

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

DOCKETED
USNRC

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OFFICE OF SECRETARY
RULING AND
ADJUDICATION STAFF

SERVED APR - 6 1998

In the Matter of

MAGDY ELAMIR, M.D.
Newark, New Jersey

Order Superseding Order
Prohibiting Involvement in
NRC-Licensed Activities
(Effective Immediately)

Docket No. IA 97-070

ASLBP No. 98-734-01-EA

April 6, 1998

MEMORANDUM AND ORDER
(Telephone Conference Call, 3/26/98)

On Thursday, March 26, 1998, the Atomic Safety and Licensing Board in this enforcement proceeding held a telephone conference to resolve questions as to whether this proceeding should continue to be stayed pending completion of a Department of Justice criminal investigation of Dr. Magdy Elamir, subject of this proceeding. The conference call was transcribed (Tr. 1-19). Participating, in addition to the three Administrative Judges comprising the Licensing Board, were Thomas H. Lee, II, Esq., representing Dr. Elamir, Ann P. Hodgdon, Esq., for the NRC Staff (Staff), and Lee S. Dewey, Esq., Chief Counsel for the Atomic Safety and Licensing Board Panel.

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The stay was initiated by Dr. Elamir's October 4, 1997 motion, which was supported by the Staff. The motion sought a stay of this proceeding pending completion by the Department of Justice of a criminal investigation of Dr. Elamir. We granted the stay by our Memorandum and Order (Deferral Pending Department of Justice investigation), dated November 18, 1997, which imposed a stay until March 5, 1998, or such earlier date as the Department of Justice states that its criminal investigation of Dr. Elamir had been completed, and subject to extension under specified circumstances.

On March 3, 1998, Dr. Elamir filed a motion for the stay to be extended until June 1, 1998, or until ten business days from the date the Department of Justice declines prosecution of Dr. Elamir and Newark Medical Associates, the company for which Dr. Elamir serves as President. By our Memorandum and Order (Extension of Stay), dated March 5, 1998, we extended the stay pending our receipt of the Staff's response to Dr. Elamir's motion (due to be filed on March 23, 1998) and our ruling on the motion. By our Memorandum and Order (Telephone Conference: Staff Response to Stay Request), dated March 23, 1998, we granted the Staff's unopposed request to extend its response time to March 25, 1998.

The Staff filed its response on March 24, 1998. It recommended that the stay be lifted, based on a copy of a

March 20, 1998 Department of Justice communication to Dr. Elamir's counsel (Mr. Lee) advising that Dr. Elamir was not at that time the "target" of a Department of Justice criminal investigation.

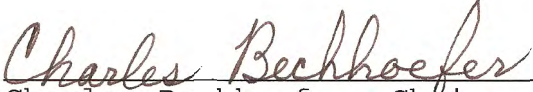
We conducted the March 26, 1998 conference call to ascertain Dr. Elamir's reaction to the Department's letter, as well as the Staff's interpretation (which had been faxed to Mr. Lee) and whether Dr. Elamir continued to seek continuation of the stay. Mr. Lee stated that, read literally, the "not a target" letter was not sufficient to indicate whether Dr. Elamir was still subject to criminal prosecution by the Department of Justice but rather indicated that the Department had not yet decided on criminal prosecution (Tr. 5). Based on his own previous experience as a former Assistant U.S. Attorney, Mr. Lee described the "target" language as being very subjective and permitting the Department of Justice to change its mind. Mr. Lee stated that Dr. Elamir was thus put into a position of choosing to pursue his rights in the administrative hearing at the risk of potentially incriminating himself in the criminal investigation or, alternatively, forfeiting his right to go forward in the administrative proceeding in order to protect his interests with respect to the criminal investigation (*id.*). Dr. Elamir's position accordingly was that the need for the stay continued.

The Staff agreed that the Department of Justice letter was "somewhat cryptic" (Tr. 6) and not entirely clear but interpreted it as meaning that the Department was agreeable that the stay might be lifted and the proceeding go forward (Tr. 7). In reponse to a Board inquiry, the Staff stated that the continuation of the stay would harm its interests in that the longer the stay continued, the greater the likelihood that potential witnesses might not be readily available (Tr. 8-10). The Staff added, however, that continuation of the stay in this proceeding might adversely affect its interests in the companion proceeding involving Dr. Aharon Ben-Haim, where a similar stay has already been lifted and where the hearing is scheduled for May 27-29, 1998, in Newark, New Jersey (Tr. 12-13).

The Staff drew a distinction between the letters of declination ordinarily received from the Department of Justice and the "not a target" letter received here. The Licensing Board suggested that the Staff seek clarification from the Department of Justice as to whether it is formally declining prosecution. Taking into account the schedule preferences of both parties, the Board set Monday, April 27, 1998 as the date by which the Staff would attempt to obtain a response from the Department, and it continued the stay pending receipt of that information. The Board deferred its decision on Dr. Elamir's motion pending receipt of such additional information.

IT IS SO ORDERED.

For the Atomic Safety and
Licensing Board


Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 6, 1998

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NUCLEAR REGULATORY COMMISSION

In the Matter of

MAGDY ELAMIR, M.D.

(Superseding Order Prohibiting
Involvement in Licensed Activities)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O-TELEPHONE CONFERENCE... 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.

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Dated at Rockville, Md. this
6 day of April 1998

Adria T. Byrdson
Office of the Secretary of the Commission