

MEMORANDUM TO: Samuel J. Collins, Director, NRR
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James Lieberman, Director, OE
Guy P. Caputo, Director, OI
Richard L. Bangart, Director, OSP
Hubert J. Miller, Regional Administrator, RI
Luis A. Reyes, Regional Administrator, RII
James L. Caldwell, Acting Regional Administrator, RIII
Ellis W. Merschoff, Regional Administrator, RIV

FROM: William D. Travers (Original signed 10/19/98)
Executive Director for Operations

SUBJECT: ALLEGATION GUIDANCE MEMORANDUM 98-02 - REVISING
THE CRITERIA FOR INVESTIGATING DISCRIMINATION ALLEGATIONS

The purpose of this Allegation Guidance Memorandum (AGM) is to implement the guidance provided by the Commission on this topic in the Staff Requirements Memorandum SECY 97-147, "Re-Evaluation of SECY 96-199 Issues; Plan to Better Focus Resources on High Priority Discrimination Cases." This AGM revises the priorities for investigating discrimination allegations. Additionally, the AGM provides guidance for Allegation Review Boards (ARBs) on implementing the revised priorities and determining when it is appropriate to defer investigations of discrimination allegations by the Office of Investigations (OI) because the Department of Labor (DOL) is conducting an investigation based on the same or similar complaints.

REVISED CRITERIA FOR HIGH PRIORITY DISCRIMINATION INVESTIGATIONS - PART
IV(B)(5)(a)(ii)(c)

Section (B) of Part IV of Handbook 8.8 in Management Directive 8.8 (MD 8.8), "Guidance for Initiating, Prioritizing, and Terminating Investigations," describes the current priorities for investigating discrimination allegations. Examples are provided to assist in applying the priority guidance. In subsection (5)(a)(ii)(c) of Part IV, Section (B), examples are provided of allegations of discrimination that should be given a high priority. The guidance provided in that subset is superceded by new guidance as set forth below:

- Discrimination issue: (c)
- Allegations of discrimination as a result of providing information regarding nuclear safety or regulatory issues directly to the NRC (i).
- Allegations of discrimination caused by a licensee or contractor mid-level manager or above (consistent with the current Enforcement Policy classification of Severity Level I or

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II violations) (*ii*)

11

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- Allegations of discrimination resulting from raising concerns of degraded or non-conforming conditions that, if true, would impact the operability of a safety-related structure, system, or component, or safeguards equipment (*iii*), or
- Allegations of discrimination that appear particularly blatant or egregious (*iv*)

ADDITIONAL GUIDANCE FOR INITIATING AND COMPLETING INVESTIGATIONS OF DISCRIMINATION ALLEGATIONS - Part I(E)(2)

Section (E)(2)(c) of Part I of MD 8.8 provides guidance on issues that should be considered by ARBs in determining appropriate actions to address allegations. Guidance is being added to Subsection (c)(iv), "Wrongdoing concerns and the prioritization of investigations," to assist ARBs in determining when it is appropriate for OI to proceed with an investigation of a discrimination allegation, including when it may be appropriate to defer an OI investigation of a discrimination allegation pending completion of the DOL investigative process.

(a) When an allegation of discrimination is received, the ARB should assign a priority for OI investigation based on the MD 8.8 criteria, as revised by the guidance in this AGM. This priority should be assigned without regard to whether the DOL is separately investigating the allegation. The ARB minutes must document the decision and the rationale for the priority assigned.

(b) For both high and normal priority discrimination cases, OI will continue to conduct an initial interview of the allegor and any other preliminary investigation deemed appropriate to understand the nature of the allegation and the basic circumstances of the case.

(c) After OI has performed the initial interview of the allegor and the transcript or summary of interview has been reviewed by the staff, the ARB will re-convene. This second ARB meeting should review the circumstances of the case in a broader context, considering the history of discrimination cases at this facility (or for this licensee); trends, if any, which exist at this facility (or licensee) related to technical or discrimination allegations, to settlements of discrimination cases, to findings of discrimination by the Department of Labor, or related to NRC enforcement actions¹; if this case has generic or unique legal implications; if DOL is investigating (or adjudicating) this case; and/or if there are any generic or programmatic weaknesses identified by OI in the course of investigation(s).²

Based on consideration of these questions, the ARB should determine the further disposition of the case, as outlined in the following sections.

¹ As part of the input to this evaluative process, the ARB should review the statistical information available concerning allegations, investigations, and enforcement relevant to the case.

² This second ARB should also determine if any new technical or regulatory issues were raised by the allegor during the interview and, if so, disposition them appropriately.

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(i) For high or normal priority discrimination cases in which the DOL is pursuing an investigation, the ARB will request that OI defer the investigation³ and await the results of the DOL investigation unless (1) there has been a finding by NRC or DOL in the previous 24 months that the licensee discriminated against an employee, (2) the alleged discriminatory act is particularly egregious, (3) the existence of related licensee performance issues indicating a deteriorating safety conscious work environment (e.g., the findings of other ongoing discrimination investigations, or relevant licensee problems in identifying and resolving safety concerns) lends credibility and/or potential significance to the discrimination allegation under investigation.

(ii) For discrimination investigations that do not meet the criteria to be deferred, the ARB will request that OI perform a full investigation.

(iii) For instances where there are multiple open discrimination allegations involving a licensee with a history of adverse OI or DOL discrimination findings or other relevant performance characteristics which would indicate an environment not conducive to raising safety concerns⁴, the ARB should consider additional actions to supplement investigations. These actions may include a meeting with licensee management; a review of the licensee's employee concerns program (Inspection Procedure 40501); a request or order that the licensee obtain an independent evaluation of its environment for raising concerns; an order to establish independent third-party oversight of the environment for raising concerns; or other actions as appropriate. These actions should be coordinated with appropriate levels of NRC management.⁵

³ If an investigation is deferred, the allexer will be informed of the deferred status in writing. The letter will also inform the allexer that the NRC will continue to monitor the DOL proceedings.

⁴ Other relevant performance characteristics that may indicate an environment not conducive to raising safety concerns include, (1) a lack of effective evaluation, followup, or corrective action for findings made by the licensee's Quality Assurance or oversight organization or concerns raised to the Employee Concerns Program (ECP), licensee ineffectiveness in identifying safety issues, (3) delays in or absence of feedback for concerns raised in the ECP, or (4) breaches of confidentiality for concerns raised in the ECP.

⁵ The Commission has stated that they are to be consulted prior to ordering a licensee to conduct a survey or hire an independent third party to oversee the work environment.

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The following table outlines the major steps discussed in this AGM.

<p>Initial ARB Meeting:</p> <p>Initial Priority Assigned to or Recommended for the Case</p>	<p>OI Performs Initial Allegor Interview</p> <p>Staff Reviews OI Transcript of Interview and Other Information Gathered by OI</p>	<p>Second ARB Meeting:</p> <p>Evaluation of Allegation in Relation to Licensee History, Trends, and Other Information Identified by OI or Elsewhere</p>	<p>(i) Case Deferred Pending Results of DOL Process -----</p> <p>(ii) OI Proceeds With Independent Full Investigation -----</p> <p>(iii) Supplementary Action Proposed Considering Overall Licensee Performance</p>
Step 1	Step 2	Step 3	Step 4

(d) For investigations deferred, the decision to defer the investigation will be reviewed as each stage of the DOL process is completed. Following NRC review of the DOL Area Director's decision and the DOL investigator's report or Administrative Law Judge's decision, an ARB will review the decision to defer the investigation. The ARB will reconsider the criteria in (c) above in light of any new information resulting from the DOL process. The ARB should also consider whether an OI investigation is necessary to provide information beyond that provided by the DOL process in order to reach a decision on whether to proceed with an enforcement action.

CONSISTENCY OF IMPLEMENTATION

To assure that the agency consistently implements the provisions of this AGM, the EDO has requested that all decisions to defer an investigation pending completion of a DOL investigation be reviewed by the Agency Allegation Advisor (AAA) and headquarters representatives of the Office of Enforcement (OE) and OI. Therefore, the ARB's decision and the rationale for deferring the investigation must be documented in the ARB minutes. The AAA must be notified of all investigations deferred under these criteria and provided a copy of the ARB minutes describing how the criteria were applied and the rationale for deferring the investigation pending completion of DOL action. The AAA will coordinate the review with representatives from OI and OE. If the reviewers conclude that the OI investigation should not await completion of the DOL process, the AAA will arrange with the appropriate office or regional OAC to discuss the differences during the next scheduled ARB. The AAA will inform the office or regional OAC of the decision within seven working days of receiving the ARB minutes. If differences of opinion are not resolved through discussion during the ARB, the differences will be discussed with the Deputy Executive Director for Regulatory Programs.

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TRAINING

The allegation coordinators in each region and office should discuss this guidance with appropriate staff members currently working on allegations prior to the full implementation date. In addition, future training sessions shall cover this guidance, as appropriate.

REVISION OF OFFICE LETTERS AND REGIONAL INSTRUCTIONS

Office letters and regional instructions should be revised as necessary to reflect this guidance. Alternatively, this AGM may be forwarded to the appropriate staff as interim guidance pending revision of Management Directive 8.8, "Management of Allegations."

IMPLEMENTATION

This AGM is effective as of the date of issuance and will be fully implemented within 30 days.

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DATE	10/ 08 /98		9/ 24 /98		10/ 13 /98		10/ 06 /98		10/ 08 /98

OFFICE	EDO*		EDO						
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DATE	10/ 19 /98		10/ /98						

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SECRETARY NAME: NANCY OLSON

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OF PRIORITIES FOR INVESTIGATING DISCRIMINATION
ALLEGATIONS

	<u>Name</u>	<u>Date</u>
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2.	<u>JLIEBERMAN</u>	_____
3.	<u>GCAPUTO</u>	_____
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6.	<u>HTHOMPSON</u>	_____
7.	<u>LCALLAN</u>	_____

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YES

NO

RESOLUTION OF SUBSTANTIVE COMMENTS

1. Under the revised criteria for high priority discrimination investigations, the criteria concerning providing information directly to the NRC was revised to clarify that the information had to concern nuclear safety or regulatory issues. This change clarifies that raising industrial safety issues is not a protected activity under NRC regulation.
2. The discussion of the second ARB was clarified to make it clear that it will not be held until after the staff has reviewed the transcript of the OI interview of the alleged.
3. The time frame the staff must consider in reviewing findings of discrimination was limited to the previous 24 months.
4. As a result of the Commission's decision not to develop an instrument to survey the work environment at a licensee's facility, that option was deleted from the discussion of supplementary actions.
5. To address the issue of when it might be appropriate to reinstate an investigation, a provision was added to require reviewing the decision to defer an investigation following completion of each step of the DOL process.
6. To address potential timeliness issues, a provision was added requiring that the consistency review by the AAA, OE, and OI of decisions to defer an investigation be conducted within seven workdays.
7. The requirement for training was modified to allow the regions and offices to determine which staff needs training.
8. The discussion of the consistency review was clarified to indicate that the AAA will coordinate the review with OE and OI.
9. Conflicting comments were received from OI and RII concerning whether investigations should be put on hold or closed and reopened. Because of the potential negative impression an alleged may have when informed an investigation is closed, a compromise was reached and the term used in the AGM is "deferred."
10. OE recommended that additional guidance be provided on what may constitute relevant performance characteristics that may indicate an environment not conducive to raising safety or regulatory concerns. OE recommended that the characteristics stated in Footnote 3 in SECY-97-260 be used. A footnote containing the recommended guidance was added to subsection (E)(2)(c)(iv)(c)(iii).
11. Discussion concerning the fact that normal priority investigations would only be investigated based on existing resources was removed at OGC's request. The rationale is that this is not unique to discrimination investigations. On a monthly basis the regional administrators and the OI field office directors meet to discuss the status of investigations and which investigations should receive additional attention or resources. If the high

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priority investigations consume all available investigative resources, normal priority investigations are not worked. Additional guidance is not needed on this topic.