

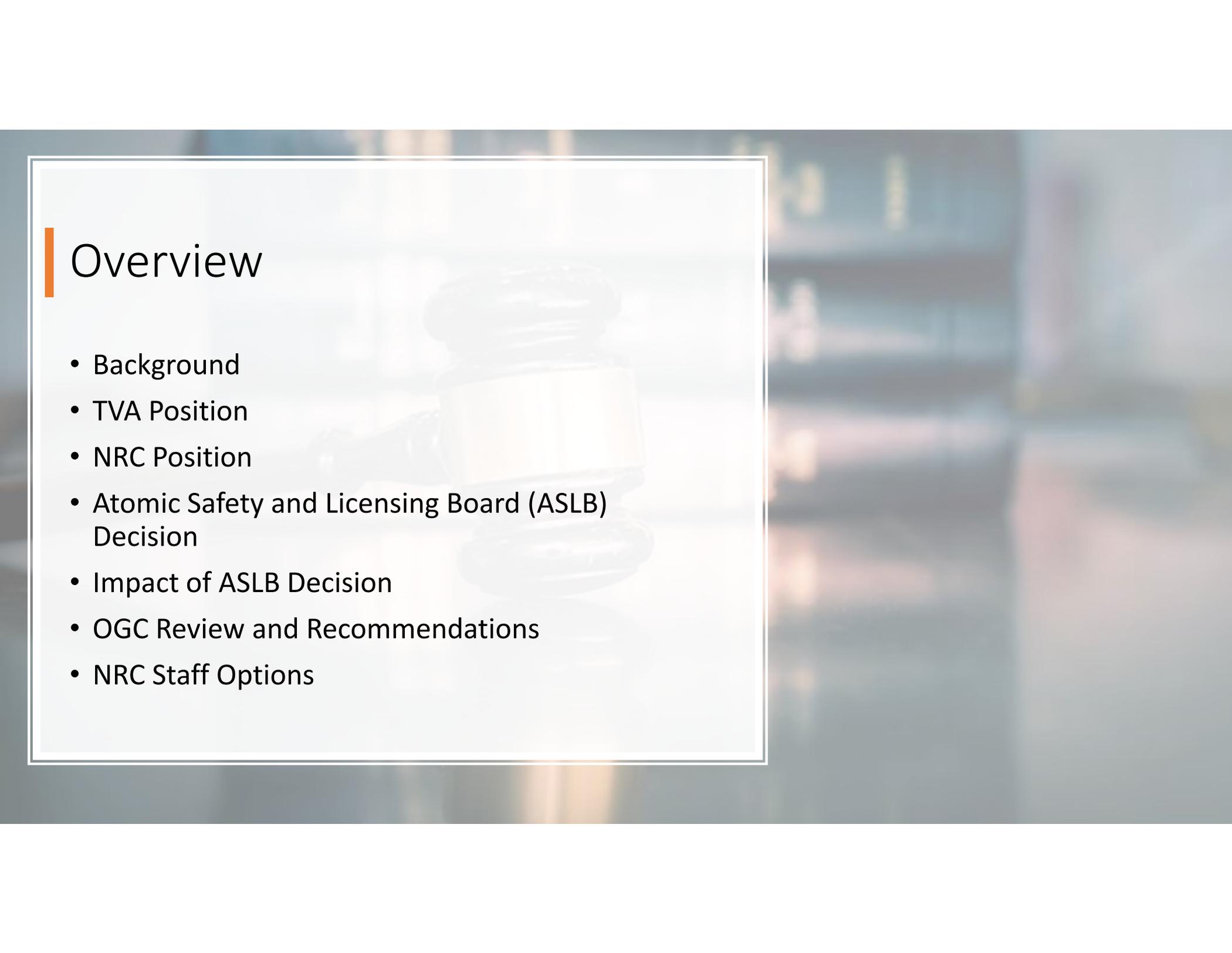


ATOMIC SAFETY AND LICENSING BOARD RULING IN THE TVA ENFORCEMENT LITIGATION

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Overview

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Background

- In November 2021, the Atomic Safety and Licensing Board (ASLB) in the Tennessee Valley Authority (TVA) enforcement litigation issued a ruling with several implications for the legal interpretation of the NRC's employee protection requirements in 10 C.F.R. 50.7.
- ASLB interpreted both the definition of "adverse action" as well as the scope of what constitutes "protected activity" more narrowly than has been the NRC's practice.

Background

- Fall of 2018, NRC received two allegations regarding discrimination at TVA facilities (Sequoyah and Corporate).
- Both allegations claimed that TVA Licensing Management had discriminated against the employees for raising nuclear safety concerns.
- OI investigated both allegations and the agency substantiated both.
- On August 24, 2020, the NRC issued discrimination enforcement actions for violations of 10 C.F.R. 50.7, based on TVA's actions against two former employees.
 - TVA: 2 violations of discrimination (2 SL II violations, 4 examples in total) with a total CP of \$606k;
 - Shea: A 5-year Prohibition Order, based on a deliberate discrimination violation;
 - Henderson: Severity Level II violation, based on a deliberate discrimination violation with 2 examples

TVA Position

- TVA denied the violations and requested an evidentiary hearing.
- TVA argued that the adverse action asserted by the NRC did not meet the legal standard defined in ERA Section 211.
- TVA argued that neither paid administrative leave nor the filing of a harassment complaint and subsequent investigation into that complaint can constitute discrimination adverse actions under ERA Section 211.

NRC Position

- NRC argued that the ERA and 10 C.F.R. 50.7, is more appropriately interpreted as establishing a broader “materially adverse” standard for determining adverse actions—specifically, whether the employer’s action would deter a reasonable worker from engaging in protected activity.
- NRC argued that TVA placing one of the employees on paid administrative leave for 83 days, in combination with evidence of harm to his reputation and to the safety culture at Sequoyah, would deter a reasonable worker from engaging in protected activity.
- NRC argued that the filing of a harassment complaint that triggered an internal investigation would also deter a reasonable worker from engaging in protected activity.

ASLB Decision

- The ASLB concluded that ERA Section 211 and 10 C.F.R. 50.7 “prohibit only retaliation that takes the form of an adverse change in the terms and conditions of employment, and not every type of retaliation that might be possible.”
- The ASLB used the definitions of “adverse action” and “protected activity” for discrimination (since it is called out in 10 C.F.R. 50.7 as discrimination) versus retaliation that is broader.
 - NRC staff used retaliation and discrimination as interchangeable terms.

ASLB Decision

- As such, the ASLB held that putting an employee on paid administrative leave of 83 days did not constitute an impact on the “terms, conditions, and privileges of employment” and so could not legally be an “adverse action” under the ERA and 10 C.F.R. 50.7
- The ASLB also concluded that initiation of a complaint against an individual for engaging in protected activity, leading to a licensee internal investigation of the individual, was legally not an “adverse action” because it did not change the employee’s “compensation, terms, conditions, or privileges of employment” as a matter of law.
- The ASLB found that to engage in “protected activity,” an individual must have “definitively and specifically” raised nuclear safety-related concerns.

Impact of Decision

- January and November 2021, the NRC rescinded the enforcement actions to Shea/Henderson and TVA.
- Certain activities that NRC has interpreted as 'adverse actions' and/or protected activities do not appear to meet the ASLB's standard.
- Because the Commission did not review the ASLB's decision, the decision is not precedential, and future ASLBs are not bound to follow the TVA ASLB's interpretation.
- However, the absence of Commission caselaw on this issue makes it likely that future boards will find the legal reasoning persuasive unless there is overriding direction from the Commission.
- Other licensees may now be more willing to challenge enforcement actions that might be considered to be inconsistent with the ASLB decision, potentially leading to a large expenditure of Staff resources and instability for the enforcement program.

OGC Review and Recommendations

- OGC issued a memo to OE on May 6, 2022, to advise of the NRC staff options in light of the ASLB Decision.
- OGC views the ASLB's interpretation of Section 211 as a legally viable interpretation of the statute, however it is not the only legally viable interpretation.
- OGC concluded that the broader interpretation on which the NRC has historically relied (as reflected in its regulation, the Enforcement Policy, and staff practice) remains supportable.
- The Commission has the prerogative to make a policy choice between two legally supportable interpretations of a statute.

OGC Review and Recommendations

- Reevaluate the Allegations Manual, MD 8.8, Enforcement Policy and OI “Investigative Procedures Manual” definitions of an “adverse action” which currently include adverse actions that may not be upheld under the reasoning of the ASLB decision.
- The Staff should assess how the decision is perceived by nuclear workers and whether this decision contributes to a decline in industry safety culture.
- Staff should consider actions it can take to publicly reaffirm its commitment to safety culture, such as public communications reaffirming the Safety Culture Policy Statement.

OGC Review and Recommendations

- Staff should analyze how many cases that previously would have met the prima facie bar would no longer do so including cases that OI ultimately did not substantiate.
- Evaluate whether to continue offering early ADR to individuals in situations where the Staff would find a prima facie case of discrimination under its existing guidance but may not under the ASLB interpretation.
- If OI uncovers information that does not meet the ASLB interpretation during an investigation, OI should consult with OGC as well as OE and consider terminating the investigation.

OGC Review and Recommendations

- Gather more information from the allegor if the evidence supporting either the adverse action or the protected activity is weak.
 - More information on whether the adverse action involved a tangible impact, including (but not limited to) a monetary impact.
 - Ensure that the protected activity implicated nuclear safety “definitively and specifically”. If the protected activity involves concerns about safety culture or a CWE, the Staff should explicitly inquire into how those concerns affected the employee’s willingness to raise nuclear safety concerns.

NRC Staff Options

- The Staff could modify its practices to reflect adherence to the ASLB's interpretation of section 50.7 by altering the program procedures and priorities going forward to only investigate and take final enforcement actions for cases that involve a more limited universe of adverse actions and protected activities.
- However, the Enforcement Policy, requires Commission approval for modification.
- Furthermore, accepting this narrowed interpretation, may not effectively serve the NRC's regulatory goal of ensuring employees are free to raise concerns without reprisal, and it thus may have an adverse impact on our nuclear safety mission.

NRC Staff Options

- Another option would be to amend the Enforcement Policy to clarify the definition of an adverse action to encompass, for example, an action that “a reasonable person would find materially adverse and might have dissuaded a reasonable worker from engaging in protected activity.”
- The purpose of the clarification would be to indicate why the Commission views such actions as adversely affecting the conditions of employment is consistent with the statute.
- The Policy could similarly be amended to emphasize that, for purposes of a protected activity, expressing concerns about a licensee’s chilled work environment is likely raising a nuclear safety concern.

Questions

