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MEMORANDUM TO: File

FROM: Barry Westreich /RA/
Office of Enforcement

SUBJECT: SUMMARY OF JULY 11, 2001, DISCRIMINATION TASK GROUP PUBLIC MEETING IN LISLE, ILLINOIS

On July 11, 2001, a public meeting was held at the NRC Offices in Lisle, Illinois 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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MEETING SUMMARY - DISCRIMINATION TASK GROUP , LISLE, IL - 7/11/01

Frank Congel, Director, Office of Enforcement (Slides attached)

Mr. Congel presented a summary of the Task Group activities and recommendations.

Mr.Beedle - With regard to the information issue, people on the receiving end of the investigation have no idea what is going on, including what the issue is, or why they are being interviewed. This is part of the transparency issue.

Mr. Dambly - I don't understand the comment. How can we conduct the investigation without telling people what the issue is. It is difficult to see how the investigation could go forward that way.

Mr. Beedle - That is what we are hearing.

Mr. Letts - From an industry perspective, what is the feeling about this.

Mr. Stenger - It varies, some individuals don't know who the OI is or what the investigation is about, and it can scare the bejeepers out of them. Many working level people do not fully understand the explanation of the reason they are there and where the interview is going.

Mr. Helfrig- I have run into people who are confused as to who they are talking to and what the process is. There is no reason why these people should not be fully informed as to what the issues and process is. There is a limit to a counsel's ability to brief the individual.

Mr. Letts - Have you felt comfortable to raise questions during the interview?.

Mr. Helfrig - Yes.

Mr. Beedle - The contrast between an interview with an OI investigator and a inspector is quite large and can be daunting for some to understand. They say they are uncomfortable during the process, lawyers are present, and it puts people on edge.

Mr. Stenger- -In internal investigations we encounter the same sorts of things.

Mr. Beedle - This is as important an issue as is releasing the OI reports. This point may have gotten hidden by other aspects of the process

Mr. Baker - My take was that people we uncomfortable with the detailed questions, etc. But I don't think I understood this point. Thank You.

Mr. Fewell discussed comments received on the legal standards used to initiate an OI investigation and to determine whether discrimination occurred. Comments included that the

threshold are too low and that the standards are not what DOL uses, but a scintilla of evidence. Also that the agency should not be using a contributing factor type of standard, but look at the reason the licensee gave and if they would have taken the same action anyway, in spite of the protected activity, no enforcement action should be taken.

Mr. Beedle - That was the general thrust of the comments in the first round of public meetings.

Mr. Dambly - A comment was that we should not be in the business and that DOL should handle these cases. I think there is a misunderstanding by the public that we are not the white knights coming to their rescue, but we are looking at the overall environment.

Mr. Beedle - Whenever you have duel regulation there is confusion, and the comments you have received underscore these mis-perceptions and confusion. The principle of duel regulation, such as EPA and NRC standards, is something that we should try to eliminate.

Ms. Pederson explained the proposed enforcement process slide. (Attached)

Mr. Baker - In our process, at the ARB screening step, about 40% of allegations do not meet the threshold to continue.

Mr. Stenger- When the ARB meets, are some cases referred to the licensee?

Mr. Baker- No, not in discrimination cases.

Ms. Pederson- We have recommended looking for ways and thresholds for licensee referral.

Mr. Fewell: It is notable that 40% of the time, people don't meet the threshold, which is not a very high standard.

Mr. Beedle - The option of issuing a proposed violation is a better way that just to issue the action.

Mr. Helfrig - With regard to the recommendation to perform a legal review prior to issuance of the report. What are the possible results of that review? Is that to fill in some gaps?

Mr. Congel - Yes, it is to make sure the NRC has the best case before going forward.

Mr. Helfrig - The opportunity for OGC review is a good one.

Mr. Beedle - Isn't the review to look at the sufficiency of the evidence?

Mr. Dambly - Yes, we now look at them after the report is issued.

Mr. Helfrig: I think that is significant improvement.

Mr. Beedle - Before we leave this chart (chart attached), I don't see the separation where waiting for DOL hampered the OI investigation.

Ms. Pederson - there are not a large number of cases, but we do have this problem. We would not wait for the DOL decision.

Mr. Beedle - If DOL comes to a different conclusion, would you then reopen the case?

Mr. Baker - We would have to evaluate this.

Mr. Beedle - How separate is this really, if you change after a DOL decision?

Mr. Congel - If there is something we did not know when we made our conclusions, such as new information, we may look at the case again, but the idea is to move forward.

Mr. Clayton - So we would not automatically issue an action on a DOL decision?

Mr. Congel - Yes.

Mr. Dambly - It would be a rare case that DOL would finish first. We would finish our action long before it went to the ARB. But in reality many of the cases are settled without finality anyway.

Mr. Fewell - A DOL action that occurred five years after the adverse action is not very reflective of the current environment, so I don't think we would re-evaluate very often.

Mr. Westreich - You can see from the timeliness charts that DOL is a major player in extending the time on these long cases.

Mr. Dambly - On the deferral issue, the alleger could go to us, and then 180 days later , when our investigation is almost complete, then go to DOL.

Mr. Helfrig - Is it fair to say that the decision to not defer to DOL was not so much part of comment heard but an NRC decision?

Mr. Baker - It was really to respond to timeliness questions.

Mr. Beedle - But not all long cases are related to DOL.

Mr. Westreich - Well, not all the long cases are the result of DOL delays, but if you look at the data, the longest have a DOL component, without that delay the cases run 400-500 days, which can still be improved.

Mr. Beedle - A lot of the problem with this process is that it is very subjective, based on what an investigator thought about what a person was thinking.

Ralph Beedle, NEI Presentation (Slides attached)

I think the creation of this task group was an opportunity to examine the way these discrimination cases were dealt with. Unfortunately , I don't read into the recommendations much of the comments from the public or industry.

Mr. Baker - In our presentation, we listed the major issues that we addressed and I thought you agree with that.

Mr. Beedle - I agree with the issues, but I don't think your recommendations get at the heart of those issues. I see the fundamental reason is the interface with NRC and DOL. I don't believe that you won't go back and reopen cases if DOL comes up with a different decision. I don't think it really solve the conflict of jurisdiction problems.

Mr. Baker - I don't agree the comments from the public was that we should yield and get out the business.

Mr. Beedle: I would argue that having two agencies doing it is problematic.

Mr. Dambly - Would you support giving us, the NRC, the authority to issue remedies?

Mr. Beedle - Yes, if it means that DOL is out and only one agency is doing it.

Mr. Stenger - What does DOL think about it?

Mr. Baker - They agree that the agencies conduct supplemental investigations and are not in conflict.

Mr. Beedle - Supplemental in your mind, that DOL is looking at an individual and that you are looking at the licensee. I agree that may not be a conflict. The problem is that the way it is implemented is a problem. Different witnesses and time frames for the investigations.

Mr. Baker: I would challenge the industry to provide some facts that back up your generalizations.

Mr. Dambly - One problem is that the DOL investigators first priority is to get a settlement. Then if no one is happy and the case goes to the DOL ALJ, it is like the OSHA investigation never happened and the individual hires a lawyer. Then it is a judge ruling. We look at a case and prove it ourselves.

Mr. Stenger - I want to second what Ralph said, that is the duel regulation aspects. Two agencies looking at the same set of facts. I agree that the NRC could issue a personnel remedy and that would be fine, but there is consternation about that duel aspect.

Mr. Dambly - You could also have DOL issue punitive damages to have the deterrent effect that

we think is appropriate.

Mr. Beedle - It doesn't make much difference who issues the thing as long a the correct standard is used.

Mr Stenger - I'm not in favor giving punitive damages to individuals. This may make a lot of work for lawyers, but may not solve the problems.

Mr. Dambly - For actions that have no financial harm, appraisals downgrades as an example, what would the be worth going forward?

Mr. Beedle - Related to the level of severity, what about the severity of the chilled environment or SCWE?. We talk about this being an important factor but it is not addressed.

Mr. Dambly - In our recommendations, we tried to address this by the notoriety factor we discussed.

Mr Beedle - We have seen many cases where there was no impact on the SCWE or notoriety until the NRC got involved and made it widely known.

Ms. Pederson - How would we do this, evaluate the impact on SCWE?

Mr. Beedle - Is one of the questions when reviewing a case, what was the impact on the SCWE?

Mr. Baker - No, there is no regulation on SCWE, only that discrimination occurred, which is what we go out to prove.

Mr. Beedle - How do we assess in applying duel motive issues, that the licensee would have taken the same action without the protected activity?

Mr. Dambly - With the exception of one case we have not made a duel motive analysis. Every one of the cases was a pretext case, where there reasons for talking the action did not hold water.

Bob Helfrig, Exelon (Slides provided)

Mr. Helfrig presented Exelon's views on the draft report. Exelon is planning to provide written comments.

The report is an extensive review of the NRC's approach and frames and highlights the issues for consideration. Exelon is committed to fully cooperating with NRC investigators. Improvements were discussed in the report. We do agree that licensee should be allowed to investigate some allegations of discrimination and believe that it should be the norm.

We agree that more factors should be used to determine the significance to look at the totality of the evidence. In addition to four elements, there needs to a balance of the legitimate reason the

licensee had in taking the action.

Exelon does not agree that the sequencing of the process should be changed. An enforcement action should not be issued without the licensee having the opportunity to respond and after the PEC as well to make sure that there is a complete and accurate record.

We agree the SCWE rule is not warranted. At the October, last year, meeting we suggested specific process improvements. Consider providing allegation in writing when the investigation begins and give the licensee the opportunity to respond early and in advance of PEC. Provide the ability to address the inferences to be used. Once there is no direct evidence, it is important for the licensee to be aware of that in order to provide sound reasoning.

We do not support discontinuing deferral to DOL under certain circumstances. It may be the central issue from your review. This would be a dramatic change. The NRC should be able to defer to DOL under certain circumstances already in place.

Mr. Baker - The primary reason for the deferral was for resource concerns. But we have seen that the investigative record from DOL would not support an NRC action, as well as the cases that are settled.

Mr. Helfrig - Would the position be the same if there was one pool of investigator that was used in both systems?

Mr. Baker - No because the quality of evidence developed is not the same.

Mr.Dambly - Hypothetically, if there was an federal investigative service that would provide reports to both agencies, that would serve our purpose.

Mr.Baker - I would feel more comfortable eliminating the duel regulation we discussed earlier.

Mr. Helfrig - There must be circumstances that you can rely on from DOL.

Mr. Baker - Maybe the ALJ decision, but not the OSHA report.

Mr. Stenger - I read the SRM to say that if there is an isolated case, and no impact on SCWE, the NRC should stay out of it.

Mr. Baker - We did not consider that in the paper, how often it would occur that there is no decision. This is OK from the personal remedy, but there is no discussion of the impact on the work environment.

Mr. Stenger - I thought that was addressed in the settlement discussions.

Mr. Dambly -We have recommended eliminating this deferral.

Mr. Stenger - This discourages settlements.

Mr. Dambly - No, it doesn't discourage settlements, but what does a settlement have to do with the SCWE. Our point is the settlement should not be part of the decision making process.

Mr. Stenger - I have always thought that settlement was encouraged.

Mr. Fewell - We do encourage settlement, but the value of the NRC's involvement is not reason to give special consideration.

Mr. Beedle - Would a settlement also indicate guilt?

Mr. Helfrig - I can't imagine using the settlement in a DOL case as a strategic action for the NRC action. They don't line up that way. The NRC complaint does not automatically start a DOL 211 investigation, which means you need information at different times. You can't impute your responsibility to DOL.

Mr. Dambly - I don't ever see a time when based on good performance we don't care that a single act of discrimination occurred.

Mr. Stenger - I would support the latter position, that if a manger made a mistake which was isolated, and we took remedies and appropriate action, that is a perfect circumstance where we should refer the case to the licensee. I would support developing factors to refer to the licensee. Isolated cases should be separated from a pattern or egregious cases. When you get the licensee's response if unsatisfied, you can take action and the individual can always still go to DOL. Why are these cases different from all others that are referred?

Mr. Baker -We ask all allegers now if they mind us referring the case to the licensee. All safety issues, even in discrimination cases with safety issues referred.

Ms. Pederson - We don't refer willful violations either.

Mr. Dambly - We have heard that once an employee comes to us, they already don't want to, or have already gone to the licensee. In these cases they typically don't want it to go to the licensee.

Mr. Stenger - I don't think you should always just leave it up top the alleger. There are some cases that can be referred based on criteria. I don't think we always need to allow the alleger to make that decision.

Mr. Baker - The worst case, for either of us is that the alleger is so dissatisfied, he tries the issue in the press. In that case, we are not served, you are not served and the individual typically is not well served. It is rare that the individual has not already tired two or three avenues with the licensee to get the issue resolve.

Mr. Stenger - I would support expanding section 3.a, factors to defer.

Mr. Baker - The recommendation of the group was that those should be developed further.

Mr. Beedle - One more factor to keep track of is the impact on middle level managers,

particularly in cases that go on for years, makes managers reluctant to take normal personnel actions.

Mr. Baker - But managers we have talked did not say they were chilled.

Ms. Pederson - We have struggled with that, but when asked, we don't have anything solid.

Mr. Congel - I would like to have some information other than hallway talk, I can sink my teeth into on this issue.

Mr. Baker - Sources I have talked to have seen a great difference in managers that have received adequate training on this issue.

Mr. Beedle - I agree that there is some shared responsibility, but I believe that this is a real issue.

Mr. Dambly - What do you tell managers that say they can't manage woman, race issues, age, etc.. These are the same issues.

Mr. Beedle - I agree.

Mr. Helfrig - In October a Zion employee who had been the subject of enforcement action provided comments. He was quite confused about how to deal with people who performed protected activities. Other managers were also confused and cautious. What you need to do is train them regarding the requirement, often based on subtle facts of discrimination. Careful consideration must be made when taking action against the individuals.

Mr. Stenger - Pretext vs, duel motive issues is central to the conflict between DOL and NRC. DOL recognizes the duel motive theory . Employees have a very low threshold as made by congress. But then it is up to the employer to show by clear and convincing evidence that they would have taken the action anyway.

Mr. Dambly - That is where you are wrong. Section 211 provides that there is a violation if the protected activity was a contributing factor. However, you don't get a remedy if the employer can show by clear and convincing evidence that they would have taken the action anyway.

The meeting concluded at 9:00p.m.