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Mail Envelope Properties (6569660ffd124c38945faf591dff80c7)

Subject: draft documents for caucus
Sent Date: 2/17/2021 8:21:10 PM
Received Date: 2/17/2021 8:21:13 PM
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Post Office: HQPWMSMRS02.nrc.gov

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Options
Priority: Normal
Return Notification: No
Reply Requested: No
Sensitivity: Normal
Expiration Date:

From: Thompson, Catherine
Sent: Wednesday, July 8, 2020 3:13 PM
To: Solorio, Dave; Gifford, Ian
Subject: draft documents for caucus
Attachments: Overview for Panel 2-19-2020_OUO reordered and with names.docx; caucus agenda 7-20-2020.docx

Follow Up Flag: Follow up
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Dave and Ian,

Attached is a draft of the caucus agenda. I summarized our proposed actions, and then included the summary slide from each of the PECs (where they proclaimed their innocence). On page 2 and 3 are discussion questions. Take a look these and see if you want to edit or add/delete anything or if the question is irrelevant. Also, on page 3 are specific issues I found in the enforcement manual that might apply. I put the relevant excerpts on page 4 for quick reference.

The other attachment is the overview we used in the strategy meeting in February. It has the case summaries, prima facie summary and proposed enforcement actions for reference. They should all have the PEC presentation materials, exhibits and EAWs, so I thought this was enough to provide just as a summary document of our original analysis.

Thanks,
Kitty

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Mail Envelope Properties (DM6PR09MB47443A3EE3D8A84B636A4EDB8C670)

Subject: draft documents for caucus
Sent Date: 7/8/2020 3:13:19 PM
Received Date: 7/8/2020 3:13:20 PM
From: Thompson, Catherine

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Post Office: DM6PR09MB4744.namprd09.prod.outlook.com

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Priority: Normal
Return Notification: No
Reply Requested: Yes
Sensitivity: Normal
Expiration Date:

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**Enforcement Panel
February 19, 2020**

TVA Corporate Discrimination Case (2-2019-015)

Overview:

This investigation was initiated to determine whether a former Manager of Emerging Regulatory Issues employed by the TVA at the TVA Corporate Office in Chattanooga, TN, was the subject of discrimination for participating in a protected activity.

By report dated January 22, 2019, OI substantiated the allegation, including deliberate misconduct by two individuals.

Case background:

- Between 2016 and 2017, the CI, Beth Wetzel, was under the direct supervision of Eric Henderson, the former Director of CNL. During this time, the Wetzel raised numerous safety concerns and submitted an allegation to the NRC regarding a chilled work environment.
- Wetzel contacted Joe Shea, the VP of Regulatory Affairs, with concerns that Henderson was creating a hostile work environment by retaliating against the individuals that raised safety concerns. Three previous ECP investigations within CNL confirmed a “work environment that could be found to be chilled” and a “perception of retaliation.”
- On March 9, 2018, Henderson filed a complaint with TVA accusing several employees, including Wetzel, of creating a hostile workplace and engaging in insubordinate conduct. In the complaint, Henderson specifically cited assertions made to the NRC about a chilled work environment as an example of retaliatory behavior imposed by Wetzel.
- Wetzel was placed on paid administrative leave on October 15, 2018 and terminated on January 14, 2019. The Notice of Termination cited the Wetzel’s concerns of retaliation made to the Senior Attorney during the investigative interview and the CI’s statements to Shea as contributing factors for termination.

Prima Facie Element Details

Element 1: Did the Employee Engage in Protected Activity? Yes

- Wetzel raised numerous safety concerns and submitted an allegation to the NRC regarding a chilled work environment (RII-2017-A-0114) on July 24, 2017.
- Wetzel raised concerns of retaliation to Shea and the Senior Attorney during an investigation.

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Element 2: Was the Employer Aware of the Protected Activity at the Time of the Adverse Action? Yes

- Henderson believed that Wetzel was responsible for filing an allegation of a chilled work environment to the NRC and cited that as an example of retaliatory behavior in the formal complaint filed with TVA.
- The CI raised concerns of retaliation directly to Shea. Shea was also aware of concerns of retaliation made by Wetzel to the Senior Attorney during the investigation. Shea testified to the OI agent that Wetzel had raised these concerns on several occasions, verbally and in writing.

Element 3: Was an Adverse Action Taken Against the Employee? Yes

- Henderson filed a formal complaint with TVA accusing Wetzel of creating a hostile work environment. The formal complaint resulted in an investigation by TVA OGC that contributed to Wetzel’s termination.
- Wetzel was placed on paid administrative leave by Shea on October 15, 2018 and terminated on January 14, 2019.

Element 4: Was the Adverse Action Taken, at least in part, because of the Protected Activities?
Yes

- The formal complaint filed by Henderson cited assertions made to the NRC about a chilled work environment as an example of Wetzel’s retaliatory behavior. The formal complaint resulted in an investigation by TVA OGC that contributed to Wetzel’s termination.
- The Notice of Termination stated that Wetzel was being terminated, in part, for derogatory statements made about Henderson during an investigative interview with the Senior Attorney. These statements made by Wetzel related to concerns of retaliation.

Preliminary Conclusion:

Based on the evidence, the allegation that the 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.

OE proposes two violations for TVA Corporate in this case and individual actions against Henderson and Shea.

Sequoyah Discrimination Case (2-2018-033)

Overview:

This investigation was initiated on August 22, 2018, to determine whether a former Tennessee Valley Authority (TVA) Site Licensing Manager (CI) (Michael McBrearty) employed at Sequoyah was discriminated against for engaging in protected activity.

By report dated October 3, 2019, the Office of Investigations (OI) substantiated the allegation.

Case background:

- Between 2015 and 2018, McBrearty was involved with ongoing communications with Corporate Nuclear Licensing (CNL), which included the VP of Regulatory Affairs (Joe Shea) and the former Director of CNL (Erin Henderson), about how to respond to two non-cited violations (NCVs) issued by the NRC during an inspection. McBrearty attempted to address the NCVs but was unable to get them resolved with CNL in a timely manner, leaving Sequoyah in non-compliance for years. Raising concerns about regulatory non-compliance is a protected activity.
- During this time, McBrearty was also involved with several complaints and investigations involving the Employee Concerns Program (ECP), Human Resources (HR), and the TVA Office of General Counsel (OGC). In 2017, McBrearty filed two ECP complaints against Henderson. On March 9, 2018, Henderson submitted a formal complaint of harassment against McBrearty to stop his actions regarding the NCVs and ECP complaints. This led to a TVA OGC investigation. In 2018, a draft TVA OGC report stated that McBrearty misused the ECP and said that this was a form of retaliation against Henderson. Using the ECP is considered a protected activity.
- On May 25, 2018, based on the draft TVA OGC report, McBrearty was placed on paid administrative leave, as recommended by the [REDACTED] ([REDACTED]). The OGC investigation was re-opened and continued until August. Because of this, McBrearty was essentially placed on indefinite suspension. For almost three months, McBrearty was provided with inconsistent information on when he may return to work and if he faced possible termination or further disciplinary action from TVA. On August 16, 2018, McBrearty resigned from TVA.

Prima Facie Element Details

Element 1: Did the Employee Engage in Protected Activity? Yes

- McBrearty attempted numerous times to respond appropriately to the NCVs and raised concerns about regulatory non-compliance, which are considered protected activities.

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- McBrearty filed ECP complaints against Henderson, which are considered protected activities.

Element 2: Was an Adverse Action Taken Against the Employee? Yes

- On March 9, 2018, Henderson submitted a formal complaint against McBrearty. The formal complaint resulted in an investigation by TVA OGC.
- On May 25, 2018, McBrearty was put on paid administrative leave and essentially indefinite suspension based on the draft TVA OGC report. He resigned on August 16, 2018.

Element 3: Was the Employer Aware of the Protected Activity at the Time of the Adverse Action? Yes

- McBrearty raised awareness of his concerns about non-compliance with Henderson and Shea. McBrearty was also involved with several ECP complaints with Henderson. On March 9, 2018, Henderson submitted a formal complaint against McBrearty.
- ██████ said he was aware of the Service Life NCV issue and was also aware of the ECP complaints. On May 25, 2018, he recommended that McBrearty be placed on paid administrative leave which resulted in essentially an indefinite suspension, based on the TVA OGC report.

Element 4: Was the Adverse Action Taken, at least in part, because of the Protected Activities?

Yes

- On March 9, 2018, Henderson submitted the formal complaint of harassment against McBrearty to stop his actions and behaviors regarding the NCVs and ECP complaints. This complaint was ultimately investigated by TVA OGC. The draft TVA OGC report stated that McBrearty misused the ECP and was the basis for the CI being placed on paid administrative leave.
- On May 25, 2018, McBrearty was placed on administrative leave, and essentially an indefinite suspension, at the recommendation of ██████ McBrearty resigned on August 16, 2018 after three months of on-going OGC investigation.

Preliminary Conclusion:

- 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 proposes 2 violations for TVA, and individual actions for ██████ and Henderson.

Proposed Actions

SLI for TVA (Sequoyah): two violations

- Violation 1: Enforcement Policy Example 6.10.b.1, Severity Level II violation of 10 CFR 50.7: An executive-level corporate manager is the decisionmaker.
- [REDACTED] (executive level corporate manager) is the decisionmaker who caused McBrearty to be put on paid administrative leave and indefinite suspension until he eventually resigned.
- A unique factor is present: [REDACTED], in violation of 10 CFR 50.5, deliberately caused TVA to be in violation of 10 CFR 50.7.
- SLII with escalating factor results in SLI.
- Base civil penalty of \$300,000 for SLI. 2X Base due to no ID or CA credits. However, civil penalty capped at statutory maximum of \$303,471 due to single day violation.
- Violation 2: Enforcement Policy Example 6.10.c.1, Severity Level III violation of 10 CFR 50.7: A mid- or senior-level plant manager (or equivalent) or a corporate-level line manager (or equivalent) is the decisionmaker or plays a significant role in the adverse action decisionmaking process.
- Henderson (corporate level line-manager) played a significant role in the adverse action process. She initiated the complaint, after years of ongoing communications with McBrearty and multiple ECP/HR investigations, that led to the TVA OGC investigation and McBrearty's suspension.
- A unique factor is present: Henderson, in violation of 10 CFR 50.5, deliberately caused TVA to be in violation of 10 CFR 50.7
- SLIII with escalating factor results in SLII.
- Base civil penalty of \$300,000 for SL I. 2X Base due to no ID or CA credits. However, civil penalty capped at statutory maximum (\$303,471) due to single day violation.
- Proposed next action: Choice letter

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SLI for TVA (Corporate) two violations

- Violation 1: Enforcement Policy Example 6.10.b.1, Severity Level II violation of 10 CFR 50.7: An executive-level corporate manager is the decisionmaker.
- Shea (executive level corporate manager), is the decisionmaker who put the CI on paid administrative leave and played a significant role in the decision to terminate the CI.
- A unique factor is present: Shea, in violation of 10 CFR 50.5, deliberately caused TVA to be in violation of 10 CFR 50.7.
- SLII with escalating factor results in SLI.
- Base civil penalty of \$300,000 for SL I. 2X Base due to no ID or CA credits. However, civil penalty capped at statutory maximum (\$303,471) due to single day violation.
- Violation 2: Enforcement Policy Example 6.10.c.1, Severity Level III violation of 10 CFR 50.7: A mid- or senior-level plant manager (or equivalent) or a corporate-level line manager (or equivalent) is the decisionmaker or plays a significant role in the adverse action decisionmaking process.
- Henderson (corporate level line-manager) played a significant role in the adverse action process. She played a significant role initiating an investigation against the CI, with the expectation of an adverse action, by filing a formal complaint with TVA accusing the CI of retaliatory behavior for contacting the NRC with concerns of a chilled work environment.
- Two unique factors are present: 1) Henderson, in violation of 10 CFR 50.5, deliberately caused TVA to be in violation of 10 CFR 50.7 and 2) the adverse action was taken, in part, because the CI had contacted the NRC with concerns about a chilled work environment.
- SLIII with escalating factor results in SLII.
- Base civil penalty of \$300,000 for SL I. 2X Base due to no ID or CA credits. However, civil penalty capped at statutory maximum (\$303,471) due to single day violation.
- Proposed next action: Choice letter

**One choice letter to TVA offering ADR or PEC,
Four violations, 4 X \$303,471 = \$1,213,884**

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SLI - Individual Action for [REDACTED]

- Enforcement Policy Example 6.10.b.1, Severity Level II violation of 10 CFR 50.7: An executive-level corporate manager the decisionmaker.
- [REDACTED] is the decisionmaker who caused McBrearty to be put on paid administrative leave, essentially resulting in an indefinite suspension, in part, used the ECP. McBrearty eventually resigned.
- A unique factor is present: [REDACTED] in violation of 10 CFR 50.5, deliberately caused TVA to be in violation of 10 CFR 50.7.
- SLII with escalating factor results in SLI.
- Given [REDACTED] position and the significance of these actions, a 5-year ban is proposed.
- Proposed next action: Letter – PEC only

SLI - Individual Action for SHEA (VP of Regulatory Affairs)

- Enforcement Policy Example 6.10.b.1, Severity Level II violation of 10 CFR 50.7: An executive-level corporate manager is the decisionmaker.
- Shea (executive level corporate manager), is the decisionmaker who put the CI on paid administrative leave and played a significant role in the decision to terminate the CI.
- A unique factor is present: Shea, in violation of 10 CFR 50.5, deliberately caused TVA to be in violation of 10 CFR 50.7.
- SLII with escalating factor results in SLI.
- Given Shea’s position and the significance of these actions, a 5-year ban is proposed.
- Proposed next action: Letter - PEC

SL II - Individual Action for HENDERSON (former Director of CNL) (one violation, two examples)

- Enforcement Policy Example 6.10.c.1, Severity Level III violation of 10 CFR 50.7: A mid- or senior-level plant manager (or equivalent) or a corporate-level line manager (or equivalent) is the decisionmaker or plays a significant role in the adverse action decisionmaking process.

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- Example 1: Henderson initiated the complaint, after years of ongoing communications with the CI and multiple ECP/HR investigations, that led to the TVA OGC investigation and the CI's suspension (Sequoyah).
- Example 2: Henderson played a significant role initiating an investigation against the CI, with the expectation of an adverse action, by filing a formal complaint with TVA accusing the CI of retaliatory behavior for contacting the NRC with concerns of a chilled work environment (Corporate).
- Two unique factors are present: 1) Henderson, in violation of 10 CFR 50.5, deliberately caused TVA to be in violation of 10 CFR 50.7 and 2) the adverse action was taken, in part, because the CI had contacted the NRC with concerns about a chilled work environment.
- SLIII with escalating factor results in SLII.
- Given Henderson's position and the significance of these actions, a 1-year ban is proposed.
- Proposed next action: Letter – PEC

Next Steps:

- Conduct a call with [REDACTED] Shea, and Henderson to offer PEC only.
- Conduct a call with TVA to offer ADR or PEC.
- Letters will be issued by HQ (OE has the lead). The drafts will be provided to the Region for review. The letters will be sent to OGC for NLO. Redacted OI reports will be included with these letters.
- OE will contact McBrearty and Wetzel to offer them the opportunity to attend the PECs for the individuals.
- If the TVA chooses ADR, OE will contact McBrearty and Wetzel to solicit any potential corrective actions; however, OE will not offer them the opportunity to participate in the actual ADR mediation session.
- Individual PECs to be held before TVA in the proposed order of Henderson, Shea, and [REDACTED]

PEC Caucus
Discrimination Cases for Henderson, [REDACTED], Shea, TVA
July 20, 2020

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 [REDACTED], 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. [REDACTED]
- c. Shea: Proposed SL I; 5-year ban
- d. TVA: Proposed four violations, $4 \times \$303,471 = \$1,213,884$

2. PEC letters sent 3-2-20

3. PECs held 6-23-20 (Henderson); 6-24-20 ([REDACTED]); 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.

- Erin was justified in filing her complaint based on McBrearty's behaviors.

- After two years and numerous attempts to address all of these issues, Erin filed her harassment complaint only in good faith.

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

5. NRC questions for discussion:

- a. Was evidence provided by TVA or the Individuals that would change our preliminary conclusions?
 - i. 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?
 - ii. 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?
 - iii. Was evidence provided that supported the claim that the CI's actions were disrespectful, harassing and egregious enough to warrant termination?
 - 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?
- c. Is there still evidence of deliberate misconduct for all individuals?
- 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. Does this apply to TVA since the two cases were within the 18-month timeframe?
- 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 Wetzel 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?

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.