

October 31, 2000

MEMORANDUM TO: File

FROM: Barry Westreich /RA/
Office of Enforcement

SUBJECT: SUMMARY OF October 5, 2000, DISCRIMINATION TASK GROUP
PUBLIC MEETING IN LISLE, ILLINOIS

On October 5, 2000, a public meeting was held at the NRC Region III offices in Lisle, IL to discuss the NRC enforcement program and practices in employee protection cases. The meeting was part of a series of meetings being held to solicit stakeholder input on the NRC's processes for handling discrimination cases. A summary of the meeting presentations, materials and statements submitted and an attendance list is attached.

Attachments: As stated

cc: FMiraglia, DEDR

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DISCRIMINATION TASK GROUP MEETING

October 5, 2000

Region III office, Lisle, IL

The meeting began at 7:00 p.m.

Bill Borchardt, Director, Office of Enforcement

(slides included as Attachment 1)

Mr. Borchardt began the meeting by giving a brief presentation of the Task Group Activities and the NRC processes for handling discrimination matters.

Ray Landrum, Manager ComEd

(Slides included as Attachment 2)

Mr. Landrum stated that he had first hand experience with the process since an enforcement action taken against him for discrimination.

Three areas of comment:

Impact on the accused

Process

Lesson Learned

Mr. Landrum gave some background on his case based on a 1997 issue at Zion Station. He was cited with a violation of 10CFR50.5. ComEd submitted more information and the individual Violation against him was subsequently dropped. The impact on the accused is significant and can be career ending. His 27-year livelihood was threatened, all based on one instance of alleged discrimination. It has an impact on the ability to manage.

The Process should be more balanced and provide fair notice of allegations. The NRC should give more credit for valid business decision (10CFR50.7d). The process places a difficult burden on the accused to prove innocence and it seems as though you are guilty until proven innocent. There should not be an inference based on temporal proximity alone. Managers should be careful but the process should not be one sided and should maintain fairness and balance. The NRC should require objective evidence before finding deliberate misconduct.

Mr. Borchardt asked: On the issue of the stigma on a manager; at what point does that initiate?

Answer: On the issuance of the notice of violation.

Mr. Borchardt: Is it a site specific issue?

Answer: It is probably site specific, but there was some interest elsewhere.

Mr. Dambly stated that as part of the task group meetings, we have heard that just because OI investigates creates a stigma. Do you think this is true?.

Answer: Mr. Landrum stated that he believed the fact that an investigation is ongoing is held

close to the chest and there isn't a lot of general knowledge outside the investigation.

Mr. Borchardt: On the subject of releasing the information and reports. Whom would you have the reports given to?

Answer: I would have wanted to know the details of the allegation before the OI interview.

Mr. Borchardt: What about having the OI reports before the enforcement conference.

Answer: That would have been helpful, I saw things in the report that I had answered and wish I would have known before the interview.

Mr. Dambly: Do you feel that individuals that intentionally discriminate violating 10CFR50.5 regulations should be subject to sanctions?

Answer: Sure, as a manager you want people to bring up safety concerns. There is no room to take a discriminatory act just because they raised issues. There needs to be protection so people feel comfortable bringing up safety concerns.

Question: How did the issuance of the NOV against you impact your ability as a manager?

Answer: It did not have much of an impact on my ability to deal with the workforce. They knew me before and after the violation as the same person.

Ms. Pedersen: Can you gauge the impact of the violation?

Answer: Every day you are trying to improve. You may have someone who just wants to slow the process down. As a manager, you want to reward the right behaviors and punish the bad behaviors. If I can't go to the guy to say improve in this area, your hands are tied.

Ms. Pedersen: Is it a conscious thought that when you go to deal with an individual, you need to be careful that you aren't being accused of discrimination?

Answer: It wasn't before, but now you have to constantly be weighing the protected activity. It is a great burden.

Ms. Pedersen: Is that an isolated or common feeling amongst the managers at the plant?

Answer: I don't know if it is widespread, but I am very conscious of the issue.

Question: What would you consider objective evidence?

Answer: Direct conversation that states I am doing this because of that. Memos to file, emails, or first hand conversations.

Question: You stated that some people just try to slow the process down by raising questions. Who makes that determination?

Answer: It isn't a one day event. It is over a long period of time.

Question: If people are raising issues, and they are valid issues how can you say they are raising road blocks.

Answer: There are people in the industry that want to slow down the process and we should be able to talk to them about their performance.

Ellen Ginsberg, NEI

(Slides included as attachment 3)

This is a timely topic. The current NRC implementation has the ability to adversely affect safety and not improve safety. The current state of play is that the industry has worked very hard to ensure that SCWE is the standard. Training on this topic is performed at every plant in the country. Every plant has multiple avenues to raise concerns. Licensees' understand the value of these programs.

NEI's proposed reform objectives:

Why is reform necessary? Because the current regulatory approach doesn't recognize the current industry practices in this area. The process is inconsistent with good regulation. It is not open, not independent, not reliable and not timely.

Mr. Baker: With regard to the relatively low percentage of discrimination complaints substantiated, can you explain your perspective that we are looking to prove discrimination.

Ms. Ginsberg: While the numbers were relatively static, the resources required is very high. The analytical model and the evidentiary threshold that has been put in place have changed.

Assigning more resources does not seem appropriate.

Mr. Baker: It depends on what objectives you are trying to meet.

Ms. Ginsberg: I don't think you increase public confidence if you are just doing a lot of investigation. The analytical models being used are inconsistent.

Comment: The NRC tends to replay this idea that the number is very small, when many people think that it is a high number. I don't think we need to talk about the numbers about being small or high, but don't take a lot of credit that your number is small.

Mr. Baker: DOL substantiates about the same percentage of cases as the NRC does.

Ms. Ginsberg: It isn't so much the numbers, but the process. Since MIRT, the process has changed drastically and the good intentions are going to result in less safety rather than more.

Our recommendation is for fundamental change. A new way of looking at these issues.

Fundamentally, the NRC should refocus orientation of its inquiry from a punitive approach to one that looks at the underlying safety issue, and the potential chilling effect. The NRC should not focus on whether discrimination occurred but whether there is a chilling effect.

Mr. Baker: You say that, but in looking at the chilling effect do we look at SCWE, which we don't have a regulation for.

Ms. Ginsberg: No, not in the construct that the NRC puts it. It is not an SCWE rule recipe.

Mr. Baker: Then what would you have us do?

Ms. Ginsberg: This should be a non enforcement approach

Mr. Baker: Specifically, what are you proposing we do?

Ms. Ginsberg: I am not the expert in this area. But we should look at this in a non enforcement context. Discontinue the OI referral. It is much more akin to criminal prosecution which is closed and adversarial. The OI investigation polarizes the parties. Defer to DOL on indication.

Mr. Dambly: Why don't you ask for hearings in these cases?

Ms. Ginsberg: What is the business benefit to go to hearing? The Federal Government should not have a framework to go to hearing. It should be fundamentally fair.

Mr. Dambly: Should we eliminate the enforcement conference and go straight to hearing?

Ms. Ginsberg: That bears greater thought.

Mr. Baker: What about people that do not go to DOL?

Ms. Ginsberg: If someone sits on their rights, the NRC should not rush in to fill the void.

Mr. Dambly: If we adopt your recommendations, should we amend Section 211 to allow DOL to issue punitive damages. Otherwise, there is no disincentive to discriminate in this area. Other agencies have a punitive aspect.

Ms. Ginsberg: I reserve judgement on this topic, but I don't think the DOL process is easy.

Mr. Dambly: But license's don't want to litigate through us. There has got to be a reason.

Ms. Ginsberg: The issues are being argued more than once in more than one area. DOL is the correct place for personnel remedy.

Mr. Borchardt: You state that the current process is not open. What does your proposal do to make it more open?

Ms. Ginsberg: Release of OI reports. When OI takes the criminal approach, it is an adversarial approach that limits the give and take aspects.

Mr. Borchardt: Are you talking about opening up enforcement conferences?

Mr. Letts: Does this OI approach apply to the other OI investigations including wrongdoing?

Ms. Ginsberg: There is a distinction where a heavy handled approach is warranted, such as in wrongdoing cases. In discrimination, many of these issues are based on misunderstandings. The NRC should consider decriminalizing this process.

Mr. Borchardt: Focusing on the underlying safety issue, does that mean a safety issue that is of minimal safety impact that resulted in an adverse action, gets a different response than a more significant safety issue.

Ms. Ginsberg: There has been some thought put into how to risk inform this area. Yes there probably is a way to risk inform the process.

George Sutton, “Whistle blower in Nuclear Industry”

(Slides included as Attachment 4)

The statement that has been made here tonight that managers are afraid to manage people is false. As my management said to me when I was a supervisor, if you can't manage the employee's they will get someone else who can.

NEI would like the NRC to not tie the utilities' hands and make it easier. If the NRC does this, they are not following their responsibility. That the NRC fines only \$110,000 is laughable. For the company whether to discriminate is strictly a business decision.

People that manage nuclear utilities have to know a lot of laws. It seems that the only ones they don't have to know are federal laws. Whistle blowers are treated as pariahs and are isolated. The NRC needs to recognize that they are part of the public and need to be protected. Whistle blower programs at the utilities have failed them, so they went outside to the NRC or DOL..

There is no protection for whistle blowers. As a result, there aren't too many left in the industry. Managers that are cited are probably still working for the utility. Workers see this and don't trust the NRC or management. Once they go to the NRC, the first thing is an investigation of the allegor. If DOL investigates the NRC stops. Both the NRC and DOL should investigate.

The Utility Ombudsman is appointed by the plant management. Workers should pick the Ombudsman that they trust. My belief is that workers don't trust the Ombudsman. If all these programs were effective, then the number of allegations would be going down, but the data does not show this.

The years it takes to investigate these issues leave the workers unprotected. The NRC or DOL need to make the playing field even. If the industry is accused, they bring everyone they want to

an enforcement conference. But the allegor can only bring one person and the NRC wants to know who it is. Attorneys for industry are well versed and there is no one for the allegors. The NRC has to end the relationship with the industry.

Mr. Borchardt: The comment that the NRC allows ignorance to be an excuse, is this for individuals or utilities.

Mr. Sutton: Individuals. Different areas of the country have different ways of dealing with it.

Mr. Baker: With regard to your comments that the process should be more timely. What would you consider timely?

Mr. Sutton: Months not years. Maybe the Resident Inspectors can get involved in these matters.

Mr. Borchardt: The statement that there is no one to protect the allegor. Can you clarify that?

Mr. Sutton: Yes, when I turn in an allegation it takes along time. If I decide to go to the DOL the NRC should continue the investigation. There should be parallel investigations. NRC looks at the wrongdoing of individuals and the DOL looks at a remedy. A guy at the site can get harassed all day, there is nothing we can do to stop it. If we get fired, you can't stop it. A utility can talk to top-level NRC management about a case. The allegor can't do this. They can't get through. It needs to be a level playing field.

Mr. Baker: What about the new joint NRC/DOL rule to issue remedy after an Area Director's review.

Mr. Sutton: That is well and good, but the employee is still being harassed and his life is made miserable.

Question: Once the utility gets an employee out the door, it is very hard to get back.

Mr. Sutton: And once you get back you are a pariah, a snitch, you will never be made whole again.

Bob Helfrich, ComEd Senior Counsel

(Slides included as Attachment 5)

Mr. Helfrich stated that he assists ComEd in dealing with discrimination and enforcement matters and would like to offer some observations and recommendations. The NRC needs to be in a position to take actions so employees can feel comfortable raising safety concerns.

Process: Importance of management involvement. It helps ensure that utility management is aware of issues and the facts are promptly determined and that relevant documentation is available. The company should cooperate to ensure that a complete and accurate records are available. The best way is to do it collegially by working directly with the NRC investigation staff. Attorney attendance in the interview is important.

Enforcement Conference: Both sides should arrive with a common understanding of what the issues are. Both parties should have a common understanding of the legal issues and the theory of the discrimination case and any technical issues. It is much more productive if all parties are aware of direct and indirect evidence, such as inferences. If prior to a conference there appears to be gaps in the facts and if the NRC wants to use some inferences, by letting individuals be aware of these gaps, we could determine how to best fill them and not to have to use inferences.

Suggestions:

Provide the investigation materials to those involved to allow the licensee to focus its resources. The NRC should invite the licensee to provide a written statement before the conference. NRC and Licensee should be able to communicate on the questions that need to be addressed at a conference. There should be an opportunity for reconciliation.

Predecisional Enforcement Conference phase:

The NRC should specify what the alleged violation is, in detail.
Provide details of the investigation. A few paragraphs are insufficient.
Parties should be able to agree on the issues and differences of opinions.
There should be agreement on the potential for the use of inferences.

These suggestions would improve transparency, common understanding of the facts, promote informed rule making. It is very unsatisfying to spend time addressing issues and have no explanations as to how the agency addressed the factors in the violation.

Mr. Borchardt: With regard to reconciliation, could you expand at what phase and what impact that would have with NRC process.

Answer: Employees feel that once they express a concern and set the process in motion, it may have gone too far. He may not appreciate the end result or how long it would take. If there could be an early approach to use ADR or some other way to decrease the tensions.

Mr. Sutton: At these conferences. Who advocates for the alleged?

Mr. Borchardt: This question highlights the NRC process and DOL. Once we are aware of the discrimination, the case it is really between the NRC and utility. The NRC does not give the individual personal remedy. That function is part of the DOL responsibility.

Mr. Sutton: Then why do we invite the alleged to the conference and give him an hour to rebut.

Mr. Borchardt: The alleged is invited to add a perspective on the discriminatory issues. Even if the alleged wanted to terminate the finding, it may not have an impact on the NRC process.

Mr. Sutton: There should be a strong role for the alleged.

Mr. Dambly: The ability to stop the process depends on where we are in the process. In the beginning, we can stop. But at the enforcement conference, it is a little too late.

Kevin Doody

(Presentation material included as Attachment 6)

We need to push as much responsibility as we possible can down to the licensee.

Central themes: Communication, openness, giving information to all involved.

I'd like to push for the NRC to give allegations to the licensee and report to the NRC. Then the NRC can look at it after they submit the report. Change the regulations to require licensees to report discrimination. We are talking in general terms. I want to talk about specifics.

Mr. Doody went over some of the specifics of a case (EA-99-02) at the Perry Plant. The investigation took two years.

Panel process worksheet. It say "Although the intent could not be clearly established". It seems

that you should always be able to determine the intent. Why would the NRC proceed without establishing intent? Several key missed inspection points. The NRC did not want to touch them.

Analysis of root causes: "Unknown", what was the root cause?

The paper work under item 3 "the corporate attorney recommends". When the NRC went in to decide, they didn't have a root cause, or an established intent. The attorney did not request, he/she asked, not recommended.

Severity levels are tied to the management level of the discriminator. The corporate attorney was a high level employee but did not get attached to the action, which she should have been. She was a corporate level attorney. Is this why the corporate attorney is not identified in the NOV, because she is an attorney? The attorney told them to do the counseling session. Why isn't she included? The only answers I have gotten from the NRC are misleading and inaccurate.

Missed opportunities: Explain by who and how the item was identified and list any missed item. There is nothing there.

Mr. Borchardt: We have the strong message that you are not satisfied with the documentation of this worksheet. As the staff reviews these cases, we have a series of detailed conversations to review whether we can determine if we want to go forward. This document is only used to lead a staff discussion of the aspects of the case. But, we are looking for information on the process and not on the shortcomings of this specific worksheet.

Mr. Doody: But this is the process. You take this and hand it from person to person until you lose something.

Mr. Borchardt: Are you saying the people who were closely involved in this case were excluded? You are going to lose us by going into detail of this particular case. If you want to talk about improvement to this process, you will capture our attention.

Mr. Doody: You need to make what you have work. Communicate with the alleged and others. Open up the process. If this isn't meant to be a public process, maybe next time it should be. We have a right to see what the process is and how it works.

Mr. Borchardt: What you are looking at is the earliest stages of this investigation.

Mr. Doody: An ombudsman shredded documents which you didn't say. These are important issues that you are missing. How can we give \$110,000 for this? Why don't we increase the fine to the per day that the allegation occurred?

Mr. Baker: That is the maximum for this level.

Mr. Doody: Per day.

Mr. Borchardt: In arriving at a decision on Severity Level and Civil Penalty for a violation we look at many things, like who identified it and many other factors. You are advocating a stronger civil penalty for these cases. You advocate turning these issues over to the licensee. Are you not afraid that the licensee will identify the individual and take actions to cover the tracks of the discrimination?

Mr. Dambly: Who do you trust at the licensee?

Mr. Doody: They should be required to have an independent person to review the complaints. You should push your investigation down to the licensee. Most people want to resolve these issues.

Mr. Borchardt: A comment we have heard is that a reason people come to the NRC is because they have reached a level of dissatisfaction with the licensee. Returning the allegation to the licensee would send it right back.

Mr. Doody: If they had to report it to the NRC.

Mr. Sutton: The best solution is a good Ombudsman, but the problem is that no one in the licensee is truly independent and the licensee wants to cover it up.

Mr. Baker: There have been a few proposals that there be an industry wide panel for handling these issues:

Mr. Doody: I agree with that. The best solution is to push it down to the licensee.

Mr. Sutton: The key issue is trust. If the employee trust it, they will use it.

Mr. Borchardt: A question on the increased role of the allegor. Another faction believes that the allegors presence causes interference with the process.

Mr. Doody: It is not in their interest to have the allegor present. It is worthwhile to have the allegor present as long as we all have the same information, not to find out information at the conference for the first time.

Mr. Borchardt: Release of OI reports. There seems to be agreement that we should provide all the information.

Mr. Sutton: The OI report in its entirety that shouldn't be given away so that they can't make up a story.

Question: Given the paper work on violation. Is the NRC tracking the remedies of which the individual used prior to coming to the NRC? The industry is recommending that Ombudsman is working, but the people on the inside think that no one trusts the Ombudsman and other internal processes. And we don't know how many of those processes the allegor tried to use. Are we looking at getting some industrial social evaluation for these processes?

Mr. Baker: We have a policy on SCWE but no regulation. The Ombudsman is not an NRC requirement. We are starting to send out surveys to ask allegors who they went to and what processes they went to.