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Bill Borchardt, Director
Office of Enforcement
Group Leader - Discrimination Task Force
U.S. Nuclear Regulatory Commission
One White Flint North, Room 14E2
Rockville, Maryland 20852-2738

Dear Mr. Borchardt and Members of the Task Force:

This letter summarizes my views on the issues that you have explored during the past six months regarding the Nuclear Regulatory Commission (NRC) policy and practice in responding to allegations of retaliation. In preparing these comments I have reviewed the materials provided by the agency from the public meetings conducted throughout the country. Please consider these comments as you develop your recommendations for improvements in the regulatory process in this area.

A. Evaluate the current NRC processes for dealing with discrimination matters.

There is uniform agreement that the NRC's process for dealing with discrimination and retaliation complaints has serious flaws. Industry representatives, lawyers, employees and advocacy groups all complain that the process is untimely and unfair. It is my opinion that the NRC process for handling allegations of discrimination should focus on prevention. First, the agency should require the industry to provide substantial training to all supervisors and managers in order to prevent discrimination from occurring in the first place. (While the industry states that it already does training in this area, it varies widely in quality, content and measurement. Many companies do not require training for the contractor work force.) Second, the agency should develop a consistent response to allegations of a specific event or incident of harassment, intimidation, retaliation and/or discrimination (HIRD). That response should be based on a determination of whether or not the event has caused a "chilling effect" within the impacted work group.[1] While the licensee may respond to a potential 'chilling effect', the agency should be

[1] A "chilling effect" occurs when other employees form an opinion or belief that an adverse action has been taken against an employee for raising safety related concerns, and might also be taken against them if they raise concerns. This belief may result in information about potentially significant safety concerns not being raised internally or externally, putting the environment, the public and/or the workforce at risk.

prepared to step in if the action taken by the licensee is untimely or inadequate. Third, specific guidance should be developed on agency expectations for licensee reaction to HIRD allegations, recognizing the inherent conflict between a licensee's right to defend itself in private litigation and its public obligation to ensure a safety conscious work environment. Finally, intervention and investigation by the Office of Investigation (OI) should be reserved for those cases in which there is *prima facie* evidence of intent to retaliate by the decision-maker and a refusal by the licensee to take timely and appropriate corrective action.

B. **Determine whether the Enforcement Policy supplements need to consider a more graded approach regarding the appropriate enforcement sanction given the specific facts of the case, rather than the current supplement guidance which largely relies on the individual's position. Examples of guidance to consider revising include consideration of the severity of the adverse action, and better defining thresholds for taking individual action.**

The Enforcement Policy guidance document should be reissued, including a graded approach regarding the appropriate enforcement sanction given the specific facts of the case. The relevant facts should include, but not be limited to, the alleged perpetrator's position in the licensee hierarchy, whether the licensee provided HIRD training, the impact of the event on the workforce and whether it caused a 'chilling effect' among other employees, the degree of the adverse action, i.e., oral warning for engagement in protected activity versus termination, whether there were missed opportunities to have prevented the event, and the mitigation actions taken by the licensee.

C. **Consider changes to the current enforcement process in discrimination cases, such as the usefulness of pre-decisional Enforcement Conferences and settlement discussions.**

Changes to the current enforcement process in discrimination cases should be made consistent with the comprehensive review of these issues resulting from this Task Force.

D. **Evaluate the process used for DOL deferrals.**

The NRC deferral process in cases where an employee has filed a HIRD action with the Department of Labor makes sense and should be continued, with the caveat that the NRC should always make an immediate determination on the potential 'chilling effect' of an alleged HIRD event.

E. **Evaluate the release of documents prior to final action being taken.**

It is my opinion that any and all documents that shed light on the licensee's decision-making process, the basis for the adverse action decision, the licensee's asserted legitimate business reason, and any other documents that form the basis for the decision should be

released, consistent with privacy limitations of the Freedom of Information Act (FOIA), as soon and as often as possible. Secrecy breeds suspicion and distrust.

F. **Consider the issues raised in the Petition for Rulemaking "Employee Protection Training", Docket PRM-30-62, 64 Fed. Reg. 57785 (Oct. 27, 1999) regarding requiring training of first line and above supervisors of their responsibilities in implementing the employee protection regulations.**

I strongly support mandatory training for all managers, supervisors, employees and contractors in the unique expectations that Congress has placed on the industry in management of employees consistent with a safety-conscious work environment. (See, comments supplied in response to the Petition for Rulemaking, "Employee Protection Training", Docket PRM-30-62, 64 Fed. Reg. 57785 (October 27, 1999.)

G. **Evaluate the reliance on regulations such as 10 CFR 50.5 for Individual Actions and evaluate revising 10 CFR 50.7 to include individual actions.**

In my opinion both 10 CFR 50.5 and 50.7 are important enforcement tools that the agency has available to it. However, as presently implemented, the enforcement action against individuals presents terrible due process issues for those accused of serious wrongdoing, and little opportunity for those managers or supervisors to respond to the allegations against them. If the NRC decides to continue to utilize 50.5 and 50.7 in enforcement action and/or in connection with actions by the Office of Investigations, it must revise its procedures to provide for fundamental fairness to the accused and the accuser. Of course, full hearings are currently available to the licensee or individual (depending on the situation) if they oppose the proposed enforcement action. However, the practical reality of the regulatory scheme is that such opposition is often a regulatory and political mistake. It is my understanding that no licensee has yet requested a hearing on the proposed enforcement action arising from a 50.7 finding against individual managers or supervisors. Individuals have been accused of HIRD through investigations by OI, in which they are not entitled to know either the charges or the evidence against them, and then adjudicated as guilty in an enforcement action that favors admission of the wrongdoing of their conduct by the licensee as part of the mitigation. While it is not fair to the accused, it is also not just to the accuser, whose allegations and evidence are often misunderstood or ignored by the agency.

If the NRC is going to reach conclusions on whether retaliation played a factor in adverse actions against employees, the motive and intent of individual decision-makers, and the impact of these events on others, it needs to provide basic due process opportunities. Even people who get traffic tickets have an opportunity to confront the evidence against them! The practical reality is that the OI and enforcement process appears to many as a "star chamber" with no true opportunity for accused or accuser to participate.

This process needs to be changed to increase the confidence of all parties, participants and the public in a fair and credible regulatory process.

H. **Clarify how the NRC should use the decisions of other Agencies (e.g. DOL, MSPB).**

I agree that the NRC should clarify the use of other agency decisions, as well as the use of judicial or other court decisions from the civil court process. Either the agency should always rely upon judicial or civil processes and decisions, or never rely on such decisions. Which approach to take depends entirely on whether the agency decides to stay involved in making any decisions about the retaliatory intent of decision-makers or defers such decisions to a due process forum designed to protect the rights of participants.

I. **Review the role of the complainant in the process.**

As I have stated before, the role of the Complainant is crucial to understanding the allegations and the facts that give rise to the events or incidents at issue. As those facts are refined and explored the Complainant should be given an opportunity to comment on the information provided by the licensee. Failure to provide the Complainant that opportunity renders the final decision by the agency suspect, as it did not fully probe the information, evidence and context of the actions.

I would also like to comment on the issue of standards, and urge the use of the same legal standards, set by Congress, in establishing whether there was a retaliatory intent behind the adverse actions at issue. That is simply, as set forth in the Energy Reorganization Act (Act), 42 USC 5851, that once the employee establishes a *prima facie* case of discrimination/retaliation by a preponderance of the evidence, the burden of proof shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity. Using any other standard would produce inconsistent results and be fundamentally unfair.

Thank you for consideration of these comments. Please keep me apprised of further developments in this important area.

Sincerely,

Billie Pirner Garde

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