U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 July 2009

CASE NO.: 2003-ERA-13

In the Matter of:

ANDREW SIEMASZKO,
Complainant

v.

FIRST ENERGY NUCLEAR OPERATING COMPANY,
Respondent

and

LERACH, COUGHLIN, STOI, GELLER, RUDMAN & ROBBINS, L.L.P,
Intervenor

DECISION & ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

Background

Procedural Background

On February 19, 2003, Complainant filed a complaint of retaliation under the employee protection provisions of the Energy Reorganization Act ("Act" or "ERA"), 42 U.S.C. § 5851, against his former employer, First Energy Nuclear Operating Company, Inc. ("FENOC"). A hearing before the undersigned was initially scheduled for October 7, 2003. On November 14, 2003, the complainant received notification that he was the target of an ongoing criminal investigation. An Order Staying Proceeding and Cancelling Hearing was issued on August 27, 2004 pending the resolution of that criminal investigation. On August 8, 2008 through August 22, 2008, a trial in the matter of *United States v. Andrew Siemaszko*, Case No. 3:06 CR 712 (N.D. Ohio) took place. Complainant was charged with five counts in violation of 18 U.S.C. §§ 1001 and 1002. On August 26, 2008, the jury found Complainant guilty of three of the five counts. The Complainant has appealed to the United States Court of Appeals for the Sixth Circuit.

On March 10, 2009, FENOC filed a Motion to Lift the Stay and for Summary Decision. On March 20, 2009, Complainant responded, through counsel, in opposition to lifting the stay

and requested an additional sixty (60) days to either respond to FENOC's Motion for Summary Decision or to withdrawal his claim. Following a telephone conference on the request, the undersigned, on March 30, 2009, issued an Order Continuing Stay and Extending Time for Response to Motion for Summary Decision. On June 3, 2009, Complainant filed his Opposition to Respondent's Motion for Summary Decision. On June 15, 2009, FENOC filed a Reply to Complainant's Opposition to Respondent's Motion for Summary Decision. No response was received from the complainant.

History

Complainant alleges that FENOC took adverse actions against him due to his protected activity in violation of the employee protection provisions of the ERA. In his complaint, he states that he engaged in various internal and external protected activities while employed with FENOC, including pressuring management to take steps to remove boric acid on the reactor vessel head and trying to convince management to take a conservative engineering approach to reactor coolant pump problems. Complainant alleges that due to his protected activity, he suffered a variety of adverse actions, including being removed from the Latent Issue Review Team and being terminated. The complainant was informed of his termination, by letter, on September 14, 2002. The letter stated that the complainant's work performance had been deficient and cited, *inter alia*, that Complainant's closeout of Condition Report 00-1037 was inaccurate and incomplete and that his "role in the preparation and review of the Company's responses to NRC Bulletin 2001-01 led to inaccurate of incomplete statements to the NRC." *Respondent's Motion to Lift the Stay and for Summary Decision, EX. 11*.

Complainant's role in the preparation and review of FENOC's responses to Nuclear Regulatory Commission ("NRC") Bulletin 2001-01, referenced in the termination letter, formed the basis of the criminal charges against him. On August 3, 2001, the NRC issued the Bulletin seeking information on the structural integrity of reactor pressure vessel head penetration nozzles due to concerns about the nozzles. The Bulletin requested information from FENOC regarding, *inter alia*, the extent of vessel head penetration nozzle leakage and cracking, and past and future inspections of the reactor pressure vessel head and vessel head penetration nozzles. The information was requested to assess the plant's compliance with NRC regulations and to guide future regulatory actions. FENOC responded to the request with Serial Letter ("SL") 2731, dated September 4, 2001. Thereafter, four SLs, containing supplemental information, were sent to the NRC by FENOC: SL 2735, dated October 17, 2001; SL 2741, dated October 30, 2001; SL 2744, dated October 30, 2001; and, SL 2745, dated November 1, 2001. The complainant and two others were indicted on five counts.[1] Generally, the complainant and the other two were indicted with preparing responses to the Bulletin as part of a scheme to ensure the plant's operation after December 31, 2001. The indictment cited that the scheme involved "making false and misleading statements and concealing material information about both the quality of past reactor vessel head inspections and the condition of the reactor vessel head." *Respondent's Motion to Lift the Stay and for Summary Decision, EX. 15*.

[1] *See* attached Summary of Charges

Parties' Contentions

FENOC argues that even if the complainant can establish a prima facie case, Complainant cannot recover under the Act as he deliberately violated both the ERA and the Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et. seq*., (collectively "the Acts"), without FENOC's direction to do so. 42 U.S.C. § 5851(g) states that the Act's employee protection provisions

> shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.

FENOC avers that Section 211(g) is invoked on both the basis of the undisputed facts of the case and through the doctrine of collateral estoppel.[2] FENOC states that collateral estoppel precludes re-litigation of whether Complainant deliberately violated the Acts as those matters were adjudicated in the criminal proceeding against Complainant. FENOC further states that if collateral estoppel is not applicable, summary decision is still proper because the undisputed facts demonstrate Complainant's violation of the Acts.

Complainant agrees that this court has the authority to apply collateral estoppel in this proceeding to dismiss the claim under 211(g).[3] However, unlike FENOC, Complainant argues that while permissible, the application of collateral estoppel is not appropriate. Specifically, Complainant states that the criminal charges are not the same as a finding that he violated the Acts and that the intent requirements under the criminal statutes and ERA are different. Complainant also objects to the entry of summary decision on the basis of the undisputed facts of the case.

The Law

Collateral Estoppel

Collateral estoppel applies when: (1) the same issue has been actually litigated and submitted for adjudication; (2) the issue was necessary to the outcome of the first case; and, (3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination. *Muino v. Florida Power & Light Co.*, ARB Nos. 06-092 and 06-143, ALJ Nos. 2006-ERA-2 and 8, slip op. at 10 (ARB April 2, 2008).

[2] Under Section 211(g), FENOC must show: (1) Complainant violated the ERA or AEA; (2) the violation was deliberate; and, (3) it did not direct Complainant to violate the ERA or AEA. *Hibler v. Exelon Generation Co., LLC*, ARB Case No. 05-035, ALJ Case No. 2009-ERA-9, slip op. at 20 (ARB March 30, 2006).

[3] *See Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 50 (3rd 1981); *Otherson v. Dep't of Justice, Immigration & Naturalization Serv.*, 711 F.2d 267, 271 (D.C. Cir. 1983).

Summary Judgment

Any party may move, with or without supporting affidavits, for summary decision on all or any part of a proceeding. 29 C.F.R. § 18.40(a). The Administrative Law Judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 29 C.F.R. § 18.40(d).[4]

The Administrative Review Board has offered specific guidance on the issue of summary decision. In *Reddy*, the Board announced the following procedure for adjudicating such motions:[5]

> Once the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Reddy* at 4-5.

The Board further emphasized that, in a summary decision ruling, the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 5. Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Id.*

Therefore, the Board has put forth a two-step burden-shifting process, whereby summary decision may only be granted if, given the parameters stated above, the moving party meets its burden AND the nonmoving party fails to meet its own. Conversely, if EITHER the moving party fails to meet its burden OR the nonmoving party succeeds in meeting its burden, summary decision must be denied.

Discussion of Facts and Law

Application of Collateral Estoppel

FENOC argues that Complainant's criminal conviction, for making false statements and concealing material information, demonstrates that the complainant deliberately violated the

[4] In *Reddy v. Medquist, Inc.*, No. 04-123 (September 30, 2005), the Administrative Review Board ("Board") elaborated on the meaning of "genuine issue of material fact." It stated, "[a] 'material fact' is one whose existence affects the outcome of the case. And a 'genuine issue' exists when the nonmoving party produces sufficient evidence of a material fact so that a fact-finder is required to resolve the parties' differing versions at trial. Sufficient evidence is any probative evidence." *Reddy* at 4.

[5] The Board noted that, because it reviews issues of law *de novo*, its procedure for reviewing a grant of summary decision is the same as the Administrative Law Judge would follow in ruling on the motion.

Acts.[6] Specifically, FENOC argues that the convictions show a deliberate violation of 10 C.F.R. §§ 50.5 and 50.9.[7]

The complainant was charged and convicted under 18 U.S.C. §§ 1001 and 1002. 18 U.S.C. § 1001 is satisfied when an individual:

> (a)… in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

18 U.S.C. § 1002 provides for a fine or imprisonment of an individual who:

> knowingly and with intent to defraud the Unites States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money….

The parties to the criminal trial agreed that the NRC is within the jurisdiction of the executive branch of the federal government and I take judicial notice of the same. Criminal Trial Tr. 2155:6-8.

In the criminal trial, the complainant was found guilty of three of the counts charged against him. Specifically, the jury found the complainant did "knowingly and willfully conceal and cover up, and cause to be concealed and covered up" material facts, and did "knowingly and willfully make, use, and cause others to make and use a false writing" containing fraudulent material statements. When instructing the jury, the Honorable Senior Judge David A. Katz stated that an act is done "knowingly and willfully if it is done voluntarily and intentionally, and not because of a mistake or some other innocent reason." Criminal Trial Tr. 2155:1-2

To establish the affirmative defense under Section 211(g), FENOC must show by a preponderance of the evidence that: (1) Complainant violated the ERA or AEA; (2) the violation was deliberate; and, (3) it did not direct Complainant to violate the ERA or AEA. *Hibler v.*

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[6] FENOC argues that collateral estoppel precludes the re-litigation of two elements of 211(g) -- that the complainant violated the Acts and that the violation was deliberate.

[7] *See infra* page 7.
The regulations at 10 CFR Part 50 were promulgated by the NRC pursuant to the AEA and the ERA. 10 C.F.R. § 50.1. A violation of these regulations constitutes a violation of the AEA and the ERA. *Hibler v. Exelon Generation Co., LLC*, ARB Case No. 05-035, ALJ Case No. 2003-ERA-9, slip op. at 21 (ARB March 30, 2006); *Fields v. Florida. Power Corp.*, ARB No. 97-070, 96-ERA-22, slip. op. at 5 n. 9 (ARB Mar. 13, 1998), *aff'd sub nom, Fields v. U.S. Dep't of Labor*, 173 F.3d 811 (11th Cir. 1999).

Exelon Generation Co., LLC, ARB Case No. 05-035, ALJ Case No. 2009-ERA-9, slip op. at 20 (ARB March 30, 2006). In *Fields v. Florida Power Corp*., ARB No. 97-070, 96-ERA-22, slip. op. at 13 (ARB March 13, 1998), *aff'd sub nom, Fields v. U.S. Dep't of Labor*, 173 F.3d 811 (11th Cir. 1999), the Administrative Review Board defined "deliberately causes a violation" as requiring the employer to show "that a complainant willfully or recklessly caused a violation of the ERA or the Atomic Energy Act, that is, that the complainant acted with knowledge or with reckless disregard of whether his or her act would cause a violation." Reckless disregard is "[c]onscious indifference to the consequences (of an act)." BLACK'S LAW DICTIONARY 1021 (7th ed. 2000).

In the case *sub judice*, the complainant is not precluded from relitigating the issues under 211(g) as collateral estoppel is not applicable.

FENOC seeks to preclude litigation regarding whether the complainant "deliberately" violated the Acts. As previously stated, this requires finding that the complainant violated one of the Acts and that in doing so he "acted with knowledge or with reckless disregard of whether his or her act would cause a violation." *Fields v. Florida Power Corp.*, slip. op. at 13. In the criminal trial, the issue of whether Complainant "deliberately" violated either Act was neither actually litigated nor necessary to finding the Complainant guilty.

The issue in the criminal trial was whether the complainant knowingly and willfully concealed material information and made false statements. As Judge Katz explained the scienter requirements, the jury was charged with determining whether the complainant's acts of concealing material information and making false statements were done voluntarily and intentionally. Whether Complainant violated the Acts and whether Complainant knew he was violating the Acts or was acting with reckless regard as to the same was not submitted to the jury; neither was such a determination necessary to finding the complainant guilty under the federal criminal statutes. Judge Katz described the elements of each charge and none of the counts required the jury to find, for conviction, that in concealing material information and making false statements, Complainant was violating the Acts and either knew he was violating the Acts or was acting with reckless disregard as to a violation.[8]

[8] With respect to Count One, Judge Katz instructed the jury as follows:

> For you to find the defendant guilty of this crime, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt: First, that the defendant concealed a fact that he had a duty to disclose; Second, that the fact was material; Third, that the defendant concealed the fact by using a trick, scheme, or device; Fourth, that the defendant acted knowingly and willfully; and Fifth, the material fact related to a matter within the jurisdiction of the executive branch of the government of the United States. Criminal Trial Tr. 2155-2155:17-5.

With respect to Counts Two through Five, Judge Katz instructed the jury as follows:

> For you to find the defendant guilty of this crime, you must be convinced beyond a reasonable doubt that the government has proved each and every one of the following elements beyond a reasonable doubt. First, that the defendant made or used a false writing; Second, that the writing contained a statement that was false or fraudulent; Third, that the statement was material; Fourth, that the defendant acted knowingly and willfully and; Fifth, that the writing pertained to a matter within the jurisdiction of the executive branch of the United States. Criminal Trial Tr. 2156-2157: 17-5.

Furthermore, a finding that the complainant knowingly and willfully concealed material information and made false statements is not the same as finding Complainant "deliberately" violated the Acts. In the criminal trial, the jury had to determine whether Complainant intentionally and voluntarily concealed material information and made false statements. In other words, did the complainant know he was concealing information and making false statements and was his doing so of his own volition? This is not the equivalent of finding that Complainant "deliberately" violated the Acts as required by 211(g). While "deliberately causes a violation" is defined in *Fields* as "willfully and recklessly" causing a violation, "willfully," in this context, requires knowledge that the action engaged in will cause a violation of the Acts; willfully does not refer to the scienter of the action (i.e. concealing information or making false statements) which may lead to the violation.

Therefore, I do not find that the issues necessary to successfully raising a 211(g) affirmative defense are the same issues addressed in the criminal trial. Whether the complainant deliberately caused a violation of the Acts was neither litigated during the criminal trial nor necessary for finding the complainant guilty.

While the issue of whether Complainant engaged in a deliberate violation of the Acts may be litigated, the doctrine of collateral estoppel does prevent the Complainant from re-litigating the facts established at the criminal trial. *Chisholm v. Def. Logistics Agency*, 656 F.2d 42 (3rd Cir. 1981); *Otherson v. Dep't of Justice, Immigration & Naturalization Serv.*¸711 F.2d 267 (D.C. Cir. 1983). In short, Complainant cannot deny that he engaged in the actions for which he was convicted. The relevant question, therefore, becomes whether FENOC is entitled to summary decision based on those facts.

Violation of the Acts

As previously stated, Complainant was charged with five counts, and was found guilty on Counts 1, 2, and 5. Under Count 1, the government alleged nine specific acts. Under Count 2, five specific acts were alleged. Finally, Count 5 was based on one specific act. The jury was given unanimity instructions and a general verdict was rendered. Criminal Trial Tr. 2162:10-23. Given the aforementioned facts, it is not possible to determine which specific allegations the jury relied on in finding the complainant guilty of Counts 1 and 2. *See* attached Summary of Charges. These convictions establish, however, that the complainant did make false statements to the NRC, concerning the nature of the vessel head and previous vessel head inspections, and did make and cause others to use a false writing, namely SL 2735, which was submitted to the NRC.

It is possible to determine that in finding the complainant guilty of Count 5, the jury found the complainant did "knowingly and willfully" make, use, and cause others to make and use a false writing, sent to the NRC, which he knew contained the following fraudulent statement which was material: "During 10 RFO in spring of 1996, the entire head was visible so 100 percent of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head."[9] To find the Complainant guilty, the jury determined, beyond a reasonable doubt, that

[9] The writing referred to is SL 2745.

(1) the complainant made or used a false writing; (2) the writing contained a statement that was false and fraudulent; (3) the statement was material; (4) the complainant acted knowingly and willfully; and (5) the writing pertained to a matter within the jurisdiction of the executive branch of the United States. Criminal Trial Tr. 2156-2157:21-5.

Based on collateral estoppel, Complainant can not argue or attempt to re-litigate the truth of these findings. It is established that Complainant knowingly and willfully made and used a false writing, and caused others to do the same. More specifically, Complainant's input into SL 2745 included a statement, which Complainant knew was fraudulent, regarding the extent of the 1996 inspection, and the statement was material. The false statement was taken into account when calculating the probabilistic risk assessment included in SL 2745. SL 2745 was sent to the NRC on November 1, 2001.

The facts established from the Complainant's criminal conviction show that the Complainant has violated the Acts and that his actions placed FENOC in violation of the same. As previously stated, a violation of the regulations at 10 CFR Part 50 is a violation of the ERA and the AEA.

10 C.F.R. § 50.5 provides, in pertinent part, that any licensee or employee of a licensee:

> (a) …who knowingly provides to any licensee,…goods or services that relate to a licensee's or applicant's activities in this part, may not:
>
> > (1) Engage in deliberate misconduct that causes or would have caused, if not detected, a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission; or
> > (2) Deliberately submit to the NRC, a licensee,..., information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.[10]

10 C.F.R. § 50.9(a) requires that:

> (a) Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to

[10] 10 C.F.R. §50.5(c) states: For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:
(1) Would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation, of any license issued by the Commission; or
(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor.

> be maintained by the applicant or the licensee shall be complete and accurate in all material respects."

The criminal trial findings satisfy both 10 C.F.R. §§ 50.5(a)(2) and 50.9(a).[11] With respect to § 50.9(a), SL 2745, which contained and whose contents relied on Complainant's fraudulent statement, was sent to the NRC. The letter contained a false statement, which was material to the NRC, and therefore, the information was not "complete and accurate in all material respects" as required. With respect to § 50.5(a)(2), Complainant's criminal conviction of knowingly and willfully causing others to make and use a false writing, SL 2745, required finding that the Complainant was aware of the false statement regarding the extent of the 1996 inspection. Therefore, Complainant had knowledge of the inaccurate information as required by § 50.5(a)(2). Furthermore, it is established that the false statement was material to the NRC. Finally, the facts show that the complainant knew that the information he provided was to be submitted to FENOC and that SL 2745 was to be submitted to the NRC. It can therefore be concluded that the complainant deliberately submitted the false information.[12]

Deliberate Nature of Violation

For Complainant to have deliberately caused a violation of the Acts, he must have acted with knowledge or reckless disregard of whether his action would cause a violation. A finding of a deliberate violation does not require the complainant to "know the particular rule he is violating." *Fields*, slip op. at 11. Neither does such a finding require that the complainant acted with "'specific intent' to cause a violation." *Fields*, slip op. at *12.* In *Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2003-ERA-9, at 22 (ALJ Dec. 15, 2004), the administrative law judge found the complainant deliberately violated the Acts when he intentionally falsified inspection reports and there was credible testimony that the he "would have known of the regulatory requirements governing his job."

The facts of this case, as they presently stand, do not establish that the complainant knew that making a false statement regarding the extent of the 1996 inspection, which was included in SL 2745 and served as a basis for the probabilistic risk assessment contained therein, violated the Acts. The record does not contain an undisputed showing of fact that the complainant was even generally familiar with or generally aware of any regulatory requirements governing his job and the work he was performing.

The facts show, however, that the complainant did act with reckless disregard. Complainant was aware of the NRC's issuance of Bulletin 2001-01. He was familiar with the Bulletin's subject matter, purpose, and the response requested from FENOC. The complainant was assigned the task of providing the following information which was requested by the NRC:

[11] While the following discussion only addresses how the facts established by Complainant's criminal conviction on Count 5 constitute a violation of the Acts, the facts established by Complainant's criminal convictions on Counts 1 and 2 also appear to show a violation of the Acts.

[12] Deliberate is defined as "intentional; premeditated; fully considered." BLACK'S LAW DICTIONARY 349 (7th ed. 2000). Neither 10 C.F.R. § 50.5(c), defining "deliberate misconduct," nor *Fields*, defining "deliberately causes a violation" as set forth in 211(g), defines "deliberately" as used in 10 C.F.R. § 50.5(a)(2).

> a description of the VHP nozzle and RPV head inspections (type, scope, qualification requirements, and acceptance criteria) that have been performed at your plant(s) in the past 4 years, and the findings. Include a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the RPV head for visual examinations.

Respondent's Motion to Lift the Stay and for Summary Decision, EX. 3, NRC Bulletin 1(d).

Complainant knew that the false information he intentionally provided was part of larger response to an NRC information request. Therefore, Complainant knew that the false information was going to be incorporated into FENOC's official responses to the NRC, whether as stand alone information or as information relied on by others to perform the required assessments. Furthermore, based on the Bulletin, Complainant knew that the NRC was going to use the information provided to, *inter alia*, assess FENOC's compliance with NRC regulations and guide the development of additional regulatory actions. Therefore, Complainant knew that the NRC would rely on the information provided. Generally, knowingly providing false and inaccurate information and writings to a governing agency in response to an information request violates a regulatory requirement. In undertaking the above actions for which the complainant was convicted, he acted with reckless disregard as to whether he was violating the Acts.

Direction by FENOC

FENOC has shown that there is no genuine issue of material fact as to whether it or one of its agents directed the complainant to violate the Acts. FENOC has demonstrated an absence of evidence supporting a finding that the complainant was directed to violate the Acts, and the Complainant has failed, in response, to bring forth any evidence creating an issue of fact.

Furthermore, Complainant was convicted of "knowingly and willfully" concealing material information and making false statements. This required the jury to find that the Complainant acted *voluntarily* and intentionally in concealing material information and making false statements. Such a finding requires that Complainant acted out of his own volition, and not under the strict direction of FENOC.

Conclusion

In conclusion, I find that the complainant is collaterally estopped from re-litigating the facts established at the criminal trial. On the basis of these facts, FENOC is entitled to summary decision. There is no genuine issue of material fact and FENOC has established a valid Subsection 211(g) defense as a matter of law. As 211(g) is a complete bar to subsection (a)

relief, the Complainant has forfeited the protection of ERA protection provisions. Based on the foregoing, it is hereby ordered that Respondent's Motion for Summary Decision is GRANTED, and the complaint herein is DISMISSED.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).

SUMMARY OF CHARGES

COUNT 1

Complainant and others did knowingly and willfully cover conceal and cover up, and caused to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the U.S. government, to wit, the condition of Davis-Besse's reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head in violation of 18 U.S.C. §§ 1001, 1002.

a) On or about September 4, 2001, Complainant and others caused Serial Letter 2731 to be forwarded to the NRC. Complainant drafted portions of the letter. The defendants deliberately omitted critical facts concerning the inspections and limitations on accessibility. In addition, they also falsely stated that the inspections complied with the requirements of Davis-Besse's "Boric Acid Corrosion Control Program."
b) On or about October 17, 2001, Complainant and others approved Serial Letter 2735 with an attached table that falsely stated that there were 10 nozzles that had satisfactory visual inspections during 11 RFO, such that no video was required of the nozzles.
c) On or about October 17, 2001, Complainant and others caused Serial Letter 2735 to be forwarded to the NRC. The letter falsely represented that in the inspection during the 10th RFO (in 1996) the entire reactor pressure vessel head was inspected. Attached was a table prepared by the complainant, wherein it was falsely stated that the entire reactor pressure vessel head was inspected during the 10th RFO and that the video recording of that inspection was void of head orientation narration.
d) On or about October 30, 2001, Serial Letter 2741 was forwarded to the NRC. The letter repeated and expanded on representations made in Serial Letters 2731 and 2735 and included representations contained in a table prepared by the complainant, that the entire reactor vessel head was inspected during the 10th RFO and that the video of that inspection was void of head orientation narration.
e) On or about October 30, 2001, Complainant and others caused Serial Letter Number 2744 to be forwarded to the NRC. This submission included photographs taken from the videotapes of the inspections of the reactor vessel head, indicating that the photographs were "representative" of the condition of the reactor vessel head, but which omitted portions of the videos showing substantial deposits of boric acid.
f) On or about November 14, 2001, in Rockville, Maryland, Complainant, and other FENOC employees, met with NRC staff employees at NRC headquarters to discuss prior head inspections, among other things.

COUNT 2

On or before October 17, 2001, Complainant and others did knowingly and willfully make, use, and cause others to make and use a false writing, Serial Letter 2735, knowing that it contained the following material statements, which were fraudulent, in a matter within the jurisdiction of the executive branch of the U.S. government in violation of 18 U.S.C. §§ 1001, 1002:

a) "[d]uring 10 RFO, 65 out of 69 nozzles were viewed," whereas, the defendants knew that significantly fewer than 65 nozzles were viewed;
b) "[i]n 1996, during 10 RFO, the entire RPV head was inspected," whereas, the defendants knew that the entire head had not been inspected during the 10th refueling outage;
c) "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, the defendants knew the 10th refueling outage inspection video included head orientation narration;
d) "[t]he 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," whereas, defendants knew that areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and
e) "[f]ollowing 12 RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results," whereas defendants knew a substantial layer of boric acid remained, which would impede future inspections

COUNT 3

On or before October 30, 2001, Complainant and others did knowingly and willfully make, use, and cause others to make and use a false writing, Serial Letter 2741, knowing that it contained the following material statements, which were fraudulent, in a matter within the jurisdiction of the executive branch of the U.S. government in violation of 18 U.S.C. §§ 1001, 1002:

a) "[d]uring 10 RFO, 65 out of 69 nozzles were viewed," whereas, the defendants knew that significantly fewer than 65 nozzles were viewed;
b) "[i]n 1996, during 10 RFO, the entire RPV head was inspected," whereas, the defendants knew that the entire head had not been inspected during the 10th refueling outage;
c) "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, the defendants knew the 10th refueling outage inspection video included head orientation narration;
d) "[t]he 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," whereas, defendants knew that areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and
e) "[f]ollowing 12 RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results," whereas defendants knew a substantial layer of boric acid remained, which would impede future inspections

COUNT 4

On or before October 30, 2001, the complainant and others did knowingly and willfully make, use, and cause others to make and use a false writing, Serial Letter 2744, knowing that it

contained the following material statements, which were fraudulent, in a matter within the jurisdiction of the executive branch of the U.S. government in violation of 18 U.S.C. §§ 1001, 1002:

a) "[i]n 1996 during 10 RFO, 100% of nozzles were inspected by visual examination," whereas defendants knew that significantly fewer than 100 percent of the nozzles were inspected during the 10th refueling outage;
b) "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, the defendants knew the 10th refueling outage inspection video included head orientation narration;
c) "[t]he following pictures are representative of the head in the Spring 1996 Outage. The head was relatively clean and afforded a generally good inspection," whereas the defendants knew the pictures were not representative, the head was not relatively clean in 1996, and a good inspection was not completed;
d) "[b]ecause of its location on the head, [a pile of boric acid] could not be removed by mechanical cleaning but was verified to not be active or wet and therefore did not pose a threat to the head from a corrosion standpoint," whereas, the defendants knew no action had been taken in 1996 to verify whether the boric acid was active or wet and, thus, not a corrosion threat;
e) "these attached pictures are representative of the condition of the drives and the heads," during the inspection during the 11th refueling outage, whereas, the defendants knew the referenced pictures were not representative of that inspection; and
f) "[t]he photo for No. 19 depicts in the background the extent of the boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives," whereas the defendants knew other images from the 2000 inspection showed that the extent of boron buildup on the head was much greater than what was depicted in the photo of nozzle 19.

COUNT 5

On or before November 1, 2001, the Complainant and others did knowingly and willfully cause others to make and use a false writing, Serial Letter 2745, that contained the following material statements, which were fraudulent, in a matter within the jurisdiction of the executive branch of the U.S. government in violation of 18 U.S.C. §§ 1001, 1002:

a) "[d]uring 10 RFO, in spring of 1996, the entire head was visible so 100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head," whereas, the defendants know that many more than the center four nozzles were not inspected.