



Geisen Appeal Goes to the Commission

Introduction

On September 21, 2009, the Nuclear Regulatory Commission (“NRC”) Staff filed a petition seeking Commission review of the Atomic Safety and Licensing Board (“ASLB”) decision setting aside an Enforcement Order against David Geisen. Mr. Geisen is a former employee at the Davis-Besse Nuclear Power Plant owned and operated by First Energy Nuclear Operating Company (“FENOC”). The case involves a significant action by the NRC Staff, and the ASLB decision was a significant setback. On appeal, the NRC Staff argues that the ASLB relied on legal principles that are contrary to or without precedent and also asserts that the decision raises substantial questions of law, policy, and use of enforcement discretion that should be resolved by the Commission. In a reply brief from counsel, Mr. Geisen argues that the board adopted appropriate legal standards and that there is no basis for review of factual determinations.

Background

On January 2, 2006, based on a lengthy investigation, the NRC Staff issued an Enforcement Order to Mr. Geisen, charging him with engaging in deliberate misconduct by allowing the company to submit information to the NRC that he knew to be materially incomplete and inaccurate, in violation of 10 C.F.R. § 50.5. Under the order, Mr. Geisen was barred from involvement in all NRC-licensed activities for five years. Despite a criminal conviction on similar charges, Mr. Geisen continued to contest the civil Enforcement Order through the NRC’s administrative process. Mr. Geisen and the NRC Staff both stipulate that certain statements made by FENOC and Mr. Geisen regarding the Davis-Besse reactor were false. The issue for the NRC’s administrative board was whether Mr. Geisen’s contributions to these statements were made with a “deliberate” and “knowing” state of mind.

In a 2-1 decision, the ASLB concluded that Mr. Geisen did not have the requisite knowledge and set aside the Enforcement Order. The ASLB determined that the NRC Staff had failed to prove its allegations of misconduct “by a preponderance of the reliable, probative, and substantial evidence.” The ASLB majority observed that the NRC Staff’s arguments benefited tremendously from hindsight. The ASLB determined that, although false, Mr. Geisen’s statements to the NRC were “not contradictory to his then-understanding of the relevant situation and information.”

Discussion

A. Alleged “Five Factor” Test

In its appeal, the NRC Staff argues that the ASLB eschewed the preponderance of the evidence test in favor of a standard far higher than “more likely than not.” The petition for review refers to the ASLB’s standard as a new, albeit implied, “Five Factor” test for establishing the knowledge element of the deliberate misconduct rule:

CHARLOTTE

CHICAGO

GENEVA

HONG KONG

LONDON

LOS ANGELES

MOSCOW

NEW YORK

NEWARK

PARIS

SAN FRANCISCO

WASHINGTON, D.C.

1. The wrongdoer must be an expert in the particular matter at issue;
2. The wrongdoer must not be busy with other important matters during any relevant time period;
3. The matter at issue must be within the wrongdoer's job description and permanently assigned duties;
4. The wrongdoer must not only read written communications concerning the matter at issue, but must also act upon or otherwise respond positively to the communication in a way that conforms to the Majority's "Knowledge Hierarchy;" and
5. The wrongdoer must have knowledge of not only the content of any relevant document, but also its context and implications.

According to NRC Staff, the Five Factor test would erode the NRC's enforcement program by excusing deliberate action if an individual is "busy" with other important matters.

The NRC Staff objects to various specific elements of the ASLB's fact finding relative to the factors. For example, the NRC Staff argues that the ASLB rationalized Mr. Geisen's behavior and ignored portions of the record that render such rationalizations implausible. The NRC Staff also argues that the ASLB let Mr. Geisen off the hook because another manager may have had greater responsibility. This principle would, according to the NRC Staff, prevent the Commission from ever holding a knowledgeable individual accountable if that individual could show that someone else had a greater responsibility.

According to Mr. Geisen, the Five Factor test is a straw man with no basis in the ASLB decision. To the extent that the Board discussed any of the five factors enumerated by the NRC Staff, it was in support of specific assessments of the record and findings of fact. The decision ultimately turned on the NRC Staff's ability to demonstrate misconduct by a preponderance of evidence and, according to the reply, the ASLB's assessment was not "clearly erroneous." Mr. Geisen points out that the board's decision may be contrary to the NRC Staff's "entrenched institutional view," but that is not reversible error.

B. Circumstantial Evidence

The ASLB noted that the NRC Staff did not call a single witness able to testify to any willful or deliberate conduct by Mr. Geisen. The ASLB stated that:

We do not dispute that circumstantial evidence can be compelling. That principle should not, however, be allowed to obscure a salient observation, namely, that notwithstanding the extensive investigation that [the Office of Investigations] conducted of over thirty of Mr.

Geisen's co-workers at Davis-Besse – a number of whom ended up cooperating with the Government – not a single one was put on the stand to testify that he had observed Mr. Geisen engage in any conduct during the period in question, or heard him utter any words during the NRC interactions (or any concessions after the discovery of the corrosion cavity), that would have established a basis for finding that he had greater knowledge than he asserts he had.

The NRC Staff argues on appeal that the ASLB was wrong to afford more weight to the absence of direct evidence than to the totality of circumstantial evidence. The NRC Staff contends that, under NRC precedent, a case may be proven using either direct or circumstantial evidence, and that circumstantial evidence carries the same probative value as direct evidence.

Mr. Geisen maintains that the ASLB did review all of the evidence and draws a distinction between ignoring circumstantial evidence (what the NRC Staff claims that the ASLB did) and weighing circumstantial evidence alongside the lack of other evidence, circumstantial or otherwise (which Mr. Geisen argues that the ASLB did). And, according to Mr. Geisen, the NRC Staff's evidence actually supports the conclusion that Mr. Geisen was not aware of the severity of the underlying problems with the reactor head.

C. Collateral Estoppel

Following Mr. Geisen's criminal conviction, the NRC Staff requested that the ASLB adopt the doctrine of collateral estoppel to apply the guilty verdict to a parallel charge in the Enforcement Order. Mr. Geisen opposed application of collateral estoppel on the basis that the criminal conviction relied on a more expansive standard of guilt than that governing NRC proceedings.

Collateral estoppel is a form of "issue preclusion" designed to prevent the re-litigation of issues of law or fact. To apply collateral estoppel, four factors must be present: 1) the issue sought to be precluded must be the same as that involved in the prior action; 2) that issue must have been actually litigated; 3) it must have been determined by a valid and final judgment; and 4) that determination must have been essential to the prior judgment.

The ASLB found the first factor — identical issues — to be dispositive. Additionally, the ASLB stated that, to some extent, application of collateral estoppel is a discretionary matter. The ASLB therefore declined to apply collateral estoppel based on: 1) a pending appeal of the criminal conviction; 2) questions over the equivalence of the knowledge standard in the criminal case to the applicable standard in the administrative proceeding; and 3) the possibility that the jury verdict was internally inconsistent.

The NRC Staff concedes that the “deliberate ignorance” standard in the criminal trial is not coextensive with the “deliberate misconduct” standard governing NRC proceedings. Deliberate misconduct refers to an “intentional act or omission” that a person “knows” would cause a licensee to be in violation of an NRC rule. In other words, deliberate misconduct occurs only when a person is knowledgeable about information associated with his actions and willfully and deliberately acts in contradiction to that knowledge. The NRC Staff argues that the ASLB should have examined the record in the criminal case and found that a reasonable and rational jury would have concluded that Mr. Geisen knowingly, with actual knowledge, made false material statements to the NRC.

Conclusion

The ASLB majority took a pragmatic approach in evaluating Mr. Geisen’s role at Davis-Besse. The ASLB analyzed Mr. Geisen’s mindset through what it believed to be a reasonable interpretation of events. The NRC Staff on appeal points to its detailed, three-and-a-half year investigation and pulls tidbits from the extensive

record again attempting to make its case. Where the ASLB found inconsistencies in the record and in the NRC Staff’s arguments, the NRC Staff sees a clearly developed factual basis for the Enforcement Order. These disparate perspectives are frequently encountered in NRC enforcement matters — where the parties can become entrenched in their view of the facts over time. Ordinarily, the Commission on review will reverse an ASLB determination of facts only if the decision is clearly erroneous.

More broadly, the Geisen proceeding raises significant questions about the standards of misconduct that apply to NRC enforcement actions. The issues carry far beyond the Geisen proceeding. Any Commission action in this proceeding could have significant ramifications for future enforcement actions — in underscoring the NRC Staff’s burden of proof and thereby shaping Office of Investigation inquiries and the work of the NRC Staff in initiating and defending enforcement actions. The Commission decision will also further define the amount of discretion to be given to the agency’s administrative boards in the enforcement context.

If you have any questions about the matters discussed in this client briefing, please contact:

Washington, D.C.

David A. Repka	drepka@winston.com	(202) 282-5726
Rachel Miras-Wilson	rwilson@winston.com	(202) 282-5635

San Francisco

Tyson R. Smith	trsmith@winston.com	(415) 591-6847
----------------	--	----------------