



**UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
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August 31, 2001

MEMORANDUM TO: File

FROM: Barry Westreich /RA/  
Office of Enforcement

SUBJECT: SUMMARY OF JULY 12, 2001, DISCRIMINATION TASK GROUP  
PUBLIC MEETING IN PADUCAH, KENTUCKY

On July 12, 2001, a public meeting was held in Paducah, Kentucky 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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## **JULY 12, 2001 DISCRIMINATION TASK GROUP MEETING, PADUCAH, KY**

The meeting began at 7:00 p.m.

### **Frank Congel, Director, Office of Enforcement**

Mr. Congel and Task Group members presented a summary of the Task Group activities and draft recommendations. (Slides Provided).

Mr. Letts - Related to the release of information, we have heard recently from industry officials that this concern also relates to providing more detailed information related to the procedures and subject of the interview.

Conduct of investigations relates to comments of heavy handedness and sneaky motives. Public stakeholder have also indicated that the investigation is heavy handed, and unduly inquisitive by challenging them on the veracity of their complaint.

Some feel that the investigators should be technically conversant in the technical matters.

Mr. Fewell discussed comments received related to the legal standards. Comments included that we needed to better clarify what constitutes a protected activity. Industry comments included a more detailed description of what prompts the starting of an investigation and that we perform too many investigations for frivolous reasons. Industry representatives also commented that we are not using the DOL standard but a scintilla of evidence that discrimination occurred. The industry would rather we didn't conclude discrimination occurred if the protected activity was a contributing factor, but if a clear and convincing evidence that they would have taken that action anyway.

Mr. Dambly discussed the NRC/DOL interface. A comment was that the actions of both NRC and DOL in this area is dual regulation and that we should discontinue it. Comments also were that we were not clear as to when we would defer cases to DOL. From the public, they did not understand what the NRC role is in this area. A misunderstanding is that NRC comes in as sort of the whistle-blower's counsel in the matter, which is not the case.

Mr. Congel - With regard to the draft recommendations, the Task Group concluded that the NRC should continue the investigation and enforcement of discrimination cases. However, we should proceed without waiting for DOL to complete their investigation and lengthy process. The DOL process is complimentary to the NRC. DOL is looking for remedy to the individual and the NRC is looking at the Safety Conscious Work Environment.

Ms. Pederson: discussed the Task Group's recommended process flow chart. In the NRC process the Allegation Review Board screens out about 40 % of the cases we receive. The recommended process has a change to have a legal review of the OI evidence before the report is issued and brought to an enforcement panel for review.

Mr. Labarraque - The only real issue is does the OI report has enough information to go forward? It is hard for an organization to change once it goes forward. OI needs to ensure that the

information they are using is accurate. You should offer the interviewee the opportunity to review the investigation for accuracy. You are now relying on the investigator to give you the accurate information.

Ms. Pederson - We rely on the OI investigators for information. But what we are trying to do here is to ensure we have the legal justification to move forward. We have to be careful that we do not give the impression that we are not independent by giving the information to certain individuals to review.

Mr. Dambly - Most of the interviews are transcribed, and we review the transcripts to ensure we understand the underlying issues and that we agree with the conclusions. With a transcribed interview, it is difficult understand how we are getting erroneous information.

Mr. Labarraque - I understand, but in some cases the interviewee does not agree with the report. The issue is that whatever we need to do to ensure that the decision is based on the true facts should be done.

Ms. Pederson - We have recommended changes in the process for releasing information that may help. We have recommended that a pre decisional enforcement not be conducted, and that we proceed with a proposed enforcement action. At that time we will release the report and the interviews, redacted for personal privacy information. This is a significant change from the past procedure. After this the licensee has the opportunity to respond, in writing or at an enforcement conference. If we still believe there is a violation we will go to imposition.

Mr. Labarraque - Will you be able to have a hearing if you have a violation?

Ms. Pederson - Not unless there is an order of civil penalty.

Mr. Baker - If licensees only get a violation with no CP or order they also do not get a hearing right.

Mr. Labarraque - Yes but there is a significant difference between a company and an individual. A violation to an individual is a significant impact and the accused should have the right to go before an independent panel.

Public - You should be really sure about that because the first thing the company is going to do is fire the individual, so you need to be really sure.

Mr. Baker - Individuals have the ability to write to the Commission, and they have review to issues, so there is an opportunity to appeal.

Mr. Labarraque - I just want to make sure that you don't place an individual at the same level as the company.

Public - If the plant puts an manager in their position, they should be able to withstand that responsibility.

Mr. Labarraque - I agree, but what I am saying is that before you reach that point, you need to be very sure that you are taking the appropriate action.

Public - From what I have seen, I don't believe the NRC really takes actions against individuals.

Mr. Dambly - We do issue orders on occasion and violations to individuals. We don't issue orders very often because that is a drastic step. It also depend on the adverse action. A change in a performance appraisal would not warrant that. In the new process, we are planning to issue a proposed violation and at that time give you all the information you need to come to a conference.

Mr. Congel - This change to the process is a significant change to address timeliness and release of information concerns. You get the information without going through a lengthy FOIA process.

Public - When you do provide the information, does the entire record go to the company and individual.

Mr. Baker - Yes with the exception of privacy information.

Mr. Labarraque - Is there any reason why the process favors one person over the other? Why only pay for the allegor and not the accused individual? You should also consider the impact on the accused if he is not being paid for by the company.

Mr. Dambly - I don't see why we shouldn't pay for the travel expenses of the person having the conference, as we have proposed for the allegor, if they are not being brought by the company but are coming on their own.

Public - In DOL there is something called various liability where the supervisor cannot be held liable without the company being held liable. Do you have this in your process.

Mr. Dambly - In order to hold people responsible, we have to show that the action taken was deliberately, not just that a violation occurred. That is a different standard that for a company. To prove the company guilty of discrimination we just have to show that an adverse action was taken due to protected activity. For a deliberate violation to an individual we have to show that the manager knew it was a violation and took the action anyway.

Mr. Labarraque - I would like to make some comments. In looking at the nuclear industry, it looks like the industry is doing very well, except in this area. Have we done a specific look at this indicator.

Another comment is that how can we actually comply with the in part rule, and are we going to indicate what that means.

Mr. Dambly - We are going to try to clarify the issues, but it is difficult to specify all the factors. Looking the data from the cases we have processed and substantiated (slide provided) you can see that the number of actions taken has not increased it has been fairly stable. If you are looking

at the enforcement for reactors, we are not issuing violations and Civil Penalties the way we used to, so that is a change.

DOL and NRC both look at the in part aspect. But in section 211 DOL does not issue a remedy if there is clear and convincing evidence that the action would have been taken anyway. People keep talking about the dual motive, but in most of our cases they always deny that they used the protected activity and that is a pretext case.

Public - In 1999 you had 125 allegations, investigated 75 and only saw that there were 5 legit cases. Isn't something wrong with that? That has a chilling effect.

Mr. Dambly - Discrimination is difficult to prove, and that is why these number are low.

Mr. Baker - When allegers come in they have to show the four parts of discrimination.

Public - Yes, but if there are 125 cases and only a few are substantiated, that tells me that there is no use filing a complaint because it most likely to be unsubstantiated. It says to me that if you shouldn't bother to file a complaint. To the individual inside the plant, its not going anywhere because when you ask the company if they discriminated, they are going to say no.

Mr. Baker - OI will talk to individuals to see if discrimination can be proven. But you are right about the substantiation rate.

Public - What this is saying is that NRC is not regulating the plant, but should be dissolved and just let the company run the plant.

Mr. Jackson - Nobody thinks this is an easy process, but I think there are some improvements in your recommendations. It is very difficult to prepare for a conference if you don't know what the complaint is. This will help both sides prepare for the conference. We have been to conferences where we did not know all the facts going in. When that happens we have already spent \$200,000 preparing for the conference and we are not going to spend another \$250,000 to fight it. We will just take the \$80,000 fine and move on.

In some cases the OI reports are of poor quality. It would be nice to have only one regulator on these issues and I think we should work to get there. But I think that the overall improvement are a good step.

Public - The small number of substantiated cases is dwarfed by the number of allegations. The lives and pain and sacrifice of people represented by the number of allegation should make the industry satisfied with the small number of cases substantiated. The should have nothing to complain about if there are only these small number of cases.

Mr. Dambly - It should be noted that only 1/3 of the people that come to us go to DOL. So we provide some avenue for individual to come forward. The DOL process is only worth it if there is a monetary benefit since you are on your own and have to get a lawyer. So complaints that have no money involved are often not pursued. The industry says that the mere fact that an investigation is conducted causes a significant problem to managers and licensees.

Public - On the chart for the new process, does the split with DOL ever come back?

Mr. Congel - No, we plan on moving forward, with our own investigation and action. The only time we would consider looking again is if the new information was available.

Public - If a case goes to DOL and not NRC, is there not a backup look if DOL finds discrimination?

Mr. Congel: The proposals recognizes that there may be different conclusions in the processes. The only way we would reopen is if there is something new and significant in the DOL process.

Mr. Dambly: At present, if DOL said yes after we said no, we would reopen.

Public - So if there is a chilled environment you would not reopen?

Mr. Dambly - It would be extremely unlikely that DOL would call something protected when we didn't.

Public - So you would not care if an issue was causing a chilled environment?

Mr. Baker - If you are talking about industrial safety issues, outside our jurisdiction, we do not have the authority to look at that area, OSHA would look at that.

Public - If people were being discouraged from making OSHA violation complaints, wouldn't you be concerned about that?

Mr. Fewell - If we felt that the problem raising OSHA issues was making people chilled to raise safety issues under NRC jurisdiction. But you have to make the connection that because people were not raising safety issues under OSHA regs, that nuclear issues are also not being looked at.

Public - But you are missing the point that there is a chilled environment because people are afraid to raise safety issues, including OSHA and NRC issues.

Mr. Dambly - I can see your point that a problem with raising issues under OSHA may result in a chilled environment to the process of raising all issues. But the only cases we would follow from DOL would be those that related to 211 issues. Age, gender, etc. issues we would not look at. We could make a recommendation that there are other whistle-blower statutes that are being violated we may want to look at the environment in our jurisdiction.

Mr. Labarraque - The NRC seems to condone people not telling the truth since people are not telling the truth we don't do anything.

Mr. Dambly - Is your point that if a person lies to us, and we find out they lied we should take action against the individual.

Mr. Labarraque - Absolutely. For proved false lies.

Mr. Dambly - We have had a couple of cases where we believe that has happened, but if we went after alleged for raising issues, that would have a major impact on people bringing issues to us.

Mr. Labarraque - But that is the problem with the process, you are condoning lying. You give consequences to the accused for lying, but the alleged can lie and no action is taken. The ends of being afraid people will not come forward does not justify the means of allowing people to lie.

Mr. Dambly - We don't condone lying. When we take action against a manager and licensee we don't issue violations for lying to us, although we must be concluding they did since they denied the violation.

Mr. Baker - Is there something specific you are referring to about lying?

Mr. Labarraque - No, it is a matter of principle that you are expected to tell the truth and if you don't tell the truth, something should happen.

Public - It seems that it is on the alleged that he has some proof that the act occurred.

The meeting ended at 9:00p.m.