

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Dale E. Klein
Kristine L. Svinicki

In the Matter of)
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)
DAVID GEISEN) Docket No. IA-05-052
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CLI-09-23

MEMORANDUM AND ORDER

The NRC Staff has requested that we stay the effectiveness of the Atomic Safety and Licensing Board's Initial Decision¹ setting aside the enforcement order that is at issue in this proceeding, pending our action on the Staff's petition for review of the Initial Decision.²

In deciding whether to grant a stay, we consider the following factors:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm the other parties; and

¹ *David Geisen*, LBP-09-24, 70 NRC __ (Aug. 28, 2009)(slip op.). The Board ruled in Mr. Geisen's favor in a split decision. Chief Judge Hawkens dissented, finding in favor of the Staff.

² *NRC Staff's Application for a Stay of the Effectiveness of LBP-09-24 Pending Commission Review* (Sept. 21, 2009)(Stay Application). Mr. Geisen opposes the Stay Application. See *David Geisen's Answer Opposing the Staff's Application for a Stay of the Effectiveness of LBP-09-24 Pending Commission Review* (Oct. 6, 2009)(Geisen Answer).

(4) Where the public interest lies.³

As the Staff observes, irreparable injury is the most important of the four factors.⁴ The Staff's claim of irreparable injury arises principally from the fact that, if the Initial Decision is not stayed, then Mr. Geisen will request that the U.S. District Court reconsider its sentence in the parallel criminal case.⁵ The Staff argues that the consideration by the court of the "flawed" initial decision will constitute improper "interference with the district court's deliberations," and will harm the Staff's continuing interest in ensuring that the five-year employment ban imposed on Mr. Geisen remains in force for its full term.⁶ The Staff also cites its continuing interest in ensuring the employment ban imposed on Mr. Geisen remains in force for its full term.⁷ In our view, the Staff has not demonstrated that it will be irreparably harmed if the Initial Decision is immediately effective. Even if the court lifts Mr. Geisen's employment ban, should the Staff ultimately prevail in its petition for review, the agency's employment ban would be reinstated. In

³ 10 C.F.R. § 2.342(e).

⁴ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) ("A party seeking a stay must show it faces imminent, irreparable harm that is both 'certain and great'").

⁵ In May, 2008, a jury in the U.S. District Court for the Northern District of Ohio found Mr. Geisen guilty in a parallel criminal case. LBP-09-24, 70 NRC __ (slip op. at 7 n.13). The court sentenced Mr. Geisen to three years' probation, and also prohibited him from employment in the nuclear industry during the period of probation (ending May 1, 2011). *Id.* At Mr. Geisen's sentencing hearing, Judge Katz indicated that, if the NRC adjudication found in Mr. Geisen's favor, the court would be open to reconsidering the employment ban. See Transcript of Criminal Case Sentencing at 30:4-16 (May 1, 2008)(appended to Geisen Answer as Attachment 1). After the Board majority ruled in Mr. Geisen's favor, Mr. Geisen's counsel notified the court that he would request the federal ban be lifted if we do not stay the effectiveness of the Board's ruling. See Letter from R. Hibey to the Honorable David A. Katz (appended to Stay Application as Attachment 1).

⁶ Stay Application at 7.

⁷ *Id.*

addition, that the district court will agree to lift the employment ban it imposed as part of Mr. Geisen's sentence is neither certain nor imminent.⁸

The Staff argues that we have "left open the possibility" that an overwhelming showing of likelihood on the merits can overcome a "weak showing" of irreparable harm.⁹ Even if this were so, we are unable to find that the Staff has demonstrated with "virtual certainty" that it will prevail on the merits of its petition for review.¹⁰ The parties' appellate briefs highlight a number of sharply contested legal and factual determinations, and are underlain by carefully crafted, lengthy and detailed opinions by the Board majority and Chief Judge Hawkens.

Consideration of the remaining stay factors does not tip the balance in the Staff's favor. The Staff says little regarding the potential harm to Mr. Geisen if a stay is granted, observing only that, as long as Mr. Geisen remains under the district court's three-year debarment, a stay will not result in substantial harm to him.¹¹ However, as Mr. Geisen points out, a stay of effectiveness of the Board's order would preclude him from petitioning the district court for relief from a condition of his sentence.¹² In our view, this factor weighs in Mr. Geisen's favor. Finally,

⁸ See Transcript of Criminal Case Sentencing at 30:5-13 ("if Mr. Geisen, for instance, were to be reinstated by the NRC and had the opportunity for reemployment ... [the Court would] hold a hearing to consider that ... request.").

⁹ Stay Application at 8-9 (citing *U.S. Department of Energy (High-Level Waste Repository)*, CLI-05-27, 62 NRC 715, 719 (2005); *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma, Site)*, CLI-94-9, 40 NRC 1, 7 (1994)).

¹⁰ See *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 7 (citing *Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, ALAB-928, 31 NRC 263, 269 (1990)).

¹¹ Stay Application at 9.

¹² Geisen Answer at 4 n.7. The Staff counters that, if a stay is not granted and Mr. Geisen seeks reconsideration of his sentence based on the Initial Decision, the outcome of reconsideration is uncertain, thus detracting from a finding that Mr. Geisen would be harmed. Stay Application at 9 n.31. But this observation serves principally to counteract the Staff's argument, discussed *supra*, that it would be immediately and irreparably injured by allowing Mr. (continued. . .)

with respect to where the public interest lies, we agree with the Staff that it is unquestionably in the public interest to ensure that NRC regulations are followed. Even assuming this factor weighs in favor of the Staff, however, it does not outweigh our determinations with respect to the other three factors.

The Staff's Stay Application is *denied*.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of November, 2009.

(. . .continued)

Geisen to use the Initial Decision to seek relief before the District Court.