

July 14, 1997

SECY-97-147

FOR: The Commissioners

FROM: L. Joseph Callan /s/
Executive Director for Operations

SUBJECT: RE-EVALUATION OF SECY-96-199 ISSUES; PLAN TO BETTER
FOCUS RESOURCES ON HIGH PRIORITY DISCRIMINATION CASES

PURPOSE:

To submit the staff's proposal for strategies to focus appropriate resources on high priority discrimination cases.¹

BACKGROUND:

On April 26, 1996, the Commission issued a Staff Requirements Memorandum (SRM) on SECY 96-056, "POLICY STATEMENT, 'FREEDOM OF EMPLOYEES IN THE NUCLEAR INDUSTRY TO RAISE SAFETY AND COMPLIANCE CONCERNS WITHOUT FEAR OF RETALIATION.'" Among other things, the SRM asked the staff to submit a plan to focus resources better on high priority discrimination cases.

In response to this SRM, the staff submitted SECY-96-199, "PLAN TO BETTER FOCUS RESOURCES ON HIGH PRIORITY OF DISCRIMINATION

¹ For the purposes of this paper, the term "discrimination" is used to refer to harassment, intimidation, or retaliation for engaging in protected activities as defined in 10 CFR 50.7 and similar regulations in Parts 30, 40, 60, 70, and 72. These regulations, in essence, adopt the statutory prohibition of discrimination of the type described in Section 211 of the Energy Reorganization Act of 1974.

CASES," on September 13, 1996, and a supplemental response on December 16, 1996. SECY-96-199 discussed (1) current structure for investigating discrimination cases, including the complementary responsibilities of the NRC and the Department of Labor (DOL)

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in this area²; (2) the priorities for investigation by the NRC's Office of Investigations (OI), based on Management Directive (MD) 8.8, "Management of Allegations"; (3) enforcement based on DOL findings; (4) the timeliness of NRC actions based on OI Investigations versus the timeliness of NRC actions based on the DOL process; and (5) a discussion of the impacts and resource needs for implementing the proposed plan.

On February 7, 1997, the Commission issued an SRM on SECY-96-199, asking for further evaluation.³ In the SRM, the Commission noted that, based on recent experience with implementing the MD 8.8 criteria, 93% of all discrimination cases are designated as high priority. The Commission asked that, in light of resource implications and competing priorities, the staff proposals be reconsidered.

The number of discrimination cases opened in FY 96 was 96. As of March 31, 1997, OI has opened 54 discrimination cases. It is estimated, based on an extrapolation of OI data, that the number of discrimination cases opened by the end of FY 97 will have increased 13% over FY 96.⁴

² SECY-96-199 provided a background discussion of NRC and DOL statutory authority and responsibilities in the area of discrimination and employee protection. That discussion has not been repeated in this supplemental paper. In addition, NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation" (January 1994), pp. II.C-10 - II.C-17, provides a more detailed discussion of various considerations relevant to whether the NRC should conduct its own independent investigations of allegations of discrimination when a related complaint is pending before the DOL.

³ The February 7, 1997, SRM approved the portions of SECY-96-199 that proposed changing the pre-decisional enforcement conference, for harassment and intimidation cases, to allow the allegers' attendance and participation within certain guidelines.

⁴ Although OI fiscal year case statistics indicate a potential increase in FY 97 over FY 96; Calendar Year 97 (CY 97) data from the Allegation Management System, as of 5/31/97, indicates that the NRC has received 59 allegations, representing a decrease of 17% from CY 96

As indicated in the Table 1, prior to the June 1996 review of all pending OI investigations in conjunction with the issuance of the revised MD 8.8, 37% of the average monthly open case inventory of all types of cases were high priority (44 out of 119 cases). After the review and as of March 31, 1997, 76% were high priority (93 out of 122 cases). This represents a general increase of approximately 111% in high priority cases (44 to 93 cases).

Focusing specifically on discrimination investigations, Table 1 shows that prior to the June 1996 review, 37% of the inventory of discrimination cases were also high priority (22 out of 59 discrimination cases). After the review and as of March 31, 1997, 96% were high priority (64 out of 67 discrimination cases). The number of high priority discrimination cases increased from 22 to 64, or approximately 191%. In the first 6 months of FY 97 the average percentage of high priority discrimination cases in the open case inventory was 92.25%.

TABLE 1

Category	High Priority	High Priority as	Increase in High
ALL CASES	37%	76%	111%
DISCRIMINATION	37%	96%	191%

In FY 96, OI substantiated 10 discrimination cases, or 9% of the total number of discrimination cases completed that year. These cases have resulted thus far in 8 enforcement actions (4 of which were escalated enforcement actions), with a total of \$340,000 in civil penalties. As of 3/31/97, the first 6 months in FY 97, OI has substantiated 3 discrimination cases, or 6% of the total number of discrimination cases completed to date. These cases have resulted thus far in 1 escalated enforcement action with a civil penalty of \$8,000. All of the above described substantiated cases were referred to Department of Justice.

in the number of discrimination allegations received.

DISCUSSION:

In determining the optimum strategy for addressing high priority OI investigation cases, the staff focused on four primary considerations:

- ! performing investigations necessary to take appropriate regulatory action to foster a safety-conscious work environment;
- ! avoiding duplication of DOL investigative effort except in cases where the NRC has determined that an independent investigation is justified;
- ! ensuring that information gained through OI investigations and/or any resulting NRC enforcement action is integrated, as applicable, into overall assessments of licensee performance; and
- ! ensuring prudent expenditure of NRC resources.

The staff applied these considerations to a review of the process for handling discrimination allegations by the NRC in general by addressing the priorities for OI investigations, the allegation review and investigation processes, and the optimization of NRC resources. In developing this strategy the staff has considered that the investigation/enforcement of individual discrimination allegations is not the only approach to the NRC regulatory concern for achieving a safety-conscious work environment at Commission licensees. Clearly, in significant cases the investigation/enforcement approach is warranted. Given relatively limited NRC resources, the decision to focus those resources on significant cases, and the desire to complete the process in a more timely manner, the staff concludes that other approaches should be considered for less significant cases. In those instances where discrimination appears to be more widespread, the focus should be on addressing the overall environment as well as individual cases of alleged discrimination.

A. Priorities for OI Investigations

Under Management Directive 8.8, an allegation of discrimination is assigned a "high" priority for an OI investigation if it meets one of four criteria. Any discrimination case that does not meet one or more of these criteria is assigned a "normal" priority. It should be noted that no discrimination cases are assigned a "low" priority, and "normal" priority discrimination cases are fully investigated when resources permit.

The staff reviewed each of the four existing criteria (Appendix A), and determined that criterion changes should include redefining the management level causing discrimination as mid-level manager or above; deletion of the history of discrimination findings; and one addition that allegations of discrimination resulting from raising concerns of degraded or non-conforming conditions that, if true, would impact the operability of a safety-related structure, system, or component, or safeguards equipment, or result in operation outside the design basis. Experience in the past year indicates that the revised criteria would be most effective in identification of high priority cases.

B. The Allegation Review and Investigation Processes

The staff reviewed existing processes for Allegation Review Board (ARB) review and dispositioning of allegations of discrimination. Based on the four primary considerations outlined above, recommendations were made for process improvements, as described in Appendix B. In summary, the major adjustments to the process are as follows: (1) There will be an ARB conducted after the initial interview of the allegor, in which the staff and OI will evaluate the circumstances of the allegation in relation to licensee history, trends, generic issues identified by OI or elsewhere, settlements, past discrimination findings, enforcement actions, in determining further disposition of the case. (2) In discrimination cases in which the DOL is already pursuing an investigation, and where the licensee does not have a history of adverse discrimination findings or other information suggesting a lack of a safety-conscious work environment, the course of action should be to put the OI investigation on hold, closely monitor DOL progress, and

consider their findings in determining what further NRC action is appropriate. (3) In instances where there are multiple discrimination cases in which the licensee has a history of adverse OI or DOL discrimination findings, and other relevant performance characteristics which would indicate an environment not conducive to raising safety concerns, the ARB should examine alternative actions for normal priority cases and additional actions to supplement high priority investigations. These actions may include a meeting with licensee management; a review of the licensee's employee concerns program; a survey of the licensee's work environment; a request or order that the licensee obtain an independent evaluation of their environment for raising concerns; or an order to establish independent third-party oversight of the environment for raising concerns.

The staff anticipates that most high priority discrimination cases will continue to result in OI pursuing a full investigation. In addition, the increased scope of the ARB review proposed in these improvements will force consideration of allegations in the larger context of relevant licensee performance trends related to discrimination.

The staff strongly supports incorporation of these adjustments into the allegation review and investigation processes, because (1) it will prompt earlier review and recognition of adverse trends; (2) it will focus staff attention on the potential relationship between the safety-conscious work environment and other licensee performance aspects; and (3) it facilitates integration of OI investigative results (including, but not limited to a finding of discrimination in the particular case under investigation) into the overall process of licensee performance assessment.

C. Optimization of NRC Resources

A review was conducted of the existing structure of the Office of Investigations; the specific training offered to OI, OE and the legal staff for investigating and reviewing discrimination issues; and the relevant technical, legal and

enforcement expertise available in terms of the four considerations outlined at the beginning of this discussion. This review resulted in several modifications and recommendations for modification in operations, coordination, administration, and training within the programs which focus on discrimination issues. These adjustments are described in Appendix C, and, in part, include modifying the senior investigator duties to include oversight and quality control of regional caseload with emphasis on programmatic and generic issues; expanding the investigation scope in some cases to review chilling effect and safety conscious work environment aspects; use of regional and legal staff earlier to ensure evidence for discrimination is obtained and the investigation is better focused; and develop and maintain enforcement and investigative expertise in the area of discrimination. The staff believes that these recommended changes will help to optimize the use of NRC, and particularly investigative resources.

D. Review of Recommendations Previously Made in SECY-96-199

In SECY-96-199, the staff stated its intention to refine certain elements of the investigative and enforcement processes relevant to discrimination cases. As requested in the Commission's February 7, 1997, SRM, the staff re-evaluated the material presented in SECY-96-199, as well as the staff response to follow-up questions regarding SECY-96-199. As a result of this re-evaluation, the staff recommends adjustments to the investigative and enforcement processes which will enhance efficiency, timeliness and coordination with the DOL process. These recommendations are described in Appendix D. In part, the proposed investigative process changes include use of DOL findings for normal priority cases without a full OI investigation; consultation with OGC and OE on substantiated discrimination cases at the conclusion of the field work; and streamlining the OI report format to include analysis of evidence which specifies the elements of proof of discrimination. In addition, changes, in part, to the enforcement process would include development of enforcement action after the OI field work is complete and prior to the report issuance.

RESOURCES REQUIRED TO IMPLEMENT THIS PLAN:

Based on projected workload and anticipated continuing focus on high priority discrimination cases, the resource estimates to address SECY-96-199 have been revised and will be included in the FY 1999 budget proposal. The budget proposal will include an additional 5 FTEs for OI (one for each of the 4 OI field offices and 1 administrative FTE at OI Headquarters), and an additional 4 FTEs for OE (2 for OE and 2 for the regions) beginning in FY 1999. The budget proposal will also include 1.5 FTEs for OGC from their existing resources, to address discrimination issues.

The implementation of the approach recommended in this paper will impose an additional burden on the allegation coordinators and the technical staff/management participants in preparing for the ARB. NRR estimates that this additional work would require approximately 2 FTEs. These resources are not included in the FY 1999 budget proposal. If this plan is approved by the Commission, NRR will reprogram 2 FTEs to accomplish the work.

By making improvements and adding efficiencies to the processes, as well as by looking at allegations of discrimination in a broader context, the staff believes the additional resources are necessary to effectively implement this modified plan.

COORDINATION:

The Office of the General Counsel has no legal objection to this recommendation. The Office of the Chief Financial Officer and the Office of the Chief Information Officer have no objection to this paper.

RECOMMENDATION:

The staff recommends approval of this approach toward improving the focus on high priority discrimination cases and clarifying the Enforcement Policy as stated in Appendix D, Section 2(c) to add the word "normally" that OI reports involving discrimination will be made public.

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Attachments:

1. Appendix A: Priorities for OI Investigations
2. Appendix B: The Allegation Review and Investigation Processes
3. Appendix C: Optimization of NRC Resources
4. Appendix D: Review of Recommendations Previously Made in SECY- 96- 199

cc: SECY
OGC
CFO
CIO
OPA
OCA

APPENDIX A

Priorities for OI Investigations

Under Management Directive 8.8, an allegation of discrimination is assigned a "high" priority for an OI investigation if it meets one of four criteria. Any discrimination case that does not meet one or more of these criteria is assigned a "normal" priority. It should be noted that no discrimination cases are assigned a "low" priority, and "normal" priority discrimination cases are fully investigated when resources permit.

The staff reviewed each of the four existing criteria, and determined that certain changes should be made, as discussed below.

- ! "Allegations of discrimination as a result of providing information directly to the NRC"

This criterion should be retained without change. The staff remains particularly concerned about the chilling effect that can result when the perception exists, among licensee employees, that providing information to the NRC can result in discriminatory behavior from other members of the licensee's organization. This perception, if allowed to continue without NRC intervention, has the potential to impede the flow of critical information that the NRC depends upon to supplement the routine facility inspection program.

- ! "Allegations of discrimination caused by a manager above first-line supervisor (consistent with the current enforcement policy classification of Severity I or II violations)"

This criterion should be changed to read "... caused by a mid-level manager or above ..." This is consistent with the classification of violations within the enforcement program and will better clarify the intent of this example. In addition, this change is

consistent with NUREG-1499, which states, "...the higher the position, the greater the sphere of influence, with the resulting increased potential for a chilling effect if discrimination is practiced at this level."

- ! "Allegations of discrimination where a history of findings of discrimination (by the DOL or the NRC) or settlements suggests a programmatic rather than an isolated issue."

The staff recommends deleting this as a criterion for high priority and considering these factors in a broader context as described in Appendix B (Steps 4a and 4b). These factors should be a consideration of overall licensee performance suggesting a systemic issue. The staff is recommending use of a more in-depth evaluation, which may or may not result in a high priority being assigned to the individual discrimination case under review. In developing this recommendation, strong consideration was given to alternatives to investigation/enforcement as a means of achieving a safety-conscious work environment as discussed earlier under the primary considerations.⁵

- ! "Allegations of discrimination which appear particularly blatant or egregious."

This criterion should be retained without change. The circumstances associated with a given discrimination allegation can be highly case-specific, and may be egregious enough to warrant assignment of a high priority even when the case falls outside the other criteria. This criterion gives the Allegation Review

⁵ An unintended effect of raising the level of management involvement and deleting history of discrimination as a separate criterion may be that more industry employees raise safety concerns directly to the NRC, because that would ensure that any subsequent discrimination claims would be classified as high priority.

Board (ARB) the freedom to assign or recommend a high priority in such cases.

In SECY-96-199, the Executive Director for Operations (EDO) recommended an additional high priority criterion, as follows:

- ! "Allegations of discrimination resulting from raising concerns of degraded or non-conforming conditions that, if true, would impact the operability of a safety-related structure, system, or component, or safeguards equipment, or result in operation outside the design basis. "

The staff continues to recommend adoption of this criterion, without change. It clearly adds focus to the agency emphasis on risk/safety.

APPENDIX B

The Allegation Review and Investigation Processes

The staff reviewed existing processes for ARB review and dispositioning of allegations of discrimination. Based on the four primary considerations outlined in the discussion at the beginning of this paper, recommendations were made for process improvements.

<p>Initial ARB Meeting: Initial Priority Assigned to or Recommended for the Case</p>	<p>OI Performs Initial Allegor Interview</p>	<p>Second ARB Meeting: Evaluation of Allegation in Relation to Licensee History, Trends, and Generic Issues</p>	<p>4a: Case Placed On Hold Pending Results of DOL Process ----- -- 4b: OI Proceeds With Independent Full Investigation ----- -- 4c: Alternative Action Proposed</p>
<p>Step 1</p>	<p>Step 2</p>	<p>Step 3</p>	<p>Step 4</p>

Figure 1: Process Map

In accordance with the process map given as Figure 1, the staff recommends several adjustments to the existing allegation review and investigation processes, as detailed in the following steps.

Step 1: When an allegation of discrimination is received, the ARB should assign or recommend a priority for OI investigation based on the MD 8.8 criteria (with the revisions recommended in Appendix A of this paper). This

priority should be assigned without regard to whether the DOL is separately investigating the allegation.

Step 2: For both high and normal priority discrimination cases, OI will continue to conduct an initial interview of the alleged and any other preliminary investigation deemed appropriate to understand the nature of the allegation and the basic circumstances of the case.

Step 3: After OI has performed the initial interview of the alleged, the ARB will re-convene. This second ARB meeting should review the circumstances of the case in a broader context, considering such issues as the history of discrimination cases at this facility (or for this licensee); trends, if any, which exist at this facility (or licensee) related to technical or discrimination allegations, to settlements of discrimination cases, to

findings of discrimination by the Department of Labor, or to related NRC enforcement actions⁶; if this case has generic or unique legal implications; if DOL is investigating (or adjudicating) this case; and/or if there are any generic or programmatic weaknesses identified by OI in the course of investigation(s).

Based on consideration of these questions, the ARB should determine the further disposition of the case, as outlined in Steps 4a, 4b, 4c, and 4d.

Step 4a: For discrimination cases in which the DOL is already pursuing an investigation; where the licensee does not have a history of previous discrimination allegations, adverse discrimination findings, or DOL settlements; where no adverse trends or relevant performance characteristics exist suggesting a lack of a safety-conscious work environment; where no other generic or legal issues warrant pursuit of an independent investigation, and where the case does not appear particularly blatant or egregious, the course of action should be to put the OI investigation on hold, await the results of the DOL investigation, and closely monitor their progress. In such cases, following the results of the DOL investigation, the staff should review the DOL findings to determine whether NRC action is appropriate. Depending on the completeness of the DOL record and its conclusion, the staff may either request OI to fully develop the investigation, or await further results of the DOL process.

Step 4b: For the high priority discrimination cases that do not result in placing cases on hold, as outlined in 4a, the ARB should request that OI perform a full investigation.

⁶ As part of the input to this evaluation process, the ARB should review the statistical information available and relevant to the case. Recent improvements to the Allegation Management System; anticipated upgrades to the information management systems for OI and OE; as well as an on-going project to integrate the AMS, OI, and OE data bases should increase the sophistication of this review and evaluation.

Step 4c: For instances where there are multiple discrimination cases in which the licensee has a history of adverse OI or DOL discrimination findings, a history of settling discrimination issues, or other relevant performance characteristics which would indicate an environment not conducive to raising safety concerns, the ARB should examine alternative actions for normal priority cases and additional actions to supplement high priority investigations. These actions may include a meeting with licensee management; a review of the licensee's employee concerns program; a survey of the licensee's work environment; a request or order that the licensee obtain an independent evaluation of their environment for raising concerns; an order to establish independent third-party oversight of the environment for raising concerns; or other actions as appropriate. These actions should be coordinated with appropriate levels of NRC management.⁷

Step 4d: Normal priority cases which do not come under 4a and 4c, above, will be investigated based on existing resources.

⁷ Alternative actions were generally discussed in NUREG 1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation" (January 1994), and incorporated, in part, in Paragraph 7.7.4, of the revised NRC Enforcement Manual. The staff is also considering comments on the pending Federal Register Notice concerning the safety conscious work environment (SECY-96-255, "Recommendation to Issue Request for Public Comment on Establishing and Maintaining a Safety-Conscious Work Environment")

In addition, the Office of Research is currently pursuing the development of a survey instrument for assessing licensee work environments. The development of such a measuring device, as well as the development of methods for incorporating these measurements into overall assessments of licensee performance, will supplement the recommendations of this paper.

The staff anticipates that most high priority discrimination cases will continue to result in pursuing the Step 4b course of action (i.e., a full OI investigation). In addition, the increased scope of the ARB review will force the consideration of these allegations in the larger context of relevant licensee performance trends related to discrimination.

The staff strongly supports incorporation of these adjustments into the allegation review and investigation processes, because (1) it will prompt earlier review and recognition of adverse trends; (2) it will focus staff attention on the potential relationship between the safety-conscious work environment and other licensee performance aspects; and (3) it facilitates integration of OI investigative results (including, but not limited to a finding of discrimination in the particular case under investigation) into the overall process of licensee performance assessment.

APPENDIX C

Optimization of NRC Resources

A review was conducted of the existing structure of the Office of Investigations; the specific training offered to OI, OE and the legal staff for investigating and reviewing discrimination issues; and the relevant technical, legal and enforcement expertise available in terms of the four primary considerations outlined in the discussion at the beginning of this paper. This review resulted in several modifications and recommendations for modification in operations, coordination, administration, and training within the programs which focus on discrimination issues. The staff believes that the following changes will help to optimize the use of NRC, and particularly investigative resources:

1. The Office of Investigations has modified the duties of the senior investigators in each OI field office. Under the previous structure, these individuals concentrated their efforts on working an inventory of their own cases. As modified, the duties of these senior investigators, while reducing somewhat their individual caseloads, will include a greater focus on oversight and quality control of the overall field office caseload, an oversight of the identification and follow-up of generic and programmatic issues, and responsibility for training less senior investigators in specific areas, especially discrimination.
2. OI has also undertaken an expansion in the scope of investigations of discrimination. In some cases, this may result in adjusting the line of questioning to suit the known characteristics of a particular licensee's work environment, or expanding the scope of inquiry to a more generic or programmatic approach, delving into such issues as chilling effect and a safety-conscious workplace. Additional training will also be considered on legal elements of proof for discrimination

violations. Some discrimination training may be provided through DOL or other external sources.

3. OI typically enlists the assistance of technical staff when such expertise is material to pursuing a specific investigation. The organizational change causing OI, OE, AEOD, and RES to report to one Deputy EDO facilitates obtaining such technical assistance. In discrimination investigations, OI will make better utilization of regional counsel and the headquarters OGC resources, at early stages of an investigation, to determine whether a potential discrimination violation exists, and during the course of a discrimination investigation, as evidence is uncovered, to better focus the direction of the investigation.
4. As discussed in SECY-96-199, OE will dedicate specific enforcement specialists who will develop and maintain expertise in the area of discrimination, to further support the overall NRC effort to better focus resources on high priority discrimination issues.
5. The staff believes that OGC and the regional counsels, who currently advise OI and OE, have the expertise in discrimination matters required to support the efforts described above, and that earlier and continuous coordination with these legal resources will generate an improved and more efficient overall outcome.

APPENDIX D

Review of Recommendations Previously Made in SECY-96-199

In SECY-96-199, the staff stated its intention to refine certain elements of the investigative and enforcement processes relevant to discrimination cases. As requested in the Commission's February 7, 1997, SRM, the staff re-evaluated the material presented in SECY-96-199, as well as the staff response to follow-up questions regarding SECY-96-199. As a result of this re-evaluation, the staff recommends the following adjustments to the investigative and enforcement processes:

1. Investigation Process Adjustments

- (a) Open a discrimination investigation normally within three business days of the Allegation Review Board meeting when there is specific indication of wrongdoing.
- (b) Continue with the current approach, established in the past several years, which provides that OI will normally interview or arrange for an interview of alлегers in discrimination cases within 30 days of opening the investigation.
- (c) Provide the written results of the interview of the alлегer and other preliminary investigative activity to the technical and enforcement staff for appropriate review normally within one week of receipt. The NRC staff would then re-examine the circumstances and the initially assigned priority and prioritize the investigation as either 'high' or 'normal.' Additional revisions to the assignment of priorities are presented in Appendices A and B of this paper.
- (d) The initial recommendation in SECY-96-199 was for OI to proceed to fully develop and complete high priority investigations without delay or deferral

to the DOL process. It was expected that most of the investigations would be completed in about 10 to 12 months, typically prior to the issuance of the DOL Administrative Law Judge's (ALJ) Recommended Decision and Order. As discussed in Appendix B, the staff is recommending additional refinements to the ARB process for recommending or requesting a full investigation. In some cases, this may result in deferring to the DOL process.

- (e) As recommended in SECY-96-199, on normal priority cases, although OI would open a case and, at a minimum, interview the alleged, NRC would routinely allow the DOL process to be completed and the staff would take enforcement action based on the DOL adjudicatory findings without a fully developed OI investigation.
- (f) Terminate discrimination investigations when OI concludes that based on the initial evidence gathered, it does not appear that the allegation of discrimination would be proven by a preponderance of evidence, and it is not likely that further investigation would alter the initial conclusion. This will both shorten OI investigations and allow resources to be used for other investigations.
- (g) In substantiated cases of employee discrimination, consult with the Office of the General Counsel, and OE, at the conclusion of field work regarding OI investigative findings as they relate to potential enforcement action. This action is discussed further in Appendix C, Section 3.
- (h) It was recommended in SECY-96-199 that the format of the Report of Investigation (ROI) be modified on discrimination cases to better focus reviewers on the pertinent evidence and findings and the rationale for the OI conclusion. OI is employing a trial format that streamlines the Report of Investigation, providing a section on "Analysis of

Evidence" that addresses the specific elements of proof of discrimination. This should optimize the usefulness of the report for end-users. This format will be made permanent if it meets the desired goals.

- (i) SECY-96-199 recommended that all H&I investigation reports and exhibits be redacted immediately upon issuance so that they may be provided to the parties to the DOL proceeding for possible use in the DOL process. OI is currently implementing this recommendation with regard to reports required in support of enforcement conferences. Full implementation for all H&I investigation reports will occur once the administrative FTE requested in SECY-96-199 and in this paper has been received.

2. Enforcement Process Adjustments

The Commission SRM dated February 7, 1997, asked the staff to implement the enforcement process adjustments (related to pre-decisional enforcement conferences for discrimination cases) as presented on pages 17-19 of SECY-96-199. These adjustments have been made as requested. In addition, the staff had proposed several other adjustments to the enforcement process, as discussed below.

- (a) The staff proposed that OE should dedicate two enforcement specialists, as well as additional efforts in the regional offices, to the development of enforcement actions related to discrimination cases and other wrongdoing cases. These individuals would enable more timely review of discrimination investigation results and DOL adjudicatory decisions, as well as more timely development of enforcement actions.
- (b) The staff also proposed that on substantiated cases, OE should review OI exhibits and begin the development of enforcement action after the OI

field work is complete, but before issuance of the OI report. This material will also be provided to OGC at the same time.⁸ Similarly, to improve the timeliness of enforcement actions based on DOL ALJ Recommended Decisions and Orders (or decisions by the DOL Appeal Board), OE would review these decisions and schedule the initial enforcement strategy meeting within 3 weeks of the DOL decision. In addition, the staff will normally initiate scheduling an enforcement conference promptly following the enforcement strategy meeting. (The staff had proposed in SECY 96-199 that the scheduling occur one week after receipt of the OI report. The additional time now proposed will allow a decision to be made as to whether there is sufficient information available to go forward with the enforcement process, whether additional investigation is needed, or whether no action is warranted.) These early actions should reduce the enforcement action development process time by at least several weeks.

- (c) The staff proposes that the March 17, 1997, changes to the Enforcement Policy published on March 24, 1997, in the Federal Register (62 FR 13906) as a result of the February 7, 1997, SRM be clarified. Specifically, the Statement of Consideration for this change provided that "normally" OI reports involving discrimination will be made public, however, the actual policy change stated that they would be public. The word "normally" needs to be in the policy statement to reflect closed conferences where individual action is contemplated in which case it would not be appropriate to make public the OI report. In

⁸ The staff appreciates the importance of OI's independence. The purpose of sharing the information is to improve upon the timeliness of the OI/OE process and not to impact on the integrity of the investigative conclusion.

addition, the policy should be clarified to provide that the complainant may attend the licensee/employer conference not the conference with the individual wrongdoer.