



Geisen Sanctions Set Aside

I. Introduction

On August 28, 2009, a three-member panel of the Atomic Safety and Licensing Board set aside, in a 2-1 decision, an Enforcement Order against David Geisen, a former employee of the Davis-Besse Nuclear Power Station (“Davis-Besse”) owned and operated by First Energy Nuclear Operating Company (“FENOC” or “Licensee”).¹ A majority of the Licensing Board held that the Nuclear Regulatory Commission (“NRC”) Staff failed to show by a preponderance of the evidence that Mr. Geisen engaged in the deliberate misrepresentation with which he was charged.

II. Background

In 2001, the NRC became aware of a new aging mechanism, circumferential cracking of stainless steel control rod drive mechanism nozzles. Subsequently, the NRC required all highly susceptible reactors, including Davis-Besse, to report on their plant’s susceptibility to cracking, steps they had taken to detect it, and their plans for addressing the problem in the future. FENOC made a series of written responses to the NRC, upon which the NRC based its decision to allow Davis-Besse to remain in operation until its next refueling outage, several months after the deadline for action. It was later discovered that all six inches of the head’s carbon steel thickness had degraded, leaving just a quarter inch of stainless steel between the coolant pressure and the outside of the reactor head. Based on its investigation, the NRC Staff’s Office of Investigations (“OI”) concluded that FENOC’s submissions were materially incomplete and inaccurate.

On January 2, 2006, the NRC Staff issued an Enforcement Order, charging Mr. Geisen with engaging in deliberate misconduct by contributing to the submission of information to the NRC that he knew to be materially incomplete and inaccurate, in violation of 10 C.F.R. § 50.5(a)(2). Under the order, Mr. Geisen was barred from involvement in all NRC-licensed activities for five years. Further administrative proceedings were stayed pending resolution of a criminal case against Mr. Geisen. After Mr. Geisen’s criminal conviction, he requested that the NRC proceedings be reactivated. The parties stipulated that certain statements made by FENOC and Mr. Geisen regarding the Davis-Besse reactor were false. The issue for the Licensing Board was whether Mr. Geisen’s contributions to these statements were made with a “deliberate” and “knowing” state of mind.

III. Discussion

A. The Board’s Decision

The Licensing Board set out the standard for “deliberate” and “knowing” as follows:

¹ *In the matter of David Geisen, LBP-09-24, ___ NRC ___ (Aug. 28, 2009).*

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Fundamental to our decision today is the concept that . . . ‘knowledge’ does not necessarily follow from simply previous exposure to individual facts . . . [I]t is not just the absorption of the key facts that is in issue. Beyond knowing the existence of those facts, to be found liable for a knowing misrepresentation, Mr. Geisen has to know of their significance.

Under this framework, the Licensing Board determined that the NRC Staff failed to prove its allegations “by a preponderance of the evidence of the reliable, probative, and substantial evidence.” The NRC Staff is expected to appeal the Licensing Board’s decision.

Mr. Geisen argued, and the Licensing Board majority agreed, that the NRC Staff’s arguments benefited tremendously from hindsight. The NRC Staff issued the Enforcement Order three and a half years after the 2002 outage, after a lengthy and detailed investigation. The Licensing Board determined that, although false, Mr. Geisen’s statements to the NRC were “not contradictory to his then-understanding of the relevant situation and information.” The question at issue was not whether Mr. Geisen was good at his job, but whether he willfully and deliberately provided incomplete and inaccurate information to the NRC.

The Licensing Board also gave Mr. Geisen credit for events that demonstrated a lack of willfulness on his part. For example, when Mr. Geisen realized that some of the information he had provided was erroneous, he made an immediate attempt to correct the errors. Mr. Geisen also played an important role in the decision to use a novel cleaning “rover” in an inspection of the reactor vessel head. The Licensing Board determined that Mr. Geisen’s knowledge of the plans to use the rover constituted strong evidence of Mr. Geisen’s belief that the reactor head had been successfully cleaned. Finally, Mr. Geisen freely showed videotapes to NRC Staff personnel in November 2001 that contained footage suggesting that Mr. Geisen’s prior representations had been false. The Licensing Board found this supported Mr. Geisen’s assertion that he had not seen the videotapes previously, and that he did not know his statements were false at the time they were made.

B. Lessons

The Licensing Board decision demonstrates that an individual challenging an enforcement action will receive the benefit of the doubt under the preponderance standard. An OI report and an OI conclusion are certainly not dispositive in an administrative hearing.

The NRC’s administrative judges are independent of the NRC Staff, have the ability to be critical of the OI conclusions, and will be sensitive to and protective of the rights of individuals.

Ultimately, Mr. Geisen prevailed because the NRC Staff was unable to prove every element of its case by a preponderance of the evidence. The decision reaffirms that the burden is on the NRC Staff to thoroughly investigate, support, and ultimately prove charges.

The decision in this case does prove the efficacy (and the time and cost involved!) of challenging NRC enforcement actions. This case could also lead to further changes at the NRC. In particular, the Licensing Board in LBP-09-24 asks the Commission to explore how to balance the agency’s role in ensuring public safety with avoiding the result in the Geisen case – that is, a protracted process whereby the subject of an enforcement order had to endure nearly three quarters of a five-year ban from his chosen career before being exonerated.

C. Completeness and Accuracy: Best Practices

The underlying events also cause us to reflect on the day-to-day perils of regulatory compliance for plant management personnel. The circumstances that led to this protracted litigation suggest several lessons and guidelines for nuclear managers and plant personnel:

- * Hold yourself (and others) to the highest standards.
 - If you believe “completeness and accuracy” issues exist, consult with your management and licensing, and, if difficult or complex issues arise, with regulatory counsel.
 - If a “completeness and accuracy” issue is raised to you, investigate the issue thoroughly.
 - You are most vulnerable when outside your scope of expertise or when your involvement in an issue is peripheral.
 - Ignoring or concealing even the most minor issue is not acceptable.
- * There is no such thing as an innocuous signoff on a regulatory submittal.
 - Make sure the concurrence signoff sheet shows who is specifically responsible for the accuracy of a document.
 - Confirm that all concurrences are really necessary.
 - Read the document, understand it and how it affects your work, make sure you understand the issue, note any inaccuracies, and assure any questions you may have are answered.
- * Internal and external e-mails are forever.
 - Compose each e-mail carefully.
 - Note whether any action is required of you in e-mails you receive.
 - Discourage people from merely copying you on all issues.

- * Your notes on a document can show that you recognized that an issue existed, but no action was taken.
- * Oral statements made to the NRC at meetings, on phone calls, or otherwise, as well as presentation slides, must be as complete and accurate as formal written submittals.
 - Challenge every word on each slide.
 - Beware of last minute changes.
 - Preview everything that may potentially be shared with the NRC.
 - Extemporaneously answering a question can cause as much trouble as statements in a formal presentation.
 - Assure that others present (including consultants, vendors, attorneys, etc.) are aware they must affirmatively correct errors or omissions made by others at a meeting or bring the issue to your attention as soon as possible.
 - Consider committing to answer complex questions in writing rather than trying to respond on the spot.
- * Expediently evaluate information that is potentially incomplete and inaccurate for reportability and/or possible clarification and correction of the document.
 - Even if not formally reportable, let the NRC know of a material inaccuracy and document the correction to the NRC if not made in writing.
- Merely mentioning issues to the Resident Inspector or Project Manager will not necessarily resolve the matter.
- Assure that as new information develops, it is evaluated as to how it affects prior statements made to the regulator.
- * Always ask at internal meetings or informal technical exchanges “Is there anything else that I need to know?”
- * Be careful in interviews and discussions in using “we” to mean the company, in general, or others in the company because it includes you.
 - Be careful to note what you know, when you knew it, how you acquired the information and your specific role in the technical issue.
 - Confront what others may know and what information/reports you are relying upon. Always inquire if you do not understand an issue.
- * The NRC is not always right just because it initiates an enforcement action.
 - An OI Report is not disposition.
 - NRC must prove each element of its case.
 - NRC Administrative Law Judges are sensitive to and protective of the rights of individuals.

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