

issue a Show Cause Order to the licensee, issue a Severity Level I violation and civil penalty, and require the licensee to post a public apology. In support of this assertion, the Petitioner submitted as an attachment to the Petition an affidavit by a ComEd employee that stated that ComEd's denial that the filing of a PIF constitutes protected activity "chills" the willingness of employees to file PIFs.

In construing ComEd's response to Request Number 3 in such a manner, the Petitioner appears to have misconstrued the statement by taking it out of context and misstating the licensee's position. In making this statement, the licensee does not appear to be taking the position that the filing of all PIFs was not a protected activity. Rather, the licensee was objecting specifically to a request for admission as being an inappropriate discovery request as a litigative technique. Nothing in its response suggests that ComEd did not recognize that the actual filing of a PIF could constitute protected activity. In fact, in its response to the Petition, dated June 19, 1998, ComEd specifically stated that it recognizes that the preparation of internal nuclear safety-related documents, such as PIFs, could give rise to protected activity.<sup>3</sup> Thus, there is no merit to this assertion, nor does it warrant the action requested by the Petitioner.

The Petitioner's second assertion is that ComEd intentionally imposed a restrictive provision upon Mr. Robarge aimed at prohibiting employees from providing information to the NRC in violation of 10 CFR § 50.7. To "correct" this practice, the Petitioner requests that the NRC issue a Show Cause Order to ComEd, impose a Severity Level I violation and civil penalty against ComEd, require ComEd to transmit to all individuals under similar confidentiality terms notice that they are now free to communicate information to the NRC, and require ComEd to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and its subcontractors since March 21, 1990.

The provision that the Petitioner asserts was intended to prohibit Mr. Robarge from providing information to the NRC in violation of NRC requirements is Section 3(g) of the Confidentiality Order. Section 3(g) of

the Confidentiality Order states that confidential information may be disclosed to governmental law enforcement agencies and other governmental bodies pursuant to valid subpoena, provided that: (1) The subpoenaed party give counsel for the designating party written notice of the subpoena and, if so directed by the designating party, object to such subpoena on a timely basis so as to preserve the designating party's rights; and (2) the subpoenaed party proceed in good faith to seek to obtain confidential treatment of the subpoenaed documents from the relevant governmental body. The Confidentiality Order also contains a provision (Provision 6) that would allow either party to challenge the applicability of this stipulation to any document designated as confidential.

The Petitioner alleges that Mr. Robarge objected through his counsel to the wording of Section 3 (g) and requested that the provision include an additional paragraph stating the following:

Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as "confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the documents as "confidential" and request that the documents be treated as confidential to the fullest extent reasonable under the circumstance.

The Petitioner asserts that ComEd's counsel responded in a letter dated March 19, 1998, that "the language in your addendum is not something that ComEd will stipulate to end a confidentiality order (or an addendum to such an order). On the merits, this section goes directly against the purpose for having a confidentiality order in the first place." The Petitioner also states that ComEd's counsel acknowledged to counsel for Mr. Robarge that "the restrictive confidentiality language is routinely incorporated in agreements entered into by ComEd." The Petitioner asserts that these statements demonstrate that the prohibition in communication with the NRC was intentional rather than inadvertent, and that identical restrictive language is routinely incorporated into ComEd agreements.

The language of which the Petitioner complains is reflected in the Confidentiality Order executed by counsel for *both* parties as well as the Administrative Law Judge (ALJ) presiding in the DOL proceeding regarding Mr. Robarge's Section 211 complaint. Indeed, it appears that the Confidentiality Order was executed by

counsel for both parties on March 23, 1998, and entered by the DOL ALJ on March 24, 1998; both dates are after the exchange of correspondence alluded to by counsel for Mr. Robarge with respect to his complaints about the possible restrictive nature of the provision. To the extent that Mr. Robarge had such concerns, they should have been raised in the first instance, before the DOL ALJ. That agency has, in the past, expressed no hesitation in assuring that agreements reached by parties to proceedings before it under Section 211 do not contain provisions which unlawfully interfere with an individual's right to engage in protected activity, *Polizzi v. Gibbs & Hill, Inc.*, 87-ERA-38 (Secretary of Labor, July 18, 1989). There is no indication that Mr. Robarge requested that the ALJ consider this matter in the first instance, or sought reconsideration by DOL. In the absence of consideration of this matter by the ALJ, NRC does not intend to take action.

#### IV. Conclusion

For the reasons discussed in the preceding section, no basis exists for taking the actions requested by the Petitioner. Accordingly, the Petition is denied.

A copy of the Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission, 25 days after issuance unless the Commission, on its own motion, institutes review of the decision within that time.

Dated at Rockville, Maryland, this 31st day of August 1998.

For the Nuclear Regulatory Commission.

/s/ Frank J. Miraglia,

**Samuel J. Collins,**

*Director, Office of Nuclear Reactor Regulation.*

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## NUCLEAR REGULATORY COMMISSION

[Docket Number: 030-14526; License Number: 37-00062-07]

### Department of Veterans Administration Medical Center, Philadelphia, PA; Issuance of Director's Decision Under 10 CFR § 2.206

Notice is hereby given that the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission (Commission or NRC), has taken action with regard to a

<sup>3</sup>With regard to the attached affidavit (Exhibit 5 to the Petition), the affiant indicates that he viewed the licensee's response to request number 3 in its Respondent's Response to represent ComEd's "official legal position." It thus appears that the affiant misunderstood the purpose of the response and its limited significance as a litigation technique and the fact that this statement did not constitute an "official legal position" about whether the filing of PIFs could constitute protected activity.

Petition dated January 28, 1998, submitted by Ann Lovell (Petitioner), regarding the Department of Veterans Administration Medical Center, Philadelphia, Pennsylvania (PVAMC). The Petitioner has requested that NRC take immediate action to suspend or revoke the NRC license issued to PVAMC. As grounds for her request, the Petitioner asserts that executive management is operating in a manner that has the potential to present a significant danger to medical center patients, staff, and the general public. Specifically, the Petitioner asserts that: (1) there has been a consistent pattern of NRC violations occurring within the medical center for which PVAMC has failed to take corrective action; (2) PVAMC has a history of supplying false information to NRC; (3) individuals, including the Petitioner, became contaminated with radioactive material in the nuclear medicine department as a result of what the Petitioner believes was an intentional incident; and (4) PVAMC employees are fearful of bringing safety concerns to the licensee for fear of retaliation, and to NRC because of NRC's "history of inaction" regarding the medical center. Additionally, the Petitioner claims that NRC withdrew a civil penalty after a change in NRC Region I management, which may have been withdrawn as it was not "cost-effective" to pursue the issue.

The Director of the Office of Nuclear Material Safety and Safeguards has denied the Petition. The reasons for this denial are explained in the "Director's Decision Under 10 CFR § 2.206," (DD-98-07) the complete text of which follows this notice. The Director's Decision is available for public inspection at NRC's Public Document Room, the Gelman Building, 2120 L Street, N.W., Washington, D.C.

A copy of this Decision will be filed with the Secretary of the Commission, for the Commission's review, in accordance with 10 CFR § 2.206(c) of the Commission's regulations. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision, unless the Commission, on its own motion, institutes a review of the Decision within that time.

Dated at Rockville, Maryland, this 28 day of August, 1998.

For the Nuclear Regulatory Commission.

**Carl J. Paperiello,**

*Director, Office of Nuclear Material Safety and Safeguards.*

### **Director's Decision Under 10 CFR § 2.206**

#### *I. Introduction*

By a Petition addressed to the Director, Division of Nuclear Materials Safety, U.S. Nuclear Regulatory Commission (NRC), Region I, dated January 28, 1998, Ann Lovell (Petitioner), requested that NRC take immediate action to suspend or revoke the NRC license issued to the Department of Veterans Administration Medical Center, Philadelphia, Pennsylvania (PVAMC or licensee). As grounds for her request, the Petitioner asserts that executive management is operating in a manner that has the potential to present a significant danger to PVAMC patients, staff, and the general public. Specifically, the Petitioner asserts that: (1) there has been a consistent pattern of NRC violations occurring within the medical center for which PVAMC has failed to take corrective action; (2) PVAMC has a history of supplying false information to NRC; (3) individuals, including the Petitioner, became contaminated with radioactive material in the nuclear medicine department as a result of what the Petitioner believes was an intentional incident; and (4) PVAMC employees are fearful of bringing safety concerns to the licensee, for fear of retaliation, and to NRC, because of NRC's "history of inaction" regarding the PVAMC. Additionally, the Petitioner claims that NRC withdrew a civil penalty after a change in NRC Region I management, which may have been withdrawn because it was not "cost-effective" to pursue the issue against the Department of Veterans Affairs.

On February 27, 1998, the receipt of the Petition was acknowledged and the Petitioner was informed that the Petition had been referred to the Office of Nuclear Material Safety and Safeguards pursuant to 10 CFR § 2.206 of the Commission's regulations. The Petitioner was also informed that her request that NRC immediately suspend or revoke the PVAMC's license was denied, and that other action on her request would be completed within a reasonable time, as provided by 10 CFR § 2.206.

#### *II. Background*

The circumstances surrounding the issues raised in the Petition can be summarized as follows. From 1994 until Spring 1998, the Petitioner was

employed by PVAMC as the Radiation Safety Officer (RSO). In November 1995, the Petitioner raised concerns to NRC regarding the safety of the licensee's operations in connection with a potential furlough of Federal government employees. As a result, NRC conducted a special inspection of the licensee's facility on November 17, 1995 (Inspection Report No. 030-14526/95-002). During the inspection, the inspector discovered that the licensee had replaced the RSO before NRC approval and had held a Radiation Safety Committee (RSC) meeting without a quorum, in that the RSO and half of the RSC membership were not present. Based on these violations, a Notice of Violation (NOV) was issued to PVAMC on January 4, 1996.

The licensee responded to the NOV by letter dated February 23, 1996. In its response, the licensee stated that it replaced the RSO with a nuclear physician, to ensure continuous coverage of the radiation safety program during a Federal government furlough, and that the full complement of the RSC could not be assembled to formalize the decision, because of the furlough of personnel, including the RSO.

On February 5, 1996, the Petitioner filed a discrimination complaint with the United States Department of Labor (DOL), asserting that she had been discriminated against for contacting NRC. In a decision issued on March 6, 1996, the Acting District Director of the DOL Wage and Hour Division determined that discrimination was a factor in the actions that comprised the complaint, in violation of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988 and Supp. V. 1993). The licensee did not appeal the findings of the Acting District Director, so that the decision of the Acting District Director became the final DOL decision.

NRC held an Enforcement Conference with PVAMC on August 26, 1996, regarding this matter. On September 18, 1996, NRC issued a NOV and Proposed Imposition of Civil Penalty to PVAMC based on the DOL Acting District Director's decision and information provided by PVAMC during the conference, for a violation of the Commission's Employee Protection regulations, 10 CFR § 30.7 (EA 96-182). Specifically, the licensee was cited for discriminating against the Petitioner in that her supervisor had chastised her for contacting NRC. The violation was categorized, in accordance with the Commission's Enforcement Policy, NUREG-1600, "General Statement of Policy and Procedures for NRC Enforcement Actions" (hereafter,

Enforcement Policy), as a Severity Level II violation, and a civil penalty of \$8000 was proposed.

On November 15, 1996, PVAMC submitted a "Response to Notice of Violation and Proposed Imposition of Civil Penalty" and "Answer to a Notice of Violation." In these documents, it admitted the violation, but requested reconsideration of the determination that the violation constituted a Severity Level II violation warranting a civil penalty of \$8000. In support of its request, PVAMC stated that the supervisor had chastised the Petitioner not just for contacting NRC, but for failing to notify him of certain information of which she was aware; that the chastisement was an isolated occurrence; that other employees were not "chilled" from raising safety concerns as a result of this event; and that a Severity Level II violation was for the most severe violations involving actual or high potential impact on the public, which had not been the case here. Following a review of the licensee's response and the findings of an investigation conducted by NRC's Office of Investigations (OI) that there had been no continued discrimination against the Petitioner, NRC informed the licensee, by letter dated September 25, 1997, that it had concluded that the violation would be more appropriately classified as a Severity Level III violation and that enforcement discretion should be exercised to not issue a civil penalty, in accordance with Section VII.B.6. of the Enforcement Policy.<sup>1</sup> NRC conducted an inspection of the licensee's facility from July 9 through October 20, 1997, (Inspection Report 030-14526/97-001). On approximately July 24, 1997, a contamination incident occurred in the licensee's Nuclear Medicine Department, in which the hands of the RSO and the Chief Nuclear Medicine Technologist (CNMT) became contaminated. The inspector determined that a radiation survey instrument may have become contaminated during surveys of the Nuclear Medicine Department, and that the two individuals' hands became contaminated as a result of handling the instrument. The inspection results indicated that the incident may have

been caused by a weakness in the licensee's contamination control techniques, including not using contamination control precautions during the use of radioactive material, and, in some cases, failing to wear gloves. In addition, NRC determined that significant weaknesses existed in the licensee's program in such areas as the functioning and effectiveness of the RSC, training, teamwork, communications, leadership, and conflict resolution. NRC issued a Confirmatory Action Letter (CAL) to PVAMC on December 19, 1997, (with corrected copy issued December 31, 1997), confirming the licensee's commitments to conduct a comprehensive review and assessment of its radiation safety program; to provide training to staff, including among other things, instruction regarding employees' rights to raise safety concerns to management and NRC; and to develop a formal program audit system to continuously identify and correct program deficiencies.

### III. Discussion

As stated above, the Petitioner has raised numerous issues in support of her assertion that executive management of PVAMC is operating in a manner that has the potential to present a significant danger to medical center patients, staff, and the general public. These issues, and NRC's evaluation of these issues, are set forth below.

#### A. Petitioner's Assertion of Consistent Pattern of Violations for Which PVAMC Failed to Take Corrective Action

Among other things, the Petitioner maintains that there has been a consistent pattern of NRC violations occurring within the medical center for which PVAMC has failed to take corrective action. In support of this assertion, the Petitioner has submitted an attachment to her Petition, entitled "Chronology of PVAMC/NRC Interaction Since Whistle Blower Incident of November 17, 1995," that she purports "attests" to such a consistent pattern of violations within the facility.

NRC inspections conducted at PVAMC's facilities from 1995 through 1997 identified several violations. However, none of these violations was of high safety significance, and, with the exception of the enforcement action discussed above, involving discrimination against the Petitioner for raising safety concerns (EA 96-182), all the violations were categorized as Severity Level IV violations in accordance with the Commission's

Enforcement Policy.<sup>2</sup> The Severity Level IV violations are described in Inspection Reports 030-14526/96-002 and 030-14526/97-001, issued on September 11, 1997, and December 10, 1997, respectively. The licensee responded to the violations identified in Inspection Report 030-14526/96-002 by letter dated November 4, 1997, and to the violations identified in Inspection Report 030-14526-001, by letter dated January 9, 1998. In its responses, the licensee described its corrective actions for the violations.

In addition, as noted above, during these inspections, certain programmatic weaknesses were identified by NRC, including conflicts between management, the RSO, the RSC, and the licensee's staff. NRC determined that weaknesses existed in such areas as the functioning and effectiveness of the RSC, training, teamwork, communications, leadership, and conflict resolution. NRC also was concerned that PVAMC employees may have been reluctant to raise safety concerns because of these communication problems. As a result of these findings, NRC management toured the facilities on December 15, 1997, and met with representatives of the licensee on December 18, 1997, to discuss these program weaknesses. Subsequently, on December 19, 1997 (with corrected copy issued December 31, 1997), a CAL was issued to PVAMC, documenting the licensee's commitment to: (1) have the RSO and the RSC Chairman conduct a comprehensive review and assessment of the radiation safety program; (2) provide training, conducted by the RSO and the RSC Chairman, to all nuclear medicine staff, researchers using radioactive material, RSC members, and the facility management, on all applicable NRC regulatory requirements, on management expectations, and on the policy on bringing forth identified program deficiencies; and (3) establish a formal program audit system to identify, report, and correct program deficiencies. The licensee completed these actions by May 30, 1998. Additionally, the CAL provided that the licensee was to notify NRC, after completing all items in the CAL, so as to arrange for a meeting between NRC and PVAMC senior management, to discuss the program status and achievements. This meeting was held as part of the exit meeting on June 3, 1998, at the conclusion of the

<sup>1</sup> Section VII.B.6 of the Enforcement Policy (63 FR 26630, May 13, 1998) provides that NRC may refrain from issuing a civil penalty if the outcome of the normal process described in the Enforcement Policy does not result in a sanction consistent with an appropriate regulatory message. The Enforcement Policy further provides that NRC may reduce, or refrain from issuing, a civil penalty, for a Severity Level II, III, or IV violation based on the merits of the case.

<sup>2</sup> As described in the Enforcement Policy, Severity Level IV violations are less serious violations, but of more than minor safety concerns, in that, if left uncorrected, they could lead to a more serious concern.

inspection conducted by NRC at the licensee's facilities from June 1-3, 1998 (Inspection Report 030-14526/98-001, issued July 23, 1998).<sup>3</sup>

By letters dated February 20, April 6 (with revisions to audit report dated April 10), April 13, and May 28, 1998, PVAMC responded to the CAL, and submitted the results of its audit. In its responses, it stated that it had made numerous improvements to its program. Among these were the implementation of an "Open-Door Policy" of encouraging staff to identify and report program deficiencies. A notice from executive management, the RSC, and the RSO was sent to employees and posted in numerous, visible locations. The notice encouraged all staff to report apparent radiation safety problems, violations, and potential misadministrations. It explained that management, the RSC, and the RSO encouraged all staff to report problems without fear of reprisal, indicating that it was management's responsibility to assure a safe working environment. The notice stated that the goal was to create a secure, friendly environment that fosters self-identification of problems. A list of whom to contact, including the RSO, executive management, and the members of the RSC, and their phone numbers, was included in the notice. PVAMC staff has received training in this policy. PVAMC hired an Interim RSO while the previous RSO (the Petitioner) was out on medical leave,<sup>4</sup> and also informed NRC of the new Interim Director of the PVAMC. The Interim RSO was mandated to evaluate the radiation safety program and to recommend any needed changes. PVAMC provided NRC with a copy of its assessment and audit of the radiation safety program, in which it evaluated its program, identified certain program deficiencies, and specified its corrective actions. PVAMC also indicated that training would be provided, by March 15, 1998, to staff who use radioactive material. The training would include, as a minimum, instruction regarding all applicable NRC regulatory requirements, management expectations, and the policy on bringing forth identified program deficiencies. PVAMC also submitted its formal radiation safety audit program.

NRC has verified that the licensee has taken the actions required by the CAL. NRC has reviewed PVAMC's audit report and found that the licensee's audit demonstrated that PVAMC had

taken corrective actions and implemented its commitments in the CAL to improve its oversight of the radiation safety program and to improve its problems related to communication, teamwork, and conflict resolution. PVAMC has conducted a comprehensive review and assessment of the radiation safety program. NRC has determined that PVAMC's audit was thorough in its assessment of the problems with communication, teamwork, and conflict resolution, as well as its evaluation of program deficiencies. In the audit report, PVAMC recognized the problems, and indicated that it had made progress in those areas. PVAMC noted that it had been concentrating on re-focusing attention on issues rather than past interpersonal conflicts, and is working on re-establishing trust and team work. PVAMC also stated that staff was beginning to feel more comfortable with admitting mistakes and initiating corrective actions. To clarify responsibilities, and to prevent the RSO from auditing its own activity, the Interim RSO recommended that the authorized users and their staff perform their own routine monitoring duties, with radiation safety staff auditing these duties. Staff has received training on all applicable NRC regulatory requirements, on management expectations, and on the policy on bringing forth identified program deficiencies. Additionally, PVAMC has established a formal system for conducting radiation safety program audits.

NRC conducted an inspection from June 1-3, 1998, at the licensee's facility (Inspection Report 030-14526/98-001, issued July 23, 1998). The inspection focused on the licensee's responses, dated November 4, 1997, and January 8, 1998, to the violations identified in Inspection Reports 030-14526/96-002 and 030-14526/97-001, respectively; licensee actions to assess and improve the radiation safety program; and implementation of management commitments addressed in the CAL. Within the scope of this inspection, no violations were identified. The inspectors verified that PVAMC's submitted corrective actions, as described previously, had been implemented for the violations identified in Inspection Reports 030-14526/96-002 and 030-14526/97-001.

The NRC inspectors, through a review of records, discussions with the licensee's staff, and observation of onsite activities, noted that major staff changes have occurred in areas that affect radiation safety and communication of management's

message to staff concerning the significance of bringing forth any safety concerns. A new chairman of the RSC was appointed in September 1997, and a new RSO was appointed in December 1997. The Chief Operating Officer currently has direct oversight of the radiation safety program, and the RSO is reporting to this individual. When the new Chief of Staff (COS) is appointed, the RSO will report directly to the COS. The inspectors noted that these staff changes, and their initiatives, significantly improved personnel's understanding of the importance of radiation safety and the importance of a work environment in which staff is encouraged to bring forth issues relating to radiation safety without fear of retaliation. The licensee's Interim Director (appointed March 1998), the new RSC chairman, and the new RSO, in cooperation with the facility staff, have initiated and implemented specific actions that enhanced and improved management oversight of the radiation safety program. These actions included establishing a formal audit program and providing training to staff on all applicable NRC regulatory requirements and the importance of reporting any program deficiencies. Additionally, management has worked to build teamwork and improve communication, and has made a commitment to increase program oversight. In summary, although the Petitioner is correct that certain violations and programmatic weaknesses have been identified in the past at PVAMC, as discussed above, the violations were not of major safety significance, and the licensee has undertaken extensive corrective actions for such deficiencies. In addition, NRC will continue to inspect the licensee's radiation safety program on an accelerated inspection schedule, in accordance with NRC's Inspection Manual Chapter 2800, so as to closely monitor the licensee's progress in improving its radiation safety program and communication among its RSO, RSC, management, and staff. In sum, the NRC has not substantiated the Petitioner's assertion that there has been a consistent pattern of violations occurring at the licensee's facilities for which the licensee has failed to take corrective action, and has found no basis for taking the action requested by the Petitioner.

#### B. Petitioner's Assertions of Altered Records and Licensee's "History" of Providing Inaccurate Information

The Petitioner also asserts that the inspector to whom she had provided information concerning problems at PVAMC had "copies of records which

<sup>3</sup>This inspection is discussed later in Section D of this Decision.

<sup>4</sup>The Petitioner has subsequently resigned from PVAMC.

appeared to have been deliberately altered by medical center personnel." In addition, she asserts that PVAMC has a "history of supplying information inconsistent with reality to the NRC." Finally, in her attachment to the Petition, the Petitioner refers to a letter from PVAMC to NRC, dated February 23, 1996, which she asserts contained inaccurate information.

The Petitioner has not specified the records that were allegedly altered by PVAMC personnel, and NRC has not identified any alterations of records required to be provided or maintained by NRC requirements. Therefore, this portion of the Petitioner's assertion has not been substantiated.

The Petitioner also asserts that her attached "chronological summary" of correspondence between PVAMC and NRC will "attest" to the fact that there had been a "consistent pattern of NRC violations occurring within the medical center" and that the licensee has a "history of supplying information inconsistent with reality to the NRC, and taking minimal, if any effort to correct cited violations." The attachment to the Petition references, among other documents: (a) an NOV issued to the licensee dated January 4, 1996; (b) a letter from PVAMC responding to the NOV, dated February 23, 1996, in which PVAMC allegedly supplied NRC with inaccurate information; (c) a letter from NRC to the licensee dated April 19, 1996, which noted "inconsistencies" in the licensee's letter, dated February 23, 1996; (d) a letter from the licensee dated May 6, 1996, in which the licensee acknowledged that there were inconsistencies in its letter dated February 23, 1996; and (e) a letter from NRC, dated June 27, 1996, accepting the licensee's statements in its letter, dated May 6, 1996, and approving the licensee's corrective actions to the violations cited in the NOV dated January 4, 1996.

The licensee's letter, dated February 23, 1996, responded to the NOV issued on January 4, 1996, citing it, among other things, for violating 10 CFR 35.13(c) by replacing the RSO without receiving a license amendment, and for violating 10 CFR 35.21(a) and 35.22(a)(3) by conducting a meeting of the RSC without half of the RSC membership or the RSO being present. In its response to the violations, by letter dated February 23, 1996, the licensee stated that an amendment request had been filed during the government-wide furlough, as the RSO was furloughed but, in order to ensure uninterrupted coverage of the radiation safety program, a nuclear physician was

assigned as RSO until the shutdown terminated. The licensee also stated that the full RSC could not be assembled because its members, including the RSO, had been furloughed.

This information initially appeared to the NRC staff to be inconsistent with its understanding of the events surrounding the furlough. Among other things, the NRC determined that, contrary to the licensee's statement, the RSO had never been furloughed. By letter dated April 19, 1996, the licensee was requested to provide clarification of the facts surrounding its understanding of these events. By letter dated May 6, 1996, the licensee submitted its response to this letter. In its response, it apologized for any inconsistency. The licensee stated that the RSO had been scheduled to be furloughed and the redesignation request filed with the NRC was to ensure radiation safety compliance in preparation for the contingency of the furlough. The licensee admitted, however, that the RSO was never officially furloughed and had not been contacted to attend the meeting.

NRC evaluated the information submitted by the licensee and determined that the information it had submitted in its letter dated February 23, 1996, was inaccurate. Nonetheless, the NRC concluded that the inaccuracy was not a deliberate attempt by the licensee to deceive the NRC, and that the licensee admitted to, and clarified, its error. The Petitioner's "chronological summary" that she submits as an attachment to her Petition does not provide any additional examples of the licensee's failure to submit accurate information. Therefore, this single incident of supplying inaccurate information does not support the Petitioner's assertion that PVAMC has a "history of supplying information inconsistent with reality to the NRC and taking minimal, if any, effort to correct cited violations." In addition, as described above, the licensee has taken considerable corrective action with regard to other identified violations and problems. Therefore, this matter does not provide a sufficient basis for taking the action the Petitioner has requested.

#### C. Petitioner's Assertion Regarding Contamination Incident

The Petitioner also asserts that individuals at PVAMC have become contaminated in what the Petitioner believes was an intentional incident. As noted above, NRC conducted an inspection of PVAMC during the period of July 9 through October 20, 1997, during which the inspectors examined the circumstances surrounding a

contamination incident that occurred in the Nuclear Medicine Department around July 24, 1997 (Inspection Report 030-14526/97-001, dated December 5, 1997). The incident involved the contamination of the hands of the RSO and the CNMT and contamination of a survey instrument.

The cause of the contamination was not definitively identified; however, NRC staff believes that the instrument may have been contaminated during routine surveys of the Nuclear Medicine Department. The licensee later determined that the survey instrument was contaminated with indium-111, a radionuclide that is not regulated by NRC. However, during the course of NRC's investigation of the contamination incident, NRC found violations of procedures related to the use of byproduct material. The inspector noted that the incident may have been caused by a weakness in the licensee's contamination control techniques, including not using contamination control precautions during the use of radioactive material, and, in some cases, failing to wear gloves. The inspector determined that the RSO and CNMT hand contamination was most likely caused by handling the contaminated instrument. The PVAMC was cited for four violations, three of which were related to NRC program deficiencies found as a result of NRC's review of the contamination incident, in an NOV dated December 10, 1997 (Inspection Report 030-14526/97-001): (1) failure to provide training to personnel who work in or frequent an area where radioactive materials are used or stored; (2) performing inadequate surveys in an area where radiopharmaceuticals were prepared for use and administered, in that an instrument with a faulty cable that rendered the instrument inoperable was used; and (3) failure to use an extremity monitor by a nuclear medicine technologist.<sup>5</sup>

Notwithstanding the above, the results of urinalyses performed on the licensee personnel involved in the incident indicated that there had been no intake of radioactive material by any of these individuals, including the Petitioner. In addition, the results of thyroid counts taken of these individuals indicated that the Petitioner did not exhibit any counts above

<sup>5</sup>The licensee committed, in its response to the NOV by letter dated January 9, 1998, to providing training to staff, to ensure that appropriate techniques will be used by its personnel so as to minimize contamination and avoid such incidents in the future. It also committed to provide training in the requirement to use personnel monitors and proper survey techniques.

background in any of the radioactive iodine channels.<sup>6</sup>

The Petitioner also asserted in her Petition that she was fearful for her personal safety as well as that of her then unborn child, that certain NRC staff shared these concerns, and that she believed that the contamination was intentional. In support of her claim, she stated that "two senior NRC physicists telephoned, and cautioned me to remove all consumable items from my office and not to eat or drink anything over which I did not have positive control." Although the NRC inspector did caution the Petitioner as she stated, this was advice given following the contamination incident as a reasonable precautionary health physics recommendation, based on the circumstances of the individual situation and the Petitioner's expressed concern for her personal safety.

Additionally, the Petitioner stated that "I received a visit in my office by two NRC inspectors, one of whom came to caution me that he believed my physical safety was in jeopardy due to the allegations I had made regarding violations involving human uses of radioactive materials." The Petitioner has not provided specific information as to who the inspector was who made this statement, and NRC has been unable to identify any individual as having made this statement. Nonetheless, NRC is aware that the Petitioner had raised a concern about her personal safety during 1997 following her raising allegations to NRC. However, NRC also was aware that the PVAMC security force was contacted by the parties involved. Therefore, the Petitioner has not raised any new information of which the NRC was not aware. As discussed above, NRC investigated the contamination incident, and did not find any evidence that the contamination incident was intentional and that the Petitioner was in any physical danger as a result of this incident.

Furthermore, as explained above, the licensee has since made numerous changes to its program and organizational structure, and has developed a program to encourage employees to raise nuclear safety concerns without fear of retaliation. In addition, as is also explained above, NRC will continue to closely monitor

the licensee's program on an accelerated inspection schedule to assure that PVAMC's corrective actions for past problems continue to be effective. Therefore, notwithstanding the seriousness of the situation that occurred during 1997, the Petitioner has not provided any information that would provide a basis for the NRC to take additional action such as she requested at this time.

#### D. Petitioner's Assertion of Employees' Fear of Raising Safety Concerns

The Petitioner also asserts that PVAMC employees are fearful of bringing safety concerns to the licensee for fear of retaliation, and to NRC due to NRC's "history of inaction" regarding the medical center.<sup>7</sup> With regard to the Petitioner's assertion that PVAMC employees are fearful of bringing forth safety concerns, as described above, during NRC inspections conducted at the licensee's facility from 1995 through 1997, certain programmatic weaknesses were identified, including communication problems among PVAMC staff, management, the prior RSO, and the previous RSC chairman. Furthermore, NRC became aware that, as a result of these problems, some PVAMC employees may have been reluctant to inform management or NRC about safety concerns. However, as described above, NRC Region I and Headquarters management met with the licensee on December 18, 1997, to discuss these program deficiencies, and subsequently issued a CAL, in which the licensee made several commitments to improve its oversight of the radiation safety program and to provide training to all nuclear medicine staff, researchers using radioactive material, RSC members and the facility management, on all applicable NRC regulatory requirements, on management expectations, and on the policy on encouraging employees to bring identified program deficiencies to management's attention. The licensee committed to complete these items by May 30, 1998. As discussed above, NRC inspected the facility June 1-3, 1998, and confirmed that the licensee completed these items. Additionally, the licensee is on an accelerated inspection schedule so that NRC can closely monitor PVAMC's progress in improving communication among the facility staff and program performance.

The licensee has conducted a comprehensive review and assessment

of its radiation safety program and provided a copy of the report to NRC by letters dated April 6 (with revised copy of report dated April 10) and April 13, 1998. NRC has determined that the assessment was of an adequate depth and breadth and covered not only technical radiation safety program issues but was expanded to include interpersonal communications, cooperation, and conflict resolution among the facility staff, as well. An audit was also performed by the Department of Veteran's Affairs' National Health Physics office manager.

NRC has found, through a review of the audit report and during its inspection performed June 1-3, 1998, that PVAMC has provided comprehensive training to all nuclear medicine staff, researchers using radioactive materials, RSC members, and facility management. The training focused on, among other things, the right and duty of employees to raise any nuclear safety concerns to management, or directly to NRC.

The inspectors also reviewed the implementation of PVAMC's actions documented in its responses to the CAL. The inspectors, through a review of records, discussions with the licensee's staff, and observation of onsite activities, noted that major staff changes have occurred in areas that affect communication of management's message to staff concerning the improved communications at all levels and the significance of bringing forth any safety concerns. The inspectors noted that these staff changes, as well as the implementations of their directives, significantly improved personnel's understanding of the importance of radiation safety and the importance of a work environment in which staff is encouraged to bring forth issues relating to radiation safety without fear of retaliation. The licensee's new senior management, the new RSC chairman, and the new RSO, in cooperation with the facility staff, have initiated and implemented specific actions, including providing training to staff on the importance of reporting any program deficiencies and safety concerns. Additionally, management has worked to build teamwork and improve communication, and has made a commitment to increase program oversight. During the June 1998 inspection, the inspectors found that the licensee's corrective actions to date have been effective. The new RSO and management team are making a concerted effort to create a favorable work environment which fosters an open flow of communication. The inspectors interviewed staff and found

<sup>6</sup>The CNMT did have an uptake of  $1.5 \times 10^{-3}$  Bq (40 nanocuries) of iodine-123, which is indicative of a minor intake of iodine-123 (a radionuclide not regulated by NRC, but regulated by the State of Pennsylvania). The licensee indicated that training will be given to this individual to ensure that appropriate techniques are used to minimize contamination in the future.

<sup>7</sup>The Petitioner's assertion of NRC's history of inaction regarding the PVAMC was referred to the Office of the Inspector General on February 12, 1998.

that individuals appear to be "more comfortable" raising safety concerns without fear of retaliation.

In sum, although, as a result of a general weakness in communications at the licensee's facility, there may have been, in the past, a reluctance among employees to raise safety concerns, NRC has found that the licensee has taken numerous effective corrective actions to ensure that employees are encouraged to raise nuclear safety concerns. Additionally, as stated earlier, PVAMC is on an accelerated inspection schedule, and this issue will be reviewed during future inspections. Therefore, the Petitioner's assertions regarding this issue do not provide a basis that would warrant the action she has requested.

The Petitioner also asserts that NRC withdrew a civil penalty after a change in NRC Region I management, possibly because it was not "cost-effective" to pursue the issue. She states that NRC's withdrawal of a civil penalty involving a violation of protected activities sent a "chilling" effect to individuals both within and external to the PVAMC who may have thought of raising a safety concern.

NRC staff assumes that the Petitioner is referring to the NOV dated September 18, 1996 (EA 96-182). As discussed earlier, NRC issued a NOV and Proposed Imposition of Civil Penalty of \$8000 to PVAMC as a result of concluding that PVAMC had discriminated against the Petitioner for raising safety concerns in November 1995, related to then-impending Federal government furloughs. NRC had identified this violation based on the determination of the DOL Acting District Director of the Wage and Hour Division that the Petitioner had been chastised by her immediate supervisor, the Chief of Engineering, for raising safety concerns. However, as explained previously, after its review of all of the available information, including the results of the OI investigation and PVAMC's responses to the NOV, NRC concluded, in a letter dated September 27, 1997, that the violation would be more appropriately classified as a Severity Level III violation and that enforcement discretion would be exercised to withdraw the civil penalty, pursuant to Section VII.B.6 of the Enforcement Policy. In this case, the determination to withdraw the civil penalty was made based on the fact that the chastisement of the Petitioner did not substantially affect the conditions of her employment; an apology was issued; she remained the RSO; DOL had concluded that it found that PVAMC had met the terms and conditions of

remedies it had outlined concerning the violation; and investigations conducted by DOL and OI failed to substantiate that there had been any continued discrimination against the Petitioner. Nonetheless, while NRC believes that there is no merit to the Petitioner's assertion that the decision to withdraw the civil penalty resulted from the fact that it was not "cost-effective" to pursue the issue against PVAMC, the Petition was forwarded to the Office of the Inspector General for its review on February 12, 1998.

#### IV. Conclusion

NRC has determined that, for the reasons discussed above, the Petitioner has not provided a sufficient basis for taking any action to suspend or revoke PVAMC's license, as requested in the Petition. Accordingly, the Petition is denied.

As provided by 10 CFR § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission, for the Commission's review. The Decision will become the final action of the Commission 25 days after issuance unless the Commission, on its own motion, institutes review of the Decision within that time.

Dated at Rockville, Maryland, this 28th day of August, 1998.

For the Nuclear Regulatory Commission.

**Carl J. Paperiello,**

*Director, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 98-24011 Filed 9-4-98; 8:45 am]

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#### SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23420; 812-11286]

#### DG Investor Series, et al.; Notice of Application

August 31, 1998.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under section 6(c) of the Investment Company Act of 1940 (the "Act") from section 15(a) of the Act.

**SUMMARY OF APPLICATION:** The requested order would amend a prior order (the "Prior Order")<sup>1</sup> permitting the implementation, without prior shareholder approval, of new advisory ("New Management Agreement") and sub-advisory agreements ("New Sub-

<sup>1</sup> *DG Investor Series, et al.*, Investment Company Act Release Nos. 23107 (April 9, 1998) (notice) and 23163 (April 30, 1998) (order).

Advisory Agreements") (collectively, the "New Agreements").

**APPLICANTS:** Parksouth Corporation ("Adviser"), Womack Asset Management ("Womack"), Bennett Lawrence Management, LLC ("Bennett"), Lazard Asset Management, a division of Lazard Freres & Co. LLC ("Lazard"), and DG Investor Series (the "Trust").

**FILING DATE:** The application was filed on August 31, 1998. Applicants have agreed to file an amendment during the notice period, the substance of which is described in this notice period, the substance of which is described in this notice. *Hearing or Notification of Hearing:* An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:00 p.m. on September 21, 1998, and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, NW, Washington, DC 20549. Trust, Adviser, Womack, Bennett, and Lazard, c/o Timothy S. Johnson, Esq., Federated Investors, 5800 Corporate Drive, Pittsburgh, Pennsylvania 15237-7010.

**FOR FURTHER INFORMATION CONTACT:** John K. Forst, Attorney Advisor, at (202) 942-0569, or Mary Kay Frech, Branch Chief, at (202) 942-0564 (Office of Investment Company Regulation, Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, NW, Washington, DC 20549 (tel. 202-942-8090).

#### Applicants' Representations

1. The Trust is a Massachusetts business trust registered under the Act as an open-end management investment company. The Trust currently offers nine series: DG Equity Fund, DG Opportunity Fund ("Opportunity Fund"), DG Mid Cap Fund ("Mid Cap Fund"), DG International Equity Fund ("International Equity Fund"), DG Limited Term Government Income Fund, DG Government Income Fund,