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To: <nrcprep@nrc.gov>
Date: Mon, Aug 20, 2001 10:56 AM
Subject: Discrimination Task Group

Below is the result of your feedback form. It was submitted by Ted Metzler (ted@arguendo.net) on Monday, August 20, 2001 at 10:55:10

Affiliation: None.

Comments: Commission Members:

I am a third year law student at Georgetown University Law center. I am very new to this issue, but I was present at the August 16 meeting in Rockville Maryland, and I have read the draft report. I am writing not because I have strong views on how (or whether) the NRC should conduct its investigations into allegations of discrimination, but because I have strong views on legal process.

I took a class this past semester called "Legal Process." One of the main ideas in the course is that legal processes work best when decisions are given to the institution that is best situated to make the kind of decision presented. Thus, legislatures are good at making certain kinds of decisions (political, policy decisions), courts are good at making other kinds of decisions (unbiased fact finding, questions of interpretation), and administrative agencies are good at making still other kinds of decisions (rules and regulations requiring specialized expertise).

I think the Task Group, and by extension the Commission, should look closely at the question of investigations into discrimination claims, and consider whether the sorts of decisions that are being made are the kind that the agency is best situated to make. I would argue that they are not. In its investigative role, the Commission is acting as a law enforcement agency, yet by issuing NOV's, the Commission is taking on a judicial role. While these contradictory roles are bad enough to warrant a hard look at the process, the problem is compounded because the Commission is acting outside its area of expertise in both of these roles.

If the Commission performs investigations, those investigations should be related to its expertise. No other agency is better situated to determine whether a nuclear facility is complying with regulations than the NRC. If the Commission performs a judicial role, that role should again be confined to the Commission's area of expertise. Furthermore, any quasi-judicial role should be integrated into the judicial system, such that a full hearing allows both sides to be heard, and a Commission decision has a right of appeal to the Federal Circuit. From the Draft Report and the comments I heard at the public meeting, it appears that the NRC is investigating mostly employee relations matters outside its area of expertise, that it makes decisions without both sides being given an opportunity to be heard at a hearing, and that when it makes a decision by issuing a NOV, that decision is not subject to review by any impartial third party.

It is no wonder that stakeholders complain that the process is broken. A lot of my Legal Process class seemed obvious because it made so much sense. How remarkable is it to say that an administrative agency should confine its activities to its area of expertise? Yet here is an example of an agency doing just the opposite. Neither is it remarkable to think that a person facing a sanction by a government agency that could adversely affect his career should be able to face his accuser in an open court (or court-like administrative proceeding), and that such a person should have a right to appeal an adverse ruling. These are basic and obvious features of our legal system, and the Task Group and the Commission should make align the system with them.

Finally, I would like to comment on the Task Group's assertion that promotion of a safety-conscious work environment justifies the current process (with some modifications in the draft report). This assertion is untenable. If the Commission feels the need for a rule requiring licensees to maintain a safety-conscious work environment, it has the power to make such a rule. Another key concept in Legal Process is that

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statutes are to be interpreted according to a "purposive" approach. What was the purpose of the statute? Here, the purpose of the statute was to prevent licensees from retaliating against employees that report safety concerns. The purpose was not to ensure a safety-conscious work environment. As I understand it, the Commission rejected such a rule. Therefore, for the Commission staff to use the power of investigation as a club to enforce a rule that was rejected goes against not only good legal process but also against fair and just enforcement of the law.

For the foregoing reasons, I urge the Task Group to recommend to the commission to defer allegations of discrimination to the Department of Labor, which IS well-situated to make decisions about such allegations. In the alternative, I urge the commission to allow a full and fair hearing before an impartial decisionmaker for individuals accused of discrimination, with a right of appeal for any adverse decision.

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