In the Matter of:

ANDREW J. SIEMASZKO, **ARB CASE NO. 09-123**

COMPLAINANT, **ALJ CASE NO. 2003-ERA-013**

v. **DATE: February 29, 2012**

FIRST ENERGY NUCLEAR OPERATING COMPANY INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Billie Pirner Garde, Esq., *Clifford & Garde, LLP,* Washington, District of Columbia

***For the Respondent*:**
Timothy P. Matthews and Charles B. Moldenhauer, Esqs., *Morgan, Lewis & Bockius LLP,* Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge,* Luis A. Corchado, *Administrative Appeals Judge,* and Joanne Royce, *Administrative Appeals Judge.* Judge Royce concurring.

ORDER OF REMAND[1]

[1] In this order, we cite to Siemaszko's Complaint as "Comp.," to Siemaszko's brief to the ARB as "Comp. Br.," to FirstEnergy's brief to the Board as "Resp. Br.," to FirstEnergy Nuclear Operating Company, Inc.'s Motion to Lift the Stay and for Summary Decision as "Motion," and to Siemaszko's Complainant's Opposition to Respondent's Motion to Dismiss as "Opp. to Motion."

Andrew Siemaszko filed a whistleblower complaint on February 15, 2003, alleging that the Respondent, FirstEnergy Nuclear Operating Company, Inc.,[2] fired him in violation of the employee protection provisions of the Energy Reorganization Act (ERA). 42 U.S.C.A. § 5851 (West 2007).[3] A United States Department of Labor (DOL) Administrative Law Judge (ALJ) granted FirstEnergy's motion for summary decision and dismissed Siemaszko's complaint, finding that Section 211(g) of the ERA barred his whistleblower claim, as a matter of law. [4] Decision and Order (D. & O.) at 10. For the following reasons we affirm in part, reverse in part, and remand.

PROCEDURAL HISTORY

On February 15, 2003, Siemaszko filed his complaint with the Occupational Safety and Health Administration (OSHA). After OSHA dismissed the complaint, Siemaszko requested a hearing before an ALJ. On November 14, 2003, Siemaszko learned that he was the subject of an ongoing criminal investigation. On August 27, 2004, the ALJ stayed this matter pending the criminal investigation. D. & O. at 1. On April 21, 2005, the NRC issued an Order prohibiting Siemaszko from being involved in NRC-licensed activities.[5] On January 19, 2006, a Grand Jury indicted Siemaszko on five criminal counts. Motion (Exhibit 15). On August 26, 2008, after a two-week trial, a jury convicted Siemaszko on three criminal counts. On March 10, 2009, FENOC moved for summary decision, asserting that Siemaszko was not entitled to protection

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[2] In this order, we refer to the Respondent as "FirstEnergy," relying on the Respondent's brief that there is no space between "First" and "Energy," but left the caption as originally designated.

[3] Congress has amended the ERA since Siemaszko filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). We need not decide whether the amendments would apply to this case, which was filed before their enactment date, because even if the amendments applied, they are not at issue in this case and thus would not affect our decision. The ERA's implementing regulations are found at 24 C.F.R. Part 24. The Department of Labor has amended these regulations since Siemaszko filed his complaint, but application of the amended regulations to this case would not affect its outcome. *See* 29 C.F.R. Part 24, 76 Fed. Reg. 2808 (Jan. 18, 2011) (effective August 10, 2007; implementing the provisions of the Energy Policy Act of 2005 and harmonizing procedures with those of other DOL-administered whistleblower regulations).

[4] 42 U.S.C.A. § 5851 (g) ("§ 211(g)") states: "Subsection (a) of this section 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. [42 U.S.C. § 2011 et seq.]."

[5] Motion, Exhibit 4.

under the ERA, as a matter of law. FirstEnergy argued that ERA § 211(g) provides that the ERA's whistleblower provision shall not apply to employees who, acting without direction from their employers, deliberately caused a violation of any requirement of the ERA or the AEA, as FirstEnergy alleged Siemaszko did in this case. Motion at 7. After full briefing, the ALJ granted summary decision on July 14, 2009, and Siemaszko appealed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (Board) to issue final agency decisions in cases arising under the ERA's employee protection provisions. Secretary's Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110 (2011).

The Board reviews an ALJ's grant of summary decision de novo.[6] The ALJ's standard for granting summary decision also governs the Board's review.[7] Summary decision is appropriate "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 a party is entitled to summary decision." 29 C.F.R. § 18.40(d) (2011). When the moving party focuses its motion on the complainant's ability to prove each element of his claim, it may prevail by pointing to the absence of evidence needed for one or more elements.[8] Similarly, where the issue is an affirmative defense, the moving party may prevail by pointing to the lack of sufficient evidence to raise a genuine issue of material fact and showing that it is entitled to judgment as a matter of law.[9] In opposing a motion for summary decision, the nonmoving party may not rest upon the mere allegations, speculation, or denials of his pleadings, but instead must set forth specific facts that could support a finding in its favor. *See* 29 C.F.R. § 18.40(c). In reviewing an ALJ's summary judgment decision, we do not weigh the evidence or determine the truth of the matters asserted.[10] The facts are viewed in the light most favorable to the nonmoving party.[11]

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6 *Hasan v. Southern Co., Inc.,* ARB No. 04-040, ALJ No. 2003-ERA-032, slip op. at 3 (ARB Mar. 29, 2005).

7 *Id.*

8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Hasan,* ARB No. 04-040, slip op. at 4.

9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985); *see Cunningham v. Tampa Elec. Co., Inc.*, No. 2002-ERA-024, slip op. at 3 (ALJ Dec. 18, 2002); *Martel Cosmetics Ltd. v. Int'l Beauty Exch. Inc.*, 2007 Westlaw 895697 at 24 (E.D.N.Y.) (unpublished) ("where the resolution of a claim requires the movant to prove a negative fact, the burden shifts to the non-movant").

10 *Anderson*, 477 U.S. at 249; *Hasan,* ARB No. 04-040, slip op. at 4.

BACKGROUND AND FACTUAL ALLEGATIONS

Allegations Related to Whistleblowing

Siemaszko's factual allegations of his protected activity are not the focus of the summary decision, but they provide necessary context. Siemaszko began working for FirstEnergy on July 6, 1999, as a Lead Nuclear Engineer. Comp. at 3. He worked at the David-Besse Nuclear Power Station (the "Plant"), a pressurized water reactor that FirstEnergy owned and operated. He alleges that, while he was becoming familiar with his job, he discovered that boric acid had been left on the top of the reactor pressure vessel (RPV) head since at least 1996. Comp. at 3. Siemaszko allegedly began activities that would enable him to remove and clean the boric acid and he prepared for Refueling Outage (RFO) 12, scheduled for February 2000. Comp. at 4-5. Siemaszko discovered that there were insufficient preventive maintenance requirements and procedures in place to meet NRC requirements. Comp. at 5.

After Peter Mainhardt issued Condition Report (C.R.)[12] 2000-0782, Siemaszko allegedly recommended to management that FirstEnergy immediately and aggressively act to address the conditions listed in the reports. Comp. at 5. Siemaszko alleged that C.R. 0782 had a mode restraint, which is an administrative tool that prohibits increasing the temperature in the reactor. Comp. at 6. On April 27, 2000, David Geisen prepared a C.R. that lifted the mode restraint on C.R. 0782. Motion, Exhibit 6. Geisen, a FENOC manager, wrote that C.R. 0782 addressed the concern of boron on the reactor vessel head and that it would be cleaned in a scheduled cleaning and that the C.R. could be removed from the mode restraint list. Motion, Exhibit 6 at 8. Allegedly, Geisen removed the mode restraint without Siemaszko's knowledge. Comp. at 6.

On April 18, 2000, Siemaszko issued C.R. 2000-1037. Comp. at 8. In that C.R., Siemaszko described that "[l]arge deposits of boron accumulated on the top of the insulation and on the Reactor Vessel Head," even describing them as "lava like." Motion, Exhibit 6. Siemaszko also recommended replacing gaskets. *Id.* He admittedly recognized that "nozzles as well as penetrations must be free of boron deposits" to perform required inspections, and he noted that there were areas that required cleaning. Motion, Exhibit 6 at 5. Siemaszko "recognized the dilemma of boric acid buildup on the reactor head and made it a personal goal to get it removed" and attempted to convince management to do so. Comp. at 19.

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[11] *Hasan,* ARB No. 04-040, slip op. at 4.

[12] The "Condition Report" (C.R.) system allowed employees to detail problems that were identified and make recommendations on Condition Reports. Comp. at 5.

On April 28, 2000, Siemaszko began cleaning the boric acid on the reactor head; the cleaning was performed under Siemaszko's direction and control. Comp. at 8. Siemaszko intended to continue cleaning the next day. At the end of the day, Siemaszko told management that more cleaning was required because there were "lava-like" boric acid deposits. Comp. at 9. The next day, April 29, 2000, Siemaszko's supervisor told him that cleaning could not be finished until the next refueling outage (RFO) and that they were satisfied with what he had done. Comp. at 9. Siemaszko disagreed with this decision. He made it clear to management that he was dissatisfied with the status of the boric acid cleaning efforts and that additional work was necessary. Comp. at 11. Management told him that he could clean it in RFO 13. Comp. at 11.

Siemaszko allegedly continued to try to find the source of the boric acid leaks and recommended more tests; management denied his requests. Comp. at 11. Siemaszko also recommended replacing the reactor head. Comp. at 11. Management rejected his recommendation. Comp. at 12. Between RFO 12 and 13, he allegedly continued to press the issue of cleaning the reactor head. Comp. at 19. Siemaszko was involved in interviews and discussions with the NRC about the corrosion. Comp. at 19.

In March 2001, Siemaszko made a presentation to the Plant Engineering Review Board in which he admittedly discussed RFO 13 issues including the need to complete the boric acid removal remaining from RFO 12, and he requested funding and assistance for the project. Comp. at 21.

On August 30, 2001, Siemaszko allegedly notified FirstEnergy that previous attempts to remove deposits performed during RFO 12 were unsuccessful because of the inadequate size of access holes. Comp. at 21. He alleges that management knew that the reactor head was not clean and needed cleaning, and did nothing. Comp. at 21-22.

The NRC Bulletin and FirstEnergy's Response Efforts

On August 3, 2001, the NRC issued NRC Bulletin 2001-01 (the "Bulletin") to specifically address concerns about nozzle stress cracking in RPV Heads, the type of reactor head at Davis-Besse. Comp. at 24.[13] The Bulletin stated that the discovery in February and April 2001 of "circumferential cracking" at another nuclear station raised "concerns about potential safety implications . . . ."[14] The Bulletin explained that the 2001 "circumferential

[13] See also Opp. to Motion at 9, 11; the Bulletin is located at Motion, Exhibit 3.

[14] See Motion, Exhibit 3, at 1. In opposing the Motion, Siemaszko expressly stated that he would refer to FENOC's exhibits rather than resubmit the same exhibits. See Opp. to Motion at 8 n.5. He specifically referred to a copy of the Bulletin submitted by FENOC. See Opp. to Motion at 11. The Bulletin was addressed to "[a]ll holders of operating licenses for pressurized water nuclear power reactors," which included David-Besse. *Id.* at 1.

cracking" discoveries led to the NRC staff "reassessing" previous conclusions about safety concerns and "question[ing] the adequacy of current visual examinations for detecting either axial or circumferential cracking in VHP nozzles."[15] All pressurized water reactors were divided into four categories relative to the level of NRC's concern. The Plant fell into the group with the second highest level of urgency, reactors with "high susceptibility" to nozzle stress cracking.[16] The NRC required all of the Bulletin's addressees to provide certain information "in order to determine whether any license should be modified, suspended, or revoked." Bulletin at 13. The NRC staff bypassed certain notice requirements for public comment on the Bulletin because it was asking for information on an "expedited basis for the purpose of assessing compliance with existing applicable regulatory requirements and the need for subsequent regulatory action." Bulletin at 14.

On August 6, 2001, FirstEnergy, through Goyal, assigned Siemaszko to work on the first draft response (Serial Letter 2731)[17] to the NRC's Bulletin. Comp. at 24; Opp. to Motion at 12, 22. Specifically, Siemaszko was asked to prepare a response to the following paragraph in the Bulletin:

> [A] description of the [vessel head penetration] 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.

Bulletin at 11, paragraph 1(d); Comp. at 24.

On August 9, 2001, Siemaszko sent a draft summary to Goyal and his supervisor, John Cunnings. Opp. to Motion at 12, Exhibit D. Unlike his alleged disclosures, the draft Siemaszko admits creating did not refer to any "lava like" flow of boron, but only to "some accumulation." He described the use of demineralized water to clean the head but not the use of bars to knock down chunks of boron.[18] He asserted that a "majority of the nozzles were inspected," a

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[15] FENOC's Motion, Exhibit 3 (Bulletin) at 4.

[16] See Opp. To Motion, Exhibit E at 4; Motion, Exhibit 3 (Bulletin) at 7 of 15; *U.S. v. Siemaszko*, 612 F.3d 450, 456 (6th Cir. 2010).

[17] Serial letters are submissions to the NRC submitted in response to information requests from the NRC. Opp. to Motion at 10-11.

[18] C.R. 1037 includes the reference to the demineralized water. The Sixth Circuit noted that Siemaszko did not report that bars were used to knock off chunks of boric acid deposits. *U.S. v.*

statement the NRC labeled as materially false. Comp. at 25. Finally, in his draft, he made no mention of the photographs that were taken. The NRC deemed Serial Letter 2731 insufficient as a response. *See* Motion at 7.[19]

Management allegedly edited out Siemaszko's qualifications and limitations on his report he submitted that were submitted to the NRC as Serial 2731 on September 4, 2001. Comp. at 25; Opp. to Motion at 12. The statement, as edited, creates an inaccurate impression that the head was completely cleaned. Comp. at 24.

Siemaszko admits that he worked on the supplemental response (dated October 17, 2001, Serial 2735) to the Bulletin. Comp. at 27. He signed the green sheet for Serial Letter 2735 on October 17, 2001. Opp. to Motion at 36. Siemaszko created a nozzle inspection table (Table) as an attachment to Serial Letter 2735. Opp. to Motion at 13, 27. He also drafted a footnote to that Table partly based on Geisen and Miller's dictation. Opp. to Motion at 13, 27, 37. The footnote to the table falsely stated that "100% of nozzles were inspected by visual examination" during the 10th RFO in 1996, and that "[s]ince the video was void [sic] of head orientation narration, each specific nozzle view could not be correlated by nozzle number." Opp. to Motion at 27.[20] The footnote also stated that four nozzles that did not have sufficient interference gap were excluded and that the remaining 65 nozzles did not show any evidence of leakage. Opp. to Motion at 27. Geisen and Miller allegedly dictated the information about the 1996 RFO to Siemaszko on October 17, 2001. Opp. to Motion at 27.

Allegedly, Miller later changed Siemaszko's footnote without Siemaszko's knowledge or consent. Opp. to Motion at 28. The footnote was changed to state that during the 1996 RFO, "the entire RPV head was inspected," and "[s]ince the video was void of head orientation narration, each specific nozzle view could not be correlated." Opp. to Motion at 28. The footnote, before and after Miller changed it, created the false impression that correlation was not possible.[21]

Siemaszko, 612 F.3d at 463. Siemaszko alleged in his complaint that when he was cleaning the reactor head on April 28, 2000, the workers used a crowbar to attempt to break up the hardened boric acid deposits at times. Comp. at 9.

[19] Following Serial Letter 2731, the NRC required FENOC to provide supplemental responses. *See also U.S. v. Siemaszko,* 612 F.3d at 458 ("the NRC notified the plant that SL 2731 was not entirely responsive to NRC 2001-01 and was insufficient to guarantee safe operation until RFO13.").

[20] *See also* the Indictment from the criminal trial. Motion, Exhibit 15 at 4.

[21] *U.S. v. Siemaszko,* 612 F.3d at 465-66. While Siemaszko argues that his statement that he could not correlate each nozzle from the RFO 10 because of lack of head orientation was true because he did not know how to accurately repeat the inspection, he admits that it was possible to do so, because a witness was able to do so at the criminal trial. Opp. to Motion at 17.

Siemaszko alleged that he did not take part in the drafting of Serial Letter 2745. Opp. to Motion at 42-43. But the draft apparently used the Table for reference. Opp. to Motion at 41. Siemaszko allegedly never saw Serial Letter 2745, and did not sign or review the green sheet for it. Opp. to Motion at 42.

On November 14, 2001, at a meeting with the Nuclear Reactor Regulation (NRR) at NRC headquarters, Siemaszko testified that "he had not seen any 'popcorn like' deposits on the nozzles that could be seen." Comp. at 26. At this meeting, the NRC staff expressly requested an "immediate shutdown" of the Plant due to suspected "Primary Boundary Leakage." Comp. at 27 n.12. FENOC responded by saying that the "NRR had an obligation to prove its accusation was true prior to FENOC taking any such drastic action, or litigation against the agency would ensue." *Id.*

Right before Christmas in 2001, FirstEnergy gave Siemaszko a $1,000.00 bonus. Opp. to Motion at 20.

On February 16, 2002, Davis-Besse shut down for RFO 13. Motion, Exhibit 15. During RFO 13, in late February 2002, Siemaszko allegedly finished cleaning the head and found the source of the leak – a hole. Comp. at 1, 12. Siemaszko believes that if FirstEnergy had allowed him to complete the cleaning during RFO 12, he would have found the hole two years earlier. Comp. at 9. He reported to management that there was a hole. Comp. at 1. Management initially praised him for his efforts in cleaning the head of the reactor vessel. Comp. at 1-2. However, management then removed him from responsibility and gave him a new assignment. Comp. at 1, 12.

Additional Protected Activity

At the new assignment, on July 10, 2002, Siemaszko issued a letter to his supervisor, John Cunnings, and RCP Project Manager Geisen, entitled "RCS Extent of condition recommendations." Comp. at 2, 15. Siemaszko recommended that FirstEnergy replace gaskets for all four reactor coolant pumps. Comp. at 15. Sometime between July 10, 2002, and August 20, 2002, Siemaszko began to suspect that management was no longer using him as the RCS Team Leader and that he had been pushed out. Comp. at 16. FirstEnergy removed him from his responsibilities in this position. Comp. at 16.

During the two months prior to his termination, Siemaszko allegedly engaged in protected activity when he tried to convince management to take a conservative engineering approach to a serious problem with the reactor coolant pumps. Comp. at 19.

On September 16, 2002, Siemaszko had a meeting to discuss the gasket issues he had found. At the meeting, Siemaszko allegedly confronted Jim Powers, Jr., the Director of Nuclear Engineering, regarding the alleged partial air pressure drop test and objected to and challenged

management's decision to reject and ignore the recommendations of the expert contractor and the system engineers involved in the RCP gasket review. Powers and Mike Stevens, Director of Work Management, recommended that only two gaskets be replaced. Comp. at 16.

At a September 18, 2002 meeting, FirstEnergy gave Siemaszko the choice of being fired or resigning, allegedly because of his involvement in the events surrounding the cleaning of the reactor head. Comp. at 16.

On January 19, 2009, it is undisputed that a Grand Jury indicted Siemaszko on five criminal counts. It is also undisputed that, on August 26, 2008, a jury convicted him on three of those five counts (Counts 1, 2, and 5). Count 1 of the indictment charged Siemaszko with violating 18 U.S.C. §§ 1001 and 1002 by:

> knowingly and willfully conceal[ing] and cover[ing] up, and caus[ing] to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the [NRC], to wit, the condition of Davis-Besse's [RPV] head, and the nature and findings of previous inspections of the [RPV] head.[22]

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[22] *U.S. v. Siemaszko*, 612 F.3d at 462. The Sixth Circuit Court's paraphrasing of the criminal counts contains no material variances from the actual indictment. See Motion, Exhibit 15 (Indictment) at 6. The counts under which Siemaszko was convicted (1, 2, and 5) state that he:

> Count 1. Knowingly and willfully concealed and covered up, and caused to be concealed and covered up, by various tricks, schemes and devices listed in Count 1 of the Indictment, material facts in a matter within the jurisdiction of the executive branch of the government of the United States, to wit, the condition of Davis-Besse's reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head,
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> Count 2. Knowingly and willfully made, and caused others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2735, knowing that it contained the following material statements, which were fraudulent in the manners listed in Count 2 of the Indictment, in a matter within the jurisdiction of the executive branch of the government of the United States, and
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> Count 5. Knowingly and willfully caused others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2745, that contained the statement: "[d]uring 10RFO, 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," which was

Count 2 charged Siemaszko with violating 18 U.S.C. §§ 1001 and 1002 by:

> knowingly and willfully mak[ing], us[ing], and caus[ing] others to make and use a false writing, that is, [SL 2735], knowing that it contained . . . material statements, which were fraudulent, to the NRC.[23]

Count 5 charged Siemaszko with violating 18 U.S.C. §§ 1001 and 1002 by:

> knowingly and willfully caus[ing] others to make and use a false writing, that is, [SL 2745], that contained . . . material statements, which were fraudulent," to the NRC.[24]

Siemaszko appealed his convictions and the Sixth Circuit Court of Appeals, in a published decision, affirmed the convictions on all three counts. [25] Geisen was also convicted on three counts.[26] The Sixth Circuit Court of Appeals also affirmed his convictions.[27]

DISCUSSION

Pursuant to 42 U.S.C.A. § 5851(a), employers governed by the ERA may not "discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.)." To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action taken against him. 42 U.S.C.A. § 5851(b)(3)(C). But resolution of the case before us turns on the

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> fraudulent because Siemaszko then well knew, many more than the center four nozzles were not inspected, in a matter within the jurisdiction of the executive branch of the government of the United States.

23 *U.S. v. Siemaszko,* 612 F.3d at 467. See *supra* n.14.

24 *U.S. v. Siemaszko,* 612 F.3d at 469. See *supra* n.14.

25 *U.S. v. Siemaszko,* 612 F.3d 450.

26 Both Siemaszko and Geisen were charged with the same five counts of making or causing others to make false statements to the NRC in connection with Serial Letters submitted by FENOC. Siemaszko was found guilty of Counts 1, 2, and 5. D. & O. at 7. Geisen was convicted of Counts 1, 3, and 4.

27 *U.S. v. Geisen,* 612 F.3d 471 (6th Cir. 2010).

interpretation and application of the "deliberate violations" provision contained in the ERA employee protection statute under which this case was filed. 42 U.S.C.A. § 5851 (g) ("§ 211(g)"). That provision provides as follows:

> Subsection (a) of this section 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. [42 U.S.C. § 2011 et seq.].

Section 211(g) operates as an affirmative defense to a complainant's whistleblower claim. Because it is an affirmative defense, FENOC carries the burden of proving that it applies.[28] FENOC argues that Siemaszko's conviction establishes the § 211(g) affirmative defense as a matter of law, requiring dismissal of this action. Siemaszko argues that the conviction did not resolve all the factual and legal issues required under § 211(g), specifically that he deliberately caused a violation of the ERA or AEA.

The ALJ found the criminal convictions did not resolve the exact issue in § 211(g), but they did resolve dispositive facts that established a violation of the ERA and AEA. The ALJ reasoned that the issue under § 211(g) was whether Siemaszko "deliberately violated the [ERA or AEA] Acts." D. & O. at 7. Elsewhere in his opinion, the ALJ wrote that "none of the counts required the jury to find" that the "Complainant was violating the Acts and either knew he was violating the Acts or was acting with reckless disregard as to a violation." *Id.* at 6. The ALJ found that "the Complainant is not precluded from relitigating the issues under § 211(g) as collateral estoppel is not applicable." *Id.* In contrast to the § 211(g) "issue," the ALJ found that the findings in the criminal conviction established certain "*facts"* which, in turn, established that Siemaszko violated the ERA and AEA. More specifically, the ALJ concluded that the jury findings established that Siemaszko acted with "reckless disregard" and violated 10 C.F.R. §§ 50.5(a)(2) and 50.9. D. & O. at 9. Finally, the ALJ found that there was no evidence that FENOC directed Siemaszko to commit these violations. The ALJ elaborated on this point by saying that the jury's findings "require[d] that Complainant acted out of his own volition, and not under the strict direction of FENOC." In essence, the ALJ found that the convictions combined with the undisputed evidence established FENOC's § 211(g) defense, as a matter of law, and he

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[28] 29 C.F.R. § 18.5(d)(2) ("Any respondent contesting any material fact alleged in a complaint, or contending that the amount of a proposed penalty or award is excessive or inappropriate or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing . . . [which] . . . shall include . . . [a] statement of the facts supporting each affirmative defense." *See Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000) (citing *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986) (it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages)).

dismissed Siemaszko's whistleblower cause of action. D. & O. at 7. We agree that the criminal conviction resolved two of the three elements required to establish the § 211(g) defense, but genuine issues of fact remain on the third element. Therefore, we remand this matter for further proceedings.

The § 211(g) Defense

Section 211(g) constitutes an affirmative defense to a whistleblower claim brought under the ERA or AEA (the Acts). In *Fields v. Florida Power Corp.,*[29] we explained that § 211(g) should be interpreted narrowly:

> As a remedial statute, the ERA should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived nuclear safety violations without fear of retaliation. *See generally, English v. General Elec. Co.*, 496 U.S. 72 (1990). *See also, Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws."). Since the ERA's remedial protection is to be interpreted broadly, any affirmative defenses logically should be interpreted narrowly so as to provide the act's protections to employees who work within the bounds of safety.

We thus review this case cognizant of the need to exercise caution in application of the § 211(g) affirmative defense to avoid undermining the broader remedial purpose of the statute. The applicability and impact of the § 211(g) defense must be analyzed case-by-case based on the specific facts of each case.

To establish a § 211(g) affirmative defense, FENOC must show: (1) Siemaszko caused a violation of the ERA or AEA; (2) the violation was deliberate and that (3) his conduct occurred without FENOC's direction.[30] In this case, the question is whether collateral estoppel bars the relitigation of any these elements.

When applicable, the doctrine of collateral estoppel prevents the relitigation of legal or factual issues. Those requirements are: (1) the same issue was actually litigated; (2) the issue

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[29] ARB No. 97-070, ALJ No. 1996-ERA-022, slip op. at 10 (ARB Mar. 13, 1998), *aff'd sub nom Fields v. U.S. Dept. of Labor Adm. Review Bd.*, 173 F.3d 811 (11th Cir. 1999) (per curiam).

[30] *Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2009-ERA-009, slip op. at 20 (ARB Mar. 30, 2006).

was necessary to the outcome of the first case; and (3) precluding litigation of the issue in the second case will not constitute basic unfairness to the party being bound by the first judgment.[31] Obviously, the record in the first litigation must be sufficiently examined where the final judgment in such case was a general guilty verdict.[32]

The ALJ correctly concludes that the jury in the criminal case did not address § 211(g) exactly as written. This may be why the ALJ determined that collateral estoppel did not preclude the relitigation of the § 211(g) defense. The ALJ then considered the impact of collateral estoppel on each element separately. Again, we agree with the ALJ that collateral estoppel bars relitigation of the first two elements, specifically that Siemaszko violated the Acts and that the violation was deliberate. It is undisputed that Siemaszko was convicted of three crimes. All of them constituted a violation of the ERA and AEA as a matter of law.[33] All of them unequivocally required proof that Siemaszko acted "knowingly" and "willfully." But we remand for further consideration on the third element of § 211(g), acting without direction.

A. First Element – Violation of the ERA or AEA

As we stated earlier, the first element in the § 211(g) defense requires proof that Siemaszko caused a violation of the ERA or AEA, either by committing the violation or causing someone else to commit the violation. Siemaszko admits he was convicted of three crimes on

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[31] *Muino v. Florida Power & Light Co.*, ARB Nos. 06-092, -143; ALJ Nos. 2006-ERA-002, -008; slip op. at 10 (ARB Apr. 2, 2008).

[32] *See, e.g., Chisholm v. Def. Logistics Agency*, 656 F.2d 42 (3d Cir. 1981), cited approvingly by the ALJ as well as both parties:

> A determination of which issues were litigated may not be immediately discernible when the antecedent criminal suit resulted in a general verdict of the jury or judgment of the court without special findings. See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951). Accordingly, the Supreme Court has held that when a prior criminal judgment is sought to be used as an estoppel, the court must examine the record of the criminal proceeding, including the pleadings, evidence, jury instructions and other relevant matters in order to determine specifically what issues were decided. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (collateral estoppel use of general verdict); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. at 569 (collateral estoppel use of verdict of guilty).

[33] General Verdict, *U.S. v. Siemaszko*, (N.D. Ohio) (No. 3:06cr712-03) (entered Aug. 26, 2008). FirstEnergy submitted a copy of this document to the ALJ as Exhibit 16 to its Motion for Summary Decision.

August 26, 2008. Comp. Br. at 6. Specifically, he was convicted on three counts of violating 18 U.S.C. §§ 1001 and 1002. He argues that the ALJ wrongly determined that these crimes were violations of the ERA or AEA. This argument is groundless.

Notwithstanding the general guilty verdicts, there is no question that Siemaszko was convicted of illegally misrepresenting to or concealing from the NRC material facts or illegally causing someone else to misrepresent or conceal such material facts. The Jury Instructions in the criminal case provided that (1) Count 1 charged Siemaszko of "knowingly and willfully concealing or causing to be concealed material facts from the NRC in violation of federal law" and (2) Counts 2 to 5 charged Siemaszko of "knowingly and willfully making or using or causing others to make or use a false writing, knowing it to contain fraudulent statements in violation of federal law." Comp. Br., Attachment 2 at 15 and 17. All three counts required a finding that the false or concealed information was "material." *Id.* These criminal elements applied regardless of which specific false or misleading fact formed the bases for a conviction.

The elements of these criminal charges paralleled all of the material components of 10 C.F.R. § 50.5(a)(2). That section essentially prohibits an "employee of a licensee" from "deliberately submit[ing] to the NRC" or "a licensee" information that such person "knows to be incomplete or inaccurate in some respect material to the NRC." Similarly, 10 C.F.R. § 50.9(a) requires that information be "complete and accurate in all material respects" whenever it is provided to the Commission by a licensee or whenever it is required by "statute or by the Commission's regulations, orders, or license conditions . . . ." As clearly indicated in 10 C.F.R. § 50.1, the NRC promulgated the regulations in Part 50 pursuant to the AEA and Title II of the ERA and individuals could be personally responsible for violations of § 50.5.[34] Consequently, it is clear that a violation of 10 C.F.R. §§ 50.5(a)(2) and 50.9(a) are also violations of the AEA and ERA, as a matter of law; therefore, Siemaszko's convictions satisfy the first element of the § 211(g) defense. The fact that the jury entered a general guilty verdict on three counts does not change the fact the indictment and jury instructions made it clear that a general verdict necessarily meant that the Siemaszko was convicted for illegally misleading the NRC or causing someone to illegally mislead the NRC. It is equally clear that each of the three convictions establishes, as a matter of law, the first element of the § 211(g) defense. We also find that the violation of the ERA and AEA was necessarily and fully litigated in the criminal trial and, therefore, barred from relitigation in this matter by collateral estoppel. In fact, in deciding Siemaszko's criminal appeal, the Sixth Circuit Court of Appeals expressly referred to 10 C.F.R. §§ 50.4(f) and 50.9(a). Our discussion below of the second element of the § 211(g) defense, deliberate conduct, sufficiently explains why we believe that the first element was necessarily and fairly decided in the criminal case.

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[34] *Fields*, ARB No. 97-070, slip op. at 5 n.9.

B. Second Element – Deliberate Violation

The second element of the § 211(g) defense requires proof that Siemaszko "deliberately" caused the violation of the Acts. We have previously ruled that "deliberate" includes an element of "willfulness" or "recklessness."[35] But we also made clear that it did not require a specific intent to cause a violation.[36] Again, in this case, we indicated that the Jury Instructions specifically required a finding of "knowing and willful" beyond a reasonable doubt to enter a "guilty" verdict. Consequently, the second element was actually and necessarily litigated for the jury to enter a guilty verdict.

After reviewing the criminal proceedings, we find no unfairness in precluding litigation of the first and second elements in the § 211(g) defense. We understand that Siemaszko maintains his innocence, but the question before us is whether he has had a fair and full opportunity to the litigate his claim of innocence in the deceptive and misleading letters written to the NRC about the dangerous boric acid accumulations at the Plant. We believe the record sufficiently demonstrates that he did. Procedurally, Siemaszko certainly received full due process: a grand jury, a two-week trial on the very issues contained in the first and second elements, reconsideration by the trial court, an appeal to the Sixth Circuit Court of Appeals, and legal representation throughout the criminal process. The appellate court engaged in a very thorough review of the criminal convictions and affirmed the convictions on all three counts, each of which could establish the first and second elements of the § 211(g) defense. The appellate court carefully focused on Siemaszko's work and responded to Siemaszko's claims that his written work was edited and that he was not responsible for the final letters submitted to the NRC. For example, it specifically focused on Siemaszko's August 9, 2001 draft response and identified several misleading and materially incomplete statements he made, including his downplaying of the boron accumulation from "lava-like" to "some accumulation," the overstated extent of the visual examinations of the nozzles, the missing reference to "red photographs," and that his August 9 draft referenced the use of demineralizing water but not the bars that were used to knock off chunks of boron deposits. The appellate court also found that there was sufficient evidence showing that Siemaszko was involved in the final submission of Serial Letter 2731, pertaining to the conviction on Count 1. Conviction on Count 1 is sufficient to establish the first and second elements of the § 211(g) defense.

As to counts 2 and 5, the Sixth Circuit Court adequately pointed out how Siemaszko's Table was materially misleading and how the Table and other evidence supported a conviction under these counts as well. Siemaszko argued in the criminal trial and here that he was not responsible for the misleading nature of the Table. The appellate court was convinced that there was sufficient evidence to show that Siemaszko "knew that the nozzle inspection table, which he prepared in draft form, concealed the incomplete nature of the prior inspections and the extent of

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[35] *Id.* at 12-13.

[36] *Id.*

boron accumulation, and that he did review the final document." *Siemaszko,* 612 F.3d at 467-78. The Table was a significant part of the Serial Letter 2735, a letter he helped draft, and Serial 2745. These two letters supported the convictions under Counts 2 and 5. The appellate court meticulously addressed many more of Siemaszko's claims of innocence and ignorance, ultimately pointing to incriminating evidence like the green sheet that Siemaszko signed, the map of the RPV head that Siemaszko had, and other "inconsistencies" and evidence that discredited Siemaszko's claims. *Siemaszko,* 612 F.3d at 465-468. All of this evidence was in stark contrast to the aggressive "whistleblowing" efforts Siemaszko allegedly engaged in during his 2000 efforts to clean the RPV of boric acid accumulations. The appellate court discussed the seriousness of the Bulletin and that the NRC clearly expected thorough and accurate information about previous RPV inspections and boric accumulation. The NRC was concerned about any inspections that did not involve seeing the "bare metal RPV head." The undisputed facts show that such "bare metal" inspection did not occur. The jury, the trial court, and the appellate court all found that there was sufficient evidence that Siemaszko was guilty of deliberately participating in the efforts to deceive the NRC, not simply "recklessly" as the ALJ found. The arguments Siemaszko raised under the first and second elements of the § 211(g) defense are the same arguments and factual issues resolved in the criminal trial. Consequently, we find that the first and second elements are established as a matter of law based on the undisputed facts and collateral estoppel. The remaining question is whether the third element was established as a matter of law.

C. Third Element - Acting Without Employer Direction

The third element of the § 211(g) affirmative defense requires proof that Siemaszko acted without FENOC's direction. The phrase "without direction" is not defined or further discussed in the ERA regulations, but we have discussed this phrase in previous cases. We recognized that "direction" could be expressed or implied.[37] We have held that the "mere presence" of a supervisor during the illegal conduct is not enough.[38] Negligent management oversight may not

[37] *Fields*, ARB No. 97-070, slip op. at 10. In *Fields*, three complainants alleged they engaged in protected activity when they conducted unauthorized tests on a nuclear reactor for the purpose of demonstrating safety concerns they felt had not been adequately addressed. The NRC later found that the complainants' actions in conducting the tests constituted a violation of 10 C.F.R. § 50. The respondent asserted a § 211(g) affirmative defense alleging that complainants deliberately violated the Acts without its direction. After finding that the respondent did not explicitly direct complainants to conduct the tests, the Board examined whether there was sufficient evidence of indirect pressure or acquiescence by the employer to support the complainants' claim that they were acting under the "implied authority" of the respondent. The Board found no such acquiescence or implied authority and dismissed the case based upon § 211(g).

[38] *Dotson v. Anderson Heating & Cooling, Inc.*, ALJ No. 1995-CAA-011 (Oct. 2, 1995), *adopted in Dotson v. Anderson Heating & Cooling, Inc.*, No. 1995-CAA-011 (ARB July 17, 1996) (interpreting a similar provision under the CAA).

be enough.[39] In keeping with the liberal application of whistleblower protections, we find that the overriding consideration is whether the employer was sufficiently involved such that a reasonable factfinder could conclude that there was expressed or implied "direction" or "pressure" on the complainant to commit the acts that led to the violation of the ERA or AEA.[40] As the Secretary has previously reasoned, "[h]aving violated the acts, Respondent would in effect gain a windfall as a result of Complainant's" misconduct and the public safety purposes of the statute would be undermined.[41]

In this case, the ALJ found that FENOC demonstrated an absence of evidence supporting a finding that Siemaszko was directed to violate the Acts. D. & O. at 10. Without discussing any of the parties' evidentiary submissions, the ALJ simply stated that Siemaszko "failed, in response, to bring forth any evidence creating an issue of fact." D. & O. at 10. The ALJ also concluded that a conviction for "knowingly and willfully" concealing material information meant Siemaszko acted "voluntarily" and therefore "without specific direction of FENOC." D. & O. at 10. We disagree with both of the ALJ's findings on the third element.

As the moving party, FirstEnergy failed to demonstrate that there was no genuine issue of material fact on this question. There was ample evidence in the record to raise a genuine issue of material fact as to whether FirstEnergy directed Siemaszko to violate the Acts. First, Siemaszko's supervisor (Geisen) was convicted of participating in the same criminal fraud committed against the NRC in drafting FENOC's responses to the Bulletin. In fact, a team of FENOC employees were indicted, convicted, or signed a deferred prosecution agreement relating to FENOC's responses to the NRC Bulletin.[42] Second, it is undisputed that Siemaszko prepared initial drafts and/or assisted in drafting responses (Serial Letters 2731 and 2735) to the Bulletin upon FENOC's request. Third, there is an overwhelming amount of evidence in the record supporting the inference that FENOC and its employees operated with the singular goal of keeping the Plant open through December 31, 2001. As previously discussed, the Bulletin made

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39 *Fields*, ARB No. 97-070 (the alarms had gone off and been ignored previous times).

40 *See, e.g., Rose v. Secretary of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (The purpose of the statute is to avoid a nuclear catastrophe by encouraging employees in the nuclear power industry to report perceived safety violations in good faith without fear of retribution or retaliation.); *Willy v. The Coastal Corp.*, No. 1985-CAA-001, slip op. at 13 (Sec'y June 1, 1994) (The central purpose of the environmental whistleblower law is to protect whistleblowers and in so doing to protect public health and safety.).

41 *Willy*, No. 1985-CAA-001, slip op. at 14.

42 Specifically, the team included the following, among others: Goyal, Geisen, Cook, and three other David-Besse employees. See *U.S. v. Siemaszko*, 612 F.3d at 460.

it clear that a December 31, 2001 shutdown was a real threat.[43] The Serial Letters to the NRC were obviously written to avoid such a shut down. FENOC's goal to avoid a shut down became very clear during a November 14, 2001 meeting at the NRC's office where the NRR staff stated that FENOC knew it was "operating with a primary boundary leakage" and that FENOC "should shut down [the Plant] and find that leak."[44] Comp. at 27 n.12. FENOC responded by saying that the "NRR had an obligation to prove its accusation was true prior to FENOC taking any such drastic action, or litigation against the agency would ensue." *Id.*

Siemaszko certainly presented evidence that his entire management chain was familiar with the extent of boric acid on the reactor head during the relevant time frame because of his own repeated efforts to get management to address the problem.[45] Such evidence would clearly be relevant to establishing whether there was any effort by FENOC management to misrepresent this knowledge to the NRC. Siemaszko further submitted evidence that all of the Serial Letters were subject to an interactive process of review, revision, and editing by a number of individuals,[46] many of whom were his superiors and/or supervisors.[47] Goyal admitted misleading the NRC because he feared he would lose his job otherwise.[48] Siemaszko submitted additional evidence to prove that information forming the basis of his indictment was dictated to him by two of his supervisors for inclusion in the Serial Letter.[49]

The record contains additional circumstantial evidence raising genuine factual issues as to whether Siemaszko acted under FENOC's direction. A document purporting to reflect the notes of OSHA investigator Eric Calhoun's interview with Siemaszko on April 30, 2003,

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[43] Bulletin at 13 ("In accordance with 10 C.F.R. § 50.54(f), in order to determine whether any license should be modified, suspended, or revoked, each addressee is required to respond as described below."). Motion, Exhibit 3.

[44] In fact, the shutdown and inspection of the Plant in February 2002 proved the NRR correct. It is undisputed that a large hole was found in the RPV at that time.

[45] Opp. to Motion at 23-24. As indicated earlier, Siemaszko submitted C.R.s relating to boric acid on the reactor vessel head. Motion, Exhibit 6.

[46] There were sixteen signatories on each "Green Sheet" for the Serial Letters submitted to the NRC; Siemaszko's supervisor, Geisen, was one of the sixteen on each green sheet while Siemaszko only signed the green sheet for serial letter 2735. Comp. Br., Attachment 1 at 17 "Atomic Safety and Licensing Board Initial Decision, *In the Matter of David Geisen*, dated August 28, 2009."

[47] Opp. to Motion at 21-43.

[48] *Id.* at 10, 24, 36.

[49] *Id.* at 27-28.

indicates that Siemaszko told Calhoun that there was "pressure coming from supervisors to carry out the misinformation campaign."[50] Calhoun noted that "[t]his [wa]s consistent with the state of affairs Prasoon Goyal described to [him] in an earlier interview." *Id.* A hearing may demonstrate that Management pressure and direction caused the stark contrast between Siemaszko's aggressive concern over boric acid in the 2000 cleaning and his less than aggressive concern in the latter part of 2001. Given the evidence in the record raising genuine issues of material fact, the third element of the § 211(g) defense cannot be resolved by summary decision, but requires an evidentiary hearing where the ALJ can hear the testimony of witnesses and assess credibility on the issue of FENOC's involvement in Siemaszko's conduct.

We disagree with the ALJ's reasoning that Siemaszko's convictions necessarily meant that he acted without "strict direction" from FENOC. D. & O. at 10. First, the phrase "strict direction" does not appear in § 211(g), only the phrase "without direction." Moreover, there is no question that an employee can be convicted of knowingly and willfully following committing a crime, even if he engaged in conduct at the direction of his employer. There is nothing in the criminal conviction indicating that the jury had to make any finding as to whether FirstEnergy directed or caused Siemaszko to commit the acts that the jury found to be illegal. From the jury instructions, it appears that employer direction was not a relevant consideration in Siemaszko's culpability. Comp. Br., Attachment 2. Therefore, collateral estoppel and the criminal convictions are rejected as a basis for finding that the third element was established as a matter of law.

In sum, we affirm that the record establishes a deliberate law violation under § 211(g) of the ERA and AEA, as a matter of law, but we remand on the factual question of FENOC's role in Siemaszko's conduct. Specifically, an evidentiary hearing is required to determine whether Siemaszko acted without FENOC's direction. We leave it to the ALJ's discretion to decide whether to hold an evidentiary hearing on this issue alone or whether to address all issues in one final evidentiary hearing. Given the unresolved issue under § 211(g), we offer no opinion on the merits of Siemaszko's whistleblower claim or the significance of the § 211(g) defense.

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[50] Motion, Exhibit 12.

CONCLUSION

For the reasons discussed above, we affirm the ALJ's decision, in part, but ultimately reverse the decision granting FirstEnergy's motion for summary decision and dismissing this case. Accordingly we remand this case to the ALJ for further proceedings consistent with this decision.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Royce, Administrative Law Judge, concurring:

I concur with the basis upon which the majority remanded this case. I would remand for two additional reasons. First, unlike the majority, I believe the ALJ erred in his application of the collateral estoppel doctrine. Generally, the ALJ failed to recognize the difficulty of applying collateral estoppel in the context of a prior criminal trial where only a general verdict was issued. It is unclear from his decision whether he adequately reviewed the entire record of the criminal trial to assess whether the evidence underlying the criminal conviction could be directly applied to support a finding of a deliberate violation under § 211(g).

At first blush, it seems reasonable to assume that the findings under Siemaszko's 18 U.S.C. §§ 1001 and 1002 convictions would also satisfy the "deliberate violation" clause found in § 211(g). However, application of collateral estoppel is not so straightforward in cases, like this one, where the jury rendered only a general verdict in the prior conviction.[51] In such cases,

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[51] General Verdict, *U.S. v. Siemaszko,* (N.D. Ohio)(No. 3:06cr712-03) (entered Aug. 26, 2008). A copy of this document was submitted to the ALJ as Exhibit 16 to FirstEnergy's Motion for Summary Decision. The general verdict reads as follows:

> We, the jury, duly impaneled and sworn, find the defendant, Andrew Siemaszko
> On Count 1 of the indictment (concealing material information): Guilty
> On Count 2 of the indictment (false statements): Guilty
> On Count 5 of the indictment (false statements): Guilty

the particular issues of law and/or fact that formed the basis of the "guilty" verdict are not at all apparent on the face of the verdict. Consequently, certain procedural protections are necessary to insure proper application of the collateral estoppel doctrine. *Chisholm v. Def. Logistics Agency*, 656 F2d 42 (3d Cir. 1081) is instructive:

> The doctrine of collateral estoppel can only preclude relitigation of those issues actually litigated and decided in an earlier proceeding. A determination of which issues were litigated may not be immediately discernible when the antecedent criminal suit resulted in a general verdict of the jury or judgment of the court without special findings. Accordingly, the Supreme Court has held that when a prior criminal judgment is sought to be used as an estoppel, the court must examine the record of the criminal proceeding, including the pleadings, evidence, jury instructions and other relevant matters in order to determine specifically what issues were decided.[52]

The operative determination in applying collateral estoppel is identification of the common issues of law, fact, or both to determine exactly which issues may be appropriate for preclusive effect. The ALJ properly recognized that significant differences in issues of law between the two relevant cases precluded the application of collateral estoppel to those issues. He correctly stated that "none of the counts [in Siemaszko's criminal conviction] 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." D. & O. at 6. The ALJ further noted that "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." *Id.* at 7.

The ALJ correctly recognized that certain *claims* and issues of *law* conclusively determined at the criminal trial were different than those necessary to make out a § 211(g) defense. He was on thinner ice however when he attempted to apply *facts* established at the criminal trial to preclude relitigation of the facts necessary to establish a § 211(g) affirmative defense. Two of the three counts for which Siemaszko was convicted contained numerous separate alleged acts. Because the jury convicted Siemaszko on a general verdict, the ALJ correctly recognized "it is not possible to determine which specific allegations the jury relied on in finding the complainant guilty of Counts 1 and 2." D. & O. at 7. Because Count 5, for which

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52 656 F2d at 47-48 (citations and footnotes omitted); *see also Otherson v. Dept. of Justice, Immigration & Naturalization Serv.*, 711 F.2d 267, 274 (D.C. Cir 1983) (to determine whether to apply collateral estoppel to a general verdict, a trial judge must examine the record of the prior trial to see if the jury might have disbelieved some aspects of the acts charged).

Siemaszko was also convicted, contained a single allegation, the ALJ determined that it was possible to isolate findings of fact from that Count for purposes of collateral estoppel.[53]

The ALJ articulated the jury's findings with respect to Count 5 as follows: "(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." *Id.* at 8. With little analysis, the ALJ hastened to conclude that these "findings" likewise satisfied both 10 C.F.R. § 50.5 and § 50.9(a). *Id.* at 9. However, these were not basic facts established at the criminal trial but mixed issues of fact and law – containing standards of law not necessarily identical with those contained in the § 211(g) defense. The ALJ neither properly identified the factual and legal issues that would support a 10 C.F.R. § 50.5 violation, nor indicated where or how they were established in the previous trial.

After concluding that violations of the regulations at 10 C.F.R. Part 50 amount to a violation of the ERA and AEA for purposes of § 211(g), the ALJ proceeded to the issue of whether the violation was "deliberate" as required under § 211(g). Recognizing that the record contained no undisputed showing that Siemaszko knew he was violating the ERA, the ALJ nevertheless found support for a finding of "reckless disregard." The ALJ strung together the following ostensibly undisputed facts to support his ultimate determination that Siemaszko acted with reckless disregard as to whether he was violating the ERA:

> Complainant knew that the false information he intentionally provided was part of [a] 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.

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[53] *See supra* n.22.

D. & O. at 10.

I fail to see how these factual and legal conclusions may be derived from the jury's general verdict of "guilty" on Count 5.[54] Although the ALJ was clearly conversant with the record of Siemaszko's criminal trial, he supplies no references to the record or any other indication of how he determined that these "facts" had been resolved in the criminal trial or were otherwise undisputed. Certainly, the Complainant hotly disputes these assertions. Opp. to Motion at 8.

In sum, collateral estoppel may be used to bar relitigation of those issues of law or fact that were actually litigated and resolved in an earlier proceeding. But because only a general verdict was issued in Siemaszko's criminal conviction, it is difficult if not impossible to isolate exactly which issues were necessarily determined by the conviction. In such cases, *Chisholm,* cautioned that a careful review of the criminal proceedings must be undertaken for a tribunal to determine that: (1) the issue previously decided is identical to the issue before it; (2) the issue was actually litigated in the prior case and (3) the issue was necessary to the outcome of the first case. Particularly where, as in this case, the effect of collateral estoppel may deprive the litigant of independent statutory rights, the complainant is entitled to strict adherence to this process. As outlined above, the ALJ failed to demonstrate that certain of the issues of law and fact, which he employed to preclude relitigation below, were actually decided in Siemaszko's prior case.

I find support for this position in a related decision of the NRC Atomic Safety and Licensing Board (ASLB) regarding Siemaszko's co-defendant (and former superior) David Geisen.[55] Both Siemaszko and Geisen were charged with the same five counts of making or causing others to make false statements to the NRC in connection with Serial Letters submitted by FENOC. Siemaszko was found guilty of Counts 1, 2, and 5. D. & O. at 7. Geisen was convicted of Counts 1, 3, and 4.[56] Meanwhile, the NRC issued twin Enforcement Orders against Siemaszko and Geisen charging them each with engaging in deliberate misconduct by contributing to the submission of misinformation to the NRC in violation of 10 C.F.R. § 50.5(a)(2). Geisen appealed the NRC's Enforcement Order to the ASLB. The ASLB was thus faced with the same challenge as that before the ALJ in this case, namely whether to apply collateral estoppel principles between the criminal conviction under 18 U.S.C. § 1001 and administrative enforcement under 10 C.F.R. § 50.5(a)(2). The ASLB declined to apply collateral estoppel, held a five-day hearing, and issued a 145-page decision exonerating Geisen of violating 10 C.F.R. § 50.5 despite his earlier criminal conviction.

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[54] *See supra* n.51.

[55] Comp. Br., Attachment 1 at 5, 8 "Atomic Safety and Licensing Board Initial Decision, *In the Matter of David Geisen*, dated August 28, 2009" (*In re Geisen*).

[56] Both Siemaszko and Geisen were indicted on the same five counts. *See supra* n.26.

The ASLB recognized that the complexity of the issues and facts underlying the jury verdict in the criminal case raised a serious question as to whether the issues essential to the prior judgment were the same as those constituting the 10 C.F.R. § 50 violations before it.[57] As in the case before us, the ASLB was confronted with a general verdict in Geisen's prior conviction and thus was not able to ascertain the exact issues resolved from the face of the verdict. Acknowledging that the application of collateral estoppel under these conditions would require the ASLB to conduct a thorough examination of the evidence underlying Geisen's criminal conviction, the ASLB stated, "But performing such a duplicative examination is precisely what application of collateral estoppel is intended to prevent. If we must re-examine the issue one way or another, it makes more sense to do it on the evidence presented to us than on the evidence presented elsewhere."[58]

Given the complex and overlapping circumstances underlying Siemaszko's and Geisen's similar convictions, the fact that the ASLB, a technically sophisticated Board with expertise in the nuclear industry, acquitted Geisen, Siemaszko's superior, of willful violation of NRC regulations, underlines the need for caution when considering the application of collateral estoppel to bar Siemaszko's whistleblower claims.[59]

I would remand this case for an additional reason. The potential for misuse of § 211(g) convinces me of the need for further interpretation of the provision. We have noted that § 211(g) is ambiguous and there is scant legislative history to guide us in its interpretation.[60] But a literal reading of the statute is not only ambiguous, it is untenable. Under a strict reading of the "deliberate misconduct" clause of § 211(g), a relatively insignificant or technical violation of a procedural regulation under the Acts would deprive a whistleblower complainant of his cause of action as readily as the most intentional and egregious misconduct. This cannot be what Congress intended.

We have held that the plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intentions of its drafters."[61] In light of this principle, I would interpret a § 211(g)

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57 *In re Geisen* at 40, 48-49.

58 *Id.* at 50.

59 *Accord Chisholm*, 656 F.2d at 50 (reasonable doubt as to which issues were decided by a prior judgment should be resolved against using such judgment as an estoppel).

60 *See Fields*, ARB No. 97-070, slip op. at 10.

61 *McCafferty v. Centerior Energy*, ARB No. 96-144, ALJ No. 1996-ERA-006, slip op. at 6 (ARB Sept. 24, 1997) citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

defense consistent with the treatment of "after acquired evidence" as articulated by the Supreme Court in *McKennon v. Nashville Banner Pub. Co.*[62] Under such an interpretation, a finding of deliberate misconduct by a complainant under § 211(g), would not completely bar his retaliation cause of action but might affect any damages otherwise available.

In *McKennon*, the Supreme Court reversed the finding by the Court of Appeals that all relief should be denied to an employee discharged in violation of the ADEA (Age Discrimination in Employment Act of 1967), if the employer later discovers wrongful conduct that would have led to discharge if it had been discovered earlier.[63] The Supreme Court explained that, as part of a broad congressional effort to eliminate discrimination in the workplace, the ADEA contained the twofold goal of providing relief to victims of bias and, at the same time, deterring employers from engaging in discriminatory employment practices. The Court reasoned that a finding of discrimination against even a single employee vindicates the national policy objectives of the ADEA. And these objectives would be frustrated if after acquired evidence of wrongdoing that would have resulted in termination operated as a bar to all relief for an earlier violation of the Act. The Court concluded therefore that after acquired evidence of wrongdoing may be considered in fashioning appropriate relief but it does not operate to altogether bar suit.

The plain language of § 211(g) mandates denial of all relief under the whistleblower statute when a complainant is found to have violated *any* aspect of the ERA or AEA, however minor. In depriving a complainant of rights under the statute, the provision makes no distinction between the nature, timing, or degree of a complainant's violation and gives short shrift to the broader policy goal of promoting nuclear safety by deterring employer misconduct. The twin goals of the ERA whistleblower statute to protect whistleblowers and in so doing protect public health and safety would be frustrated if a whistleblower is deprived of a cause of action even where retaliation occurred – particularly if the "misconduct" of the complainant was relatively insignificant.[64] On the other hand, interpreting § 211(g) to affect damages but not liability would serve to deter abuse of whistleblower rights by private litigants but at the same time ensure the ERA's broader policy goal to promote nuclear safety.

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62 513 U.S. 352 (1995).

63 *Id*. at 355.

64 *Accord Willy*, No. 1985-CAA-001, slip op. at 12-14 (after acquired evidence of complainant's misconduct does not bar all relief under the whistleblower statute).

Accordingly, I would remand to the ALJ for a determination on the merits of Siemaszko's whistleblower claim. If Siemaszko is able to prove retaliation, the ALJ would then consider evidence of his misconduct in determining appropriate relief.

JOANNE ROYCE
Administrative Appeals Judge