistic risk assessment expert, Kenneth Byrd. Tr. 1690-91. The second was the development of the nozzle-by-nozzle table by Andrew Siemaszko. Tr. 1692.

69. Mr. Siemaszko was chosen to construct the table before he had primary responsibility for the head and was in possession of the past inspection information. Tr. 1692-94.

70. At some point after Mr. Geisen gave the assignment to prepare the nozzle-by-nozzle table, Mr. Geisen met with Mr. Siemaszko to review how Mr. Siemaszko was conducting the work. Tr. 1694. The meeting occurred at Mr. Siemaszko cubicle and lasted for approximately one hour. Tr. 1694, 96. During the meeting, Mr. Siemaszko showed Mr. Geisen nozzles from past inspections and explained his methodology in making judgments about whether the nozzles could be deemed acceptable. Tr. 1696-97. This was the first time Mr. Geisen viewed portions of the past inspection videotapes. Tr. 1696.

71. What Mr. Geisen saw during the meeting were still frames from the inspection videos. Prior to the meeting, Mr. Siemaszko had the videotapes transferred to DVD format because he had encountered difficulty pausing the videotapes without having lines or disturbances in the picture. Tr. 1694-95. The digital format allowed Mr. Siemaszko to move

through the file frame by frame. Tr. 1695. At no time during the meeting did Mr. Siemaszko play the video in running fashion as the Staff played the tapes for the Board during the hearing. Tr. 1697.

72. Mr. Siemaszko explained to Mr. Geisen that he was looking to see if the downhill side of a nozzle was clear of any popcorn-type deposits in order to declare the nozzle a non-leaker. Tr. 1698. For some nozzles, Mr. Siemaszko told Mr. Geisen he had to look at a nozzle from multiple views to get a good angle or look. Id. Mr. Siemaszko showed Mr. Geisen some photos depicting nozzles with boron piled on the uphill side of the nozzle. Tr. 1699. For those nozzles, Mr. Siemaszko explained that he would look to see if the deposits appeared to have fallen downhill and come to rest on the nozzle or whether the deposits were piled up on the nozzle. Tr. 1699. Mr. Siemaszko also told Mr. Geisen that he looked for streaks on the nozzles or stalactites on the mirror insulation to determine if there was evidence that the boron was from a source above. Id.

73. Mr. Geisen does not know which inspections the still frames were from, but assumes they were from 1998 and/or 2000 given that the meeting occurred before Mr. Siemaszko began to look at 1996 for the table. Tr. 1697. He did not see anything during that meeting resembling the portions of the 2000 video the Staff showed during the hearing where the camera was running into large piles of boron. Tr. 1700.

74. Based upon his meeting with Mr. Siemaszko, Mr. Geisen was satisfied with the soundness of Mr. Siemaszko methodology and had no concerns about the care and attention Mr. Siemaszko appeared to be giving the project. Tr. 1700.

75. Melvin Holmberg was called as a witness by the Staff. Mr. Holmberg has worked for the NRC for 15 years and has been a reactor inspector since 1995. Tr. 831-32. The

certification process to become a reactor inspector involved 2,000 hours of training and hands-on experience, and Mr. Holmberg has conducted more than a dozen head inspections. Tr. 834, 948-49. At the request of the Office of Investigations and the Department of Justice, Mr. Holmberg reviewed the Davis-Besse inspection videos and made determinations about whether nozzles were viewable and in a condition sufficient to be determined not to be leaking. Tr. 890-91. In making those determinations, Mr. Holmberg employed a standard he developed for the purpose of the present litigation. Tr. 951. The standard used criteria regarding evidence of leaking established in an EPRI document that came out in either 2002 or 2003, after the time at which Mr. Siemaszko conducted his review. Tr. 952-53. More importantly, Mr. Holmberg conceded the standard he employed was different than what Davis-Besse disclosed in terms of how it was making the determinations it presented to the NRC in Serial Letter 2744. Tr. 953-55.

76. It is noteworthy that Mr. Siemaszko's methodology comports with Dr. Allan Hiser's understanding of what was acceptable at the time the communications were occurring. In August 2002, Mr. Hiser was interviewed by the Office of Investigations and asked about his understanding of Davis-Besse's representations in the October 3, 2001 phone call regarding the inspected nozzles:

Question: On the nozzles excluding the five or six that may have had interferences, when you were told that they have done an inspection of the other nozzles, do you interpret that as a 360 degree inspection.

Answer: I would have expected at that point in time that we would not have been as detailed as 360 degrees, but I think the intent of the discussion would have been that it would have provided a sufficient coverage to effectively clear the nozzle. They did not say 360 degrees, but at least it would have been sufficient familiarity with what was observed at each nozzle to say there was no leakage there. As an example, I would have expected at the minimum that the observed area would have been what's called the downhill side of the nozzle, which is if the nozzle is cut into a curved part of the head, that would be the part that has the lowest elevation...

Geisen Ex. 20; Tr. 1408-1410.

77. For the purpose of this proceeding, Mr. Holmberg's standard, while technically superior to that used by Mr. Siemaszko, is legally irrelevant. The allegation against Mr. Geisen is that he engaged in deliberate misconduct and made or approved statements to the NRC that he knew to be inaccurate or incomplete. Those statements cannot be viewed outside of the context provided by the on-going communications between Davis-Besse and the NRC. Even if Mr. Siemaszko's methodology was flawed, it was disclosed to the NRC. Staff Ex. 13.

October 11, 2001 Meeting with the Technical Assistants

78. After the October 3, 2001 conference call, David Lockwood, at the direction of Guy Campbell, arranged a meeting with the NRC Commissioners' Technical Assistants. Tr. 1703. Mr. Geisen had no part in setting the meeting, which was held on October 11, 2001. Id. The attendees at the meeting from Davis-Besse were Mr. Campbell, Mr. Moffitt, Mr. Lockwood, and Mr. Geisen. Staff Ex. 55. Steve Fyfitch from Framatome also attended as part of the First Energy team. Id.

79. At the meeting the First Energy representatives made a presentation that included Powerpoint slides. Tr. 1703-04, Staff Ex. 55. The slides were prepared the night before the meeting by Mr. Campbell, Mr. Moffitt, Mr. Lockwood, Mr. Geisen, Mr. Byrd, and Gerry Wolf. Tr. 1704, 1725. Mr. Wolf worked in Regulatory Affairs with Mr. Lockwood. Tr. 1726.

80. Mr. Geisen presented two slides during the meeting that contained statements regarding Davis-Besse's past inspections. Staff Ex. 55.

81. Mr. Geisen testified that the basis for his belief in the accuracy of those statements was his review of Serial Letter 2731 in preparation for the October 3, 2001 phone call as well as discussions with others involved in the development of the slides. Tr. 1925-26. Mr. Geisen had also participated in the October 2, 2001 preparation sessions, Tr. 1647-52, and had

met with Mr. Siemaszko to review Mr. Siemaszko's methodology, Tr. 1694-99, prior to the October 11, 2001 meeting.

82. The Staff argues that Mr. Geisen's purported sources of knowledge could not have been Serial Letter 2731 and the interactions cited above, and that is evidence that Mr. Geisen made knowingly false statements in the October 11, 2001 meeting. That argument is not supported by the evidence.

83. The first slide at issue, titled "Davis-Besse's NRC Bulletin Response", contained the statements "Conducted and recorded video inspections of the head during 11RFO (April 1998) and 12RFO (April 2000)" and "No head penetration leakage was identified." Staff Ex. 55.

84. The second slide at issue, titled "Facts", contained the representation "All CRDM penetrations were verified to be free from "popcorn" type deposits using video recordings from 11RFO or 12RFO." Id.

85. Serial Letter 2731, in the section drafted by Prason Goyal and Andrew Siemaszko (1.d) described the 1998 and 2000 inspections. Staff Ex. 9. Regarding the 2000 inspection, it stated "[n]o visible evidence of nozzle leakage was detected." Staff Ex. 9 at Attachment 1, page 3. In a section titled "Subsequent Review of 1998 and 2000 Inspection Videotape Results" it stated:

Since May 2001, a review of the 1998 and 2000 inspection videotapes of the RPV head has been performed. This review was conducted to re-confirm the indications of boron leakage experienced at the DBNPS were not similar to the indications seen at ONS and ANO-1; i.e. was not indicative of RPV nozzle leakage. This review determined that indications such as those that would result from RPV head penetration leakage were not evident.

Id.

86. The most that can be said is that Mr. Geisen presented a slide that used the word "verified" when the Serial Letter used the word "re-confirm[ed]." If there is a distinction

between those terms, it is not sufficient to support the allegation that Mr. Geisen committed deliberate misconduct by using one instead of the other.

Mr. Geisen's efforts to correct errors

87. Other evidence regarding the slides presented at the October 11, 2001 meeting further contradicts the suggestion that Mr. Geisen intended to make deceive the NRC.

88. The original text of the slide titled "Facts" stated "All CRDM penetrations were verified to be free from "popcorn" type deposits using video recordings from 11RFO and 12RFO." Tr. 1722 (underline added). Mr. Geisen believed use of the word "and" suggested that all of the nozzles were seen during the 12RFO inspection, which he knew to be untrue. Tr. 1723. By changing the word "and" to "or", Mr. Geisen conformed the sentence to what he, on October 11, 2001, believed to be true: that the nozzles obscured by boron in 2000 were visible in 1998 so that by using 1998 or 2000, Davis-Besse had verified (or "re-confirmed") that all nozzles were free from the indications found at Ocone (ONS) or Arkansas (ANO-1). Id.; Staff Ex. 71 at 1918. Mr. Moffitt testified he believed the changed was suggested by Mr. Geisen and was made because the original wording could lead someone to believe the 2000 inspection was better than it actually was. Staff Ex. 74 at 1291-92.

89. The parties agree that the corrected language proved to be inaccurate. But Mr. Geisen's efforts to weaken language in the original slide cannot be reconciled with the Staff's argument that he intended to deceive the NRC by making statements he knew to be false.

90. A similar event occurred in the days after the October 11, 2001 meeting with Technical Assistants. Some time between that meeting and the submission of Serial Letter 2735 (Davis-Besse's next response to the Bulletin) on October 17, 2001, Mr. Siemaszko presented Mr. Geisen with the preliminary results for the nozzle-by-nozzle table. Tr. 1720. Based upon what

he understood about the past inspections to that point, Mr. Geisen expected to see a “clean bill of health” for 1998. Tr. 1723-24. When the preliminary results showed that the 1998 inspection did not allow inspection of all of the nozzles, Mr. Geisen realized his statements during the October 11, 2001 meeting were inaccurate. Tr. 1721. He immediately informed Mr. Moffitt that what the group had told the Technical Assistants was not accurate and needed to be corrected. *Id.* Mr. Moffitt testified that when Mr. Geisen reported the error, Mr. Geisen was very disappointed in the mistake. Staff Ex. 74 at 1293-94. Mr. Moffitt also testified that he never got the sense that Mr. Geisen was trying to cover up the mistake or conceal it from the NRC. *Id.* Within days, Serial Letter 2735 disclosed Mr. Siemaszko’s updated results: in 1998, 50 of 69 nozzles were not viewed and in 2000, 45 of 69 nozzles were viewed. Staff Ex. 11.

91. During cross-examination of Mr. Geisen, the Staff implied that Mr. Geisen, rather than informing Mr. Moffitt and Regulatory Affairs of the error, should have placed a telephone call to the Technical Assistants. Tr. 1946-1952. The Board finds that suggestion unwarranted and unfair. The evidence is uncontroverted that Mr. Geisen reported the mistake to his superiors and participated in Davis-Besse’s submission, within days, of the new information known to Mr. Geisen. Those actions are inconsistent with the Staff’s allegation that Mr. Geisen knowingly made false statements and intended to deceive the NRC.

Serial Letter 2735

92. Serial Letter 2735 was submitted to the NRC on October 17, 2001. Staff Ex. 11. It included the nozzle-by-nozzle table compiled by Andrew Siemaszko. *Id.* It also contained representations regarding Mr. Siemaszko’s review that led to the information provided in the table. See, Staff Ex. 11, Attachment 1 at pages 2-3 of 5.

93. Mr. Geisen participated in the drafting and review of Serial Letter 2735. Tr. 1952. He signed the Green Sheet for 2735, after Andrew Siemaszko, Prason Goyal, and Mark McLaughlin, among others. Staff Ex. 12. While he concedes that Serial Letter 2735 contained information that proved to be inaccurate, he testified that he was not aware of the inaccuracies when he signed the Green Sheet and did not intend to mislead the NRC by the submission of Serial Letter 2735. The evidence supports his testimony.

94. Serial Letter 2735 contained a section titled "Previous Inspection Results." Staff Ex. 11. In that section, the Serial Letter reported:

The inspections performed during the 10th, 11th, and 12th Refueling Outage ... consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program pursuant to Generic Letter 88-05, "Boric Acid Corrosion of Carbon Steel Reactor Pressure Boundary Components in PWR Plants." ... During 10RFO, 65 of 69 nozzles were viewed, during 11RFO 50 of 69 nozzles were viewed, and during 12RFO 45 of 69 nozzles were viewed."

Staff Ex. 11

95. The Serial Letter also included Mr. Siemaszko's nozzle-by-nozzle table. *Id.* Mr. Geisen participated in the drafting of a footnote to the table that stated, "In 1996 during 10RFO, the entire RPV head was inspected. Since the video was void of head orientation narration, each specific nozzle view could not be correlated." *Id.*

96. Mr. Geisen testified the footnote was based upon Mr. Siemaszko's statement to Mr. Geisen that there was no head orientation on the 1996 inspection tape. Tr. 1952. The Staff suggests Mr. Geisen knew that to be false, and had both Mr. Holmberg (Tr. 908-17) and Mr. Goyal (Tr. 1027-29) describe the verbal head orientation cues on the 1996 inspection video the Staff showed the Board. Staff Ex. 81. But the fact that the inspection videos played for the Board contained audio does not prove that Mr. Geisen knew the footnote in Serial Letter 2735 was inaccurate.

97. There is no credible evidence that Mr. Geisen had seen the inspection video at this point in time aside from his meeting with Mr. Siemaszko at Mr. Siemaszko's cubicle. The Staff presented no evidence contradicting Mr. Geisen's testimony that Mr. Siemaszko told him the tape Mr. Siemaszko used had no such orientation narration. Indeed, Dr. Hiser testified that he did not recall hearing any sound during his viewing of the 1996 inspection video at NRC headquarters on November 8, 2001. Tr. 1363.

98. In sum, there is no evidence that Mr. Geisen knew that 2735 contained inaccurate or incomplete statements, or that he intended to deceive the NRC by drafting language or approving the submission of the document.

Mr. Geisen's belief in Mr. Siemaszko's credibility and competence

99. Two events occurred during this time period that would reasonably have caused Mr. Geisen to question Mr. Siemaszko's credibility and his competence. The first was the discovery that Mr. Siemaszko's initial representations about the completeness of the 1998 and 2000 inspections were inaccurate. The second was the discovery that the head had not been entirely cleaned in 2000.

100. Of course, the issue before the Board is not whether Mr. Geisen should have been more dubious of Mr. Siemaszko at this point, but whether in fact he was suspicious, confirmed his suspicions, and continued to communicate Mr. Siemaszko's conclusions despite knowing the conclusions were inaccurate or incomplete. The Staff presented no evidence that Mr. Geisen expressed concern about Mr. Siemaszko's credibility, either in emails or conversations with his superiors or subordinates. Similarly, the Staff presented no evidence that anyone expressed concern about Mr. Siemaszko's reliability to Mr. Geisen.

101. With regard to the change in Mr. Siemaszko's opinion regarding the 1998 and 2000 inspections, Mr. Geisen testified that he was not surprised that Mr. Siemaszko's detailed review led to more detailed results. Tr. 1727. Moreover, the fact that Mr. Siemaszko made no effort to hide the fact that his detailed review yield different results than he had initially reported caused Mr. Geisen not to doubt Mr. Siemaszko's honesty or credibility. Tr. 1728. It is noteworthy that Dr. Hiser was advised of the same changes at approximately the same time: on October 3, 2001 he was told the 2000 inspection was of 100% of the head except for five or six that were obscured by boric acid deposits and on October 17, 2001, Serial Letter 2735 reported that the same inspection viewed 45 of 69 nozzles. Tr. 1247; Staff Ex. 11. Dr. Hiser testified that rather than viewing this change as evidence that he had been lied to, he believed Davis-Besse was gathering more information and clarifying things. Tr. 1372-73 ("I thought it was a good engineering effort to validate the information that had been provided previously.")

102. Mr. Geisen learned the head had not been completely cleaned coming out of the 2000 outage sometime in October 2001. Staff Ex. 71 at 1833-34. The Staff presented the criminal trial testimony of Gregory Gibbs and a letter Mr. Gibbs sent to Mark McLaughlin to suggest Mr. Geisen learned of that fact earlier. Staff Ex. 44, 75; Tr. 1885-97. The circumstances surrounding Mr. Gibbs' letter to Mr. McLaughlin do not support the Staff's argument.

103. Mr. Gibbs was a consultant hired by Mr. Moffitt to assist Mark McLaughlin's preparations for the upcoming 2002 outage. Staff Ex. 75 at 816. He spent three and half days at Davis-Besse, conducting interviews and reviewing documents. Staff Ex. 75 at 817-822, 832. Mr. Gibbs reviewed Serial Letter 2731 as part of his work. *Id.* at 823. He also reviewed post-cleaning videotapes from the 2000 inspection. *Id.* at 826-27. He did not meet with Mr. Geisen. *Id.* at 840, 850.

104. Mr. Gibbs summarized his conclusions in a letter to Mr. McLaughlin dated September 14, 2001. Staff Ex. 44. He asked Mr. McLaughlin to distribute the letter to Mr. McLaughlin's project team, which had been formed to plan the inspection in the upcoming outage. Staff Ex. 75 at 833-34. The team consisted of Mr. McLaughlin, Mr. Goyal, Mr. Siemaszko, Chuck Daft, Frank Kennedy, Mel Surely, and Brad Baumgardner. *Id.* at 833. Mr. Geisen was not a member of the team.

105. Mr. Gibbs left a copy of the letter for Mr. Moffitt, who had hired him to do the work. Staff Ex. 75 at 832. He then called Mr. Moffitt a number of times over the next couple weeks to make sure Mr. Moffitt had received the letter. *Id.* at 851.

106. Mr. Gibbs also left a copy on Mr. Geisen's desk as a courtesy because there were activities in Mr. Geisen's department discussed in the letter. Staff Ex. 75 at 834. Mr. Gibbs did not follow-up with Mr. Geisen. *Id.* 852.

107. There is no evidence that Mr. Geisen read Mr. Gibbs' letter immediately after Mr. Gibbs left it on Mr. Geisen's desk. Both Mr. Moffitt and Mr. Geisen were occupied during this period by the on-going INPO evaluation. Tr. 1893-94. Mr. Geisen was working 12 to 13 hour days during that evaluation, which was critical to the plant. Tr. 1623-1629, 1896.

108. The Staff also overstates the significance of Mr. Gibbs' letter to Mr. Geisen at the time it was left. The two page letter was addressed to Mr. McLaughlin. Staff Ex. 44. It related to an issue assigned to Mr. McLaughlin, *Id.*; Tr. 1893. Notwithstanding Mr. Gibbs' review of Serial Letter 2731 and the post-cleaning videos, it did not advise Mr. McLaughlin that statements in Serial Letter 2731 were false and misleading. Staff Ex. 75 at 844. It did not call into question the credibility of Mr. Siemaszko. Staff Ex. 44.

109. In hindsight, there is content within Mr. Gibbs' letter that conflicts with Davis-Besse's inspection history as then known to Mr. Geisen. But the suggestion that it is evidence that Mr. Geisen knew he was making inaccurate statements to the NRC with the intent to deceive the NRC is without evidentiary support.

110. There is no question Mr. Geisen regrets his failure to be more critical. During the hearing, the following exchange occurred:

JUDGE HAWKENS: In Mr. Martin's interview with you, he said you told him you were disappointed but not worried when you learned the head had not been cleaned. Why weren't you worried? I mean it seems to me at that point a lot of people had been representing the head had been cleaned, to you and to the NRC. To me, I would start thinking, I need to dig a little bit deeper here. I'm wondering about how responsible and accountable my subordinates are.

THE WITNESS: You're right, Your Honor, and in hindsight I wish I had dug a lot deeper into that. It's not a good excuse to say that you were tunneled in on your crack growth rate model and ignore this other stuff because that didn't affect your crack growth rate model and someone else was working on it. And I've had seven years to ponder and reflect on this and there's a lot of things I wish I had done substantially different on that, but that's why he asked me that. No, I wasn't worried about it at the time. I wish I had. That was something that I knew Mark McLaughlin was running with and I had the highest respect for Mark.

JUDGE HAWKENS: I can see it didn't have as much relevance to the crack growth rate model you may have been focusing on, but I would have thought it would have had a great deal of relevance to the nozzle by nozzle table that you were supervising just because the fact that it was so substantial, it could not be removed or was inaccessible. Did that create questions in your mind about the ... nozzle by nozzle table that Mr. Siemaszko was creating?

THE WITNESS: I didn't make that connection from the standpoint that I viewed it as that was as an as-left condition and it had nothing to do with the videos that we had in our hands that were as-found. I mean we never attempted to say that our as-found videos were qualified inspection. It was what we had and so how we left the head was irrelevant to building that table. It just created a lot of problems to Mr. McLaughlin going forward.

Tr. 1712-14.

111. Mr. Geisen has expressed similar sentiments on previous occasions. He did so during his criminal trial. Staff Ex. 71 at 1944-1945. More importantly, he expressed regret

about his and FENOC's tunnel-vision and the failures in his performance during his OI interview -- an interview conducted in 2002, long before Mr. Geisen was advised he might be the target of a criminal investigation. Staff Ex. 79 at 29-30, 156-57, 168, 173. This level of introspection and critical reflection is not consistent with the allegation that Mr. Geisen knowingly and intentionally sought to deceive the NRC.

October 24, 2001 meeting

112. One week after the submission of Serial Letter 2735, Davis-Besse representatives, including Mr. Geisen, meet with the NRC on October 24, 2001.

113. At that meeting, as had occurred on October 11, 2001, the Davis-Besse team presented slides as part of their presentation. Staff Ex. 58. Again, Mr. Geisen presented slides regarding the past inspections.

114. The slides used in the October 24, 2001 presentation tracked the information presented in Serial Letter 2735. Specifically, a slide titled "Analysis" reported: "The inspection results afford us assurance that all but 4 nozzle penetrations were inspected in 1996. All but 19 penetrations were inspected in 1998. And all but 24 penetrations were inspected in 2000." *Id.*

115. There was no evidence that Mr. Geisen was informed of potential inaccuracies in Serial Letter 2735 between its filing and the meeting with the NRC on October 24, 2001. Therefore, based upon the analysis set forth above, there is no evidence that Mr. Geisen knew statement he made to the NRC on October 24, 2001 were inaccurate or incomplete.

Serial Letter 2744

116. Davis-Besse submitted Serial Letter 2744 to the NRC on October 30, 2001. It consisted of a series of photographs drawn from the inspection videos of 1996, 1998, and 2000. Staff Ex. 13. Serial Letter 2744 also included the nozzle-by-nozzle table and head map

diagrams first presented in Serial Letter 2735. Tr. 1750. The table and diagrams were unchanged from the prior submission. Tr. 1750.

117. Mr. Geisen compiled the photographs by asking Mr. Siemaszko for representative photographs of what Mr. Siemaszko was looking at when he performed the evaluation for the nozzle-by-nozzle table. Tr. 1749. Mr. Geisen included in Serial Letter 2744 all of the photographs that he received from Mr. Siemaszko and drafted the captions based upon his conversations with Mr. Siemaszko. Tr. 1749-1752. No evidence was presented suggesting that Mr. Geisen knowingly omitted photographs showing extensive boric acid accumulations on the RPV head.

118. Some of the photographs contained in Serial Letter 2744 did show boron build-up around nozzles. Staff Ex. 80. Captions to those photographs disclosed Mr. Siemaszko's methodology for concluding those nozzles could be called non-leakers. Staff Ex. 13. While Mr. Siemaszko's methodology proved to be flawed, Mr. Geisen's inclusion of photos showing boron deposits and language describing how those deposits were analyzed contradicts the inference that Mr. Geisen was knowingly making false statements to or attempting to deceive to the NRC.

November 8, 2001 video session at the NRC

119. Mr. Geisen's lack of knowledge of the contents of the past inspection videotapes is perhaps best demonstrated by the events of November 8, 2001. It was on that date that Mr. Geisen was selected to bring the inspection videos to NRC headquarters and to show them to assembled members of the NRC Staff. Mr. Geisen's participation in that meeting and behavior during that meeting are inconsistent with the Staff's allegation that he knew the tapes' contents.

120. The November 8, 2001 meeting was scheduled by David Lockwood without advance notice to Mr. Geisen. Tr. 1758-59. Mr. Geisen learned that he had been selected to

show the tapes when he arrived in Washington, D.C. after the rest of the Davis-Besse team. *Id.* Mr. Lockwood provided Mr. Geisen with the tapes to show and details regarding the time and place of the meeting. Tr. 1758. There was no evidence that Mr. Geisen expressed any reluctance to present the tapes to the Staff.

121. Mr. Geisen arrived in the area at midday on the 8th, and the meeting occurred at 5:30 pm. Tr. 1759. Prior to the 5:30 meeting, Mr. Geisen was in meetings with Dr. Hiser and others from the NRC. Tr. 1361. As a result, Mr. Geisen had no opportunity to review the tapes prior to the meeting. Tr. 1759.

122. The session occurred at NRC headquarters, in a room that Mr. Geisen had not had unaccompanied access to prior to the start of the meeting. Tr. 1363. Mr. Geisen showed the tapes on a television and VCR that he had no opportunity to become familiar with prior to the meeting. Tr. 1364. Mr. Geisen put the 1996 videotape in the machine and hit the play button. Tr. 1316. He then fast-forwarded or rewound through the tape, sometimes at the direction of the Staff. Tr. 1316, 1362. At no point did Mr. Geisen refuse to stop, rewind, or forward the tape when asked by the Staff. Tr. 1362. When Mr. Geisen rewound or fast-forwarded the tape, the television screen did not go black, rather the image remained on the screen and moved backward or forward in view of the Staff members. Tr. 1362-63.

123. Mr. Hiser testified that he did not recall any suspicious behavior by Mr. Geisen during the meeting and did not have the sense during the meeting that Mr. Geisen had an agenda not to show the Staff parts of the tapes or was deliberately withholding anything from the Staff. Tr. 1363, 1365-66.

124. Mr. Hiser testified that the Staff watched the 1996 tape for approximately 30 minutes. Tr. 1317. The 1996 as-found inspection tape introduced by the Staff has a running time of just over 28 minutes. Staff Ex. 81.

125. Dr. Hiser also testified that there were portions of the 1996 he did not see during the session. Those portions are not concentrated at the beginning or end of the tape, but instead spread throughout the tape. For example, Dr. Hiser testified that he did not see portions of the tape located at 2:24 and 15:14 but might have seen a portion at 5:25. Tr. 1414-15.

126. Mr. Geisen next showed the 1998 inspection video. Tr. 1364. Dr. Hiser testified that the portions of the 1998 videotape he saw during that meeting clearly showed more boric acid on the head making it harder to see the nozzle interfaces. Tr. 1324.

127. According to Mr. Geisen, members of the NRC Staff present at the meeting were asking how individual nozzles shown on the tape had been determined to be leakers or non-leakers. Tr. 1762. Dr. Hiser did not recall those questions. Tr. 1431. Mr. Geisen testified that he told the NRC he was unable to answer the questions and offered to bring Mr. Siemaszko to explain how the calls were made. Tr. 1762-63. Dr. Hiser did not recall that statement from Mr. Geisen. Tr. 1431. Dr. Hiser does recall, however, that at some point after the November 8, 2001 meeting, Mr. Siemaszko was a public meeting with the NRC discussing the 2000 inspection. Tr. 1431. Mr. Geisen testified that Mr. Siemaszko flew to Washington, D.C. one week after the November 8, 2001 meeting to address the Staff's questions that Mr. Geisen had been unable to answer. Tr. 1765.

128. The Staff elicited testimony about the November 8, 2001 meeting to suggest Mr. Geisen selectively showed only beneficial portions of the past inspection videos and withheld damaging portions of the same tapes, thus proving his familiarity with the content of the tapes.

However, the circumstances of the meeting and Mr. Geisen's behavior compel the opposite conclusion.

129. In sum, Mr. Geisen's actions on November 8, 2001 were not consistent with a person that was familiar with the content of the tapes. Mr. Geisen credibly testified that had he known what was on those tapes, he would not have "agreed to go and present something that [he knew] would paint a really ugly picture of [himself]." Tr. 1765. To accept the Staff's argument, the Board would have to conclude Mr. Geisen carried a ticking bomb into the NRC hoping, with no basis, that he could fool the NRC showing selective portions of the tapes on equipment with which he had no familiarity. Such a conclusion does not comport with the Board's observations of Mr. Geisen or evidence in the record regarding his character and work history.

ACRS meeting

130. On November 9, 2001, Mr. Geisen participated in a meeting of the ACRS. Tr. 1771. During the meeting, and in response to a question, Mr. Geisen made a statement regarding the past inspection tapes. He testified at the hearing that the intent of the answer was to communicate that during the 1998 and 2000 inspections, the tapes were not made for the purpose of looking for circumferential cracking, and that as a result Davis-Besse did not have a good view of many of the drives. Tr. 1771. He made the comments based upon his understanding of what Mr. Siemaszko had found during his review and communicated during their meeting. Tr. 1787-88. Mr. Geisen denied that his intent was to mislead the ACRS about the content of the inspection tapes. Tr. 1771.

131. The Staff introduced only a small portion of the ACRS meeting transcript. Staff Ex. 59. From that excerpt, it is impossible to determine the context of Mr. Geisen's statements or the focus of the ACRS at the hearing. The general conclusion Mr. Geisen appeared to draw in

the transcript provided – that the 1996 video provided the best view of the nozzles available to Davis-Besse – is true, as proven by review of the videotapes. Staff Ex. 81. The suggestion that Mr. Geisen was trying to conceal from the ACRS the full contents of the 1998 and 2000 videos assumes, of course, that Mr. Geisen knew the full contents of those tapes – a conclusion not supported by the evidence. See ¶129, supra.

132. Other facts contradict the suggestion that Mr. Geisen was trying to deceive the ACRS about the content of the 1998 and 2000 inspections. The ACRS meeting occurred after the November 8, 2001 session in which Mr. Geisen presented the past inspection videotapes to the NRC. By Dr. Hiser's account, Mr. Geisen ran portions of the 1998 tape showing more boron on the head than in 1996, and then said if the Staff thought 1998 was bad, 2000 was worse. Tr. 1301. Dr. Hiser was at the ACRS meeting. Staff Ex. 81; Tr. 1356. Nothing about Mr. Geisen's comments to the ACRS led Dr. Hiser to believe that Mr. Geisen was not answering the question posed to him. Tr. 1357. It is a fair inference that if Dr. Hiser believed Mr. Geisen was being deceptive or evasive, he would have spoken up.

133. Given the lack of context and clarity of the evidence regarding the ACRS meeting, the Board cannot conclude that Mr. Geisen's comments, even if inaccurate, were made with the intent to deceive.

Evidence regarding undue pressure

134. Throughout the hearing, questions were asked about whether economic factors associated with a plant shutdown effected the decision making process that went on at Davis-Besse.

135. There no question that such factors are present in plant operations. Indeed, in his OI interview, Mr. Geisen spoke to that issue and discussed the inherent pressure to complete outages in a timely fashion. Staff Ex. 79 at 63-64.

136. There was also evidence that the site Vice-President, Guy Campbell, was angry when he learned about Brian Sheron's call to his boss on September 28, 2001. Tr. 1670-72.

137. There was no evidence presented, however, that Mr. Geisen was pressured to make statements to the NRC that he knew to be false, or, more importantly, that he would have done so if pressured. There is, in fact, evidence is to the contrary. Mr. Moffitt, Mr. Geisen's director, testified that Mr. Geisen was a man of high integrity who would not have lied even if told to by his superiors. Staff Ex. 74 at 1266, 1304. Nothing in Mr. Geisen's personal history, from his service in the Navy to his otherwise unblemished record at Davis-Besse and thereafter, contradicts that testimony.

Sanctions

138. Two landmark decisions of the Supreme Court are instructive in their articulation of the constitutional principles that provide guidance in this case. In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court decided the Fourth Amendment exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961) should not be retroactively applied. The rationale of the exclusionary rule goes to the due administration of criminal justice. Hence, when the police conduct an illegal search and seizure, a person's guilt or innocence does not hang in the balance; rather it is the underpinning of a system of justice that rejects constitutional violations when that system is functioning. On the other hand, the Court recognized in *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966), that rules adopted to avoid a clear danger of convicting the innocent were properly applied retroactively. Any violation that attacks the

integrity of the fact-finding process, and thereby infects the question of whether a defendant is guilty of the offense charged is of a different Constitutional magnitude. In the context of this case, the Board is sensitive to the embedded principles of the due administration of justice and integrity of their fact-finding function. These are cherished values within the umbrella of due process even though this is not a Fourth Amendment or Fifth Amendment case.

139. In the context of taking evidence on the issue of sanctions imposed on Mr. Geisen, these bedrock principles were so disserved as to severely undermine the Staff's case. Evidence was elicited regarding the NRC's process of addressing enforcement issues in terms of the receipt of allegations, the investigation of those allegations, the assessment of the report of the investigations, the ascertainment of violation of NRC regulations, and the discernment of a sanction appropriate to the circumstances of the case. Witnesses invoked platitudes and principles describing the importance of deterrence and protection of the public health and safety using a methodology that was described as holistic and collegial. Multiple stage review was referenced.

140. As applied in this case, the methodology was governed more by platitudes than by principles. It resulted in an administrative exercise that causes the Board great concern as to its purported fairness. The Board finds nothing redeeming about the fact-finding undertaken by the investigators from the Office of Investigations and by the enforcement decision-makers. Nothing in Mr. O'Brien's testimony gave the Board any assurance that Mr. Geisen's case was fairly and properly considered.

141. For example, the Board repeatedly came back to a seminal question regarding the impact on a manager of the conduct of a deceptive subordinate. The distinction the Board was drawing in its questions was between a person acting entirely on his own to be deceptive and a

person who provides incomplete and inaccurate information based upon his receipt of such from a deceptive subordinate. Tr. 2059-2065. This fundamental question of the deceptive subordinate was never properly vetted by the investigation and enforcement staff. In the first place, those who conducted the investigation for the OI never spoke to the enforcement panel convened to consider Mr. Geisen's case. At no time during the investigative process, and thereafter in the entire administrative process leading up to his debarment, was Mr. Geisen informed he was a possible target for enforcement action. Thus, the question of what Mr. Geisen knew and when he knew it was embodied in a transcript of his interview and nothing else. This is a glaring flaw in the investigatory process since Mr. O'Brien testified that an OI interview is the opportunity for an individual to persuade the NRC not to take enforcement action against him. Tr. 2123. It begs the question of whether that opportunity had been fairly (constitutionally) given to Mr. Geisen when he was never told that he could possibly be the target and that this was his opportunity. Worse, Mr. O'Brien has no answer as to why Mr. Geisen was not given that chance before the NRC banned him.

142. The OI's failure to explore the apparent discrepancy between the typed notes of Mr. Martin and the recollection of Mr. Geisen is another example of the shoddy nature of this enforcement action. As noted above, Mr. O'Brien conceded the sentence upon which the Staff has so heavily relied as evidence of Mr. Geisen's knowledge is ambiguous. Mr. O'Brien stated "as written I would [have] a difficulty coming to a conclusion in and of itself." Tr. 2186. He conceded he has difficulty with notes taken by an individual that somebody else does not verify are factual. Tr. 2234. The Staff simply cannot reasonably rely on such an ambiguous piece of evidence when ambiguity remains in large degree due to the failures of the OI agents.

143. Staff Exhibit No. 47, and specifically the handwritten notes of Dale Miller, present another example. In this instance the NRC knew who wrote those words and yet there was no follow-up regarding them, no question asked of Mr. Miller regarding the basis for his statement. Yet, Mr. O'Brien, adherent to a repeatable and predictable application of the rules as "holistically" applied by his organization, refused to concede that the failure to follow-up cast a serious doubt on the reliability, completeness and accuracy of the information in the report. In the same breath he concedes that the agency "should look into or should evaluate further or should ask further questions regarding to." Tr. 2191. This answer is disingenuous. He gives no reason why the OI report, on which he totally relied, had failed to consider these important questions. As if the issue were still open with his agency he acknowledges that this should be a matter to be further looked into. Tr. 2191. The Board states unequivocally, it should have been looked into. Mr. O'Brien was asked hypothetically that had the investigators pursued the question of being wide open with the author of the notes on Exhibit 47 and were told that "Dave Geisen did not know," what its impact would be. Mr. O'Brien conceded that that would be information he would "definitely take into consideration, absolutely." Tr. 2192.

144. Mr. O'Brien agreed that trust is an important element among professionals running a nuclear plant. He stated "it wouldn't surprise me in the least" if one worker trusts another co-worker to tell him the truth about work he has been assigned. Tr. 2209. He also stated "there is trust, but verify." Id. Yet, the record is devoid of any semblance of verification carried out by the enforcement decision-makers in this case. No one spoke to the investigators. No one explained how the Red Photo which was given to the Resident Inspector and made no impression on him was somehow to make a greater impression on everybody at Davis-Besse who saw it.

145. Finally, Mr. O'Brien's testimony regarding Mr. Geisen's expressions of remorse and acceptable of responsibility reflect a lack of candor on Mr. O'Brien's part. After listening to Mr. Geisen's testimony before the Board, Mr. O'Brien suggested he had not heard Mr. Geisen express acceptance of responsibility for the failures that occurred at Davis-Besse. Tr. 2213. He said he did not know whether Mr. Geisen had always maintained his innocent, and cited the word "always" when that statement was made with incredulity. Tr. 2214. In the end, Mr. O'Brien's repeated reference to a "holistic" approach wilted under the weight of how Mr. O'Brien and his colleagues approached Mr. Geisen's case. Mr. O'Brien's intransigence is mired in pejorative justifications⁵ for not exploring his initial conclusions about Mr. Geisen's liability and punishment in the face of evidence that would at least cause a reasonable person to consider the wisdom of those decisions..

146. The Board also received the testimony of Mr. Luehman who subsequently provided a spreadsheet of individuals prohibited from NRC licensed activities for five years or more for the period 1993 to 2008 (excluding Mr. Geisen). This information provides us with a recent history of cases in which a five-year or more ban was imposed on individuals.

147. It identifies 50 cases where 5 year bans were imposed. From that total, 3 cases involving the incident at Davis-Besse are excluded.⁶ In 44 of the remaining 47 cases, the summaries offered on the spreadsheet report direct, non-circumstantial evidence of intentional misconduct. These cases are replete with confessions, concealment of prior criminal convictions

⁵ Compare his feeling about Mr. Geisen "parsing", Tr. 2085, with Mr. Brien's indulgence in "parsing" for his own purposes. Tr. 2213 – 2215.

⁶ Case No. 2 - Allmon, Randall; Case No. 18 - Rogers, Brian; Case No. 24 - Bodean, Jerome. The summaries do not provide sufficient detail from which to infer the circumstances of the offending conduct. The irony should not be lost that, as reported, they are no more persuasive or informative than the evidence offered in Mr. Geisen's case. We are left to speculate about them. They are useless here.

or criminal history, using surrogate urine samples, discrimination, altering computer codes in order to rig random testing for fitness, conversion of government property, stealing copies of NRC examinations, destruction of records, unsafe practice of radiography, failure to maintain licensed material safely, compromising safety of employees, covering up illegal drug use, failure to train employees in radiation protection, falsifying personnel certification summaries, permitting unqualified personnel to conduct nuclear medical tests, and theft of licensed material.

148. In these instances, the summaries report evidence of guilt that was direct and of circumstantial evidence that permitted inferences to be drawn consistent with the hypothesis of guilt. In no case is guilt imputed by attributing the conduct of others to the individual offender. In each instance the record offered by the Staff in Attachment 1 supports the conclusion that the offender was a knowing and intentional malefactor. That is simply not the case here.

149. The sanction imposed upon Mr. Geisen was unwarranted and unjustified.

Conclusion

150. The Board heard testimony from Mr. Geisen regarding the impact that the immediately-effective Order has had upon his personal and professional life. Tr. 1779-1984. The effects of the Order were profound, immediate, and, it appears from the circumstances presented, potentially long-lasting. It remains shocking to the Board that these consequences were visited upon Mr. Geisen three and half years after the events central to the Order, after he had worked without incident at another plant, and without any opportunity provided to Mr. Geisen to tell his side of the story to the Enforcement Panel.

151. The Board's review of the evidence yields the conclusion that the Order is unsupported and that Mr. Geisen did not engage in deliberate misconduct as defined in 10 C.F.R. § 50.5.

152. To prove that Mr. Geisen engaged in deliberate misconduct, the Staff was required to establish intentional acts or omissions by Mr. Geisen, because a finding of deliberate misconduct cannot be based upon a person's careless disregard. 10 C.F.R. § 50.5(c).

153. The evidence does not demonstrate that Mr. Geisen knew information contained in Davis-Besse's written responses to the NRC was incomplete or inaccurate at the time he participated in their drafting or approved their submission. Nor does it demonstrate that Mr. Geisen knew information he communicated to the NRC in oral statements was incomplete or inaccurate at the time he made those statements.

154. The evidence does not demonstrate that Mr. Geisen intended to mislead or deceive the NRC through the presentation of inaccurate or incomplete information. Nor does it demonstrate and motive for Mr. Geisen to make false statements to the NRC.

155. The Enforcement Panel's determination to impose an immediately-effective five year ban on Mr. Geisen was the unsustainable result of an unreliable and flawed process that is offends Constitutional notions of fairness and due process.

156. Even if the Board were to have concluded that a sanction was warranted and appropriate after a finding of liability, the five year ban is not necessary to protect the public interest and safety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 30th day of January, 2009, 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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