

December 14, 2000

EA 00-086

Mr. Michael J. Sullivan, Director
Department of Veterans Affairs
Medical Center
University and Woodland Avenues
Philadelphia, Pennsylvania 19104

Subject: Order Imposing Civil Monetary Penalty - \$5,500

Dear Mr. Sullivan:

This refers to your letter, dated August 29, 2000, in response to the Notice of Violation and Proposed Imposition of Civil Penalty (Notice) sent to you by our letter, dated July 20, 2000. Our letter and Notice described a violation involving discrimination against a research nurse who was subjected to intolerable working conditions after contacting the NRC regarding safety concerns. The violation was classified at Severity Level III. A civil penalty in the amount of \$5,500 was proposed for the violation to emphasize the importance of continuously assuring a work environment that is free of any harassment, intimidation, or discrimination against those who raise safety concerns.

In your response, you denied the violation and requested withdrawal of the violation and rescission of the associated civil penalty. After consideration of your response, we have concluded, for the reasons given in the Appendix attached to the enclosed Order Imposing Civil Monetary Penalty, that you did not provide an adequate basis for the NRC to withdraw the violation or rescind the civil penalty. Therefore, a civil penalty in the amount of \$5,500 should be imposed.

Accordingly, we hereby serve the enclosed Order on the Philadelphia Department of Veterans Affairs Medical Center imposing a civil monetary penalty in the amount of \$5,500. Payment should be made within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, D.C. 20555.

Although you denied the violation, you described actions taken to ensure a climate at the facility where individuals feel free to raise safety concerns without fear of reprisal. We will review the effectiveness of your corrective actions during a subsequent inspection.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice", a copy of this letter and the enclosures will be made available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/NRC/ADAMS/index.html> (the Public Electronic Reading Room).

Sincerely,
/RA/

R.W. Borchardt, Director
Office of Enforcement

Docket No. 030-14526
License No. 37-00062-07

Enclosures:
As Stated

cc w/encls:
Commonwealth of Pennsylvania

DISTRIBUTION:

PUBLIC

SECY

CA

WTravers, EDO

CPaperiello, DEDMRS

FMiraglia, DEDR

RBorchardt, OE

BWestreich, OE

FDavis, OGC

DDambly, OGC

WKane, NMSS

DCool, NMSS

Enforcement Coordinators

RI, RII, RIII, RIV

BBeecher, GPA/PA

GCaputo, OI

PLohaus, STP

HBell, OIG

DScrenci, PAO-RI

NSheehan, PAO-RI

MShanbaky, RI

BFewell, RI

JNick, RI

LTremper, OC

G:\OECASES\00086order rev2.bcw.wpd

| OFFICE | RI:ES | RI:ORA | RI:DNMS | RI:RC | RI:RA |
|--------|----------------|------------------|----------------|------------------|------------------|
| NAME | JNick (JLN) | DHolody (DJH) | GPangburn(GCP) | BFewell (JFB) | HMiller(JTW for) |
| DATE | 10/04/00 | 10/16/00 | 10/13/00 | 10/17/00 | 10/17/00 |

| OFFICE | OGC | NMSS | OE | OE:DD | OE:D | |
|--------|----------|----------|------------|-----------|------------|--|
| NAME | MYoung | BSmith | BWestreich | JLuehman | BBorchardt | |
| DATE | 12/08/00 | 12/08/00 | 12/08/00 | 12/11 /00 | 12/14/00 | |

ENCLOSURE

UNITED STATES
NUCLEAR REGULATORY COMMISSION

| | | |
|---|---|-------------------------|
| In the Matter of |) | |
| |) | |
| Department of Veterans Affairs Medical Center |) | Docket No. 030-14526 |
| Philadelphia, Pennsylvania |) | License No. 37-00062-07 |
| |) | EA No. 00-086 |

ORDER IMPOSING A CIVIL MONETARY PENALTY

I

Philadelphia Department of Veterans Affairs Medical Center (PVAMC) (Licensee) is the holder of Byproduct Materials License No. 37-00062-07 (License) issued by the Nuclear Regulatory Commission (NRC or Commission) on January 16, 1979, and most recently renewed by the NRC on March 31, 1994 (to expire on March 31, 2004). The License authorizes the Licensee to possess and use certain byproduct materials in accordance with the conditions specified therein at its facility in Philadelphia, Pennsylvania.

II

On April 16, 1999, the U.S. Merit Systems Protection Board (MSPB) issued an initial decision (which became a final decision on May 21, 1999) finding that the PVAMC discriminated against a former research nurse at the facility for raising safety concerns. Specifically, the MSPB found, in part, that the former research nurse was subjected to intolerable working conditions for raising safety concerns. Based on this MSPB finding, the NRC concluded that there was a violation of NRC regulations at 10 CFR 30.7. As a result, a written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) in the amount of \$5,500 was served upon the Licensee by letter dated July 20, 2000. The Notice states the nature of the violation, the

Enclosure

provisions of the NRC requirement that the Licensee had violated, and the amount of the civil penalty proposed for the violation.

The Licensee responded to the Notice in a letter, dated August 29, 2000. In its response, the Licensee denied the violation and requested that the NRC withdraw the violation and rescind the associated civil penalty.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the staff does not believe that the Licensee has provided an adequate basis for withdrawal of the violation or for rescission of the associated civil penalty. Therefore, a civil penalty in the amount of \$5,500 should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, IT IS HEREBY ORDERED THAT:

The Licensee pay a civil penalty in the amount of \$5,500 within 30 days of the date of this Order, in accordance with NUREG/BR-0254. In addition, at the time of making the payment, the Licensee shall submit a statement indicating when and by what method payment was made, to the Director, Office of Enforcement, U.S. Nuclear Regulatory

Enclosure

Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738

V

The Licensee may request a hearing within 30 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and include a statement of good cause for the extension. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Associate General Counsel for Hearings, Enforcement and Administration at the same address, and to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, PA 19406.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order (or if written approval of an extension of time in which to request a hearing has not been granted), the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

- (a) whether the Licensee was in violation of the Commission's requirements as set forth in the Notice referenced in Section II above, and
- (b) whether, on the basis of such violation, this Order should be sustained.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

R. W. Borchardt, Director
Office of Enforcement

Dated this 14th day of December 2000

APPENDIX

EVALUATIONS AND CONCLUSION

On July 20, 2000, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) in the amount of \$5,500 was issued to the Licensee for a violation involving the discrimination of a research nurse for engaging in protected activities. The violation was based on the NRC review of the decision, dated April 16, 1999, of the U. S. Merit Systems Protection Board (MSPB). The MSPB had, in part, concluded that the research nurse was subjected to intolerable working conditions for raising safety concerns. Based on the MSPB finding and a predecisional enforcement conference (PEC) with PVAMC on May 17, 2000, the NRC concluded that the intolerable working conditions constituted discrimination against the research nurse for raising safety concerns.

The Licensee responded to the Notice in a letter, dated August 29, 2000. In its response, the Licensee denied that the violation occurred and requested that the NRC withdraw the violation and rescind the proposed civil penalty. The NRC's evaluation and conclusion regarding the Licensee's response are as follows:

1. Restatement of the Violation

10 CFR 30.7(a) states, in part, discrimination by a Commission Licensee against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in Section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

10 CFR 30.7(a)(1)(i) provides that protected activities include, but are not limited to, providing the Commission or his or her employer information about alleged violations of either the Atomic Energy Act or the Energy Reorganization Act named in 10 CFR 30.7(a) or possible violations of requirements imposed under either of those statutes.

Contrary to the above, between April 1997 and May 1998, a former research nurse was subjected to a hostile work environment for engaging in a protected activity. Specifically, after the individual raised (to the FDA in April 1997 and the NRC in June 1997) issues regarding the inadequacy of the human subjects consent forms used by the participants in a research study (as required by 10 CFR 35.6 and 10 CFR 35.7), she was isolated by her supervisor and there were significant negative changes to her working conditions.

Summary of the Licensee's Response

Appendix

The Licensee, in its response, denied that the violation occurred. In particular, the Licensee denied that a supervisor retaliated against the former research nurse by creating a hostile work environment because that employee identified safety issues.

While denying the creation of a hostile work environment for the former research nurse because she raised safety concerns, the licensee agreed that the working relationships and atmosphere in the clinical research laboratory were not optimal in 1997 and 1998. However, the Licensee contended that the nurse's raising of safety concerns did not contribute to this poor environment. In support of this contention, the Licensee responded to the specific examples that were used to describe the hostile work environment as listed in the NRC letter, dated July 20, 2000, transmitting the Notice. Specifically;

1. Threats of dismissal of the nurse by her supervisor - The Licensee noted that the supervisor denied that he threatened to dismiss the research nurse, although they had one conversation where he warned the nurse that one of the two nurses (under that individual's supervision) "may have to go" unless they could work together.
2. Isolation of the nurse from her supervisor - The Licensee noted that it was the supervisor's recollection that the research nurse voluntarily, without permission or request from her supervisor, moved her work space from her shared office to an exam room in late 1996 or early 1997. The Licensee also stated that it was the supervisor's contention that the research nurse kept the door closed and locked of her own volition, thus creating her own isolation from the staff.
3. Failure to include the nurse in work discussions - The Licensee noted that although the supervisor held unscheduled, informal morning meetings with the two nurses to discuss work and non-work related topics, the research nurse in question had informed the supervisor she did not want to participate in non-work related discussions. The Licensee also indicated that the supervisor had stated that the research nurse was not required to attend the meetings after her statement, but that she should have been able to hear the discussions if the doors to the offices were open. The Licensee concluded that the research nurse was not part of the work discussions because she chose to not attend those discussions.
4. Accusation of criminal activity by the nurse in May 1997 - The Licensee denied that criminal charges were filed against the research nurse. Rather, the Licensee contends that a preliminary police report was filed regarding missing files and the report stated that it was not clear if the files "had been taken by one of the employee (sic)" (the research nurse) who was on annual leave at the time the report was filed.
5. Insubordination during an FDA inspection - The Licensee agreed that the supervisor considered the research nurse's actions during the FDA audit (namely, volunteering information to the FDA auditors) as insubordination.

Appendix

However, the Licensee stated that the supervisor did not stop the nurse from talking about issues to the regulatory agencies. The Licensee further stated that no action (intimidation, threats, or impedance from making future disclosures) was taken against the research nurse after the FDA audit.

Principally for these reasons, the Licensee requested that the violation be withdrawn and the civil penalty be rescinded.

NRC's Evaluation of the Licensee's Response

The NRC has carefully reviewed the Licensee's response to the Notice of Violation and Proposed Imposition of Civil Penalty and has concluded after further review, including review of the MSPB finding, that the violation did occur as stated in the Notice in that the employee was subjected to a hostile work environment as a result of raising safety concerns. The Licensee did not provide any new or compelling information in its response to change the NRC's conclusion that the violation occurred.

In determining whether a hostile work environment existed, the NRC relied heavily on the MSPB finding in this area. The MSPB finding indicates that based on the testimony of Dr. Dunkman and his demeanor during testimony, the Administrative Judge (AJ) was persuaded that he was extremely upset with the appellant for having his study temporarily suspended. During the PEC the staff also observed that Dr. Dunkman still appeared upset with the complainant for this action and did not seem to have an understanding that telling her she should not give an FDA inspector information was wrong. The testimony and the June 9, 1997 memo that Dr. Dunkman authored made it clear to the AJ that he found her disloyal and tried to get rid of her. Accordingly, the AJ found that the protected disclosures did contribute significant changes to her working conditions, i.e., her working conditions became intolerable.

The Licensee contends the specific areas cited did not constitute a hostile work environment. Specifically, that (1) the supervisor denied threatening to dismiss the research nurse, (2) the research nurse was not isolated by her supervisor but isolated herself, (3) it was the research nurse's own decision to not attend routine meetings, (4) no criminal charges were filed against the research nurse regarding the missing files, and (5) no action (intimidation, threats, or impedance from making future disclosures) was taken against the research nurse after the FDA audit wherein she volunteered information to the FDA.

The NRC has determined, based on the MSPB finding and information gathered at the PEC, that the protected disclosures resulted in the complainant's supervisor becoming increasingly angry at her and did contribute to significant changes to her working conditions, i.e., her working conditions became intolerable. The NRC recognizes that the research nurse may have isolated herself from her supervisor and the other nurse in the laboratory. Nonetheless, it was clear that the supervisor failed to address that isolation or include her in work related discussions with the other nurse. In addition, he made statements that could reasonably be construed as a threat of dismissal, he

labeled the nurse as “insubordinate” for volunteering information to a regulatory agency, and he tried to terminate her after she raised safety concerns.

The Licensee’s response also provided a number of reasons for its disagreement with the MSPB conclusion that the termination of the research nurse was also discriminatory. Since the termination was not part of the violation cited by the NRC in the Notice, dated July 20, 2000, there is no need for the NRC to respond to those Licensee’s contentions.

The Licensee also stated that there was an error on page 2 of the NOV in the following statement; “Specifically, after the individual raised (to the FDA in April 1997 and to the NRC in June 1997) issues regarding the inadequacy of the consent forms used by the participants in a research study, there were significant negative changes to her working conditions.” The Licensee contends that neither the supervisor nor the management at PVAMC knew about the FDA audit until June 1997. The NRC acknowledges that the Licensee may not have known about issues raised to the FDA until June 1997, but the nurse first made protected disclosures to the Licensee in February 1997. Therefore, this information does not change the NRC’s conclusion that the Licensee created a hostile work environment between April 1997 and May 1998, which was based, in part, on the nurse’s engagement in protected activities.

2. NRC Conclusion

The NRC has concluded that this violation occurred as stated in the Notice and the Licensee did not provide a sufficient basis for withdrawing the violation or for rescinding the civil penalty. Accordingly, the proposed civil penalty in the amount of \$5,500 should be imposed.