



UNITED STATES
NUCLEAR REGULATORY COMMISSION

REGION IV

611 RYAN PLAZA DRIVE, SUITE 400
ARLINGTON, TEXAS 76011-8064

January 23, 1997

EA 95-006

Richard Littenberg, M.D.
The Honolulu Medical Group
550 South Beretania Street
Honolulu, Hawaii 96813

SUBJECT: NOTICE OF VIOLATION (U.S. DOL CASE 92 ERA 52)

Dear Dr. Littenberg:

This is in reference to the NRC's review of information related to a complaint filed with the U.S. Department of Labor by Richard G. Smith, a former employee of The Honolulu Medical Group (HMG), including our review of a November 26, 1996, letter from HMG's attorney, Richard M. Rand. Mr. Rand responded to an October 31, 1996, letter from James Lieberman, Director of the NRC's Office of Enforcement, in which the NRC requested a copy of a settlement agreement with Mr. Smith. In his most recent letter, Mr. Rand stated that HMG could not disclose the terms of HMG's settlement agreement with Mr. Smith without breaching the confidentiality provisions of the agreement. The NRC has decided to bring this matter to a close and to make an enforcement decision without benefit of seeing the terms of the settlement.

This case arose in May 1992 when Mr. Smith's employment with HMG was terminated. In June 1992, Mr. Smith filed a complaint with the Department of Labor in which he alleged that his termination was the result of his engaging in protected activity, i.e., his having raised concerns about HMG's conduct of nuclear medicine activities in a letter he sent to HMG on May 20, 1992. The NRC's regulations prohibit such discrimination. The Department of Labor found that discrimination was a factor in HMG's decision to terminate Mr. Smith, in an August 14, 1992, finding by the District Director of the Wage and Hour Division. A December 13, 1994, Recommended Decision and Order issued by an Administrative Law Judge and a September 6, 1995, Decision and Limited Remand Order issued by the Secretary of Labor addressed, primarily, the remedy awarded to Mr. Smith.

In letters dated February 23 and April 19, 1996, HMG informed the NRC that the parties had reached a confidential settlement of Mr. Smith's claims against HMG, and that the parties agreed to jointly file a motion with the Department of Labor to vacate the Secretary of Labor's decision for all purposes "except for use by the NRC in any actions it may decide in its sole discretion to take against Dr. Littenberg and HMG." In Mr. Rand's letter of November 26, 1996, he informed the NRC that the motion had not yet been filed with the Department of Labor.

The NRC has determined that no purpose is served by further delaying action. Based on a review of all information in this case, including the findings of the Department of Labor, the

NRC concludes that a violation of 10 CFR 30.7 did occur. In its simplest form, Mr. Smith engaged in a protected activity and adverse action was taken against him as a result. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600, the violation is classified at Severity Level II because the violation was caused by the president and chief executive officer of HMG (Dr. Littenberg). In accordance with the Enforcement Policy, a civil penalty with a base value of \$4,000 is considered for a Severity Level II violation. Furthermore, application of the policy normally results in a civil penalty for any violation classified above Severity Level III. However, based on the circumstances of this case and in accordance with Section VII.B.6 of the Enforcement Policy, I have been authorized, after consultation with the Director, Office of Enforcement, and the Deputy Executive Director for Regulatory Effectiveness, Program Oversight, Investigations and Enforcement, not to propose a civil penalty. In particular, the NRC considered HMG's willingness to comply with the Department of Labor's initial finding that discrimination had occurred¹; HMG's willingness to settle the matter prior to an adjudicatory hearing; the ultimate resolution of this matter in the settlement agreement that was reached between HMG and the complainant in February 1996; and the absence of any further complaints of discrimination against HMG since this matter arose in May 1992.

The NRC takes strong exception to one statement in HMG's June 21, 1996 letter. HMG stated in its letter that "the NRC should exercise discretion in this case *because the complaints raised by Smith were never substantiated* (emphasis added)." Whether a complaint is substantiated makes no difference with respect to the protections afforded employees under the law. Employees are protected against retaliation even if their perceptions of noncompliance or safety problems are not validated.

Regarding your corrective actions taken to date, the NRC notes that the specific complaint was resolved to the satisfaction of the complainant, as discussed in your letters dated February 23, April 19 and November 26, 1996. Additionally, HMG stated in a letter dated June 21, 1996, that the whistleblower protection provisions of the Energy Reorganization Act were prominently posted and HMG would be disseminating that policy to employees in the nuclear medicine department. While the NRC recognizes that your operation is small as far as NRC-licensed activities are concerned and involves few employees, we emphasize the importance of: (1) periodically advising employees of their right to express concerns about safety or compliance and of the avenues available to them to do so, including their right to contact outside agencies such as the NRC; and (2) assuring employees that availing themselves of these rights will not result in retaliation of any kind. It is not clear from your correspondence how you intend to disseminate the whistleblower protection policies to your employees. For lasting corrective action you should consider discussions

¹ On August 14, 1992, the DOL's District Director of the Wage and Hour Division found in favor of Mr. Smith, the complainant, and directed HMG, among other things, to compensate Mr. Smith for lost wages. While the licensee was willing to provide the relief ordered by the District Director, Mr. Smith appealed this finding to the DOL's Chief Administrative Law Judge and was granted a hearing.

at annual refresher training sessions or other means of periodically communicating this information. In this regard, you should be aware that the posting of NRC Form 3 is already required pursuant to 10 CFR 19.11 and, in and of itself, is not considered adequate corrective action for a violation of 10 CFR 30.7.

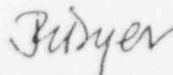
You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. However, the NRC has concluded that information regarding the reason for the violation and HMG's position on the violation, is already adequately addressed on the docket in letters dated October 7, 1992; January 31, 1995; March 13, 1995; April 14, 1995; February 23, 1996; April 19, 1996; and November 26, 1996. Therefore, you are not required to respond to items (1) and (2) of the instructions for response in the enclosed Notice unless the description in your letters to date does not accurately reflect your corrective actions or your position. As to items (3) and (4) of the instructions for response in the enclosed Notice, you should supplement your responses to date to address your plans to periodically disseminate the whistleblower protection policies to current and future employees and to assure that they understand their right to raise concerns to you and to the NRC without fear of retaliation.

We understand your position as to posting the terms of the settlement; however, this Notice is a public document and we would expect that you post it or make it available to your employees consistent with 10 CFR 19.11.² The decision of the DOL and NRC in this matter are a matter of public record. This letter and the enclosed Notice are available electronically via the NRC homepage on the internet.

After reviewing your response to this Notice, including your proposed corrective actions, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements. In addition HMG's corrective actions will be reviewed in a future NRC inspection. Significant violations in the future could result in penalties.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and any response you choose to submit will be placed in the NRC Public Document Room (PDR).

Sincerely,


for L. J. Callan
Regional Administrator

²The freedom to raise safety concerns without fear of retaliation affects radiological working conditions and is therefore captured under 10 CFR 19.11(a)(4).

Richard Littenberg, M.D.

- 4 -

Docket No. 030-11006
License No. 53-16421-01

Enclosure: Notice of Violation

cc:
State of Hawaii

Richard M. Rand, Attorney
Torkildson, Katz, Fonseca,
Jaffe, Moore & Hetherington
700 Bishop Street, 15th Floor
Honolulu, Hawaii 96813-4187

Richard R. Littenberg, M.D.

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