



U.S. Nuclear Regulatory Commission Issues Four Confirmatory Orders Related to Fitness-for-Duty and Medical Issues

Introduction

The U.S. Nuclear Regulatory Commission (“NRC”) recently issued four confirmatory orders, two to Nuclear Fuel Services, Inc. (“NFS”) and two to its primary physician for licensed activities/ Medical Review Officer (“MRO”). All four orders resulted from apparent violations identified by the NRC based on investigations conducted by its Office of Investigations (“OI”). Two related to the discovery and handling of a case involving violations of the alcohol abstinence period by a senior executive and the associated actions of NFS employees, NFS management, and the MRO. The other two resulted from a determination that, contrary to a certification by the MRO, the physical examination of two security officers had not been completed in accordance with requirements.

These confirmatory orders illustrate the extent to which the NRC Staff is willing to use its alternate dispute resolution (“ADR”) process to shape corrective and enhancement actions even when allegations of deliberate misconduct and violations of complete and accurate information standards are involved. Apparently, the Staff is willing to give up the traditional enforcement process and the possibility of associated civil penalties where it believes it could more easily effect corrective actions, including actions beyond what could be reasonably expected from a licensee in response to a notice of violation.

Discussion

Fitness-for-Duty Incident

NFS Issues

The first set of issues related to a fitness-for-duty incident (“FFD”) that occurred at NFS in March 2006. Based on an OI investigation and subsequent Staff review, the NRC had advised NFS, by letter dated January 7, 2009, of its identification of seven apparent violations relating to the consumption of alcohol by a senior executive of NFS less than five hours before a scheduled working tour in contravention of fitness-for-duty requirements. This incident was previously described in our client briefing dated January 23, 2009. It was alleged that NFS failed to relieve the executive of his duties, failed to perform for-cause testing, and failed to implement required management actions. Allegedly, NFS granted the senior executive self-referral rehabilitation status even after notification of an ongoing fitness-for-duty investigation. Furthermore, a senior NFS executive, in correspondence addressed to the NRC, stated that the NFS senior executive had entered a substance abuse rehabilitation program when, in fact, he had not done so. The NRC alleged an apparent violation of 10 C.F.R. § 70.9 in that a senior NFS manager placed another letter in the senior executive’s personnel file and provided this letter to the NRC. This letter stated that the senior executive had entered a substance abuse rehabilitation program when, in fact, the

- BEIJING
- CHARLOTTE
- CHICAGO
- GENEVA
- HONG KONG
- LONDON
- LOS ANGELES
- MOSCOW
- NEW YORK
- NEWARK
- PARIS
- SAN FRANCISCO
- SHANGHAI
- WASHINGTON, D.C.

senior executive had not done so. The NRC also alleged that NFS failed to determine the senior executive's fitness to safely and competently perform his duties and responsibilities before returning him to duty. Finally, it was alleged that NFS did not provide appropriate training to ensure that employees understood their roles and responsibilities in implementing its fitness-for-duty program.

As a result of the ADR, the company agreed to take a number of corrective actions. While NFS did not agree that all alleged violations had occurred, NFS and the NRC Staff agreed that the corrective actions and enhancements documented in the confirmatory order adequately addressed the issues. NFS identified the factors that contributed to the FFD program failures and took disciplinary action and made an organizational change with respect to the senior executive. It emphasized the five-hour abstinence period in its procedures and the requirement to test if alcohol consumption or the smell of alcohol is suspected. NFS established alternate avenues for reporting FFD-related concerns and lowered the threshold for reporting. The NRC also noted that NFS implemented measures to assure a continued safety-conscious work environment to prevent, detect, and mitigate perceptions of harassment and intimidation.

In addition, NFS agreed to further measures, including the development of an executive review board oversight process to review and consider behavioral observations and fitness-for-duty issues, allegations, positive FFD tests, disciplinary actions, and employee concern program ("ECP") concerns. NFS agreed to implement additional ECP enhancements and agreed to perform a one-time, third-party evaluation of its program. NFS also agreed to develop a behavioral observation program ("BOP") and FFD case studies for the purpose of communicating program changes, the reporting threshold for FFD issues, the avenues for reporting, and other FFD issues. NFS agreed to revise its FFD procedures as necessary to clearly define when self-referral status is no longer available. Finally, NFS agreed to revise its process for handling NRC requests for information related to allegations to assure completeness and accuracy of information.

Physician Issues

The NRC issued a confirmatory order involving the MRO who had participated in the FFD process for the senior executive. The NRC alleged three apparent violations of 10 C.F.R. § 70.10, Deliberate Misconduct. The NRC alleged that the physician provided material incomplete information to a contract professional retained by NFS to perform a determination of fitness-for-duty of the NFS senior executive. The failure to provide the information caused NFS to fail to make an informed determination that the NFS senior executive was fit to safely and competently perform his duties and responsibilities before being returned to duty. It

was also alleged that the physician provided materially inaccurate information to NFS that the NFS senior executive had entered a substance abuse rehabilitation program when, in fact, he had not done so. The physician disagreed that any of the identified apparent violations occurred, emphasizing that his actions were consistent with the role and responsibilities of a MRO providing services to a NRC licensee.

As a result of the ADR, the NRC agreed not to pursue enforcement action with respect to the physician. For his part, the physician agreed, among other things, to an independent assessment by a certified MRO as to the circumstances attending the referral of the NFS senior executive. As a result, the physician will develop lessons learned and, if indicated, implement corrective actions from the assessment. The physician and an independent MRO will meet at least quarterly to review "unique or noteworthy issues relevant to compliance with NRC regulations." The physician is required to attend certain symposiums and submit a letter to a nationally recognized MRO certification program to request advice on how to best solicit information from the MRO community on the MRO referral process.

Physical Examination Incident

NFS Issues

The second set of issues involved two apparent violations involving the actions of the same physician who, on October 19, 2007, certified on two security medical examination forms that the named security officers were medically qualified per medical standards when, in fact, their medical evaluation had not been completed. Specifically, the two security officers had not been administered the hearing test portion of the medical examination. As a result, the NRC alleged that NFS maintained incomplete and inaccurate information in violation of 10 C.F.R. § 70.9(a) and, additionally, the security officers were assigned to perform security duties without proper suitability certification in violation of 10 C.F.R. § 73.46(b)(4).

As a result of an ADR session confirmed by a confirmatory order dated November 23, 2009, NFS agreed that the two issues represented violations of regulatory requirements. To preclude recurrence, NFS completed certain corrective actions and enhancements. Both security officers were removed from security duties until scheduled hearing tests were passed. Additional physical exam paperwork was examined for discrepancies. The importance of physical exam requirements and expectations with regard to review of physical exams and immediate actions to take for identified discrepancies was communicated to certain security management. The security training manager met with the physician and reinforced the importance of physical exam requirements. Additional procedures were enacted to educate the security work force on basic physical qualification requirements,

and NFS has instituted an administrative check process to ensure that required information is annotated on incoming physical exam forms.

NFS agreed to assess why the incident was not entered into its corrective action program and why a formal root cause evaluation was not completed. Based upon its review, NFS will implement additional corrective actions. NFS agreed to complete actions to assure understanding of the extent of condition involving physician-certified processes, such as respirator qualifications. NFS agreed to benchmark other licensees in their oversight of services provided by any primary physician for licensed activities. For a period of one year after the issuance of the order, NFS will assure that the physician meets at least quarterly with a physician engaged in NRC-regulated activities to review unique or noteworthy issues relevant to compliance with NRC regulations. The physician must initiate a one-time mutual review of processes and procedures with an industry counterpart involved in applicable NRC-regulated activities. NFS is required to establish appropriate standards for the primary physician for licensed activities and other contract medical specialty. Finally, NFS will formalize its administrative check used to ensure all required information is annotated on the incoming physician forms.

Physician Issues

For his part, the physician admitted he signed the two incomplete security medical examination forms and allowed them to be submitted to the NFS security office. While the physician signed the forms and instructed his assistant to notify the NFS security officers that they needed to return to complete the test, this was not done even though a number of attempts were made. As a result of the ADR, the physician agreed to an independent assessment of the circumstances that led to the incidents and to identify root and contributing causes. The physician agreed to the quarterly review discussed above and he agreed to take a course certified for continuing medical education credit that addressed best practices for administrative officers, office procedures, and recordkeeping. He also agreed to communicate lessons learned and experiences as a result of this incident to an appropriate audience.

Conclusion

These two cases demonstrate the willingness of the NRC to accept commitments from licensees and individuals in cases where significant violations of NRC requirements have been alleged, in lieu of formal enforcement.

If you have any questions about the matters discussed in this client briefing, please contact:

Washington, D.C.

David A. Repka

Mark J. Wetterhahn

drepka@winston.com

mwetterhahn@winston.com

(202) 282-5726

(202) 282-5703

These materials have been prepared by Winston & Strawn LLP for informational purposes only. These materials do not constitute legal advice and cannot be relied upon by any taxpayer for the purpose of avoiding penalties imposed under the Internal Revenue Code. Receipt of this information does not create an attorney-client relationship. No reproduction or redistribution without written permission of Winston & Strawn LLP.

© 2009 Winston & Strawn LLP.
