

NUCLEAR REGULATORY COMMISSION

Proposed Revision of the NRC Enforcement Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: notification of proposed revision.

SUMMARY: The Nuclear Regulatory Commission (NRC) is considering a revision to its Enforcement Policy (Policy), Supplement VII, to change the criteria considered when determining the Severity Level of violations of the NRC's employee protection regulations.

DATES: Comments on this proposed revision to the NRC Enforcement Policy may be submitted on or before (insert date 60 days after publication in the *Federal Register*). The staff's disposition of comments will be documented, and made available on the NRC web site.

ADDRESSES: Submit written comments to: Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop: T6D59, U. S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, Room O1F21, 11555 Rockville Pike, Rockville, MD. You may also email comments to [nrcprep@nrc.gov](mailto:nrcprep@nrc.gov).

The NRC maintains the current Enforcement Policy on its Web site at <http://www.nrc.gov>, select **What We Do, Enforcement**, then **Enforcement Policy**.

FOR FURTHER INFORMATION CONTACT: Robert Fretz, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-1980, e-mail ([RXF@nrc.gov](mailto:RXF@nrc.gov)) or Maria Schwartz, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-2742, e-mail ([MES@nrc.gov](mailto:MES@nrc.gov)).

SUPPLEMENTARY INFORMATION:

On April 14, 2000, the Executive Director for Operations chartered a Discrimination Task Group (DTG) to evaluate the NRC's handling of employee discrimination cases. The DTG's report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," was forwarded to the Commission as an attachment to SECY-02-0166, dated September 12, 2002. Among other recommendations, the DTG recommended changing the Severity Level criteria for violations of the Commission's Employee Protection Regulations to include additional factors when applying Severity Levels. On March 26, 2003, the Commission issued a Staff Requirements Memorandum (SRM) on SECY-02-0166 approving the recommendations of the DTG as revised by the Senior Management Review Team. The Commission approved, without comment, the DTG recommendation regarding Severity Level criteria. The staff is now proposing to change the Enforcement Policy in response to the Commission's direction in its SRM on SECY-02-0166.

The primary goals of enforcement in the discrimination area are to deter licensees and individuals from taking adverse actions against employees for engaging in protected activities, and to ensure that there is a work environment that allows employees to feel free to raise

concerns. As a result, the Severity Levels assigned to a particular act of discrimination should be graded based on factors that promote these goals. In addition to these goals, the proposed revision to Supplement VII of the Enforcement Policy would improve the effectiveness of the NRC's enforcement program by allowing the staff to more appropriately assess the significance of discrimination violations.

The Enforcement Policy currently categorizes the Severity Level of a discrimination violation solely by the level of the manager in the organization who initiated or approved the adverse action. For example, a violation of an employee protection regulation attributed to a senior corporate manager would normally result in a Severity Level I violation whereas a violation attributed to a mid-level manager or first-line supervisor would normally result in a Severity Level II or III violation, respectively. The DTG recommended that Supplement VII of the Enforcement Policy be revised in the discrimination area to account for other factors in addition to the level of the manager. The proposed changes to the Severity Level factors would allow the NRC staff to further consider: (1) the severity of the adverse action (e.g., monetary effect, downgrade of position, involuntary transfer from a supervisory to non-supervisory position, and negative appraisal comments); (2) potential site or organizational impact of the adverse action; (3) failure by licensee or contractor or subcontractor management to followup on a discrimination complaint; and (4) whether or not the adverse action was taken because an employee came to the NRC or other government agency with a concern. The NRC staff will continue to consider the aspect of willfulness on the part of the individual taking the adverse action in accordance with Section IV.A.4 of the Enforcement Policy when assessing the significance of the violation.

The proposed revision incorporates the use of several terms not currently used in Supplement VII, including tangible adverse action, mid-level manager, and site or

organizational impact. These terms, as used in the proposed revision to Supplement VII, are defined below.

A tangible adverse action is that action that had an actual, negative effect on an employee. Tangible adverse actions include, but are not limited to, negative monetary effects (e.g., job termination, and failure to receive a routine annual pay increase or bonus), demotion or arbitrary downgrade of a position, transfer to a position that is recognized to have a lesser status (e.g., from a supervisory to a non-supervisory position), and an overall performance appraisal downgrade. Adverse actions that are not considered “tangible” include a negative comment in a performance appraisal, that had no effect on the overall appraisal grade or visible impact on the employee, or a letter of reprimand or counseling which subsequently did not have a negative effect on an employee’s position or compensation. These adverse actions would be considered a less severe and typically would not be considered for escalated enforcement.

The impact or consequences of the tangible adverse action would be considered when making a Severity Level determination. For example, a substantial monetary action, such as termination or job demotion, would generally be considered a significant tangible adverse action and could result in a Severity Level I or II violation. Whereas, an overall performance appraisal downgrade or action that had a lesser monetary effect (e.g., reduced bonus) would not be considered a significant tangible adverse action and, thus, could result in a Severity Level II or III violation.

A mid-level manager is, in most cases, considered to be a manager below the level of a senior manager (typically a vice-president or above) or owner of a company but above a first line supervisor. For large organizations, such as power reactor licensees with several levels of management, mid-level management may actually encompass several levels of management below the level of senior manager. Similarly, in a large organization, for purposes of Severity Level determination, a second level supervisor, such as a general foreman in a maintenance

organization, may be most appropriately grouped with first line supervision. Conversely, smaller companies, such as radiography or well logging licensees, may only have one or two levels of management, all of which would be considered at least mid-level.

For discrimination cases involving non-licensee contractors or subcontractors, the NRC may choose to exercise discretion in determining the severity level of a violation by taking into account the contract manager's position within the contractor's organization and the relation of that position to licensed activities. In discrimination cases where an adverse action was initiated or approved by mid-level management within the organization but the specific manager cannot be identified, the Severity Level determination will consider the action taken as though a specific individual manager was identified. For example, during the course of an otherwise legitimate reduction in force, an employee is subject to the layoff, at least in part, due to engaging in a protected activity. In this example, a panel of mid-level managers approves the list of employees affected by the layoff, including the employee wrongly laid off, but no single mid-level manager is specifically identified as responsible for the adverse action. Therefore, Severity Level consideration would be based, in part, on mid-level management involvement.

Potential site or organizational impact is the negative impact on the work environment that could occur if the adverse action is conspicuous and widely known to other employees. The NRC recognizes that this would be the most subjective of the proposed severity level factors and that precise criteria would likely be difficult to establish. Therefore, the NRC anticipates that this factor will only be used when the adverse action is clearly widely-known. Widely-known actions which could affect the organization by affecting the work environment for other employees include, for example, those actions that result in an individual being absent from the workplace, as a result of a termination, suspension, or relocation of work space. Adverse actions involving performance appraisals do not typically result in an employee's absence and may not necessarily be known by other employees. Therefore, actions related to

such things as performance appraisals would not typically be considered widely-known under this factor, unless evidence suggests otherwise.

Although not specifically included as a severity level factor in the proposed revision, the NRC notes that the threat of an adverse action is also considered to constitute an adverse action because the threat affects the terms and conditions of employment, thereby affecting the work environment. The NRC recognizes, however, that the threat of an adverse action does not have the same consequences to an individual as an actual tangible adverse action. Under the proposed revision, a SL II violation, for example, could be appropriate, if a mid-level manager threatened to terminate an employee and the threat had widespread site or organizational impact, i.e., was widely-known among employees.

Accordingly, the proposed revision to the NRC Enforcement Policy, Supplement VII, reads as follows:

NRC ENFORCEMENT POLICY

\* \* \* \* \*

SUPPLEMENT VII - MISCELLANEOUS MATTERS

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**A. Severity Level I - Violations involving for example:**

\* \* \* \* \*

- 4. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations, by a senior corporate officer or manager involving a significant tangible adverse action (e.g., substantial monetary action, such as termination or job demotion)

**B. Severity Level II - Violations involving for example:**

\* \* \* \* \*

4. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations where a tangible adverse action (e.g., an actual, negative effect on an employee, such as denial of training, lower performance rating, or denial of a small, routine annual pay increase) was taken or approved by a senior manager; or violations in which at least two of the following factors apply:
- (a) the adverse action was approved by at least a mid-level manager (e.g., a manager above a first-line supervisor) or at a level within the organization corresponding to a mid-level manager (in those cases where the specific mid-level manager cannot be identified); or
  - (b) the adverse action was tangible and significant (e.g., substantial monetary action, such as termination or job demotion); or
  - (c) the adverse action was widely-known; or
  - (d) the adverse action was taken because an employee came to the NRC or other government agency with a concern; or
  - (e) the licensee, contractor or subcontractor's management failed to followup on a discrimination complaint made by one of its own employees or the licensee's management failed to followup on a discrimination complaint made to the licensee by a contractor or subcontractor employee.

**D. Severity Level III - Violations involving for example:**

\* \* \* \* \*

5. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations where at least one of the following factors apply:
- (a) the adverse action was approved by at least a mid-level manager (e.g., a manager above a first-line supervisor) or at a level within the organization

corresponding to a mid-level manager (in those cases where the specific mid-level manager cannot be identified); or

- (b) the adverse action was tangible (e.g., an actual, negative effect on an employee, such as a denial of a small, routine annual pay increase, denial of training, or lower performance rating); or
- (c) the adverse action was widely-known; or
- (d) the adverse action was taken because an employee came to the NRC or other government agency with a concern; or
- (e) the licensee, contractor or subcontractor's management failed to followup on a discrimination complaint made by one of its own employees or the licensee's management failed to followup on a discrimination complaint made to the licensee by a contractor or subcontractor employee.

**D. Severity Level IV - Violations involving for example:**

\* \* \* \* \*

- 7. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations which, in itself, does not warrant a Severity Level III categorization.

Dated at Rockville, MD, this 27th day of September, 2005.

For the Nuclear Regulatory Commission,

/RA/

Michael R. Johnson  
Director, Office of Enforcement

corresponding to a mid-level manager (in those cases where the specific mid-level manager cannot be identified); or

- (b) the adverse action was tangible (e.g., an actual, negative effect on an employee, such as a denial of a small, routine annual pay increase, denial of training, or lower performance rating); or
- (c) the adverse action was widely-known; or
- (d) the adverse action was taken because an employee came to the NRC or other government agency with a concern; or
- (e) the licensee, contractor or subcontractor's management failed to followup on a discrimination complaint made by one of its own employees or the licensee's management failed to followup on a discrimination complaint made to the licensee by a contractor or subcontractor employee.

**D. Severity Level IV - Violations involving for example:**

\* \* \* \* \*

- 7. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations which, in itself, does not warrant a Severity Level III categorization.

Dated at Rockville, MD, this 27th day of September, 2005.

For the Nuclear Regulatory Commission,

/RA/

Michael R. Johnson  
Director, Office of Enforcement

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