

POLICY ISSUE NOTATION VOTE

September 12, 2002

SECY-02-0166

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations */RA/*

SUBJECT: POLICY OPTIONS AND RECOMMENDATIONS FOR REVISING THE
NRC'S PROCESS FOR HANDLING DISCRIMINATION ISSUES

PURPOSE:

To obtain Commission approval of the staff's recommendation for revising the NRC's process for handling discrimination cases.

SUMMARY:

The Executive Director for Operations (EDO) chartered a Discrimination Task Group (DTG) on April 14, 2000, to (1) evaluate the Agency's handling of matters covered by its employee protection regulations; (2) propose recommendations for improving the Agency's process for handling such matters; (3) ensure that the application of the U.S. Nuclear Regulatory Commission (NRC) enforcement process coincides with an environment where workers are free to raise concerns in accordance with the Agency's employee protection standards; and (4) coordinate with internal and external stakeholders in developing recommendations for changes to the process.

A Senior Management Review Team (SMRT) was established to review the final recommendations of the DTG and provide any additional perspectives that could enhance the potential options.

Four options are presented for Commission consideration of changing the way the Agency handles discrimination cases, based on recommendations of the DTG and the SMRT.

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BACKGROUND:

The DTG began its evaluation in July 2000. The DTG's work consisted of reviewing the current guidance, examining the approaches used by other agencies for employee protection, holding public meetings with stakeholders to obtain their input, meeting with internal NRC stakeholders to receive their input, and developing a draft report with recommendations. Two rounds of public meetings were held at six locations around the country. The DTG solicited input from interested stakeholders on the general impressions and specific recommendations to improve the NRC's process for handling employee protection complaints and subsequent enforcement activities. In addition to the public stakeholder meetings, the Office of Enforcement (OE) web site provided electronic access to the draft report, with the opportunity to submit comments and suggestions to the DTG. Comments from internal NRC stakeholders were obtained at meetings with each regional office and with the Offices of Nuclear Reactor Regulation (NRR), Nuclear Material Safety and Safeguards (NMSS), and OE.

The EDO established a Senior Management Review Team (SMRT) to review the DTG's final report with recommendations, when it was completed. The SMRT was assembled to review the final report and provide any additional perspectives that could enhance the potential options for Commission consideration. The SMRT consisted of the Deputy Executive Director for Reactor Programs, the Deputy Executive Director for Materials, Research and State Programs, the Director of NRR, the Director of NMSS, and the Region II Administrator. In addition, the Associate General Counsel for Hearings, Enforcement, and Administration served as a legal advisor to, and an adjunct member of, the SMRT.

The DTG published a final report in April 2002, which is provided as Attachment 1. The SMRT reviewed this report and evaluated the DTG's recommendations, and developed conclusions, including its perspective of the DTG recommendations. Attachment 2 provides a summary of the SMRT deliberations, along with the rationale supporting its conclusions.

DISCUSSION:

The final DTG report organizes stakeholder comments and concerns into three categories: Major Crosscutting Policy Issues, Common Option Attributes, and Additional Comments. These three categories were evaluated by both the DTG and the SMRT during the development of recommendations and are presented as measures that can be used to streamline the process of handling discrimination cases. Attachment 1 provides the details of the DTG evaluations. Table 1 in Attachment 2 provides a comparison of the DTG and the SMRT recommendations on these streamlining measures.¹

At the outset, the SMRT challenged itself to evaluate all aspects of the DTG's decision flow chart in the broad context of the Agency's goals and the Commission's direction. The SMRT would not have been able to evaluate the issues associated with the Agency's program for handling discrimination complaints in an effective or efficient manner without the comprehensive analysis of various options and the decision flow chart put forward by the DTG. The SMRT concluded that the DTG developed three options warranting consideration by the

¹Recommendations by the Office of Investigations are included in Table 1, Attachment 2.

Commission with respect to changing how the Agency handles discrimination cases. The SMRT developed one additional option for Commission consideration.

Option 1 - Eliminate NRC employee protection regulations and discontinue review and assessment of the Safety Conscious Work Environment (SCWE) (DTG Option 1, Attachment 1).

This option was considered by the DTG, based on reactor industry comments that the NRC's role in discrimination cases is redundant to that of the U.S. Department of Labor (DOL), results in dual regulation, causes managers to refrain from taking appropriate personnel actions, reduces overall safety, and adversely impacts morale. Comments from individual utility managers at DTG stakeholder meetings stated that the current process does not result in managers refraining from taking appropriate personnel actions, but does reduce morale due to the perception that whistleblowers are being treated more favorably than other individuals.

Comments from previous whistleblowers generally opposed the NRC withdrawing from the investigation and enforcement of individual discrimination cases. They asserted that there would be little deterrence from whistleblower discrimination without NRC involvement in this area. Whistleblower comments also indicated that the DOL process is expensive and untimely. Also, they indicated that it is unlikely that individuals who are unemployed, due to a disputed personnel action, would have the resources to pursue cases through the DOL appeal process, since each step in the DOL process can take months to years.

Adopting this option would eliminate NRC involvement with whistleblower protection. This option would also end the NRC's role in the review, investigation and enforcement of individual discrimination claims. Whistleblower protection would only be accomplished through the DOL process. The NRC would take no action to assess a safety conscious work environment (SCWE), and would take no action based on the outcome of a DOL case. This approach, according to the DTG, is consistent with other industries covered by DOL statutes prohibiting discrimination. The cost to licensees of the DOL process provides a level of deterrence from discrimination against employees, and provides a remedy to whistleblowers who have been discriminated against. Currently about 40 percent of the whistleblowers who come to the NRC also file complaints with DOL.

Advantages

NRC would save approximately 20 full time equivalents (FTE) per year in various offices by eliminating its role in handling discrimination complaints.

NRC's discrimination complaint policy and practice would be consistent with that of other industries.

Disadvantages

This change would likely have a significant negative impact on public confidence. Eliminating NRC's traditional role in these cases could give the appearance to the general public that the NRC is not concerned with whistleblowers. The NRC's authority

to take enforcement actions against discrimination existed before the DOL was given authority in the area, as a complement to NRC's authority.

This change would contradict previous Congressional testimony from former NRC Chairmen, which reinforced NRC's role in employee protection matters, noting that the NRC's employee protection provisions are rooted in the Atomic Energy Act.

This change may also potentially affect the forthright communication of safety information within the licensee's organization, as well as from a licensee to the NRC. The specter of whistleblower protection provides some incentive for open communication of safety information with licensees, as well as the NRC.

Both the DTG and the SMRT declined to endorse this option, primarily because of the potential reduction in public confidence, and the Commission's extensive prior support of the need for NRC involvement with employee protection.

Option 2 - Revise the investigative thresholds for Office of Investigations (OI) investigations of discrimination complaints (DTG Option 5b, in Attachment 1).

This option proposes that NRC investigate only those cases that meet the threshold of setting out a *prima facie* case², and are potentially more significant from an enforcement perspective (i.e., Severity Level III or above). Under normal circumstances, the NRC would not investigate complaints that do not meet this threshold. Potential Severity Level IV issues not investigated by the NRC would be provided to the licensee for information, with agreement from the whistleblower. However, NRC may investigate potentially low-significance complaints (i.e., Severity Level IV) which indicate a pattern of discrimination developing at a site, or other circumstances that indicate a potentially degrading SCWE. Attachment 1 provides a detailed discussion of proposed changes to the enforcement policy supplement and increasing the severity level threshold for investigations.

This option provides a balance between maintaining the agency's interest in deterring discrimination and encouraging a SCWE. It responds to many of the licensee stakeholder comments requesting changes to NRC's current process for handling discrimination complaints.

Industry stakeholders have commented that the threshold for initiating an OI investigation is far too low, and that the investigation itself causes a chilled environment at a facility. Whistleblower stakeholders disagreed that the thresholds should be changed and were concerned that raising the thresholds would result in fewer individuals coming forward with issues.

²As described in the DTG Report, the Allegation Review Board determines whether the information submitted provides the elements of a *prima facie* case of discrimination. These elements include whether: (a) the individual engaged in protected activity; (b) the individual was subjected to an adverse action; (c) the employer was aware of the protected activity when it took the adverse action; and (d) there is some evidence to raise an inference that the protected activity was, at least in part, the cause of the adverse action. If these four elements are satisfied, the NRC initiates an investigation.

Advantages

This change would result in a decrease in the burden on licensees because fewer investigations would be conducted by the NRC.

There would be a decrease in the staff resources needed to address discrimination complaints.

Disadvantages

This change would likely impact whistleblowers, since the NRC would not investigate less-significant cases, leaving DOL as the only option for whistleblowers. The DOL process has a high resource and monetary cost to the individual.

Administering employee protection regulations would remain reactive, with enforcement initiated only after receiving complaints.

The DTG endorses this option.

Option 3 - Rulemaking to develop a regulation for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency (SMRT conclusion, Attachment 2).

This option incorporates the key elements of the employee protection provisions currently included in 10 CFR 50.7, and its analogous regulations, along with the development of a standardized approach that would: (1) require licensees to establish and maintain a SCWE with clearly defined attributes; (2) require larger licensees to establish certain performance indicators that would be monitored and would, when considered collectively, provide evidence of an emerging adverse trend; and (3) outline specific remedial actions that the Commission may require when it determines that a particular licensee has failed to establish or maintain a SCWE. Attachment 2 provides a detailed discussion of this approach.

The NRC would conduct routine verification of the licensee's processing of discrimination complaints and evaluate the effectiveness of its Employee Concerns Program (ECP) using indicators such as findings from the DOL, the number and potential severity of complaints brought to the NRC, the use of the licensee's ECP, and indications of the licensee's ECP effectiveness. Any weakness or ineffectiveness can be addressed through the oversight process, which can be used to promote improvements in the work environment through the licensee's overall SCWE program.

The rulemaking is expected to require two to three years, based on past experience with rulemaking involving high levels of stakeholder interest. Interim measures, using a graded implementation approach with threshold criteria for handling discrimination complaints, can be initiated during a transition period if the Commission approves this option. Such interim measures would address various stakeholder concerns, and consider both the technical risks associated with a discrimination complaint, as well as the risk to the overall SCWE. The NRC would address all risk-significant technical issues underlying the complaint, in addition to those that are indicative of repeated or long-standing, uncorrected SCWE problems, or alleged

egregious conduct. Those complaints that do not meet that threshold would be referred back to the licensee's ECP, with the whistleblower's consent, and the NRC would monitor the resolution of those complaints through routine inspections. Additionally, the recommendations for the Major Crosscutting Policy Issues, Common Option Attributes, and Additional Comments (outlined in Option 4) would be implemented, as part of the interim measures for addressing stakeholder concerns until a rule has been promulgated.

The degree of the impact from a SCWE rule on the licensees would be graduated according to the type of licensee and the size of the workforce. The designation and number of licensee categories, based on the size of the workforce, would be determined as part of the rulemaking effort.

Advantages

A SCWE program is consistent with the licensee's role for bearing the primary responsibility for safely conducting licensed activities.

The Agency's program would be pro-active through imposition of an affirmative requirement on licensees to develop and implement SCWE programs, rather than reactive through investigation and enforcement. Inspection of SCWE programs would be a part of NRC's routine oversight processes, providing clear evaluation of licensee performance. The oversight process would also be highly visible to the public for power reactor licensees, and to a lesser extent to other materials licensees.

A rule provides a means of reducing the burden on licensees caused by NRC discrimination investigations, by placing the emphasis of regulatory compliance on licensees' ECPs. Given that many reactor licensees have informed the staff that they have started ECPs on their own, the implementation burden from a rule is expected to be minimized.

Ultimately, nearly all residual complaints would be handled by the DOL in a manner that is consistent with the employee protection approach for all other industries.

Rulemaking to establish SCWEs will relate to some extent with the safety culture initiatives currently being promoted in the international community.

Disadvantages

Approximately 9 FTE of staff resources would be needed over the course of three years to accomplish the rulemaking, and some limited staff resources in the oversight process shortly after the rule becomes effective, to assure effective implementation of the rule. Realization of resource savings would not occur until then.

During the most recent round of public meetings, industry stakeholders continue to be opposed to the development of a SCWE rule. A SCWE rule would likely be viewed as additional regulatory burden on the licensees, notwithstanding the representations that the programs themselves have already been developed and implemented.

In the short term, the public may perceive this change as NRC reducing enforcement activities in handling discrimination complaints.

The SMRT endorses this option.

Option 4 - Continue with current program, adopt recommendations for the streamlining revisions in the Major Crosscutting Policy Issues, Common Options Attributes, and Additional Comments for addressing stakeholder concerns (DTG Option 5a, Attachment 1).

This option maintains the current investigative threshold, which requires only that the whistleblower articulate a *prima facie* case of discrimination without regard to the severity level of the potential violation. Some streamlining measures would be made to address stakeholder concerns. Table 1 of Attachment 2 provides a rationale for the recommendations to address stakeholder concerns:

Major Crosscutting Policy Issues

- No changes to decriminalize the employee protection program,
- Release redacted OI reports before the final Agency Action,
- No hearing rights for Notice of Violations without civil penalties,
- Allow imposition of civil penalties on contractors,
- Consider using Alternative Dispute Resolution processes for low-significance complaints, early in the discrimination complaint process,
- Eliminate NRC deferral of discrimination complaints to the Department of Labor, and
- No increase in the current penalties for engaging in discrimination.

Common Option Attributes

- Refer low-significance allegations to the licensee for information, with the whistleblower's consent,
- Do not centralize the enforcement process
- Resequence the enforcement conference,
- OI should assess its investigation techniques, as part of an internal self-assessment,
- Modify the criteria for assessing Severity Level factors,
- Allow the whistleblower to bring two attendees to enforcement conferences,
- Provide financial support for the whistleblower and a personal representative to attend enforcement conferences,
- Consider additional factors for determining civil penalty amounts,
- Implement specific time limits for scheduling and conducting enforcement conferences, and
- Do not accept post-conference submittals other than the licensee's response to an NOV.

Additional Comments and Changes

- Do not revise the enforcement policy regarding employee training protection,
- Pursue enforcement action against false discrimination complaints on a case-by-case basis.

This option, which is comprised of multiple streamlining measures, would leave the current program for addressing discrimination complaints relatively unchanged, except for the streamlining measures to address various stakeholder comments. It is important to note that not all discrimination complaints are routinely referred to, or pursued by, OI. Since Fiscal Year 1994, OI has initiated investigations and/or assists to the staff on between 50 and 80 percent of the discrimination allegations received by the NRC. The Allegation Review Board reviews each case on its merits and against the threshold of the *prima facie* criteria before referring it to OI for initiation of an investigation. This option continues the current practice of initiating an investigation if a *prima facie* case is articulated. This is consistent with the standard used by DOL.

Advantage

Little change in staff resources would be needed to accomplish this option.

Disadvantages

No savings of staff resources would be realized.

The NRC's role in employee protection would remain reactive, with investigation and enforcement initiated only after receiving complaints.

The DTG and the SMRT agreed, to a large extent, on the implementation of the streamlining measures; however, continuing with the current program was not endorsed by either the DTG or the SMRT.

RESOURCES:

The following resource estimates are approximate, given the broad view of the options, and are provided for a general comparison among the various options presented in this paper. The level of detail contained in these estimates is not sufficient to support planning and budgeting decisions. Subsequent detailed estimates must be performed for making those decisions. None of the following resource estimates for the above options have been incorporated in the current budget planning period.

Option 1 - Eliminate NRC employee protection regulations and discontinue review and assessment of the SCWE (DTG Option 1, Attachment 1).

Staff estimates that approximately a net 20 FTE per year would be saved from the Office of Investigations, Office of Enforcement, Office of the General Counsel, and the Regions, if NRC eliminated its employee protection regulations and discontinued review and assessment of SCWE.

Option 2 - Revise the investigative thresholds for Office of Investigations (OI) investigations of discrimination complaints (DTG Option 5b, in Attachment 1).

Staff estimates this option would likely result in a decrease in the number of investigations by approximately about 10 to 15 percent per year. This would translate into a savings of approximately 2 FTE per year in the Office of Investigations, Office of Enforcement, and Office of the General Counsel.

Option 3 - Rulemaking to develop a regulation for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency (SMRT conclusion, Attachment 2).

Staff estimates this rulemaking effort would build upon the previous stakeholder interactions accomplished by the DTG, and would also require coordination with the Agreement States. Some public workshops at various locations around the country would be desirable to provide focused information to stakeholders and enhance public confidence associated with this new rule.

If this option is approved, a rulemaking plan will be provided to the Commission, which will provide the details of this rulemaking effort. Staff estimates that this rulemaking would require approximately 3 FTE per year for 3 years to complete during the interim transitional period. Staff estimates a savings of approximately 2 FTE per year in the Office of Investigations, Office of Enforcement, and Office of the General Counsel, once the investigative threshold for handling discrimination complaints becomes fully effective. These savings would be offset, somewhat, by additional training for NRC inspectors. Guidance development for inspecting a SCWE would require a one-time expenditure of approximately 1 FTE to support the final rule.

The bulk of the resource savings would be realized after the rule becomes effective and licensees' SCWE programs become the principal regulatory focus. Improvements in the work environment through effective use of licensees' ECPs should result in fewer discrimination cases reaching the level of NRC investigative and enforcement involvement. Ideally, this fundamental realignment of the way the Agency handles discrimination complaints may result in the NRC only needing to expend resources during the annual inspection of the corrective action programs at the larger licensees. This could result in a savings of as much as 16 FTE per year, if no NRC investigation of discrimination complaints are needed.

Option 4 - Continue with current program, adopt recommendations for the streamlining revisions in the Major Crosscutting Policy Issues, Common Options Attributes, and Additional Comments for addressing stakeholder concerns (DTG Option 5a, Attachment 1).

Staff considers that this option will result in little, if any, resource savings. Implementing the streamlining measures will result in some reduction of schedules for enforcement conferences, which will translate into some savings of staff resources. However, those savings will likely be off-set by the additional financial support provided to whistleblowers and personal representatives for travel expenses to enforcement conferences.

COORDINATION:

The Office of the Chief Financial Officer has reviewed this paper and has no objection. The Discrimination Task Group was briefed on the contents and conclusions of this paper. The contents of the paper have not been coordinated with the U.S. Department of Labor. Such coordination will be initiated, if needed, pending the Commission's direction on the options presented. The Office of the General Counsel has no legal objection to Option 3.

RECOMMENDATION:

The staff recommends that the Commission adopt Option 3, to pursue rulemaking for oversight of a Safety Conscious Work Environment, including provisions for handling discrimination complaints, and an interim transitional program to improve effectiveness and efficiency.

/RA/

William D. Travers
Executive Director for Operations

Attachments:

1. Discrimination Task Group Report
2. Outcomes of the Senior Management Review Team

Option 4 - Continue with current program, adopt recommendations for the streamlining revisions in the Major Crosscutting Policy Issues, Common Options Attributes, and Additional Comments for addressing stakeholder concerns (DTG Option 5a, Attachment 1).

Staff considers that this option will result in little, if any, resource savings. Implementing the streamlining measures will result in some reduction of schedules for enforcement conferences, which will translate into some savings of staff resources. However, those savings will likely be off-set by the additional financial support provided to whistleblowers and personal representatives for travel expenses to enforcement conferences.

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Executive Director for Operations

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1. Discrimination Task Group Report
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*See previous concurrence

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