

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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In the Matter of)
)
AHARON BEN-HAIM, Ph. D.)
)
_____)

Docket No. IA 97-068

CLI-99-14

MEMORANDUM AND ORDER

This proceeding stems from an August 27, 1997, enforcement order of the NRC staff against Aharon Ben-Haim, Ph. D. In that order, the staff found that Dr. Ben-Haim had deliberately caused the Newark Medical Associates ("NMA," a company for which Dr. Ben-Haim was consulting) to be in violation of several Commission requirements. The staff therefore found Dr. Ben-Haim in violation of 10 C.F.R. § 30.10 (the "deliberate misconduct" rule) and prohibited him from participating in any NRC-licensed activities for a five-year period beginning July 31, 1997. 62 Fed. Reg. 47,224 (Sept. 8, 1997).

On February 8, 1999, the Atomic Safety and Licensing Board issued an Initial Decision (LBP-99-4) affirming the NRC staff's findings of violation but reducing from five to three years the prohibition period. The Board based this reduction on its conclusion that the staff had not considered, either adequately or at all, five factors: Dr. Ben-Haim's age (65 at the onset of the suspension), his admission of error and his apology as set forth in a post-hearing pleading, the

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absence of safety consequences from the violations, the violations' duration, and the fact that Dr. Ben-Haim's violation was influenced by Dr. Elamir (NMA's owner). The Board also considered the fact that the staff's settlement with Dr. Elamir (involving the same set of facts) had imposed on him only a three-year prohibition period.

On February 24th, the staff filed a timely petition for Commission review of LBP-99-4, challenging the Board's reduction of the prohibition period. Dr. Ben-Haim did not contest the staff's petition. However, he did submit his own untimely Petition for Review on March 14th, justifying his tardiness on the grounds that he had belatedly received the Board's order and that he had been incapacitated with the flu. Staff has objected to Dr. Ben-Haim's petition. We deny both petitions.

DISCUSSION

I. The Staff's Petition for Review

The staff recognizes that, to obtain Commission review, it must show the existence of a substantial question regarding one or more of the following five considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4). Applying the standards of section 2.786(b)(4)(iii), (iv), and (v), the staff argues that the Board erred in considering the six factors set forth supra.

Although the staff presents colorable arguments (especially its assertion regarding the inappropriateness of the Board comparing a suspension period resulting from a settlement with one resulting from a hearing), the staff has not persuaded us that the issues themselves are

sufficiently “substantial” to justify our granting a discretionary review of LBP-99-4.¹ The Board’s conclusion regarding a three-year suspension does not, on its face, appear unreasonable and, given that it was based in part on Dr. Ben-Haim’s demeanor at the hearing (see 49 NRC at ___, slip op. at 87), it is subject to deference on appeal.² In any event, because the Board’s order has no precedential effect, any arguably incorrect rulings by this Board will have no adverse effect on the staff in future enforcement proceedings. See Sequoyah Fuels Corp., CLI-95-2, 41 NRC 179, 190 (1995) (“Licensing Board decisions ... have no precedential effect beyond the immediate proceeding in which they were issued”). Under these circumstances, we do not consider it an appropriate use of the Commission’s resources to set this case for briefing and to engage in a full review of the “penalty” portion of LBP-99-4.

II. Dr. Ben-Haim’s Petition for Review

Dr. Ben-Haim in his petition objects principally to the Board’s finding that he had “deliberately” caused the licensee NMA to be in violation of several of the Commission’s requirements. He insists that his errors stemmed from an inadequate understanding of the regulations rather than from a conscious attempt to circumvent them. The remainder of his petition consists of either challenges to specific findings of fact or reiterations of his good intentions.

¹ 10 C.F.R. § 2.786(b)(4). See generally Emerick S. McDaniel (Denial of Application for Reactor Operator License), CLI-96-11, 44 NRC 229, 230 (1996) (denying reactor operator candidate’s petition for review for failure to present substantial issues); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-9, 44 NRC 112, 113 (1996) (denying intervenors’ petition for review for failure to present substantial issues).

² See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1218 (1984) (where the credibility of evidence turns on the demeanor of a witness, an appellate board will give the judgment of the trial board, which saw and heard the testimony, particularly great deference), rev’d in part on other grounds, CLI-85-2, 21 NRC 282 (1985), and cited authority.

Dr. Ben-Haim does not attempt to satisfy the requirements of section 2.786(b)(4), supra, and our review of his pleading reveals no arguments that rise to the level of substantiality necessary for us to grant discretionary review. The Board's finding appears to be supported by the record, including Dr. Ben-Haim's own admissions, leaving us doubtful that any purpose would be served by plenary briefing and decision on the issues Dr. Ben-Haim raises.

CONCLUSION

The Commission denies the staff's and Dr. Ben-Haim's petitions for review.

IT IS SO ORDERED.



For the Commission

A handwritten signature in black ink, reading "Annette L. Vietti-Cook". The signature is written in a cursive style and is positioned above a horizontal line.

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of April, 1999.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

AHARON BEN-HAIM, PH.D.

(Superseding Order Prohibiting
Involvement in Licensed Activities)

Docket No.(s) IA 97-068

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM MEMO & ORDER (CLI-99-14) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Charles Bechhoefer, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Harry Rein
Special Assistant
ASLBP
1877 Wingfield Drive
Longwood, FL 32779

Catherine L. Marco, Esq.
Ann P. Hodgdon, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Aharon Ben-Haim, Ph.D.
3 Cloverhill Place
Montclair, NJ 07042

Dated at Rockville, Md. this
26 day of April 1999



Office of the Secretary of the Commission