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PEC Caucus
Discrimination Cases for Henderson, ██████, Shea, TVA
July 20, 2020

Kitty – I am not sure, but I don't think I have seen a document like this post PECs. Well David did something but don't remember it being in this format. So GOOD JOB for thinking up the format because I really think this document is helpful in framing our next steps and will be useful later should we end up in a hearing go to a hearing.

1. Enforcement Panel held 2-19-20 (see attached Overview)

Preliminary conclusions:

- a. (2-2019-015): Based on the evidence, the allegation that Wetzel was discriminated against for engaging in protected activities was substantiated. The preponderance of the evidence indicated that the deliberate misconduct of Henderson and Shea, in violation of 10 CFR 50.5, caused TVA to be in violation of 10 CFR 50.7, the employee protection regulation.
- b. (2-2018-033): Based on the evidence, the allegation that McBrearty was discriminated against for engaging in protected activities was substantiated. The preponderance of the evidence indicated that the deliberate misconduct of Henderson and ██████, in violation of 10 CFR 50.5, caused TVA to be in violation of 10 CFR 50.7, the employee protection regulation.

OE proposed Actions:

- a. Henderson: Proposed SL II; 1-year ban
- b. ██████: Proposed SL I; 5-year ban
- c. Shea: Proposed SL I; 5-year ban
- d. TVA: Proposed four violations, 4 X \$303,471 = \$1,213,884

2. PEC letters sent 3-2-20

3. PECs held 6-23-20 (Henderson); 6-24-20 (██████); 6-25-20 (Shea); 6-30-20 (TVA)

Summary slide TVA:

- Mr. McBrearty and Ms. Wetzel were engaged in ongoing, unprofessional behavior targeted at Ms. Henderson—making TVA obligated to act.
- Neither TVA or its personnel, took deliberate action to retaliate in these personnel actions.
- The level of discipline for personnel actions is confined to TVA's discretion so long as it is not in retaliation for protected activities within the NRC's jurisdiction. There was no such retaliation here.
- TVA is strongly dedicated to Safety Conscious Work Environment and Nuclear Safety Culture.

Summary slide Joe Shea:

- Joe had no intent to retaliate against Ms. Wetzel

- Joe consistently and repeatedly reached out to HR and OGC for direction on how to address Ms. Wetzel's behavior
- Joe even recommended an additional interview of Ms. Wetzel
- Joe agreed with and implemented the recommendation by OGC to separate Ms. Wetzel from the company
- Joe presented the proposed adverse action to the ERB, which concurred that it was not based on inappropriate considerations

Summary slide [REDACTED]

[REDACTED] did not retaliate against Mr. McBrearty because of his ECP contacts or any other protected activity upon receipt of the OGC investigation report.

- [REDACTED] continued to consider Mr. McBrearty for advancement after he was aware of Mr. McBrearty's ECP contacts in 2017.
- The joint recommendation to place Mr. McBrearty on paid leave was based on confirmed findings by an independent investigation that substantiated Mr. McBrearty's harassing behaviors, which had continued even after Mr. McBrearty was counseled about them.

Summary slide Erin Henderson:

- Erin's actions were in compliance with 50.7, specifically its explicit statements in 50.7(d) that no one is immune from discharge or discipline for legitimate reasons.
- McBrearty's behaviors did not stop even after multiple attempts by management.
- It was reasonable for Erin to include others that may have been involved and she was encouraged to list other individuals by ??????????.
- Erin was justified in filing her complaint based on McBrearty's behaviors because she said he was.... ??.
- After two years and numerous attempts to address all of these issues, Erin filed her harassment complaint only in good faith after being encouraged by ?????? to have her concerns addressed rather than leave the company. She said a senior VP encouraged her correct? Also didn't Shea say he encouraged her to add names?

4. TVA provided supplemental information via email from Tim Walsh 7-06-2020

5. NRC questions for discussion:

- Was evidence provided by TVA or the Individuals that would change our preliminary conclusions?
 - Was evidence provided that shows that TVA procedures and policies for investigations and discipline were followed appropriately, and supports the claim that actions against the CI's were warranted and not retaliation for protected activities? **Good question**
 - Was evidence provided that shows that the various investigations (ethics complaint, ECP, OGC) were initiated and conducted appropriately, and supports the claim that actions taken against the CI's were warranted and not retaliation for protected activities? **Good question and this question**

make me think above you should point out what certain managers did (as in did not), Shea for example, to address complaints by others against Henderson to show there was unequal treatment by these managers of concerns raised by others against Henderson. Shea told Beth he would have her claims looked into he stated I believe or some exhibit he showed us stated in like an email, but all he did was tell the OGC person about it and someone said bad idea and he didn't do anything about her concerns as he promised Beth.

- iii. Was evidence provided that supported the claim that the CI's actions were disrespectful, harassing and egregious enough to warrant termination? **Good question – above your highlights should present whatever evidence they gave us so its easy to quickly answer this question.**
- iv. Was evidence provided of corrective actions or commitments that would mitigate our proposed actions?

- b. Is prima facie still evident for both discrimination cases? **– please let's review prior work together Friday?**
- c. Is there still evidence of deliberate misconduct for all individuals? **– please let's review prior evidence together Friday?**
- d. Are the proposed violations still supported?
- e. Are our proposed actions still supported?
- f. 1.3.3 of the Enforcement Manual (page 276) (relevant excerpt on next page) refers to actions taken if two investigative findings of discrimination by the same licensee and/or contractor are made within 18 months (either by OI or OSHA). These actions can include requiring the licensee to address what is being done to prevent a chilled work environment or to issue a DFI as to why the licensee should not be ordered to obtain an outside independent contractor to review their safety culture. **Believe Does** this applies to TVA since the two cases were within the 18-month timeframe? **Put dates of each here**

Why do you start spacing after item f? Spacing should be the same throughout.

- g. 1.3.17 of the Enforcement Manual (page 294) (relevant excerpt on next page) refers to cases with finding of discrimination by DOL. In these cases, the licensee can be required to discuss corrective actions taken or planned to assess or mitigate potential chilling effect. Even though Wetzal settled her case, does this apply?
- h. 1.3.6.2 of the Enforcement Manual (page 280) (relevant excerpt on next page), says the post PEC submittals from the licensee will not generally be accepted if they received a redacted OI report prior to the conference. Should the submittals from Tim Walsh on 7-6-2020 be accepted?
- i. 1.3.12 of the Enforcement Manual (page 286) (relevant excerpts on next page) discusses credit given for corrective action if it is prompt, comprehensive and addresses the broader environment for raising concerns and provides a remedy for the particular discrimination at issue. Should TVA get credit for any corrective actions? **Please list what TVA said they did here, make sense?**

Enforcement Manual

1.3.3. Enforcement Panel (page 276)

C. If two investigative findings of discrimination by the same licensee and/or contractor are made within 18 months (either by OI or OSHA):

1. The region and/or OE should request an EA number; and
2. Schedule a multi-office enforcement panel to discuss the agency's strategy for requesting the licensee and/or contractor to ascertain whether a cultural problem exists and to identify any particular areas within the workplace in which supervisors do not appreciate the importance of raising concerns.
 - a. The NRC can require the licensee and/or contractor's senior management to meet with the Regional Administrator to explain the employment actions in question, and to address what actions the licensee and/or contractor is taking to ensure that employees are not "chilled."
 - b. The licensee and/or contractor should be expected to address:
 - Whether it has confidence that remedial actions have been effective; and
 - The basis for this view.
 - c. The letter establishing this meeting can also request the licensee and/or contractor to document actions taken or planned to assess and mitigate the potential impact on the environment for raising concerns. If responsible staff concludes that positive results have been achieved through actions already taken by the licensee and/or contractor, credit for these results should be noted in the letter.

D. If more than two OI investigative findings of discrimination occur within an 18-month period, the NRC should take the actions specified above and consider stronger actions.

1. OE will consider whether a DFI might be issued as to why the licensee should not be ordered to obtain an outside independent contractor to:
 - a. Review the licensee's programs for maintaining a safety-conscious work environment or safety culture;
 - b. Survey employees to determine whether they feel free to raise concerns without fear of retaliation; and
 - c. Develop recommendations, if warranted, to improve the workplace environment.
2. If it is determined that a DFI will be issued, OE should request an EA number; and
3. If an adequate response is not received to this DFI, then the NRC should consider issuing an order.

1.3.17 Chilling Effect of Actual or Potential Discrimination (page 294)

In addition to concerns about the appropriate enforcement action in cases of actual discrimination, the NRC must also consider the impact of such discrimination in the workplace, i.e., whether the awareness of the discriminatory act will discourage other licensee and contractor employees from raising safety concerns.

A. Letter Requesting Information from the Licensee in Responding to a Finding of Discrimination

1. In each case of a finding of discrimination by DOL, the NRC should, regardless of whether or not the NRC is aware of a party appealing the DOL determination, bring the matter to the attention of the licensee. After contacting the licensee and/or contractor to discuss their knowledge of the finding and any corrective actions planned or taken to assess and mitigate the potential chilling effect, follow up correspondence is normally provided. This correspondence serves three purposes:
 - a. To notify the licensee and/or contractor of the NRC's concern,
 - b. To understand the basis for the licensee and/or contractor's position on whether or not discrimination occurred, and
 - c. To obtain a description of any remedial action the licensee and/or contractor plans to take to address the potential chilling effect. Remedial action may be warranted, even if the licensee and/or contractor disagree with the finding of discrimination, because of the potential for a chilling effect.
 - d. If responsible staff has concluded that positive results have been achieved through actions already taken by the licensee and/or contractor, credit for these results should be noted in the letter.
2. The NRC normally issues the information request letter noted in Section 1.13.7.A.1 after the OSHA investigation has been completed and a finding has been made of discrimination, and after contacting the licensee and/or contractor to discuss their knowledge of the finding and corrective actions planned or taken.

a. If the licensee settles a case soon after the OSHA finding and does not challenge the finding in adjudication, the chilling effect may be minimized and it may not be necessary to send an information request letter. A conversation should be held with the licensee and/or contractor in order to obtain feedback regarding their knowledge of the finding and confirm that it is not apparent that the environment for raising concerns has been adversely impacted;

1.3.6.2 Conduct of PEC (page 280)

B. Post Submittals

1. Submittals from the licensee and complainant will not generally be accepted when the licensee and complainant have received redacted OI report prior to the conference.

2. The NRC will accept the licensee's response to a proposed NOV.

1.3.12 Application of Corrective Action Civil Penalty Assessment Factor for Discrimination Violations (page 286)

A. Application of the Corrective Action factor is discussed in the Enforcement Policy and this manual. The Enforcement Policy also provides an explanation of the Corrective Action factor as applied to discrimination cases.

D. Credit for Corrective Action should normally only be considered if the licensee takes prompt, comprehensive corrective action that:

1. Addresses the broader environment for raising concerns in the workplace; and
2. Provides a remedy for the particular discrimination at issue.