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August 31, 2001

MEMORANDUM TO: File

FROM: Barry Westreich /RA/  
Office of Enforcement

SUBJECT: SUMMARY OF AUGUST 14, 2001, DISCRIMINATION TASK GROUP  
PUBLIC MEETING IN WATERFORD, CONNECTICUT

On August 14, 2001, a public meeting was held in Waterford, Connecticut to discuss the Draft Discrimination Task Group Report and recommendations related to employee protection cases. The meeting was part of a series of meetings being held to solicit stakeholder comment on the draft report. A summary of the meeting presentations, materials and statements submitted and an attendance list is attached.

Attachments: As stated

cc: WKane, DEDR

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DISCRIMINATION TASK GROUP MEETING SUMMARY, AUGUST 14, 2001,  
WATERFORD, CONNECTICUT

The meeting began at 7:00 p.m.

**Mr. Congel Director, Office of Enforcement** presented an overview of the Task Group activities and recommendations. (Slides Attached)

Mr. Fewell described the legal standard comments received:

- Standards used to initiate an investigation are too low. The current standard that we use to initiate an investigation is that of a prima facie case. This standard causes the NRC to initiate too many cases.
- The standard being used to determine that there is discrimination is too low (scintilla of evidence). The current standard is that of a preponderance of the evidence to prove discrimination but the industry considered that the NRC is not using this preponderance standard, but something far lower.
- There is concern that we are using a different legal standard than DOL. With the DOL if the licensee can show that by clear and convincing evidence that they would have taken the action anyway, no remedy is awarded, even if the adverse action was a contributing factor. The NRC considers that even if the adverse action taken was only a contributing factor, the NRC will take action due to the chilling effects of the actions.

Mr. Baker discussed the flow paths of the current process and the recommended process. About 30% of the complaints that come to the NRC also go to DOL. This may be due to the public nature of the process, or because the adverse action does not lend itself to monetary remedy. A remedy for something like a downgraded performance appraisal may not result in a financial reward.

The new approach addresses a few things; timeliness because we don't wait for DOL and don't spend inordinate time scheduling conferences. It also clarifies the roles between the NRC and DOL since our action will be separate. The information used for the action, the OI report and transcripts are released earlier.

Mr. Collins - I believe that on the fourth bubble of the flow chart, when you issue the report to yourself, you should give the alleged an opportunity to review and comment on the report to ensure that the report is accurate.

I also believe that we should not attempt to fix blame or determine the fault of the action. It is not worth the time. We should only attempt to understand the conditions which allowed the event to occur.

Because you are only finding discrimination in 5-10% of the cases this reinforces my feeling that this aspect of the investigation is too difficult. By saying that only 10% of the cases is substantiated, there is a lot more discrimination going on out there than that.

Mr. Congel - I agree, that you are alluding to the core of the issue, it is very hard to determine

whether discrimination occurred.

Mr. Collins - When you only find 10 % of the cases substantiated, that tells the other workers that this is B.S. and not worth it. By not focusing on the overall environment, you are missing out on important issues. Focused surveys could be conducted to determine the conditions that exist.

John Carroll did incredible studies of Millstone, but the leadership of the organization is not paying attention to the lessons of Millstone.

Mr. Fewell - When OI has not been able to prove discrimination at Millstone and other facilities, OI has attached addenda that discuss other conditions at the facility.

Mr. Collins - The parallel path for DOL and NRC, that is not waiting for DOL is a good idea, which only delays the action.

Public - At the PEC, is the alleger invited to attend?.

Mr. Congel - Yes, the alleger in both processes, current and recommended, is invited to attend. In fact we are recommending that the NRC pay for the travel to the alleger and a personal representative .

Public - With the DOL process, is it feasible to have the both agencies doing investigations? You have two separate legal processes going, do you have some agreement with DOL?

Mr. Congel - Yes, we have an Memorandum of Understanding with DOL.

Public - You should consider providing video conferencing as an alternative to actually have the alleger there.

Ms. Ginsberg - In fact, what you are looking at in the four elements of discrimination, the same set of facts that DOL is looking at. I am perplexed by you saying you can come to different conclusions;

Mr. Fewell - Well, it is not uncommon to have two different judges look at the same facts and come to different conclusions. It is fair to say the cases that we disagree with DOL will be so few and this will speed up the process to a high degree, that is worth running the risk of a different conclusion with DOL in a small number of cases.

Ms. Ginsberg - So you are saying that the risk is acceptable because there are only a small number of them. The re-sequencing of the enforcement conference only leads to the NRC being more entrenched in there decision and being of less value.

Public - The observation that today's cases are different than past cases. The subtleties are much greater and the managers are more sophisticated now, such as waiting a number of years for a reorganization until they get rid of the person that raised issues. In the revised process, are the NRC using better techniques to determine the subtle adverse actions.

Mr. Congel - We are using the same process, prima facie case, that we used in the past.

Public - I have seen reorganizations at a number of different plants, and the manager will use a greater level of perceived procedure to remove someone, although it is really for a discriminatory reason.

Public - In some of the Millstone issues, the Department of Justice (DOJ) affected timeliness. How does this process get affected?

Mr. Baker - If the DOJ decides to pursue criminal actions, the Commission would likely feel obligated to wait for their action to be complete.

**Dave Collins, Millstone Oversight Department. (Handout attached)**

We need to perform survey of the environment at plants to see problems before they result in violations. A SECY paper on assessing SCWE listed a number of options. Option 1 was the NRC would chose to only look at, or focus if there sees to be a problem. The NRC should be looking at the environment when there is an indication of problems. Most employees, once they feel that there is a little push back from management or others have been hammered, they will not even bring issues up.

At Millstone today, they are very concerned about discrimination, but many issue that employees bring up, sit on the back burner for many years. Plants need a tool to indicate there are problems before it gets bad. A big factor is trust, do I trust the management to take care of the issue brought forward without retaliating.

A past leader only talked about cost, and people did not trust him, he did not care about employees, and he was not committed to excellence. These three factors are the hallmarks of a good safety culture. So we should be asking the employees these questions. I am proposing asking these three questions and bench marking them as a way to determine if there are problems at the facilities. Something simple like this, which ask the employees how they feel about their leaders would be very effective.

These surveys should be done quarterly, so there is effective feedback to determine what is going on. It hits on communication, which is the base of the problems.

Mr. Reynolds - 90% of the complaints come from the workers and not the management. You seem like you have forgotten about the workers. The NRC is only worried about the management and not the workers. The draft proposal is going to be looked at by senior management, but why not the workers. It is the management that is the problem and not the workers. The secretaries and such at the NRC should be consulted on this process.

Management, wants to only go through the DOL and not NRC because it is easy. There are a lot of cases at DOL are settled, but none are for the complainant.

Mr. Baker - DOL runs about 10 % in favor of the employee, which very similar to what the NRC finds.

Mr. Reynolds - In your decision there is a \$120,000 per day fine, but if you don't give these high fines, there is no deterrent.

Mr. Baker - So you are proposing that the civil penalties should be higher.

Mr. Reynolds - Yes it should be. All your recommendations do not protect the whistle-blower.

Mr. Baker - We do not have the authority to order remedy for the individual.

Mr. Reynolds - But that is the problem, you do not protect the allegor. You want him to go forward to raise issues but do not protect him.

I don't think your investigators know how to interview allegors. They investigate cases of discrimination and some they can't find prima facie evidence. Five cases at Connecticut Yankee have involve one supervisor and yet there has not been a provable case.

The NRC should go back and look at cases and together see if they mean something about the manager.

Mr. Charlie Luxon - What agency determines the fines levied?

Mr. Congel - The NRC issues the fines for violations of our regulations, but the DOL does for remedy.

Mr. Luxon - But you have never issue the maximum, and to me it seems that the fines you issue are puny. The workers take the hit and Millstone is still there. My point is that the whistle-blowers become the first line of defense, and the plant has lost respect for the technology. If you don't hit the industry hard, you are going to get no action. The whistle-blowers only reward is that they are gone, with their lives damaged. The only thing to that the industry sees is money and the only thing you can do is hit them hard where it hurts, with a monetary fine.

The NRC has had its own problems with H&I, as recorded in the paper. Does the NRC have its own house in order in this area?

Mr. Fewell - We are hesitating a little to answer that question because we really don't have the knowledge to answer that question.

Mr. Luxon - Well based on my experience, I don't trust the NRC and I would like to know if the NRC can handle these types of issues.

Public - DOD had a methodology to reward allegors, that is give them some of the fine that would be levied.

Mr. Fewell - That would require a statutory change. We have not given that a lot of thought.

Nancy Burton, Coalition against Millstone - There seems to be very little trust of the industry and regulator. It would go a long way to try to address the past bad actions. While it is known that

the allegers lost in many ways, the government has never recognized them. Legislation to award the alleger part of the fine would be very useful in restoring that trust.

**Ellen Ginsberg, Deputy General Counsel, NEI**

The NRC's evaluation process was reasonable, seeking broad spectrum of issues from stakeholders.

It is a golden opportunity to make needed changes.

NEI's view is that although we believe we have expended a lot of effort, there hasn't been a lot in the way of meaningful results. There is a lot of similarity between the industry and the public concerns.

The conduct of investigations exacerbates the problem.

The NRC has given almost no explanation as to why they differ from every other agency.

NRC recommendations do not address issues of fundamental fairness.

There is no bar that prevents the NRC from taking action in extreme circumstances.

Justification of the recommendations is clearly lacking. The limited recommendations made will not advance the ball but actually exacerbate the problem.

Preponderance of the evidence has not been applied in these cases, but the NRC uses a far lower standard.

The Pre-decisional enforcement Conference (PEC) is not meaningful because the action will have been issued, further entrenching the NRC's position.

The NRC's process polarizes both sides of the issue.

Before you affect someone's career, the right to hearing should be afforded.

Mr. Markowicz - Why do you think that the DOL process does not entrench positions? Once the DOL shows up, you are going to have bad day. Why is one better than the other?

Ms. Ginsberg - At various points in the DOL process there are opportunities to get the parties together.

Mr. Reynolds - Why can't they properly train managers to ensure that these problems don't happen. Some of the training I have attended says that the sole duty is to mitigate issues from being raised. A team is made up of individuals, and the teamwork issues at millstone exist because the workers are not treated as individuals that are part of the team. The management style of these companies are only to make money. The safety in the nuclear industry involves problems that can devastate the whole world. The managers I deal with have not seen this, they

are only looking at what they can get out of it today. Training should address these issues.

Ms. Ginsberg - We agree that training is important. The industry is working hard, maybe not as hard a you would like, but hard to train its employees.

Mr. Congel: Thank you for your comments. This meeting is now closed.