Briefing Paper for ADR Neutrals

Overview

The Nuclear Regulatory Commission (NRC) mission is to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment by regulating the activities of its licensees. Through NRC inspection and evaluation, technical concerns are routinely identified and resolved. However, as an agency of limited resources monitoring more than 100 nuclear power plants and thousands of nuclear materials licensees, the NRC can only individually review a small percentage, or sample of licensee activities. Licensees have the primary responsibility for the safe operation of their facilities. The NRC has long believed that an open work environment, now known as a Safety Conscious Work Environment (SCWE) *(i.e.*, one that encourages individuals to raise regulatory concerns to the licensee and/or directly to the NRC), supports the licensee's responsibility for safe operation, as well as the NRC's mission of ensuring adequate protection.

Enforcement ADR Program

The NRC is piloting a program that utilizes ADR in two different portions of the overall enforcement process. In the first part, the NRC is not a party in mediation. The parties will be an individual who has alleged that they have been retaliated against for engaging in protected activity (more below) and their employer. In the second part of the program, the NRC will be one party and the other (in a typically two party mediation) will be the subject of potential enforcement sanctions for apparent wrongdoing issues. Typically the other party will be an NRC licensee and the mediation will be conducted after an NRC investigation is completed but prior to a hearing.

Employee Protection

Due to its ability to inspect only a sample of licensee activities, the NRC has placed a high value on nuclear industry employees being free to raise regulatory and safety concerns to the licensee and/or the NRC without fear of retaliation. Similarly, employees must be free to engage in other protected activities, such as participating in federal or state proceedings and providing information to the NRC. The NRC has addressed these issues extensively in the past, developing regulations which prohibit discrimination for engaging in protected activity. The same regulations also prohibit restrictive agreements affecting the compensation, terms, conditions or privileges of an employee. The employee protection regulations (*e.g.* 10 CFR 50.7) state:

> (a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.
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> (1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;
(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;
(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;
(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.
(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for--

(1) Denial, revocation, or suspension of the license.
(2) Imposition of a civil penalty on the licensee or applicant.
(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30

days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(2) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter, by calling (301) 415-5877, via e-mail to *forms@nrc.gov*, or by visiting the NRC's Web site at *http://www.nrc.gov* and selecting forms from the index found on the home page.

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

Although the Atomic Energy Act (AEA) provides the NRC with authority to take action against a licensee for discrimination against an employee, it does not provide authority to order a personal remedy for such employee. Consequently, on November 6, 1978, Congress enacted Section 210 (now Section 211) of the Energy Reorganization Act (ERA). Pursuant to Section 210 (and 211), discrimination against any employee by a Commission licensee, applicant, or contractor or subcontractor of a licensee or applicant with respect to compensation, terms, conditions or privileges of employment is prohibited when such discrimination is prompted by the employee's having engaged in certain protected activities. The legislative history reveals that this statute was not intended in any way to abridge the Commission's authority under the AEA to investigate an allegation of discrimination and take appropriate action against a licensee employer, nor was the statute passed because Congress thought that the Commission lacked such power. Rather the purpose of the enactment of then Section 210 was to give the Department of Labor (DOL) new responsibilities which *complemented* the NRC's jurisdiction over such matters.

In May 1996 the Commission issued a policy statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation" [FR 24336]. The basic thrust of the policy statement was to clarify the

> Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their management and the NRC without fear of retaliation.

Thus, the NRC is primarily concerned with the SCWE at a facility, rather than a personal remedy. The development and maintenance of a SCWE is as much an art as it is a science.

Enforcement Sanction Overview

Through the standard enforcement process, a variety of sanctions are typically used by the NRC when violations are identified. These sanctions range from an exercise of discretion to not cite any violation to potentially, in cases involving individuals, an order prohibiting involvement in nuclear activities within the NRC's jurisdiction. Many of the cases involved in this program

would normally warrant a Notice of Violation with a civil penalty. The base amount of the civil penalty would vary with the size of the licensees nuclear operation and the severity of the violation - as little as $3,000 for a small materials licensee to as much as $130,000 per day per violation for a power reactor. Corrective actions taken (or *not* taken) by licensees can impact the actual civil penalty as well. It is not the NRC's intention that the economic impact of a civil penalty be so severe that it puts a licensee out of business (orders, rather than civil penalties, are used when the intent is to suspend or terminate licensed activities) or adversely affects a licensee's ability to safely conduct licensed activities.

In discrimination cases, the authority to provide a personal remedy to the employee is with the Department of Labor. Typically, a complaint is filed by the individual with OSHA. OSHA performs an investigation and attempts to settle the case. If they are unable to settle the case, a finding is made. If a merit finding is made, with near certainty, the licensee will appeal the case to a DOL Administrative Law Judge (ALJ). If the ALJ finds merit to the case, he or she may order the individual reinstated with back pay, and compensatory damages for all costs and expenses (including attorney's fees) reasonably incurred in bringing the complaint. The ALJ's Recommended Decision and Order may be appealed to the DOL Administrative Review Board (ARB) who acts for the Secretary of Labor. It should be noted that if DOL finds a violation, particularly if reviewed and upheld through the ARB, frequently the NRC will issue a notice of violation and civil penalty to the licensee even if the NRC's investigation does not substantiate the case.

Early-ADR

The first portion of the NRC's ADR program is referred to as "Early-ADR." In Early-ADR, an individual who has provided the NRC with a *prima facie* case of retaliation for engaging in protected activity is offered an opportunity to engage in mediation prior to the NRC conducting an investigation. As mentioned above, the NRC is concerned about the safety conscious work environment. The theory behind the program is that a *timely* settlement is preferable to a long investigation or litigation. In addition, if the issue can be resolved prior to an investigation - which naturally tends to be polarizing, antagonizing, and time consuming - the work environment may not be damaged as much as if an investigation is conducted.

The NRC is interested in a whistleblower's personal remedy to the extent that the SCWE may be affected. For a variety of reasons, including timeliness, jurisdiction issues, and legal costs, whistleblowers do not always file a complaint with DOL. In order to facilitate a SCWE, the settlement should typically make available some reasonable personal remedy to the alleged whistleblower. If a whistleblower is not satisfied with the settlement, the negative message that eventually will be the subject of watercooler conversations will not encourage an environment where employees are free to raise concerns. Therefore, although the NRC is not involved, a reasonable personal remedy should typically be reached to foster a positive work environment. This position is supported, in part, by 1993 testimony before Congress, when then Chairman Selin indicated that the NRC must consider the climate of the facilities and look at prevention, as well as more aggressive enforcement, "[o]therwise we have a situation where the worst that can happen to a licensee is that he has to make up to the employee what he shouldn't have done in the first place and fix the problems that he should have done in the first place. . ." He further stated that, "we will not tolerate an environment that is hostile to the employees raising safety concerns."

Certain facets of the NRC's Early-ADR program are somewhat unique. About half of the time, the individual does not obtain counsel. Historically, once an individual files a *prima facie* complaint, their issue is investigated and pursued by the NRC without the individual needing an attorney (recognizing that there is no personal remedy to the individual from the NRC). Since these individuals are frequently unemployed, or had some other adverse employment action taken, cost of an attorney is likely a factor. Conversely, in many of these cases, the other party is a large electric power utility with ample legal resources at their disposal. Consequently, it would not be unusual to have a single, unrepresented worker on one side of the table and multiple attorneys and senior corporate managers on the other side.

Another somewhat unique situation presented in Early-ADR is the potential for a very small amount of information to have been exchanged between the parties about the issue. For example, a low level supervisor may threaten or take a minor disciplinary action against an individual and the next input the company has is when a corporate attorney receives a phone call from ICR asking if the company is interested in ADR. While this example is a bit extreme, it could, and does, happen. Consequently, ICR attempts to gather some information from the individual and share a little with the company prior to the mediation. However, it is important to recognize that typically there is very little discovery-type effort prior to a mediation. Neither side may be well versed in the other parties version of the case. Of course, that is a consequence of the original design: to *reach a timely resolution prior to an investigation*.

Finally, a case may be in multiple jurisdictions. Frequently the issue is before the Department of Labor, state unemployment agencies, or employee unions in addition to the NRC. Consequently, a settlement agreement may seek to resolve all of the claims at one time.

The NRC will occasionally receive copies of settlements completed through the DOL process. In addition, all of the DOL ALJ decisions with a merit finding are reviewed. Based on observations over time, frequently the settlement or decision is in the range of tens of thousands of dollars, which may or may not include attorney's fees and typically requires *at least* 2 to 3 years to reach. This is not a scientific sample, but only a general idea of what are typical results. Of course, there have been those few cases where, depending upon the circumstances, including the individual's salary, that individuals received substantially more, typically with the corresponding substantial increase in time as the licensee exhausts all appeals. The other extreme has also been observed: a substantial settlement lost when DOL found in favor of the licensee prior to the individual agreeing to a proposed settlement.

If a settlement is reached and approved by the NRC (after a review for restrictive agreements, see below), the NRC will not investigate or take any other enforcement action. If an agreement is not reached and an NRC investigation initiated, any opportunity for the individual to obtain a personal remedy through the NRC will no longer be available. Should a case be investigated and substantiated, the NRC will no longer pursue any personal remedy options.

As previously discussed, an objective of the program is to reach a *timely* resolution. Seldom have Early-ADR cases reached agreement on the day of the mediation. The balance appear to fall into three categories. In some cases, it is clear to the mediator that there is essentially no chance of the parties reaching an agreement. At that point, the NRC removes the offer of ADR and proceeds with the normal process, typically commencing an investigation. Certain cases have not reached agreement on the day of mediation but it is clear that the parties are committed to working together and are interested in settling the case. In these cases, the NRC will allow the parties to finish negotiations to reach agreement. However, in other cases, although the parties did not reach agreement in session and there was no commitment between

the parties to continue to process, the mediator has believed, for various reasons, that given a little time and additional discussion, a settlement may be reached. In an attempt to support those opportunities, the NRC will allow up to 14 days after the session for the mediator to reach at least verbal agreement between the parties prior to removing the offer of ADR.

Pre-mediation conference call

Although the number of cases mediated through this program is still small, certain benefits supporting the conduct of a pre-mediation conference call have become apparent. As described above, some discussion between the parties regarding the issues themselves may be beneficial. A determination of whether the individual is represented and, particularly if the individual is not represented, the planned number of attendees for both parties.

Many of these cases involve power plants. Typically a corporate attorney will represent the company and will likely have the authority to settle the case. Unfortunately, the attorney may not be familiar with either the specific facts of the case or normal plant practices and procedures. The individual will likely want to discuss some of these work life realities as part of his or her case. Unless a member of plant management is represented, establishing good, effective dialog between the parties may be difficult.

Restrictive Agreements

In 1990, the Commission addressed the potential for settlement agreements, including those negotiated under Section 211 (then Section 210) of the ERA, to impose restrictions on the freedom of employees or former employees to testify or participate in NRC proceedings or to otherwise provide information on potential violations or hazardous conditions to the Commission. Accordingly, the Commission amended the employee protection regulations to specifically provide that no agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed with the Department of Labor pursuant to Section 211 (then Section 210) may contain any provision which would prohibit, restrict or otherwise discourage an employee from participating in protected activities (see paragraph (f) of the employee protection regulation provided above).

As such, and in accordance the with NRC pilot program, the NRC Office of General Counsel reviews each Early-ADR settlement for restrictive agreements prior to the NRC accepting the settlement in lieu of further enforcement activity. Unfortunately, certain settlement agreements have contained language that includes phrases potentially construed as restrictive agreements. Feedback from attorneys involved in some cases indicate that the proposed language is standard settlement “release” language. However, the NRC has a high standard regarding such language and has required modifications, although perhaps not significant in volume.

Examples of issues identified and the modifications include:

X. No Restriction on Reporting Safety or Workplace Concerns. Notwithstanding any other provision in this Agreement, _____ understands that nothing in this Agreement precludes h__ from communicating, nor impairs or restricts in any way h__ ability to communicate, with the Nuclear Regulatory Commission, the Department of Labor, or any other federal, state, or local government agency with jurisdiction over _____, concerning safety or workplace concerns s/he may have. Without limiting the foregoing, _____ understands and acknowledges that the provisions of paragraph X.a and X.b do not in any way limit h__ communications with the Nuclear

Regulatory Commission or other government agencies. However, it is the parties' understanding that this release shall be an indication that _____ does not wish to further pursue any issues s/he may have with the ~~Nuclear Regulatory Commission,~~ the _____ Equal Opportunity Commission or the U.S. Equal Employment Opportunity Commission.

X. ~~_____ agrees to withdraw forever, with prejudice, the NRC Allegations, and all claims and demands, relating in any way to h__ employment with _____.~~ _____ warrants that as of the signing of this Agreement, s/he has not filed any other ~~allegations with the NRC or~~ claims against _____ in any court or administrative agency~~, other than the above-captioned matter pending before the NRC~~ for relief or damages. If _____ has filed ~~pending allegations with the NRC or~~ claims or actions against _____ with any other court or administrative agency, for damages or other relief, s/he agrees to disclose those claims to _____ before the execution of this Agreement, to dismiss and/or withdraw those claims with prejudice, and to take all necessary actions to ensure that they are withdrawn with prejudice. _____ agrees to execute, and authorizes h__ counsel to execute on h__ behalf, any and all documents, including pleadings or motions, necessary to obtain the prompt dismissal with prejudice or withdrawal with prejudice of all actions for which s/he is or was a party and hereby confirms that s/he has no other pending claims for relief or damages against _____, or its parent companies, subsidiaries, and affiliates, and their directors, officers, employees, agents, attorneys, successors and assigns, in any other forum.

Guidance and assistance provided to the parties while a proposed settlement is being drafted may help reduce the amount of subsequent amendments.

Post Investigation ADR: Discrimination and Other Wrongdoing

The second part of the program involves issues after an NRC investigation has been completed. Typically, the investigation will have identified either discrimination (in apparent violation of NRC regulations) or other wrongdoing (careless disregard or deliberate misconduct). These cases are either being considered for, or are the subject of, enforcement actions.

The NRC's enforcement program is not intended to be punitive in nature. The civil penalties issued are intended to encourage compliance and are graduated somewhat to correspond not only to the severity of an issue, but to the size of a licensee's nuclear operation as well. The NRC requires corrective action be taken to restore compliance to the regulations in addition to the payment of any civil penalty. The NRC's interests after an investigation will vary somewhat with the facts of the case. However, typically, the NRC will be interested in seeking broader, more substantive and more effective corrective actions than those already required, in return for reduced, or avoided, enforcement sanctions.

The NRC will typically offer ADR at three points in the enforcement process: 1) prior to the issuance of a Notice of Violation; 2) with a Notice of Violation; and, if the process continues, 3) with an Imposition of Civil Penalty Order. The NRC will be a party and typically, a licensee will be the other party. Unusual situations may involve a third party, conceptually a contractor to a

licensee. The pilot program is also considering actions where individuals are subject to enforcement actions.

Some of the post-investigation cases will be discrimination cases and based on the employee protection regulations described above. The balance of the post-investigation cases will involve at least some apparent wrongdoing. The NRC considers wrongdoing to consist of either careless disregard or deliberate misconduct. The NRC's enforcement policy does not differentiate between the two when considering potential enforcement sanctions for licensees. However, the NRC has a Deliberate Misconduct Rule which prohibits not only licensees, but individuals as well, from engaging in deliberate misconduct. Roughly three quarters of the other than discrimination wrongdoing cases will involve some form of deliberate misconduct (instead of careless disregard). Falsification of records or deliberately not taking a specified action are examples of what may be included. The deliberate misconduct rule (*e.g.* 10 CFR 50.5) states:

> (a) Any licensee, applicant for a license, employee of a licensee or applicant; or any contractor (including a supplier or consultant), subcontractor, employee of a contractor or subcontractor of any licensee or applicant for a license, who knowingly provides to any licensee, applicant, contractor, or subcontractor, any components, equipment, materials, or other goods or services that relate to a licensee's or applicant's activities in this part, may not:
>
> > (1) Engage in deliberate misconduct that causes or would have caused, if not detected, a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission; or
> >
> > (2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.
>
> (b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.
>
> (c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:
>
> > (1) Would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation, of any license issued by the Commission; or
> >
> > (2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor.

While the specific violation could potentially involve almost any NRC regulation or certain licensee procedures, for the ADR program's purposes, they will generally have wrongdoing in common.

The NRC's regional offices will lead other than discrimination wrongdoing cases. As such, senior regional management and a regional counsel will be the NRC's representatives. Licensees typically have legal representation.

Discrimination cases will be lead by headquarters, normally by the Director of the Office of Enforcement. As discussed above, the NRC will be interested in actions that will substantially improve the safety conscious work environment.