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March 24, 1998

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
MAGDY ELAMIR, M.D)	IA-97-070
)	
Newark, New Jersey)	
)	

NRC STAFF OPPOSITION
TO MAGDY ELAMIR, M.D.'S
MOTION TO EXTEND STAY

INTRODUCTION

On March 3, 1998, Magdy Elamir, M.D., ("Dr. Elamir") filed a "Motion to Extend Stay" in the above-captioned proceeding. By his motion, Dr. Elamir sought to extend the stay granted by the Licensing Board in a Memorandum and Order (Deferral Pending Department of Justice Investigation) issued on November 18, 1997. That Order granted Dr. Elamir's unopposed request for a stay and established the duration of the stay as one hundred twenty (120) days until March 5, 1998, or until such time as "the staff may be notified that the Department of Justice will not pursue a formal criminal investigation." Order of November 18, 1997, at 2.

For the reasons discussed below, the NRC Staff ("Staff") opposes Dr. Elamir's motion and urges the Licensing Board to deny it.¹

¹ In a telephone conference call on March 20, 1998, the Licensing Board granted the (continued...)

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BACKGROUND

The background facts, insofar as they are relevant here, are as follows. On September 15, 1997, the NRC issued to Magdy Elamir, M.D., an Order Superseding Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately). On October 4, 1997, Dr. Elamir filed an Answer together with a "Demand for Hearing and Request for Stay of All Proceedings." On October 21, 1997, the Staff filed an Answer, noting that it did not oppose the request. On October 23, 1997, the Licensing Board issued a Memorandum and Order indicating that it lacked the information necessary to make a determination regarding Dr. Elamir's stay request and requiring the Staff to supply that information. Order at 2-3. On November 14, 1997, in an "NRC Staff Response to Licensing Board Order," the Staff provided the information required by the Licensing Board. As noted above, on November 18, 1997, the Licensing Board issued a Memorandum and Order (Deferral Pending Department of Justice Investigation) and on March 3, 1998, Dr. Elamir filed a motion to extend the stay.

DISCUSSION

In his Memorandum in Support of Motion, Dr. Elamir argues that his request should be granted for two reasons: 1) that requiring him to proceed with the administrative

¹(...continued)

Staff's unopposed request for an extension of the time to file its response, which otherwise would have been due on March 20, 1998, until Wednesday, March 25, 1998. The Board confirmed its action in a Memorandum and Order (Telephone Conference: Staff Response to Stay Request), March 23, 1998.

action while the criminal investigation is ongoing would prejudice him and Newark Medical Associates in both the administrative and criminal cases and 2) the stay would not harm the public interest. Memorandum at 4-5. Dr. Elamir argues that, if the administrative proceeding were to go forward while the criminal investigation continues, exercise of his Fifth Amendment privilege against self-incrimination would result in his not being able to fully refute the allegations in the Commission's Order, while failing to invoke that privilege might prejudice him in the criminal case. Memorandum at 5-6. Further, Dr. Elamir argues that he would be prejudiced by the Commission's and Department's unwillingness to make available information to which he would be entitled but for the pendency of the criminal investigation. Memorandum at 5-7.

Dr. Elamir argues that the public interest will not be harmed by extending the stay in that Newark Medical Associates has voluntarily complied with the terms of the Order prohibiting Dr. Elamir's involvement in NRC-licensed activities by ceasing all operations involving the use of nuclear materials pending the outcome of the proceeding. Memorandum at 7-8. Dr. Elamir also argues that any deterrent effect of the Order will continue because of the wide dissemination of the Order. *Id.*

As noted above, Dr. Elamir's arguments for a further stay are based on the harm that might occur if NRC proceedings were to go forward while a criminal investigation was ongoing. On Friday, March 20, 1998, the Staff received a copy of a letter from Faith S. Hochberg, U.S. Attorney for the District of New Jersey, to Dr. Elamir's attorneys informing them that Dr. Elamir was not a target of an investigation being conducted by the U.S. Attorney's Office for the District of New Jersey. In view of this letter, which is

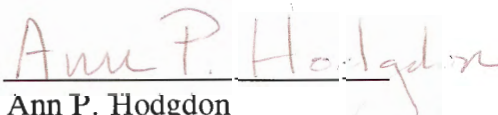
attached, the Staff submits that Dr. Elamir's arguments in support of a stay are no longer valid. Since the U.S. Attorney has stated that Dr. Elamir is not a target of a criminal investigation, nothing would preclude Dr. Elamir from defending himself in the administrative proceeding. Further, Dr. Elamir's access to documents will now be governed by the Nuclear Regulatory Commission's discovery regulations and practices. In addition, the Staff believes that the public interest lies in going forward with this proceeding.

As the U.S. Attorney's letter satisfies the Board's condition for dissolving the stay, the Board should deny Dr. Elamir's motion.

CONCLUSION

For the reasons discussed above, the Licensing Board should deny Dr. Elamir's motion to extend the stay of proceedings granted by the Licensing Board on November 18, 1997.

Respectfully submitted,


Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of March, 1998



U.S. Department of Justice

United States Attorney
District of New Jersey

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March 20, 1998

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Michael Chertoff, Esq.
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Re: Newark Medical Associates

Dear Mr. Lee and Mr. Chertoff:

You have inquired about the status of your client, Magdy Elamir, M.D., in an investigation relating to Newark Medical Associates being conducted by the United States Attorney's Office for the District of New Jersey ("this Office"). The allegations under consideration relate to alleged false statements made by Newark Medical Associates to the Nuclear Regulatory Commission.

As you are aware, the United States Attorney's Manual defines a "target" as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."

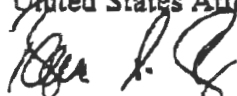
At this time, based on information currently available to this Office, Magdy Elamir, M.D. is not a "target" in the investigation. Other than as stated in this letter, no promises or representations regarding Magdy Elamir's potential criminal liability, if any, have been made to you by this Office.

Please call me if you have any questions or if you would like to discuss this matter further.

Very truly yours,

FAITH S. HOCHBERG
United States Attorney

By:


BRUCE A. LEVY
Assistant U.S. Attorney

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'98 MAR 25 A11 :10

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)
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MAGDY ELAMIR, M.D.) IA-97-070
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Newark, New Jersey)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO MAGDY ELAMIR, M.D.'S MOTION TO EXTEND STAY" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk this 24th day of March, 1998:

Charles Bechhoefer, Chairman
Administrative Judge
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Dr. Jerry R. Kline
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Staff
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