

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael C. Farrar, Chairman  
E. Roy Hawkens  
Nicholas G. Trikouros

In the Matter of

DAVID GEISEN

Docket No. IA-05-052

ASLBP No. 06-845-01-EA

December 11, 2009

**MEMORANDUM**

On August 28, 2009, this Board issued its Initial Decision in this enforcement proceeding (LBP-09-24, 70 NRC \_\_\_\_). In that decision (slip op. at 125), the Board Chairman indicated that to avoid delay in issuing that Decision he would defer providing his additional views on a particular subject that was under discussion there. See also id. at 145, fn. \*\*. Those additional views are attached hereto.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

/RA/

By Michael C. Farrar, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 11, 2009

*Copies of this Memorandum and of the attached "Additional Views" were sent this date by e-mail transmission to counsel for Mr. Geisen and for the NRC Staff.*

**Additional Views of Judge Farrar**  
(See In re David Geisen, LBP-09-24, August 28, 2009, p.145, n. \*\*)

**I. Introduction**

In its Initial Decision herein, LBP-09-24, 70 NRC \_\_ (Aug. 28, 2009), the Board found that the Enforcement Order issued against Mr. Geisen could not be sustained, and thus set aside the five-year employment ban the Order had imposed upon him.<sup>1</sup> Because the Enforcement Order had made that 60-month employment ban immediately effective, Mr. Geisen had felt the force of that ban for nearly 44 months by the time of the Board's decision.

The agency's rules do not provide a mechanism for remedying or neutralizing the significant adverse impacts Mr. Geisen suffered in those many months. In that respect, in addition to the psychological frustration that flows from being made to endure a punishment before the validity of that punishment is adjudicated, the ban here led directly – according to the testimony we heard – to specific and extraordinary negative impacts upon Mr. Geisen's financial status, career development, and family life, impacts that are to no extent addressed, much less ameliorated, by our finding that the charges against him were not proven.

Judge Trikouros and I joined in calling this matter to the Commission's attention (LBP-09-24, 70 NRC at \_\_ (slip op. at 125)). Even though the Board is powerless to do more, I believe someone must say more – for the seemingly unjust outcome that resulted here calls out to be addressed more fully, and to have its ramifications commended to those in position to prevent similar future outcomes from occurring. This focus on what transpired here should take place regardless of whether one accepts the Board's or the Dissent's view of the facts.

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<sup>1</sup> After the Board's decision was issued, the Staff petitioned the Commission for review of the merits of that decision and for a stay of its effectiveness pending that review. The Commission has since (1) extended indefinitely the time for its decision on the merits Petition (Order of the Secretary (Granting Extension of Time for Commission) (Oct. 26, 2009)) but (2) denied the interim stay (In re David Geisen, CLI-09-23, 70 NRC \_\_ (slip op.) (Nov. 17, 2009)).

Put another way, there is a difference between the issues of (1) whether Mr. Geisen should be held responsible for the charges against him; and (2) whether Mr. Geisen was treated fairly in the bringing of those charges. The Board addressed the first issue in determining that the Staff's evidence did not meet its burden of proof to support the charges. We based that decision on the evidentiary record compiled at our hearing, without regard to any views as to whether the Staff had rightly or wrongly made its enforcement order immediately effective.

But now it is time to address the question of fair treatment, not because the outcome will affect the merits of Mr. Geisen's case but because it should guide the handling of future cases. I believe that, at least where "career death sentences" are involved and the facts are complex and disputed (compare note 13, below, and accompanying text), the Commission should instruct that more care be brought to the process than appears was the case here. The apparently-unjust outcome the agency must confront flowed inexorably, in the first instance, from the sanction's having been made immediately effective when it need not and should not have been, with that misstep compounded by the Government's then denying Mr. Geisen the expedited hearing to which the regulations explicitly entitle him.<sup>2</sup>

Of course, some might question whether this is the case in which to discuss immediate-effectiveness issues since, as the Board Decision noted (70 NRC at \_\_\_ (slip op. at 5, n.4)), Mr. Geisen had not exercised "the opportunity provided by 10 C.F.R. § 2.202(c)(2)(i) to challenge, apparently on limited grounds, the immediate effectiveness of the Enforcement Order." In other words, goes the argument, with Mr. Geisen having waived the remedy available at an earlier stage, I should not be concerned with the absence of a remedy at this stage.

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<sup>2</sup> In my view, the frustration attendant upon being denied the right to a timely hearing on the validity of a punishment, while the punishment is being endured, adds significantly to the impact of the punishment. Although that impact may not be readily quantifiable, it provides further qualitative reason – even if the Commission were to disagree with the Board that Mr. Geisen should be exonerated – for the Commission (1) to indicate that it does not endorse the juridical or literary concept of "punishment first, trial afterwards" and (2) to say "enough" rather than to reinstate the remainder of the employment ban (as to the status of the ban, see note 21, below).

We did cover briefly in the Board Decision (70 NRC at \_\_\_ (slip op. at 123-24)) why that fact does not preclude addressing the matter for present purposes. To the extent the point might have some remaining validity, what I say later (see pp. 7-9 and note 12) about the deficiencies in the earlier remedy addresses it more fully.<sup>3</sup>

In any event, that there might be an adjudicatory remedy that can promptly be invoked but was not invoked by the recipient of an unwarranted immediate effectiveness order scarcely means that the issuance of such an order is tolerable. To the contrary, all those acting under NRC licenses are entitled to fair treatment at the hands of the Staff in the first instance so that it will not prove necessary to incur the travail and expense associated with having to bring a challenge before a licensing board.

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To begin with, there is no dispute over the legitimacy of allowing immediately-effective orders in appropriate situations. The agency must have the means available to ban immediately any malefactors whose continued presence in the regulated workplace creates the potential for an imminent threat to the public health and safety.<sup>4</sup> Here, however, punishment was imposed in advance of trial when there was no plausible reason stated, or existent, to do so. That Staff action breached three fundamental principles.

The *first* involves the unfairness generally inherent in requiring a person to serve a punishment before its validity is tested in whatever adjudicatory process exists for that purpose. The *second* was in not expressing – and even worse, in not having – adequate reason for departing in this specific instance from the first principle. The *third* was in not seeking to

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<sup>3</sup> In a related vein, there is no validity at all in the argument that the initial success of the criminal prosecution should alleviate any concern about the employment ban. The criminal indictment had not yet been handed down when the immediately-effective employment ban was imposed, and the Board Decision explains at great length (70 NRC at \_\_\_ (slip op. at 33-53)) why the later criminal conviction, now on appeal, does not constrain our analysis here.

<sup>4</sup> Revisions to Procedures to Issue Orders: Challenges to Orders that Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,195 (May 12, 1992).

develop some lesser measure(s) that could have protected the values the Staff claimed to be serving – protecting the public health and safety – without destroying a person’s career before the legitimacy of that ultimate measure could be adjudicated. I discuss each of these below.

## **II. Principles**

### **A. Imposing Punishment Before Trial**

A fundamental principle of our legal system is that an accused must be provided the opportunity to challenge the validity of the accusations before being required to endure the punishment attendant thereto. To be sure, the Staff must be given the necessary authority to protect the public health and safety by banning individuals, effective immediately, when appropriate. But this power is granted, and this action is allowed, not as a routine means to impose on the accused punishment for past action, but as an extraordinary measure to protect the public against potentially dangerous future wrongdoing. As such, it cannot be viewed as the norm, but rather as an exception that is allowed – and tolerated – only when needed.

In that regard, the law frequently requires that the more weighty the power, the more carefully and cautiously it must be exercised and the more quickly the circumstances underlying the exercise of that power must be brought before independent adjudicators for testing.<sup>5</sup> But that did not occur here. Instead, the Staff compounded the injustice, through its advocacy of the

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<sup>5</sup> Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957) (“It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas”); Katzenbach v. Morgan, 384 U.S. 641, 654 n.15 (1966) (“the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened”); Groppi v. Leslie, 404 U.S. 496, 504 n.8 (1972) (“The Court has been careful to limit strictly the exercise of the summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge”); cf. I.N.S. v. Chadha, 462 U.S. 919, 959 (1983) (“carefully crafted restraints” in the Constitution “preserve freedom” by curbing “the exercise of power”). In this regard, the Staff cannot seek to describe itself in terms akin to being “only a prosecutor” (cf. NRC Staff Response to Board Questions at 8 (Jan. 30, 2009)) such that any misjudgments or lapses are wiped away by the Licensing Board hearing. That might be true where the Staff simply proposes a punishment, but not when it also imposes the punishment.

Department of Justice's repeated stay motions, by delaying the "expedited hearing" – supposedly guaranteed by agency regulations – that would have tested the validity of the punishment relatively early on. Cf. Board Decision at 6; CLI-07-06, 65 NRC 112 (2007). The Staff position indeed seemed to be that the length of that delay was susceptible to no limits.<sup>6</sup>

Prosecutors wield enormous power over their targets' lives. To be sure, the ultimate determination of guilt or innocence is not made by the prosecutor, but by an independent adjudicator, whether jury or judge.<sup>7</sup> Nonetheless, the decision to prosecute often has an interim life-altering effect upon a target, and prosecutors ought generally to proceed with a large degree of thoughtfulness and carefulness, given the impact of their decisions.<sup>8</sup> This principle applies even more forcefully where, as here, the initiation of charges also resulted in the onset of the punishment attached to those charges.

Perhaps, above all, prosecutors need to consider the possibility they could be making an erroneous decision, and the costs such a decision would impose in the period before a formal

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<sup>6</sup> Thus, the Staff argued orally at the first appearance in the case that if the hearing were delayed even for the full five years there would not necessarily be any injustice. Transcript of David Geisen Enforcement Proceeding Oral Arguments at 35-38 (Apr. 11, 2006). Then, quite recently, as if to demonstrate that the tenor of its initial position was not due to failure to have anticipated the question presented, the Staff moved in writing for a stay of our decision while (1) giving scant attention to the impact that would have upon Mr. Geisen (see Geisen, CLI-09-23, 70 NRC at \_\_\_ (slip op. at 3)), and (2) without acknowledging that – were the Commission to have granted the stay and then to have taken a normal period to review this complex matter – the employment ban would likely be well into its final year before the Commission would be in position to rule on the merits.

<sup>7</sup> In this vein, the Board's probing of the facts resolved the merits of the problems involving the reconciliation of the "Martin document" and the participation in Serial Letter 2731, problems caused in no small measure by deficiencies in the Staff investigatory and enforcement processes (see pp. 6-7, below). But resolving them for merits purposes does not undo the impact they had in driving the immediately-effective punishment.

<sup>8</sup> With respect to a prosecutor's role, and as most lawyers who ever worked for the Government know, Government lawyers should understand and follow the venerable maxim that "the Government wins when justice is done." See, e.g., United States v. Dawkins, 562 F.2d 567, 569 (8th Cir. 1977). To discount this maxim would be to adhere to the converse, i.e., that "Justice is done whenever the government wins." Goehring v. United States, 870 F.Supp. 106, 109 (D. Md. 1994).

adjudication can be held (whether that period be a mini-hearing at the outset, the promised full-blown expedited hearing, or the long-delayed hearing that eventually transpired here). I saw no evidence here that either the possibility or the consequences of error were given any consideration.<sup>9</sup>

Had that been done, it might have led to an entirely different conclusion, at least as to immediate effectiveness (my concern here), if not also as to the length of the ban and indeed the bringing of charges at all. For example, we learned at the hearing that, as the Staff process for filing charges nears its culmination, the subjects of those charges are often afforded a “last chance” interview to explain the matter before charges are lodged. Transcript of Hearing (Dec. 8-12, 2008) at 2267-68 (Tr.). Mr. Geisen was not offered such an interview, even though he had in effect not even had a “first chance” interview.<sup>10</sup>

Such an interview might have been revealing in a number of respects, all to Mr. Geisen’s advantage. In the first place, it would likely have provided an opportunity, not otherwise taken by the agency personnel involved during the investigation or during the enforcement deliberations, to look for some way to reconcile the discrepancy between the Martin document and Mr. Geisen’s views. See LBP-09-24, 70 NRC at \_\_\_ (slip op. at 76). Instead, it appears that Mr. Geisen was never informed of the existence of that crucial document, much less given an

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<sup>9</sup> In this regard, see David Ignatius, Certainty That Hit a Wall, The Washington Post, July 7, 2009, at A-17, noting, on the passing of former Secretary of Defense Robert McNamara, that “perhaps the memory of this brilliant and tragic man will keep us from being too certain of our own judgment – and encourage us to consider, even when we feel most confident, the possibility that we could be wrong.” Here, no matter how convinced it was that Mr. Geisen was the bad actor at the heart of the Davis-Besse problem, the Staff should have considered that, if it were later to be proven wrong about him (as the Board later found it was), he would – if the Staff’s order were immediately effective – end up subjected to years of unfair and unjustified punishment. By entertaining this possibility, the Staff could have eschewed immediate effectiveness, and the worst that would have happened, had the Staff been proven right on the merits (as the Dissent believed), his punishment could have waited – without harming the public interest – for the adjudication to be completed before being imposed, just as it had already waited for 28 months (see p. 14, below).

<sup>10</sup> All the investigators who had actually spoken to Mr. Geisen, having later been assigned to work with DOJ on its investigation, a matter covered by grand jury secrecy rules, were thus unavailable to provide their views to the agency’s enforcement panel. Tr. at 2154.

opportunity to confront it. And it might have led the Staff to reassess its view as to the ongoing state of Mr. Geisen's knowledge had he been able to point out that he had played not a central but a very limited role in the drafting of Serial Letter 2731.

Similarly, an interview would almost assuredly have brought to light the steps Mr. Geisen had taken to correct an error once he learned of it. As the Board Decision noted, the Staff witness conceded that such information might well have served to reduce the penalty imposed. See 70 NRC at \_\_\_ (slip op. at 104-05, 121 n.160).<sup>11</sup>

It is no answer to suggest that the Staff need not be too concerned about making proposed punishments immediately effective, because the agency's regulations provide for a very early review of any such immediate effectiveness. There are three problems with that notion.

The *first* is that the pertinent regulation (10 C.F.R. § 2.202(c)(2)(i)) purports to limit severely the scope of that early review, and appears to embody the premise that the Order's immediate effectiveness (depriving the accused of the freedom to work pending trial) is

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<sup>11</sup> I need add only that the Dissent also recognized that this eminently sensible step of a pre-sanction interview should have been taken. Specifically, the Dissent pointed out the following (LBP-09-24, 70 NRC at \_\_\_ (Hawkens, J., dissenting, slip op. at 59 n.45)):

In the unique facts of this case, it appears the NRC Staff had ample time prior to issuance of the immediately effective Enforcement Order to accord Mr. Geisen "some form of [pre-deprivation] hearing" (Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). When the NRC Staff can, consistent with its duty to protect public health and safety, accord some form of pre-deprivation hearing, such a course of action is advisable in light of the important "private interest in retaining employment" and the fact that such a proceeding provides "some opportunity for the employee to present his side of the case" (*id.* at 543). As the Loudermill Court explained, providing pre-deprivation "notice and informal hearing permit[s] the [employee] to give his version of the events [and] provide[s] a meaningful hedge against erroneous action" (*id.* at 543 n.8) (quoting Goss v. Lopez, 419 U.S. 565, 583-84 (1975)).

In this regard, I concur entirely with the Dissent's analysis, and note that the Staff witnesses were unable to supply any valid reason why this did not occur here.

presumptively valid, placing the burden on the accused to demonstrate its invalidity.<sup>12</sup> In sharp contrast (see p. 13, below), the rules that govern an analogous situation – the grant or denial of bail pending trial in criminal prosecutions – place the burden squarely on the Government to demonstrate not only the reasons why bail should be denied (thereby depriving the accused of liberty pending trial) but also that there are no conditions, short of denying bail, that can accomplish the same purposes.

The *second* problem is that adjudicators are not necessarily in as good a position, or as adequately empowered, as are prosecutors to ascertain the critical facts at the outset of a proceeding. Given the narrowness of the review standard in the current regulation, it might be much harder for judges to detect error than for the Staff to prevent error.

The *third* problem involves inequality of time and resource availability, an issue that might not arise in the routine cases that appear to be the grist of the agency's enforcement mill,<sup>13</sup> but that is central here, where the Staff took nearly four years to compile its case (16 months during the OI investigation, the report of which was issued on August 22, 2003, and over 28 more months before issuing its Order in early January, 2006). In contrast, in this or any complicated case, the person eventually charged might well, at the time he or she would have to exercise the right to challenge the ban's immediate effectiveness, not only have just recently

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<sup>12</sup> To succeed under the terms of that regulation, the challenge brought by the Order's target must show that "the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error" (emphasis added). In addition to having the burden on immediate effectiveness, the target is apparently expected to address the merits at that point as well, as is indicated by the next sentence, which requires the challenge to "state with particularity the reasons why the order is not based on adequate evidence" and to "be accompanied by affidavits or other evidence relied on." All in 20 days, unless extended. 10 C.F.R. § 2.202(a)(2).

<sup>13</sup> Analysis of the material provided to us by the Staff (Attachment 1 to NRC Staff Proposed Findings of Fact and Conclusions of Law (Jan. 16, 2009)) indicates that out of the 47 other immediately-effective Enforcement Orders issued by the Staff in the last 15 years involving five-year employment bans (not related to the Davis-Besse incident), 44 appear to have dealt with cases of simple and/or uncontroverted wrongdoing, such as providing false urine specimens for drug testing.

been served with the Enforcement Order, but also have no control over – or even access to – the underlying evidentiary documents the Staff has been studying for years.

In such circumstances, how can an accused, even aided by counsel, respond in a brief period to the enormous file of interviews and documents that the Staff took nearly four years to compile? In this respect, only after our full evidentiary hearing did some of the deficiencies in the Staff's support of its Enforcement Order emerge.

For all these reasons, Staff officials contemplating the issuance of an immediately-effective order that destroys the subject's opportunity to work at a chosen profession ought to be as careful as we would be in analyzing that aspect of the proposed order's impact. And they should do so in light of the principles of national policy that apply in an analogous area (i.e., pre-trial bail).<sup>14</sup>

Put another way, whether or not the remedy of an early hearing on immediate effectiveness is expected to be invoked, the responsibility to act in accordance with the rule of law perdures at every level of the agency's management. If the rule of law is put aside (see Section B, below) and a person (even if later found to have committed the misdeeds alleged) is unnecessarily and unfairly deprived of the opportunity to work before trial, there has been harm – harm to the values upon which our legal system is based.

### **B. Failing to Provide Plausible Reasons**

The Enforcement Order has certain indicia of having been prepared in some haste, notwithstanding the lengthy period – 28 months – that had passed since the publication of the

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<sup>14</sup> I recognize that the enormity of the Davis-Besse incident and inquiry might have led the Staff to believe it so obvious that Mr. Geisen was at the heart of the problem that he could not be allowed to work another day. But when such passion is most present is when due process is most important. As to fairness, most observers would not think it tolerable, at the very outset of any type of enforcement matter, for the authorities to tell a suspected malefactor – no matter how guilty he appeared – that a punishment with a five-year duration was being imposed but that no hearing on the legitimacy of that penalty would be held until nearly three years of that penalty had already been endured. Cf. In re Andrew Siemaszko, Licensing Board Order (Sept. 29, 2005) at 8 (separate Statement of Judge McDade, dissenting from the grant of a stay of hearing on a proposed punishment that, even though not made immediately effective, nonetheless had immediate practical impact). See also n. 17, below.

OI Report that had detailed what the investigation revealed.<sup>15</sup> But the single most troubling aspect of the Enforcement Order is not any possible carelessness in its drafting. It is, rather, the real deficiencies in its reasoning.

Specifically, the Enforcement Order, while setting forth allegations of misconduct at Davis-Besse, fails to provide, with any specificity, how or why these allegations warranted Mr. Geisen's immediate dismissal from his position at Kewaunee. To be sure, that Order and its cover letter indicated at several points that it was effective immediately, and once stated generally that "the public health, safety and interest" required the result that Mr. Geisen be relieved immediately of his NRC-regulated responsibilities. But the only attempt to give any specific supporting reason(s) as to why or how that conclusion was reached was limited to 26 words in a 19-page document, i.e., that his alleged conduct "raise[s] serious doubt as to whether he can be relied upon to comply with NRC requirements and to provide complete and accurate information to the NRC." Order, p. 15, Part IV; 71 Fed. Reg. at 2575.

Even a layman would question whether it is permissible for the Government to direct that a person be removed from his employment and his career, effective immediately – before he has a chance to be heard – without specifying plausible, considered reasons for taking such drastic action. In any event, such an explanation is required by the very regulation that permits the Staff to issue an immediately-effective Enforcement Order upon finding "that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful" – viz., Section 2.202(a)(5) explicitly requires the Staff to "state[ ] reasons" (emphasis

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<sup>15</sup> One mistake in the Enforcement Order might seem to be trivial but in context is seen to be significant. Specifically, that Order contains a duplicative paragraph that appears to have been electronically cut and pasted from the similar order involving Mr. Goyal, for his name still appears therein. Compare Order at 17 with 18-19; 71 Fed. Reg. at 2576. There is, of course, nothing wrong as a drafting matter with copying text from one document to help create another. But care must be taken to conform the copied material to the context of the new document. This was not done here – and no one noticed. In these circumstances, it is not unreasonable to think that perhaps the reason for this oversight was that the documents – or at least the one concerning Mr. Geisen – were processed with unseemly haste.

added) for making those findings. The Staff's merely asserting, without explaining, that such is the case is inadequate.<sup>16</sup>

Of course, it is plain now – after the hearing has been held – why no reasoned explanation for the immediacy of the employment ban was provided in the Order. There did not exist any explanation that could have survived scrutiny.

This conclusion follows from the facts that eventually emerged. After its investigation was completed, the Staff had delayed any action for 28 months, during all of which time Mr. Geisen was employed in a (different) nuclear power plant. Had anyone on the Staff thought that during those two-plus years there was genuine reason to believe Mr. Geisen's work at Kewaunee constituted a real and imminent risk to public health and safety – in that there did indeed exist, as the Order later stated, “serious doubt as to whether he can be relied upon to comply with NRC requirements and to provide complete and accurate information to the NRC” – we must presume that the job debarment action would have been taken then, for failure to have done so would be an indictment of the NRC Staff rivaling that brought against Mr. Geisen.

Therefore, unless something new was uncovered just before January 4, 2006 – and the trial revealed no such discovery – any serious explanation that might have been given for the immediate effectiveness of the Order issued that date would have called into serious question whether the Staff had fulfilled its responsibilities to the public in the foregoing years. So, no such explanation was given in the Order. And, as the evidence showed, none existed.

Instead, the explanation – such as it was – that we heard from the Staff at the hearing was that the issuance of enforcement orders sometimes, as occurred here, awaits parallel

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<sup>16</sup> On that score, with the exception of the cited 26 words, the Staff's accusations elsewhere in the Order concern past activities and in no way allude to any then-ongoing or potential future misconduct on Mr. Geisen's part. Again, perhaps the matter seemed obvious to everyone on the Staff. But persuasive reasons must nonetheless be articulated. After all, the relevant regulation (10 C.F.R. § 2.202(c)(2)(i)) goes on to provide that a challenge to immediate effectiveness “must state with particularity the reasons why” the Order is unsound – and one can readily anticipate the Staff's response if the reasons provided by the challenger (see note 12, above) were framed as briefly and generically as were the Staff's here.

consideration of criminal charges by the Department of Justice. Tr. at 2075. Such waiting might in certain instances serve the public purpose of avoiding interfering with a potential criminal case. But that purpose is not facially so significant (and in the situation here was not seen as so germane to this proceeding<sup>17</sup>) as to justify, without explanation, allowing to remain at his post in the interim – apparently to great public detriment if the Enforcement Order’s protective sanctions are to be given any credence – a nuclear plant employee who was allegedly an imminent threat to public health and safety.

### **C. Not Considering Lesser Measures**

As mentioned before, I recognize the importance of the Staff’s vital task of protecting the public health and safety by vigorously pursuing wrongdoers and preventing them from causing additional problems while litigation is pending. But apparently no one even considered whether those aims could have been achieved while simultaneously protecting all or some of Mr. Geisen’s employment interests.

Had this alternative been considered judiciously and a thoughtful process brought to bear, any number of measures might have been developed that would have sufficed to achieve the Staff’s purposes in the interim while ameliorating Mr. Geisen’s injury until adjudication was complete. For the reasons set forth below, I respectfully urge the Commission to instruct the Staff to consider future “career death sentence” enforcement matters with the sensitivity and caution justified – and required – by the punishment it has in mind to impose. I also suggest to future litigants and Boards that the matter discussed below (pp. 13-15) be given serious consideration in reviewing any immediately-effective sanctions.

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<sup>17</sup> See In re Geisen, LBP-06-13, 63 NRC 523, 537-41, 548-56 (May 19, 2006), aff’d, CLI-06-19, 64 NRC 9 (July 26, 2006). But see In re Geisen, CLI-07-06, 65 NRC 112 (2007). See also In re Siemaszko, above, note 14, where Judge McDade, with 30 years of experience representing the Government on matters at the intersection of criminal and civil enforcement, noted the absence there, too, of any factors that would interfere with the criminal prosecution if discovery in the civil enforcement matter went forward; but see In re Siemaszko, CLI-06-12, 64 NRC 495 (2006).

Our justice system abides by principles and operates under measures that seek in a coherent fashion to balance the exercise of authority and the enjoyment of liberty.<sup>18</sup> Here, the Staff might have sought to balance its authority and need to protect public health and safety pending a hearing with the competing need to preserve, as well as possible, Mr. Geisen's freedom to pursue his career prior to having his responsibility and punishment adjudicated.

For guidance, the Staff might have sought instruction from one aspect of the practices followed in connection with the grant of bail pending trial in criminal cases (which concededly is inapplicable to civil enforcement matters but which might nonetheless offer some constructive guidance). Specifically, to succeed in imposing pre-trial detention because the accused is a "danger to the community," the Government must, among other things, prove in an adversary hearing by clear and convincing evidence that no conditions of release can reasonably assure the community's safety. 18 U.S.C. § 3142(c), (f). See also United States v. Salerno, 481 U.S. 739, 751-52 (1987).

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<sup>18</sup> This jurisprudential notion was discussed by retired Supreme Court Justice David Souter in remarks recently made at Harvard Law School. As Justice Souter explained:

I don't know of any formula in advance that says, 'Liberty always wins' or 'Authority always wins.' Either one would be an anathema.

That's why I espouse the common law method, which gets down to the nitty-gritty factual issues. To provide a premise for deciding which of the competing principles has the better argument in any given case. The notion of a Constitution in which we want it both ways is sensible by accepting the proposition that we can't have it both ways all the way, but we can have it both ways partially on each side. ...

[W]hat we cannot forget is that we do not have, we are not intended to have, a system in which, as it were, the coherence of values allows for the development of any one value necessarily as far as it can logically go, because there is usually a legitimate competitor somewhere, and we cannot lose sight of that. And the value of coherence in a system, or coherence in a given body of doctrinal development has always got to admit that the door is open, or we wouldn't have a serious case.

A Conversation with Justice Souter at Harvard Law School's Constitution Day Event (Sept. 9, 2009) (emphasis added) (transcribed from web site audio).

As to that point, we suggested at the hearing that the Staff investigators might have approached Mr. Geisen's then-current employer to see if there were a way to allow him to continue working, under some sort of increased scrutiny, while this proceeding was underway. Tr. at 2272.<sup>19</sup> The answer we received was that approaching his employer would have violated Mr. Geisen's right to privacy (Tr. at 2273, 2278), a right which the Staff apparently thought more important to protect than Mr. Geisen's right to earn a living. I believe that this unwillingness at least to consider whether possible alternatives might be developed is plain wrong, both as a matter of elemental justice and in light of the steps the Government is required to take in the analogous bail situation just discussed.

Some lesser process than what is required to deny bail may well be legitimate here, where the freedom involved is not that of avoiding imprisonment but "only" the Constitutionally-protected right to work in a chosen profession.<sup>20</sup> But recognizing that "something less" may suffice is not an acknowledgement that "nothing at all" will do. Instead, I believe that, whether by approaching his employer in advance, or by crafting an Enforcement Order that set out flexible conditions to be finalized later with employer cooperation, the enforcement authorities, and their counsel, should have attempted to develop measures that would have achieved balance and coherence, i.e., by keeping Mr. Geisen in his job while protecting the community in which he was working, just as the Staff apparently had done via maintaining awareness of his situation during the preceding 28 months it took to reach its decision. Tr. at 2277.

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<sup>19</sup> See also Transcript of Initial Pre-Hearing Conference (Mar. 22, 2006) at 49-50, where the Board inquired as to whether Mr. Geisen might hold a position in the industry that would result in a lesser adverse interim impact upon him directly, but also preserve the values in which the Staff was trying to protect.

<sup>20</sup> See Geisen, LBP-06-13, 63 NRC at 547, n. 89, citing Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring) (noting that the "right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence" and that it "is a large ingredient in the civil liberty of the citizen"), and 557, n. 118, citing Greene v. McElroy, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable Governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment").

That this notion of developing protective conditions is not fanciful is confirmed by the Government's recently-demonstrated ability, in the parallel criminal case, to come up with a condition to impose upon Mr. Geisen were the District Court to permit him to return to his job. To be sure, that Court's recent ruling<sup>21</sup> flatly rejected (at 4) the Government's proposed condition – that Mr. Geisen “notify any NRC personnel he comes into contact with of the fact of his felony convictions.” But the salient point is this: we learned that the Government indeed had the wherewithal to suggest such a condition (albeit a then-misguided one) at the end of the case. This surely teaches that the Government also has the capability – if it cares to exercise it – to suggest appropriate conditions under which a person like Mr. Geisen, or any future targets, might be allowed to keep a job at the outset of a case.

### **III. Conclusion**

How this situation could be avoided in the future might require careful analysis of the practical workings of the relevant regulations allowing a sanction to be immediately-effective, so as to balance in each proceeding the agency's acknowledged need for emergency authority to ban imminent threats from the workplace with the target's right to pursue a career without unjustified interference. What also might be needed is to require, when an immediately-effective ban is under consideration, that the Staff make available the pre-enforcement procedures (favored also by the Dissent, see note 11, above) that the evidence revealed it sometimes invokes but chose not to utilize here.

Importantly, the agency ought also to be prepared to develop and to impose conditions protective of public health and safety that, while somewhat limiting the target's freedom of activity, would in appropriate cases preserve a target's freedom of employment pending

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<sup>21</sup> While the drafting of these additional views was nearing completion, we were informed that the District Court had granted relief from the job-ban terms of the probation initially imposed in the criminal case (relief that the District Judge had indicated at the outset could well be forthcoming, as the Board Decision had noted (see 70 NRC at \_\_\_ (slip op. at 7)). Memorandum Opinion and Order, United States v. Geisen, No. 3:06 CR 712 (N.D. Ohio, Dec. 2, 2009).

litigation. This would negate any inference that interim immediately-effective measures are being imposed illegitimately, to punish the target for perceived prior misconduct, rather than appropriately, to protect the public from potential future misconduct during the litigation.

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In short, I respectfully suggest, once again, that the Commission might wish to undertake to reform the agency's application of its regulations.<sup>22</sup>

\_\_\_\_\_/RA/\_\_\_\_\_  
Michael C. Farrar  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 11, 2009

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<sup>22</sup> See Shaw Areva MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 497-508 (2008) (concurring opinion).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of  
DAVID GEISEN

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Docket No. IA-05-052

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM (ADDITIONAL VIEWS OF JUDGE FARRAR) (RE: LBP 09-24) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 11<sup>th</sup> day of December 2009