

## **CHAPTER 5 - ADDITIONAL ENFORCEMENT GUIDANCE**

### **5.1. Notices of Violation for Subcontractors and Suppliers**

**Notices of Violation (both PNOV and FNOV) are used for subcontractors and suppliers as well as prime contractors who fail to meet nuclear safety requirements and commitments related to DOE activities. Enforcement for subcontractors and suppliers is addressed in the Enforcement Policy. Certain nuclear safety Rules apply directly to subcontractors and suppliers. For example, see the Rule on Accuracy of Information, 10 CFR 820.11, requiring complete and accurate information to be submitted to DOE. Violations of such requirements are subject to the same enforcement process described in this enforcement procedure.**

**Additionally, nuclear safety requirements may be contained in contract requirements with DOE contractors and are not directly imposed by DOE on the subcontractors and suppliers. For example, a subcontractor may be required to have a QA program that meets the requirements of 10 CFR 830.120 in order to perform work for the contractor. Violations of that QA program may subject the subcontractor to PAAA enforcement. The PNOV for a subcontractor or supplier would be similar to that prepared for a DOE Contractor, but will also include the following elements:**

- a. Any contract terms that subject the subcontractor or supplier to DOE nuclear safety requirements and the severity level proposed for the violation or problem area.**
- b. If the subcontractor or supplier to DOE is subject to nuclear safety requirements, the civil penalty proposed for each violation may apply equally to the prime contractor, if appropriate. If more than one violation is involved, it may be necessary to apportion the amount of the penalty for each violation.**

**The PNOV informs the subcontractor or supplier of the response required by DOE. The PNOV will automatically become an FNOV if the subcontractor or supplier response does not contest the enforcement action.**

If the violation of nuclear safety rules by the subcontractor or supplier has affected the work of the prime contractor, Notices of Violation to multiple parties may be issued for the same occurrence. Contractors have responsibility for the performance of their subcontractors through the oversight responsibilities of their QA Programs. Care should be exercised to determine the relevant facts in these circumstances and to assess responsibility in accord with those facts.

## **5.2. Department of Justice Referrals**

### **5.2.1. Policy on Withholding Action**

As a general policy, if a matter has been referred to DOJ, in the absence of an immediate need to take action for health and safety reasons, issuance of a DOE enforcement action should be held in abeyance. The purpose of this postponement is to avoid potential compromise of, or conflict with, the DOJ case, pending DOJ concurrence that the enforcement action will not affect its prosecution. The Director is responsible for coordinating enforcement matters with DOJ.

### **5.2.2. Department of Justice Declinations**

It is expected that if DOJ determines that a referred case lacks prosecutorial merit, it will notify DOE (Director, Office of Enforcement and Investigation) by a letter of declination. When this is received, the Director will then determine whether to proceed with enforcement action. Enforcement would then follow the same process described in this enforcement procedure.

## **5.3. Discrimination for Engaging in Protected Activities**

### **5.3.1. Background and Purpose**

This section provides guidance regarding cases involving discrimination against contractor employees for engaging in protected activities. The responsibilities of DOE in protecting the rights of employees are specified in 10 CFR 708, 'DOE Contractor Employee Protection Program'. Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees that relate to (1) employer reprisal or discrimination resulting from employee disclosure of information relating to unsafe conditions, or (2) violations of laws and regulations that involve fraud, mismanagement, waste, abuse, or safety. DOE has determined that Part 708 is a Nuclear Safety Requirement as defined in Part 820, and thus any violation of the whistleblower protection

**Provisions of Part 708 might subject a contractor to PAAA enforcement.**

(See 57 FR 20796, May 15, 1992.) Thus, if a retaliatory act occurred as a result of a worker raising nuclear safety concerns, the act of retaliation will constitute a violation subject to enforcement sanction.

To the extent that the complaint involves underlying issues related to nuclear safety, the Office of Enforcement and Investigation and the IG have established guidelines that prescribe the cooperation and working arrangements between them to investigate and resolve (1) the issues relating to discrimination, and (2) the issues relating to nuclear safety that might subject contractors to enforcement action. These cooperative arrangements and further guidance are described below.

### **5.3.2. General**

It is DOE's policy that the protected activities of contractor employees as defined in 10 CFR 708 include employee reporting of potential safety concerns to DOE. (Part 708 protection does not apply to disclosures or complaints made to parties other than DOE and Congress.) In addition, for purposes of this guidance, discrimination should be broadly defined, including intimidation or harassment that could lead a person to reasonably expect that, if allegations are made about conditions believed to be unsafe, their compensation, terms, conditions, and privileges of employment could be affected.

If a discrimination complaint is raised to any DOE employee that potentially raises a nuclear safety issue, the complainant should be informed of the following:

- a. In order to protect employee rights against discrimination under Part 708, the complaint must be filed with DOE through the Head of Field Element as defined in the Rule within 60 days of the occurrence or the discovery of the discrimination.
- b. The IG will consider the allegations of reprisal and the Office of Enforcement and Investigation will consider any nuclear safety concerns raised by the complainant.

Enforcement action may result from the investigation if it is determined that discrimination by the contractor (or its subcontractors or suppliers) had a chilling effect on the reporting of safety concerns. DOE enforcement action may be appropriate even though the specific employee-employer discrimination issues are resolved through reconciliation, information, settlement or adjudication before the DOE Office of Hearings and Appeals.

### **5.3.3. General Guidelines for Processing Whistleblower Complaints Involving Nuclear Safety Issues**

The following guidelines coordinate the processing of Part 708 whistleblower reprisal complaints with Part 820 PAAA enforcement procedures and shall apply to all Part 708 complaints involving nuclear safety concerns:

- a. The IG will be promptly provided with a copy of all complaints, reports of investigation, and decisions or orders associated with allegations of reprisal for raising nuclear safety concerns at DOE nuclear facilities.
- b. Without regard to the status of any related whistleblower reprisal complaint, the Director will conduct all necessary investigations and take appropriate enforcement action with respect to the underlying nuclear safety concern(s). In that regard, except as provided below, review of the underlying nuclear safety concern(s) would not include review of the reprisal aspect of a case.
- c. Subject to the exceptions set forth below, the Director will await the completion of the IG investigation of the whistleblower reprisal complaint. Additionally, DOE would wait for the results of any subsequent adjudication by the Office of Hearings and Appeals, before deciding whether to initiate PAAA enforcement action against a contractor for alleged acts of reprisal against contractor employees in violation of the Part 708 Whistleblower Rule.
- d. In determining whether to initiate a PAAA enforcement action, the Director will review the whistleblower report of investigation and the adjudicatory record to determine if an adequate basis exists to take PAAA enforcement action, or whether additional investigation and development of evidence is required.
- e. Notwithstanding the status of the whistleblower reprisal complaint, in egregious cases the Director may, at his discretion, proceed with a safety investigation which includes review of the allegations of reprisal. Such egregious cases would include (1) cases involving credible allegations alleging willful or intentional violations of DOE nuclear safety rules, regulations, orders or Federal statutes which, if proven, would require criminal referrals to DOJ for prosecutorial review; or (2) cases involving significant public health and safety implications, e.g., the allegations of reprisal suggest widespread managerial involvement and require immediate action or involve clear examples of high level management involvement in the retaliatory act.

- f. **The Director retains the option of initiating a safety investigation including review of any allegations of reprisal in the following cases:**
- (1) When the whistleblower reprisal complaint fails for procedural reasons and cannot be brought under the rule;**
  - (2) When the whistleblower reprisal complaint is settled before the whistleblower investigation has been completed; and**
  - (3) When the whistleblower investigation concludes that retaliation occurred but the case is settled and no adjudicatory hearing is completed.**
- g. **When reprisal issues are intended to be included in investigatory activity by the Office of Enforcement and Investigation, the IG will be advised and will be kept apprised of the status of the case.**

#### **5.4. Accuracy of Information**

**Guidance on treatment of violations involving erroneous information is found in Section X of the Enforcement Policy. Normally, citations for failure to provide complete and accurate information are made with reference to the applicable DOE nuclear safety regulation. Citations may also be made with reference to the information requirements of 10 CFR 820.11. For egregious cases involving willfulness, an adjustment to the severity level should be considered for action (see Section 5.5.).**

#### **5.5. Willful Violations**

**Violations involving gross negligence, deception or willfulness are treated more seriously, and would likely be escalated in severity level. Willful violations are of particular concern because the DOE enforcement program is based on encouraging DOE contractors to communicate with candor and openness. DOE contractors are expected to implement significant remedial measures in responding to willful violations in order to demonstrate recognition of the importance of the violation and to deter future willful violations. It should be clear that contractors are held accountable for the conduct of their employees.**

**Under the Enforcement Policy, a civil penalty is normally proposed for willful violations at any severity level. Every case involving a willful violation should be considered for an action, and may require referral to DOJ for consideration of criminal sanctions. Willful violations at any severity level are unacceptable and will not be tolerated. These violations are significant in themselves. Even if a violation could be considered for enforcement discretion, in general, a PNOV and Civil Penalty will be issued for willful violations.**

Cases involving a violation in which a contractor should have been aware of the requirements will not in itself necessarily represent a willful violation. However, as an example, if prior to taking the action, the contractor (through its employees) is informed or made aware that the action about to be taken would violate a nuclear safety requirement, plan or procedure, and the contractor proceeded to take action without appropriate approvals, then the case would be considered a willful violation. Evidence that the contractor had prior warning can include documented notes or correspondence, as well as testimonial input such as interviews subsequent to the event. Another example of willfulness is intentional destruction of records. Each case involving a potential willful violation will be considered individually with respect to the unique facts associated with that case.

#### **5.6. Nuclear Safety Activities**

Enforcement action is not limited to work inside nuclear or radiological facilities. Nuclear safety requirements may apply to work anywhere, including (1) outside a nuclear facility, but related to the facility, such as design work performed offsite for a nuclear facility, work on or in the vicinity of safety features located outside the nuclear facility, or modification work that can impact the safe operation of the nuclear facility; or (2) activities involving radiological material outside a radiological facility (e.g., material "found" outside any currently designated radiological facility). The key consideration is the extent to which the activity is related to nuclear safety. Thus applicability of the rules cannot be limited to specific safety hardware or buildings. For example, the fabrication of certain pumps might take place outside a physical structure identified as a nuclear facility or even offsite, but the work could be a nuclear activity. Where nuclear safety requirements are not met for such activities, DOE may take enforcement action for violations involving these activities.

#### **5.7. DOE Employee Liability**

The civil penalty provisions of the PAAA and 10 CFR 820 apply to DOE contractors, and in some cases DOE subcontractors and suppliers. DOE employees do not have any liability under the PAAA for civil penalties, and the PAAA does not place any liability on government employees.

Employee responsibility originates with DOE's internal personnel requirements and other federal statutes. Part 820 does not establish an independent responsibility for DOE to refer matters potentially involving criminal actions to DOJ, but simply notes DOE's obligations to do so under other federal statutes.

#### **5.8. Contractor Transition**

DOE's sites or facilities will from time to time transition management and operations responsibility to a different contractor, and appropriate planning and

transition for compliance with DOE nuclear safety requirements is required. The process of transition will normally include a period of review and due-diligence on the part of the incoming contractor. DOE's expectation is that the present contractor will have responsibility for compliance with DOE nuclear safety requirements during the period of their contract, including up to the date of turn-over to the new contractor. DOE could pursue enforcement action with the present contractor for any cases of noncompliance that occurred during the period of their contract.

The incoming contractor is expected to assume full responsibility for safe operation and compliance with DOE nuclear safety requirements on the date they assume contract responsibility for the site or facility. This responsibility includes compliance with any implementation and program plans associated with nuclear safety requirements, as well as implementing policies, procedures, documents and controls. The incoming contractor is expected to identify during their due-diligence review any issues of compliance with DOE nuclear safety requirements, including implementation plans and programs. These issues must be addressed and resolved with the appropriate DOE Operations and Program Office management prior to assuming responsibility for management and operation of the site or facility.

DOE intends to exercise reasonable discretion in considering noncompliance issues that surface in the near term after the incoming contractor assumes responsibility, and that could not have reasonably been identified during the due-diligence period. DOE will generally forego enforcement action during this early, near term period if the contractor, upon identifying the condition, appropriately reports to DOE and responds with timely and effective corrective actions.