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June 11, 2018

MEMORANDUM TO: Victor M. McCree
Executive Director for Operations

FROM: Anne T. Boland, Director /RA/
Office of Enforcement

Margaret M. Doane /RA MMaxin Acting for/
General Counsel

Miriam L. Cohen /RA JGolder Acting for/
Chief Human Capital Officer

Pamela R. Baker, Director /RA MFopma Acting for/
Office of Small Business and Civil Rights

SUBJECT: EVALUATION OF CONSIDERATIONS IDENTIFIED WITHIN A STUDY
OF REPRISAL AND CHILLING EFFECT FOR RAISING MISSION-
RELATED CONCERNS AND DIFFERING VIEWS AT THE NUCLEAR
REGULATORY COMMISSION

This memorandum transmits the results of an evaluation of nine considerations identified within a subject study by a working group (WG) comprised of managers from the Office of Enforcement (OE), Office of the General Counsel (OGC), Office of the Chief Human Capital Officer (OCHCO), and Office of Small Business and Civil Rights (SBCR). The WG evaluated the nine considerations presented in the study¹ and recommends implementing seven of the considerations. As agreed upon, in its initial review, the WG did not evaluate other components of the study, and therefore, the study's data and perspectives were not validated and do not reflect a consensus view of the WG. The working group utilized recurring meetings as a means to analyze and discuss the before mentioned considerations and any alternative mitigation strategies. It also engaged with Subject Matter Experts and other stakeholders on an as-needed basis.

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¹This study is not a consensus product and does not represent final agency views, analysis, or conclusions regarding the environment for raising concerns at the NRC. The study was a first step of an action plan tasking to further promote a positive safety culture environment. The Office of Enforcement and other relevant offices have evaluated the study's considerations and this memo identifies recommended changes to pursue in support of the Agency-Wide Action Plan's goals.

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As discussed above, the study identifies nine considerations that were evaluated by the WG for appropriateness and adoptability. The nine considerations include:

1. Demonstrate management commitment and accountability.
2. Survey all employees to ask whether they believe they have experienced reprisal for raising a mission-related concern or differing view.
3. Establish and maintain a comprehensive policy and procedures to prevent, identify, investigate, and address reprisal for raising mission-related concerns or differing views.
4. Establish an Advisory Review Panel to review proposed employment actions on an as-needed basis before the actions are taken to determine whether any of the factors of retaliation are known to be present and to advise on mitigation strategies to address the potential for the actions to cause a chilling effect and, if already alleged, respond to concerns of chilling effect and chilled work environment.
5. Examine existing training and consider adding, enhancing, or replacing.
6. Enhance communications on whistleblower rights and protections.
7. Continue to communicate the value of raising mission-related concerns and differing views and that the agency does not tolerate reprisal for speaking up or using the differing views processes.
8. Establish an agency-level advisory committee on environment for raising mission-related concerns and differing views.
9. Establish an annual Meritorious Service Award.

Results of the Working Group Evaluation

1. Demonstrate management commitment and accountability

The WG discussed this consideration in two separate parts; Management Commitment and Management Accountability.

Management Commitment

In response to this consideration, the WG recommends the future development and implementation of a Differing Views Campaign, with the objectives of increasing the awareness and availability of the Differing Views Program and affirming management's commitment to those programs at the U.S. Nuclear Regulatory Commission (NRC). The group also recommends examining existing training, and enhancing as appropriate, as well as additional communication to mitigate unacceptable practices of potential retaliation/reprisal related to participating in the Differing Views Program. If the recommendation is accepted, the details of this campaign will need to be formally developed by OE with support from OCHCO, SBCR, and OGC.

In addition, OE is currently conducting a formal assessment of the Differing Views Program to determine the program's effectiveness and efficiencies. This assessment is currently scheduled to be completed later in Calendar Year (CY) 2018, and the results and recommendations will be provided to senior management. The recommended Differing Views Campaign for this

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consideration can be informed by the results of the formal assessment of the Differing Views Program.

Management Accountability

In response to the consideration pertaining to management accountability, the working group recommends development and implementation of a neutral fact-finding process to provide an avenue whereby employees can raise allegations of retaliation for submitting and/or participating in the Differing Professional Opinion/Non-Concurrence process. By creating this fact-finding process the agency would be in a better position to encourage employees to use the Differing Views Program without fear of reprisal. If the recommendation is accepted, the details of this fact-finding process will be formally developed by the working group.

2. Survey all employees to ask whether they believe they have experienced reprisal for raising a mission-related concern or differing view.

While the working group agrees that the agency may have opportunities to enhance the internal environment for raising mission-related concerns or differing views without concern for or fear of retaliation, the working group also maintains that the data may also support a workplace that promotes differing views and the use of the aforementioned processes. The WG aligned to gather the data from the CY 2017 Federal Employee Viewpoint Survey and the CY 2015 Office of the Inspector General (OIG) Safety Culture Climate Survey to assess the results of that data. The WG will use the results of their findings of the data review to inform the new Differing Views Campaign recommendation mentioned as a mitigation strategy for the consideration related to Management Commitment. Lastly, and to better ascertain the success of the Differing Views Campaign, OE is providing OIG proposed survey questions related to reprisal for their consideration in the CY 2019 OIG Safety Culture Climate Survey.

3. Establish and maintain a comprehensive policy and procedures to prevent, identify, investigate, and address reprisal for raising mission-related concerns or differing views.

The WG recommends developing and implementing a fact-finding process as described above under Management Accountability.

4. Establish an Advisory Review Panel (ARP) to review proposed employment actions on an as-needed basis before the actions are taken to determine whether any of the factors of retaliation are known to be present and to advise on mitigation strategies to address the potential for the actions to cause a chilling effect and, if already alleged, respond to concerns of chilling effect and chilled work environment.

The WG recommends that this consideration be rejected. The draft study states that the purpose of the ARP would be to determine if the factors of retaliation are known to be present. "Employment actions" are not defined within the draft study; however, in the human capital context, such actions can include, but are not limited to, a full range of actions, such as hiring (e.g., actions such as placement on a certificate of eligibles, selection, etc.), disciplinary and adverse actions (e.g., reprimand, counseling, admonishment, suspension, removal),

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reorganizations, performance appraisals, assignments of work, leave approvals, etc. Most of these actions already have a level of review or are part of the requirements of supervision. In addition, adding an additional layer of discussion or consideration of the “action” may actually violate the existing due process and delegations of authority already inherent within the applicable processes. For example, 5 U.S.C. Chapters 43 and 75 as well as the Collective Bargaining Agreement specifically outlines the applicable process and who may “weigh in” to reach an appropriate penalty or decision on a penalty. This would not only be inefficient, but would seem to usurp the existing authorities provided to supervisors, Division Directors, Office Directors, etc., as well as the authority of OCHCO, SBCR, and OGC in certain circumstances.

In addition, many such actions have a Privacy Act component. For example, employees may have a vested interest in preserving a limited sphere of privacy around having their counseling, discipline, and/or performance information being shared (arguably with those who do not have a direct need to know) if there has been no established link between the action to be taken and the employee’s assertion of the differing view.

5. Examine existing training and consider adding, enhancing, or replacing.

The WG recommends the future development and implementation of a Differing Views Campaign that would include examining existing training as outlined above under Management Commitment.

6. Enhance communications on whistleblower rights and protections.

The WG recommends the future development and implementation of a Differing Views Campaign identified above under Management Commitment. Pursuant to recently enacted legislation, S. 585, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, all supervisors are required to receive annual training on how to respond to complaints alleging a violation of whistleblower protections. The agency is currently working with the Office of Special Counsel (OSC) to schedule training that will meet this requirement. This training will likely be held in summer or fall of 2018. The agency also expects to receive guidance from OSC in the next few months setting forth the required parameters of the annual training. By the end of the year, all supervisors will be provided the required training.

7. Continue to communicate the value of raising mission-related concerns and differing views and that the agency does not tolerate reprisal for speaking up or using the differing views processes.

The WG recommends the future development and implementation of a Differing Views Campaign and a fact-finding process as identified above under Management Commitment and Management Accountability.

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8. Establish an agency-level advisory committee on environment for raising mission-related concerns and differing views.

The WG recommends reviewing the charter for the Diversity Management and Inclusion Council (DMIC) to consider adding a Differing Views subgroup to the DMIC, as appropriate. If added to the DMIC, the WG recommends the Differing Views subgroup conduct an independent review of any challenges or issues related to the Differing Views Program. In addition, the WG recommends the subgroup analyze any relevant data from future surveys and report the results to the appropriate program office.

9. Establish an annual Meritorious Service Award.

The WG does not recommend establishing a separate Meritorious Service Award for Differing Views. The WG recognizes that the established NRC's Mission, Values, and Principles of Good Regulation (MVP) award includes differing views criteria and recommends a review of the MVP award criteria to ensure differing views elements are appropriately addressed and characterized for the MVP award. In addition, the development of a Differing Views Campaign recommended in the first consideration for Management Commitment can be used to communicate and promote the MVP award, specifically related to differing views.

The members are available to address any comments or questions related to the results of the WG evaluation of the nine considerations, and to provide any other assistance as needed.

cc: Victor M. McCree, EDO
Michael R. Johnson, DEDR
Daniel H. Dorman, Acting DEDM

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OFFICE	OE: OD	OGC	OCHCO	SBCR
NAME	ABoland	MMaxin for MDoane	JGolder for MCohen	MFopma for PBaker
DATE	06/11/2018	06/07/2018	06/08/2018	06/11/2018

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