

September 27, 2000

MEMORANDUM TO: File

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SUBJECT: SUMMARY OF SEPTEMBER 5, 2000 DISCRIMINATION TASK GROUP
PUBLIC MEETING

On September 5, 2000, a public meeting was held at NRC Headquarters to discuss the NRC enforcement program and practices in employee protection cases. The meeting was the first in a series of meetings to solicit stakeholder input on the NRC's processes for handling discrimination cases. A summary of the meeting presentations, materials and statements submitted and attendance list are attached.

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MEETING SUMMARY FOR SEPTEMBER 5, 2000 DISCRIMINATION TASK GROUP
MEETING IN NRC HEADQUARTER, ROCKVILLE MD.

The meeting began at 2:00 p.m.

Bill Borchardt, Director, NRC, Office of Enforcement
(Presentation slides included as Attachment 1)

Mr. Borchardt opened the meeting with a brief presentation outlining the formation of the Discrimination Task Group and the NRC processes for handling discrimination cases.

Bill Briggs, Attorney - Ross, Dixon, and Bell, L.L.P.
(Prepared statement is included as Attachment 2)

Mr. Briggs discussion focused on the impact of allegations of discrimination on the individuals accused of discriminating against an employee. Typically individuals accused of discriminating have many years of unblemished service before they are accused of "criminal misconduct". The individuals are often confronted with information that is untimely in that it has occurred many years prior to the allegation. The evidence against them is unknown since they don't have access to the OI investigation. They have no right to challenge the evidence and at times feel like they are a scapegoat for the employer. The Individual Action ban has been rarely used and that is a good thing. Although whistle blowers may also have to face stress and adverse treatment by their employer, the difference is that the individuals accused of discrimination are the subject of possible punitive action by their government, having the government use its resources to threaten careers, and having a stigma put upon them by simply being accused of retaliation against a whistle blower.

Suggestions: (1) Greatly limit use of 50.5 in conjunction with 50.7 . (2). Interpret 50.5 the way it was written and intended to be applied. This regulation is extremely narrow - in focus. The agency usually gets it right. But it takes long to get to that answer. Costs too much pain and money. Honest mistake can be made. Deliberate misconduct is not a serious problem in this industry. (3) Speed up the process. If an issue is actually safety significant, then the process takes too long. (4) Open up process. It is wrong to take away a person's livelihood without giving him or her the evidence to defend themselves. Release the OI reports. (5) Guarantee hearing rights before taking individual actions.

Ralph Beedle, Vice President and Chief Nuclear Officer of Nuclear Energy Institute (NEI):

Mr. Beedle made introductory remarks regarding the NRC's impact and the unintended consequences created by application of 50.7.

Ellen Ginsberg, Associate General Counsel, NEI:
(Presentation slides included as Attachment 3)

The nuclear industry's performance continues to improve, including the focus on safety conscious work environment. The current implementation of 10 CFR 50.7 has the potential to adversely impact the licensee's ability to ensure safe and efficient plant operation. The NRC's implementation of its employee protection regulations, (1) Result in impeding manager's ability

to manage the workforce. (2) Is inconsistent with regulatory reform in that it is not open, transparent, timely or unbiased. (3) Results in pre-decisional enforcement conferences not coming to a common understanding of the facts because of the fundamentally unfair practice of denying access to the OI reports. (4) Cause negative public perceptions prior to complete “ventilation” of the facts. (5) Uses a disproportionate amount of agency resources for the little value added for primarily “outlier” cases. (6) Results in enforcement guidance that nullifies 10 CFR 50.7(d) requirements. (7) Uses inappropriate criteria such as the preponderance of the evidence to establish a reasonable inference that discrimination occurred.

NEI recommended a split of jurisdiction between Department of Labor and the NRC. The NRC should focus only on the underlying safety concerns and the licensee’s actions to ensure workers feel free to engage in protected activities. However, NEI does not support rulemaking to put in place a safety conscious work environment regulation. DOL should evaluate the discrimination claims. Revise the Commission policy to release OI reports prior to the predecisional enforcement conference. Revise the Enforcement Policy severity levels to reflect the agency goals.

John R. McGaha - President Entergy:

(Slides included as Attachment 4)

Mr. McGaha endorsed the previous three speakers statements. It is important that supervisors be trained and informed in the applicable employee protection regulations. Most cases of discrimination are the result of poor communications, or ignorance of the regulations. Concerns with the 50.7 regulation include: (1) Need a balanced approach with equal protections for both the allegers and licensees. The Office of Investigations should provide same due process to all parties. Today, it is the licensee’s burden to prove innocence. There is no accountability on allegers for false or frivolous claims and the company bears all costs. The NRC has a “guilty until proven innocent” approach. (2) Enforcement action should be reserved for programmatic problems with a measured response. (3) Middle management is the most affected by this regulation. There is the feeling that if you are accused you are guilty until proven innocent and that all it takes is one strike and you’re out. (4) Contractors have figured out how to use this regulation as a shield against action such as layoffs and to create more work. We need an enforcement sanction for misuse of protection regulations. We need a balanced process, with measured responses, with enforcement limited to significant programmatic failures.

Bob Helfred - ComEd council:

(Slides included as Attachment 5)

Mr Helfred discussed the Commonwealth Edison training program related to employee protection regulations. ComEd gives in depth training for employee protection. ComEd is concerned about low evidentiary standard used in discrimination cases, inferences, and the lack of weight the NRC gives to normal business decisions. Com Ed is concerned about fairness to supervisory employees where actions were taken in good faith to enhance safety.

Bill O’Conner - VP Fermi:

If a utility is working hard to support a Safety Conscious Work Environment (SCWE), the NRC should take that into account if an anomaly appears. Contractors have the responsibility to bring up safety issues, but some have learned how to use the system to their benefit.

The causal relationship went away with the “in part” definition in EGM 99-007. The definition of a protected activity has changed, making more things fall into this category. Industry performance couldn't be as good as it is in all areas with lots of discrimination. Discrimination cases are going up at the same time other violations are going down. The NRC needs to look at the 1998 - 1999 time frame to see what changed and why the cases starting increasing at that time. Something is different and it is not the industry management. In summary don't react by taking enforcement action if there is a strong SCWE and an anomaly occurs.

Don Meinderstma - Winston and Strawn:

(Statement included as Attachment 6)

Mr. Menderstma began his discussion by agreeing with the NEI and other speakers comments. The NRC's enforcement scheme for discrimination has always been unique among federal agencies, with possible exception of the Department of Energy (DOE). It appears that DOE in recent years is attempting to track the NRC process.

The first issue is the role of 10 CFR 50.7. The important question the NRC should answer is; why is there continued justification for the NRC to target isolated instances of discrimination, given the availability of Section 211 which is precisely designed to address allegations of discrimination. Is a separate policy applied to 50.7 warranted? No other federal agency believes it is necessary to investigate and impose civil monetary penalty. The NRC should determine precisely what it is in nuclear industry that warrants both Section 211 (DOL) and 50.7. DOL has the expertise and the resources to resolve allegations of discrimination in the industry.

The NRC should review the standard of proof used in discrimination cases. The staff appears to take enforcement action when discrimination may be provable rather than a clear case that discrimination has occurred.

The second issue is the motivation standard. Why should the NRC focus on whether there was ever a consideration in the back of someone's mind of a protected activity as part of an employment decision? The question should be, did the employer have a legitimate business reason for the employment action taken. Under section 211, DOL has said that if the employer would have taken action anyway, employer would escape liability.

The third issue is protected activities. A recent enforcement action included the statement that a protected activity in a performance appraisal should not be cited as a performance weakness justifying employment determinations. Because protected activity is interpreted so broadly, employees are frequently protected in doing their job. Why should poor performance be immune from critique by a supervisor.

The final issue is adverse action. Recent enforcement actions focus on discrete workplace interactions and not on significant employment actions. The threshold reached a new low when a recent action was issued because a memo in a personnel file had the “potential” to cause an adverse action. In another action, DOL said that a brief suspension with no loss of pay that was promptly revoked was not adverse, but NRC said it was for 50.7 purposes. The adverse action bar is too low. The NRC should consider why the enforcement process should start for every work place slight. At least the nature of the action should factor into the severity level determination.

Sheldon Trubatch - Hopkins and Sutter:

(Slides included as Attachment 7)

The NRC is successfully transitioning to a risk informed regulatory oversight process. The NRC should also consider risk informing the discrimination enforcement process. The focus should be the safety basis for the concerns. The NRC should develop objective safety measures which considers actual total safety consequences for a specific situation. Trial balloon; consider risk informing the allocation of discrimination responsibility between the individual and the licensee for the determination of the appropriate regulatory response. Also recognize specific behaviors that are unacceptable independent of risk. Integration of safety and behavior will provide predictable objective regulation.

Jay Gutierrez - Morgan Lewis

(Slides included as Attachment 8)

The roles of the NRC and DOL are different. DOL is the agency that is best suited to evaluate individual claims of discrimination. The NRC should not automatically refer every case to OI. The NRC should avoid duplicative agency proceedings and inconsistent decisions. NRC should understand the complete and accurate understanding of the allegation and refer the individual to DOL for remedy. In most cases the allegation should be referred to the licensee for licensee's response and position. The NRC need to focus on any chilling effect resulting from the issue and review the programmatic implications of the case. If an individual chooses not to go to DOL, the retaliation component should be closed out if licensee has done all it can to address the chilling effect.

The thresholds for enforcement action should be heightened to investigate only above the first line supervisor unless special circumstances exist. If a settlement while in the DOL process occurs, the NRC should discontinue their investigation leading to enforcement.

The NRC should ordinarily rely on the DOL/ALJ record. If special circumstances exist that causes an OI investigation, the licensee should receive the entire investigative record before a pre-decisional enforcement conference. The NRC should set forth in a letter, similar to an ALJ's weighing of evidence, the basis for its conclusion that a preponderance of the evidence suggest that discrimination occurred. Severity levels should be realigned and include factors other than the level of the management involved in the discriminatory acts. First line supervisors should be SL IV, then increase the severity from there. The NRC should discontinue the enforcement consideration of any retaliation claim that has resulted in a settlement.

Billie Garde: - Attorney

Ms. Garde agreed that people make mistakes. For different reasons than the utility presenters, she gets to same place. The current process encourages animosity and adversity. Trust is gone. The process is unfair, not open, not consistent, and results in no due process. The Inspector General (IG) inevitably follows OI in high profile cases, because the process is not open and results in many questions as to how the results were determined. There is a cost to managers and supervisors. Ms Garde agreed with Mr. Briggs. Mistakes result in the

supervisor being treated as a scapegoat. The NRC demands that a supervisor is fired as a result of the discriminatory finding.

The entire process takes too long. The process also turns the employee/employer relationship on its head. However, Congress has set the standards. The primary responsibility for the NRC is to keep lines of communication open. The NRC should regulate SCWE. Verify ECP programs are working. If the retaliation is being addressed by the licensee, the NRC doesn't need to perform an OI investigation. However, if there have been no corrective actions, then the NRC needs to take action. The OI process is closed and needs to be opened up. The entire process is not fundamentally fair. More training is needed and a SCWE should be required. If the licensee responds correctly, then maybe the NRC should do nothing else.

Mr. Borchardt

Gave a brief summary of the areas covered in the presenters remarks. The issues raised included:

1. Access to information, specifically the OI report. The NRC should do a better job explaining in the NOV cover letter as to our reasoning for taking the action.
2. Speed up the process. Mr. Borchardt asked whether we need PECs or would we be better served to propose a NOV quicker? The participants did not offer a response, but indicated they need to think about that question.
3. The NRC should better define the role of all parties engaged in the process.
4. Legal standards, including motivation should be reviewed.
5. The roles of NRC and DOL should be reviewed. Expand the factors to be considered in enforcement process such as the severity levels.
7. Proposed models for non-escalated issues, in most cases the action should be referred to licensee for review and corrective action.