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**OFFICE OF  
THE INSPECTOR GENERAL  
U.S. NUCLEAR  
REGULATORY COMMISSION**

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Special Evaluation of the Office of Investigations=  
Role in Alleged Discrimination Cases

OIG-04-A-18 August 26, 2004

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**SPECIAL EVALUATION**

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August 26, 2004

MEMORANDUM TO: Luis A. Reyes  
Executive Director for Operations

FROM: Stephen D. Dingbaum/**RA**  
Assistant Inspector General for Audits

SUBJECT: SPECIAL EVALUATION OF THE OFFICE OF  
INVESTIGATIONS' ROLE IN ALLEGED DISCRIMINATION  
CASES (OIG-04-A-18)

Attached is the Office of the Inspector General's audit report titled, *Special Evaluation Of The Office Of Investigations' Role In Alleged Discrimination Cases*.

The report reflects the results of our special evaluation to assess the role of the Office of Investigations (OI) in alleged discrimination cases. We found that overall stakeholders do not have an issue with OI's methods and techniques but question whether criminal investigations are needed for all potential discrimination cases.

NRC had planned to hire a contractor to examine OI's procedures and techniques for conducting alleged discrimination investigations. Such an action would have been unnecessary and costly. The agency could have spent as much as \$330,000 for a product of questionable value. NRC ultimately decided to terminate the proposed procurement.

This report makes three recommendations to address the issues identified.

Comments provided at the August 11, 2004, exit conference have been incorporated, as appropriate, in our final report.

If you have any questions or wish to discuss this report, please call me at 415-5915 or Tony Lipuma at 415-5910.

Attachment: As stated

cc: W. Dean, OEDO

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## **EXECUTIVE SUMMARY**

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### **BACKGROUND**

The U.S. Nuclear Regulatory Commission (NRC) is responsible for ensuring that civilian uses of nuclear power and materials in the United States are carried out with adequate protection of the public health and safety, the environment, and national security.

While NRC is directly responsible for monitoring civilian uses of nuclear material and waste, it is physically impossible for NRC inspections to detect all health and safety issues. For this reason, it is critical that nuclear industry employees feel free to raise health and safety concerns without fear of retribution.

If fear of retaliation kept workers from speaking out about possible hazards, nuclear safety would be jeopardized. As such, NRC's statutory and regulatory scheme provides for civil and criminal sanctions that are designed to encourage licensee employees, also known as whistleblowers, to report unsafe practices to their management or the NRC without fear of retribution or discrimination in the workplace.

On June 27, 1982, NRC established the Office of Investigations (OI) as part of an agency effort to improve the quality of its investigative work and to serve NRC's overall mission. OI is generally responsible for conducting investigations of allegations of wrongdoing by licensees, applicants and their contractors and vendors. The Atomic Energy Act of 1954, as amended, provides that certain conduct is subject to criminal as well as civil sanctions (including conduct related to employee discrimination). The methods and techniques employed by OI are fundamentally the same, regardless of whether in the end, the matter is subject to civil sanctions - for example, a civil penalty - or is referred to the Department of Justice for consideration of criminal prosecution. OI supports the agency's overall safety mission by ensuring that allegations of suspected wrongdoing by licensees are thoroughly, objectively, and independently investigated.

### **PURPOSE**

The purpose of this evaluation was to determine if OI's methods and techniques in addressing allegations of licensee discrimination were appropriate for the resolution of discrimination complaints.

### **RESULTS IN BRIEF**

Credible investigations into allegations of intentional discrimination are essential in ensuring that NRC continues to meet its safety mission through its regulatory process. Stakeholders agree that OI has a role in this process,

but do not believe that NRC, and thereby OI, should investigate all potential discrimination cases. Industry stakeholders assert that the threshold for initiating an OI investigation is too low, whereas whistleblower stakeholders believe that it would be detrimental if the threshold was raised. Overall, the stakeholders do not have an issue with OI's methods and techniques.

NRC is implementing an interim enforcement policy to use Alternative Dispute Resolution in the enforcement program for discrimination and other wrongdoing cases, and NRC senior officials hope the new process will address some of the stakeholders' concerns about investigations of alleged discrimination. Public commentors are supportive of the policy, and the agency plans to reevaluate its effectiveness after about 6 months to 1 year.

NRC had planned to hire a contractor to examine OI's procedures and techniques for conducting alleged discrimination investigations. Such an action would have been unnecessary and costly. The agency could have spent as much as \$330,000 for a product of questionable value. OI's methods and techniques are not the root cause of industry and whistleblower concerns. Rather, it is the need to use criminal investigations in all discrimination allegations. NRC ultimately decided to terminate the proposed procurement.

#### **RECOMMENDATIONS**

The report makes three recommendations to address OI's role in the allegation review process.

#### **AGENCY COMMENTS**

The Commission and EDO staff provided comments on the report to provide additional information and clarification. We incorporated those comments as appropriate.

## **ABBREVIATIONS AND ACRONYMS**

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ADR	Alternative Dispute Resolution
AEA	Atomic Energy Act of 1954, as amended
ARB	Allegations Review Board
CFR	Code of Federal Regulations
DOL	Department of Labor
MD	Management Directive
NEI	Nuclear Energy Institute
NRC	Nuclear Regulatory Commission
OI	Office of Investigations
OIG	Office of the Inspector General
PCIE	President's Council on Efficiency and Effectiveness

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## TABLE OF CONTENTS

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EXECUTIVE SUMMARY.....	i
ABBREVIATIONS AND ACRONYMS .....	iii
I. BACKGROUND.....	1
II. PURPOSE.....	3
III. FINDINGS .....	4
A. OI'S METHODS AND TECHNIQUES ARE NOT THE ISSUE.....	4
B. CONTRACT TO REVIEW OI'S METHODS AND TECHNIQUES SHOULD NOT BE ISSUED.....	10
C. PEER REVIEWS HELP ENSURE QUALITY INVESTIGATIONS .....	13
IV. CONSOLIDATED LIST OF RECOMMENDATIONS.....	14
V. AGENCY COMMENTS .....	15
APPENDIX	
A. SCOPE AND METHODOLOGY .....	17

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## I. BACKGROUND

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The U.S. Nuclear Regulatory Commission (NRC) is responsible for ensuring that civilian uses of nuclear materials in the United States are carried out with adequate protection of the public health and safety, the environment, and national security. The scope of NRC's responsibility includes regulation of commercial nuclear power reactors; research, test, and training reactors; and major fuel fabrication and production facilities. NRC also issues licenses for medical, academic, and industrial uses of nuclear material. Additionally, NRC has regulatory responsibilities for the transportation, storage, and disposal of nuclear material and waste. And, the agency has a role in combating the proliferation of nuclear material worldwide.

### Raising Safety Concerns Without Fear of Discrimination

While NRC is directly responsible for monitoring civilian uses of nuclear material and waste, it is physically impossible for NRC inspections to detect all health and safety issues. For this reason, it is critical that nuclear industry employees feel free to raise health and safety concerns without fear of retribution. Employees may raise concerns directly to licensee<sup>1</sup> managers or employees or they may choose to bring allegations directly to NRC. An employee generally raises a concern with NRC if he or she is not satisfied with the licensee's resolution of the concern or is not comfortable raising the concern internally. Employees may be discouraged from raising these issues internally if they believe their employer discriminates against those who do so. This phenomenon in the working environment is termed the "chilling effect."

If fear of retaliation kept workers from speaking out about possible hazards, nuclear safety would be jeopardized. As such, NRC's statutory and regulatory scheme provides for civil and criminal sanctions that are designed to encourage licensee employees, also known as whistleblowers, to report unsafe practices to their management or the NRC without fear of retribution or discrimination in the workplace.

### Office of Investigations Established

On June 27, 1982, NRC established the Office of Investigations (OI) as part of an agency effort to improve the quality of its investigative work and to serve NRC's overall mission. Before OI was established, the

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<sup>1</sup>For this report, the term "licensee" includes licensees or applicants for licenses, or their contractors or vendors.

responsibility for investigating allegations of intentional wrongdoing<sup>2</sup> by NRC licensees was assigned to NRC's former Office of Inspection and Enforcement and regional NRC offices. The individuals conducting the investigations from these offices had the appropriate technical expertise, but many had little or no investigative training. Regarding its decision to establish OI, the NRC submitted testimony prepared on August 2, 1988, to the Subcommittee on Energy and Power, Committee on Energy and Commerce, U.S. House of Representatives. Following is an excerpt from that testimony –

The primary purpose for creating OI was to establish an office of competent, trained investigators to develop information relevant to NRC's licensing and regulatory determinations. OI performs its assigned function by providing investigative facts relevant to whether there has been intentional or willful violation of NRC requirements. This provides important factual input which helps shape the ultimate licensing and enforcement decisions the agency makes. Therefore, the Commission considers the investigative function to be a key and integral part of an effective regulatory process, and OI to be an essential NRC office.

OI's responsibilities, and consequently the investigations it undertakes, are not confined to so-called "criminal" investigations. Rather, OI is generally responsible for conducting investigations of allegations of wrongdoing by licensees, applicants, and their contractors and vendors. The Atomic Energy Act (AEA) of 1954, as amended, provides that certain conduct is subject to criminal as well as civil sanctions (including conduct related to employee discrimination). The methods and techniques employed by OI are fundamentally the same, regardless of whether in the end, the matter is subject to civil sanctions - for example, a civil penalty - or is referred to the Department of Justice for consideration of criminal prosecution. The methods and techniques employed bring a level of rigor and quality to OI's product that is in keeping with the agency's overall enforcement process. The issues underlying the conduct of an OI investigation are rooted in the health and safety purposes of the AEA, not the employee protection and redress issues of interest under Section 211 of the Energy Reorganization Act.

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<sup>2</sup> Wrongdoing is either (a) an intentional violation of regulatory requirements or (b) a violation resulting from careless disregard of or reckless indifference to regulatory requirements, or both.

Organizationally, OI currently reports directly to NRC's Deputy Executive Director for Reactor Programs, Office of the Executive Director for Operations. In fiscal year 2003, OI had on average 31 criminal investigators and 8 operational support staff at its NRC headquarters facility in Rockville, Maryland, and its four regionally based Field Offices.

### Criminal Investigators

OI's investigators are classified as criminal investigators (GG-1811) and have on average 16 years of Federal law enforcement experience. By Office of Personnel Management standards, Federal criminal investigators focus on investigating alleged or suspected violations of criminal law. This work primarily requires a knowledge of 1) the laws of evidence, 2) the rules of criminal procedure, 3) precedent court decisions, and 4) the application of investigative techniques. While there is a wide range of work assignments throughout the Federal Government for criminal investigators, there is a common application of several investigative techniques, such as:

- Interviewing or interrogating suspects and witnesses.
- Searching for physical or documentary evidence or clues.
- Preparing reports of investigations.

OI supports the agency's overall safety mission by ensuring that allegations of suspected wrongdoing by licensees are thoroughly, objectively, and independently investigated. When OI concludes an investigation and issues an investigative report substantiating licensee wrongdoing, an NRC enforcement panel reviews the report and associated evidence to determine if the information is sufficient to conclude that wrongdoing occurred and to continue with the enforcement process. The panel consists of both staff and management representatives from the region, the program office,<sup>3</sup> Office of Enforcement, Office of the General Counsel, and OI.

## **II. PURPOSE**

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The purpose of this evaluation was to determine if OI's methods and techniques in addressing allegations of licensee discrimination were appropriate for the resolution of discrimination complaints. See Appendix A for more details on the scope and methodology of this evaluation.

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<sup>3</sup> Office of Nuclear Reactor Regulation or Office of Nuclear Material Safety and Safeguards.

### **III. FINDINGS**

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By statutory provision, NRC has broad authority to establish standards as necessary to protect the public health and safety – including the prohibition of discrimination against whistleblowers. The statute also provides for criminal sanctions for willful violation of, attempted violation of, or conspiracy to discriminate against any worker because the worker brought forward safety concerns. To fulfill its responsibilities, NRC employs OI to investigate allegations of discrimination. OI follows the President's Council on Integrity and Efficiency guidelines in conducting its investigations. Although stakeholders have raised concerns about OI's involvement in the process, their concern is not with OI's methods and techniques. Instead, stakeholders are concerned about the use of criminal investigations for all discrimination cases. However, NRC plans to issue a contract to assess OI's methods and techniques. Such a contract is unnecessary and costly.

#### **A. OI'S METHODS AND TECHNIQUES ARE NOT THE ISSUE**

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The legal basis for prohibition of discrimination against whistleblowers is well established through the AEA, as amended, and it is NRC's responsibility to protect employees from discrimination and retaliation for raising concerns bearing on nuclear safety. To accomplish this task, NRC directs OI to investigate allegations of discrimination when they are received from licensee employees. However, internal and external stakeholders have expressed concerns about OI's involvement in these cases. Stakeholders' concerns include the routine need for criminal investigations in what often may be no more than employment related disputes.

##### **Criminal Sanctions and Prosecution**

The AEA, as amended, established the legal basis for NRC's prohibition of discrimination against whistleblowers. While the AEA gives NRC broad authority to establish standards as necessary to protect the public health and safety, it provides no specific provisions dealing with employee protection.

In 1978, Congress enacted section 210 of the Energy Reorganization Act of 1974 to address personal remedies for employees who had been subjected to discrimination for reporting safety concerns. Section 210 eventually became section 211 and provides a remedy to victims of discrimination through a process administered by the Department of Labor (DOL). DOL was given the authority to investigate an alleged act of

discrimination thereby affording a remedy to the individual should the allegation prove true. However, DOL's new authority did not, in any way, abridge NRC's authority to, without delay, investigate alleged discrimination and take appropriate action against the licensee-employer.

Thereafter, in 1982, Title 10, Code of Federal Regulations (CFR), subsection (§) 50.7<sup>4</sup> was promulgated to specify that no licensee shall discriminate against any worker because the worker brought forward safety concerns. Further, 10 CFR § 50.111 notes that the AEA, as amended, provides for criminal sanctions for willful violation of, attempted violation of, or conspiracy to violate 50.7.

NRC and DOL have complementary, yet independent authorities and responsibilities in protecting employees from discrimination and retaliation for raising concerns bearing on nuclear safety (see Figure 1). DOL is empowered to grant remedies directly to employees who have suffered discrimination. NRC's role is to determine whether a licensee has intentionally violated NRC's regulations regarding whistleblower protection and whether the licensee's employment practices are having a chilling effect on would-be whistleblowers. NRC has the authority take action against the employer and to do so immediately.

**Figure 1**

<b>NRC and DOL Complementary Roles In Discrimination Cases</b>	
<b>NRC</b>	<b>DOL</b>
Employee files complaint with NRC.	Employee files complaint with DOL.
Investigates (if appropriate) using criminal investigators.	Investigates (if appropriate) using non-criminal investigators.
Makes discrimination determination.	Makes discrimination determination.
Takes enforcement action against <u>employer</u> (if appropriate) to correct the safety and discrimination issue.	Takes action to reinstate and get back pay for <u>employee</u> (if appropriate).
Refers potential criminal issues to the Department of Justice.	No comparable authority.

<sup>4</sup> To cover all aspects of NRC's regulations, the Commission promulgated identical employee protection regulations in Parts 30, 40, 50, 60, 70, and 72. Part 50 (i.e., §50.7 and §50.111), which covers nuclear power plants and certain fuel processing plants, is used as an example in this report.

**Handling Allegations Through NRC’s Allegation Process**

Individuals may bring safety concerns directly to NRC at any time and it is the agency’s responsibility to respond to those concerns in a timely manner. Upon receipt of an allegation, NRC follows specific actions per its Management Directive and Handbook 8.8, *Management of Allegations* (MD 8.8). The process essentially begins with an allegations review board (ARB) meeting consisting of NRC officials such as representatives from the Office of the General Counsel or regional counsel, OI, and the Office of Enforcement. At the initial ARB meeting, the ARB assigns a priority for an OI investigation. For both high and normal priority discrimination cases, OI will 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. After OI obtains this information, the ARB reconvenes and determines if the investigation should be deferred<sup>5</sup> or if OI should proceed with a full investigation. The table in Figure 2 outlines these major steps.

**Figure 2**

Step 1	Step 2	Step 3	Step 4
Initial ARB meeting:  Initial priority assigned	OI performs initial alleged interview  Staff reviews OI transcript of interview and other information gathered by OI	Second ARB meeting:  Evaluation of allegation in relation to licensee history, trends, and other information identified by OI or elsewhere	- Case deferred pending results of DOL process  - OI proceeds with independent full investigation  - Supplementary action proposed considering overall licensee performance

By direction of the ARB, OI conducts investigations regarding allegations that licensee officials have sought to harass and/or intimidate workers for raising safety concerns. OI normally opens investigations based on the ARB’s determination that a prima facie<sup>6</sup> showing of discrimination has been articulated. As such, OI has initiated investigations on about 67 percent of the discrimination allegations received by NRC from 1996 to 2002.<sup>7</sup>

<sup>5</sup> An investigation may be deferred for high or normal priority discrimination cases in which DOL is already pursuing an investigation.

<sup>6</sup> Prima facie evidence is evidence that would, if uncontested, establish a fact or raise a presumption of a fact.

<sup>7</sup> Data from Discrimination Task Group Report issued April 2002.

## **Stakeholder Concerns**

Stakeholders generally agree that OI has an investigative role in some allegations of discrimination. Furthermore, whistleblower stakeholders stated that without OI in the process there would be little deterrence from whistleblower discrimination, taking away an avenue for whistleblowers to express their concerns. Industry stakeholders have commented that the threshold for initiating an OI investigation is far too low, yet whistleblower stakeholders believe that if the threshold is raised, it will result in fewer individuals coming forward with issues. The key, however, is to ensure that NRC's process ensures the free flow of information from employees about potential safety concerns.

### **Industry Stakeholder Concerns with OI Investigations**

The Nuclear Energy Institute (NEI) has expressed concerns about NRC investigations of discrimination allegations. During a December 2003 OIG interview, NEI officials opined that OI's interviews are heavy-handed, stressful, and further polarize the parties involved in an investigation of alleged discrimination. NEI did not provide specific examples of the heavy-handed techniques to which they alluded. NEI's major concern, however, was not the investigative techniques, but whether criminal investigations are even needed when addressing allegations of discrimination. In a letter to the NRC Chairman dated May 23, 2003, NEI's President/Chief Executive Officer suggested that an independent assessment of OI "focus on the effectiveness of using criminal investigative techniques to evaluate facts involved in what is, in essence, an employment-related dispute. It should not evaluate whether OI's techniques are established techniques appropriate for criminal investigations." (emphasis added)

Morgan, Lewis & Bockius, LLP, a law firm for the nuclear industry, is another stakeholder that expressed concerns to the NRC. On December 18, 2000<sup>8</sup>, the firm advised NRC that it had issues concerning NRC's allegation review process and the role OI should play in that process. In a June 2004 discussion with OIG and again in a July 2004 letter, an official from the firm reiterated the same concerns stating that his issues with the allegation process have nothing to do with OI -- but with NRC's involvement in investigating discrimination issues. He noted that OI is a professional organization using traditionally well-accepted criminal investigative techniques – the issue is not OI's investigative methods and techniques.

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<sup>8</sup> Letter from Jay M. Gutierrez to Richard W. Borchardt, Director, Office of Enforcement, dated December 18, 2000.

### **Whistleblower Stakeholder Concerns with OI Investigations**

In December 2003, a representative from the Union of Concerned Scientists met with OIG to discuss NRC's allegation review process and OI's role in that process. The representative suggested ways to improve the allegation review process. However, he did not mention OI investigative methods and techniques and did not suggest that OI interviews were conducted inappropriately.

Clifford, Lyons & Garde, a law firm representing whistleblowers, is also a stakeholder that expressed concerns to NRC on at least two occasions. A representative of the firm provided written comments to NRC on December 28, 2000, and testimony to the NRC Commission on December 17, 2002. In the written comments,<sup>9</sup> the firm advised NRC that "intervention and investigation by the Office of Investigation[s] (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." During Commission testimony, the same representative noted concerns with the impact of a criminal investigation and the potential results of an OI investigation (i.e., someone is found guilty). This stakeholder did not address OI's investigative methods and techniques as a concern in either communication with the agency.

### **Senior NRC Officials' Concerns with OI Investigations**

NRC Commissioners advised OIG that through a staff requirements memorandum, they were seeking to know whether there were alternative and better ways to conduct investigations of alleged discrimination and to serve the needs of the agency, hopefully without the perceived stress and angst of the present process. The staff requirements memorandum was issued in response to a recommendation from NRC's Discrimination Task Group. Based on stakeholder comments, the Task Group recommended a review of OI's investigative techniques.

During OIG's discussion with one Commissioner, OIG pointed out that investigative standards require that investigations be fair and objective. The Commissioner advised that he did not hear stakeholders say that being treated fairly and objectively was an issue. He is, however, looking for a more sensitive approach to conducting investigations of alleged discrimination. The Commissioner said that some OI investigators come to NRC having dealt with significant criminal figures and now they are put in an atmosphere of interviewing white-collar managers and/or the person making the allegation of discrimination. Further, the Commissioner's assistant noted that people get nervous when OI has its interviews

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<sup>9</sup> Letter from Billie Pirner Garde to Bill Borchardt, Director, Office of Enforcement, dated December 28, 2000.

transcribed. Prior to meeting with OIG, the Commissioner's assistant was not aware that the Office of Enforcement and the Office of the General Counsel urge OI to transcribe its interviews.

### **Alternative Dispute Resolution**

NRC is implementing an interim enforcement policy regarding the use of Alternative Dispute Resolution (ADR) in the enforcement program for discrimination and other wrongdoing cases. The policy is outlined in a Federal Register Notice dated August 13, 2004.

ADR is a term that refers to a number of processes, such as mediation and facilitated dialogues, that can be used to assist parties in resolving disputes. ADR techniques involve using a skilled third party neutral, and most are voluntary processes in terms of the decision to participate, the type of process used, and the content of the final agreement. Federal agency experience with ADR has demonstrated that the use of ADR can result in more timely and economical resolution of issues, more effective outcomes, and improved relationships.

NRC's interim policy consists of a pilot program that will use ADR for cases involving (1) alleged discrimination for engaging in protected activity prior to an NRC investigation (Early ADR); and, (2) both discrimination and other wrongdoing after OI has completed an investigation. If an ARB determines a prima facie case exists, the ARB will normally recommend the parties be offered the opportunity to use Early ADR.

Senior NRC officials believe that the pilot ADR process may address some of the concerns that stakeholders expressed about investigations of alleged discrimination. The August 13, 2004, Federal Register Notice stated that all commentors (power reactor licensees or representatives of power reactor licensees) supported the policy and provided comments for clarification or for consideration after the program has operated for a period of time. A senior NRC official told OIG that the agency would reevaluate the ADR and allegation processes after the pilot program has been in effect for about 6 months to 1 year.

### **Summary**

Credible investigations into allegations of intentional discrimination are essential in ensuring that NRC continues to meet its safety mission through its regulatory process. OI is tasked by the ARB to conduct an investigation after the ARB determines that a prima facie showing of discrimination has been articulated. Stakeholders agree that OI has a role in this process, but do not believe that NRC, and thereby OI, should investigate all potential discrimination cases. Industry stakeholders assert that the threshold for initiating an OI investigation is too low, whereas

whistleblower stakeholders believe that it would be detrimental if the threshold was raised. Overall, the stakeholders do not have an issue with OI's methods and techniques.

NRC is implementing an interim enforcement policy to use ADR in the enforcement program for discrimination and other wrongdoing cases, and NRC senior officials hope the new process will address some of the stakeholders' concerns about investigations of alleged discrimination. Public commentators are supportive of the policy, and the agency plans to reevaluate its effectiveness after about 6 months to 1 year.

### **RECOMMENDATION**

OIG recommends that the Executive Director for Operations –

1. Reevaluate ADR's effectiveness and its impact on perceptions about NRC's process for investigating discrimination allegations after the pilot program concludes.

## **B. CONTRACT TO REVIEW OI'S METHODS AND TECHNIQUES SHOULD NOT BE ISSUED**

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Based on a recommendation from NRC's Discrimination Task Group and Commission direction, NRC plans to hire a contractor to examine OI's methods and techniques for conducting alleged discrimination investigations. OIG's review determined that OI's methods and techniques are not the issue. The Discrimination Task Group's findings evinced this same conclusion. Therefore, issuing such a contract is unnecessary and costly.

### **Discrimination Task Group Chartered to Identify Stakeholder Concerns**

In April 2000, NRC's Executive Director for Operations chartered a Discrimination Task Group (Task Group) to evaluate NRC's processes for handling licensee discrimination cases. The Task Group issued its report in April 2002 and recommended that OI investigators continue to use appropriate, accepted investigative techniques for the review of discrimination issues. This recommendation was made even in light of the Task Group's finding that some stakeholders believe discrimination cases involving white-collar managers accused of taking subtle employment actions do not warrant the perceived "heavy handed" criminal investigative approach employed by OI. The stakeholders believe that OI's techniques are appropriate for investigations other than those related to discriminatory misconduct.

The Task Group noted that industry stakeholders commented that the NRC investigation/enforcement process is overly stressful. A major contributor to this stress is the fact that individuals found to have deliberately engaged in discrimination are subject to criminal prosecution by the Department of Justice. Industry stakeholders believe that criminal prosecution of these violations would be excessive and inappropriate. The Task Group found it impractical to decriminalize employee protection regulations regarding discrimination – particularly since the criminal treatment is a result of a statutory provision. While the Task Group's findings demonstrate that the issue is not OI's methods and techniques, the Task Group recommended that an assessment be performed of OI's investigative techniques used in discrimination investigations.

As a result of the Task Group's recommendation, in a March 26, 2003, staff requirements memorandum, the Commission directed the staff to perform an assessment of OI's investigative techniques. The staff was directed to –

perform an assessment of the investigative techniques used by the Office of Investigations (OI). In this connection, the Commission understands that DOL generally undertakes its investigations using informal interviews and does not commonly resort to criminal investigative techniques. Although such an evaluation of OI practices might start with a self-assessment, advice from an independent group should also be sought. The independent group should report its recommendations to the Commission through the EDO.

### **NRC's Proposed Contract Will be Costly and of Questionable Value**

To fulfill the Commission's direction, NRC staff issued a request for proposal to hire a contractor to examine OI's procedures and techniques for conducting alleged discrimination investigations. More specifically, the request for proposal states that “. . .NRC is seeking a contractor capable of assessing NRC's investigative procedures, and techniques, and their applications, to determine the intensity of normal investigations, the effects of the interviewing techniques on interviewees, and the effectiveness of those procedures and techniques, and their applications in achieving the Agency's goals.”

The proposed work expects a contractor to review 1) OI's investigative methods, procedures, standards, and techniques and 2) the use of such by three other Federal agencies (e.g., the Department of Labor, the Food and Drug Administration, and Office of the Special Counsel or the

Environmental Protection Agency) for comparison with those of OI. NRC's proposed contract also expects the contractor to interview whistleblower and industry stakeholders. However, these stakeholders have already provided similar information to the agency and have stated that OI's methods and techniques are not the issue.

### **Proposed Contract Does Not Focus on Root Cause**

NRC's proposed contract does not focus on the underlying stakeholder concern, which is using criminal investigations for all discrimination cases. The chairman of the Task Group advised that the number of substantiated cases is low and that the Task Group labored over an appropriate recommendation, finally deciding to recommend a review of OI's methods and techniques. He said that the Task Group was searching for a better way to conduct investigations of alleged discrimination.

### **Agency Action**

In May 2004, OIG informed the agency of concerns about the proposed contract, and the agency decided to suspend contracting action. During an exit conference in August 2004, the agency advised that it had reevaluated the need for the contract and the proposed contracting action was terminated. The agency provided documentation to support the termination.

### **Summary**

NRC's plan to hire a contractor to examine OI's procedures and techniques for conducting alleged discrimination investigations is unnecessary and costly. OI's methods and techniques are not the root cause of industry and whistleblower concerns. Rather, it is the need to use criminal investigations in all discrimination allegations. As a result, the agency may spend as much as \$330,000 for a product of questionable value. [The agency subsequently terminated the proposed contracting action.]

### **RECOMMENDATION**

OIG recommends that the Executive Director for Operations –

2. Terminate the pending procurement action seeking a contractor to conduct an assessment of OI's methods and techniques.  
[Recommendation closed when NRC terminated the Request for Procurement Action.]

### **C. PEER REVIEWS HELP ENSURE QUALITY INVESTIGATIONS**

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During the course of this review, OIG noted that OI conducts annual self-assessments of its four regional offices, but there is no independent review of the overall quality of OI's investigative work. A peer review from another Federal law enforcement organization could help provide assurance about the integrity and quality of OI's investigative operations. The President's Council on Integrity and Efficiency (PCIE) uses a peer review process enabling Federal law enforcement entities within the Inspector General community to conduct independent reviews to ensure compliance with investigative standards. Although OI is not a PCIE member, it does follow PCIE's investigative standards. As such, PCIE would be an excellent resource to consider for an OI peer review. Based on OIG's own observation of the beneficial aspect of undergoing a peer review to assess its operations, a PCIE peer review would be beneficial.

#### **RECOMMENDATION**

OIG recommends that the Executive Director for Operations –

3. Request a PCIE peer review to assess OI's operations.

## **IV. CONSOLIDATED LIST OF RECOMMENDATIONS**

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OIG recommends that the Executive Director for Operations –

1. Reevaluate ADR's effectiveness and its impact on perceptions about NRC's process for investigating discrimination allegations after the pilot program concludes.
2. Terminate the pending procurement action seeking a contractor to conduct an assessment of OI's methods and techniques.  
[Recommendation closed when NRC terminated the Request for Procurement Action].
3. Request a PCIE peer review to assess OI's operations.

## **V. AGENCY COMMENTS**

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At an exit meeting on August 11, 2004, agency staff provided comments on the draft report. We modified the report as we determined appropriate in response to the comments.

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## **SCOPE AND METHODOLOGY**

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The overall objective of this evaluation was to determine if the Office of Investigations' (OI) methods and techniques in addressing allegations of licensee discrimination were appropriate for the resolution of discrimination complaints. This evaluation was a collaborative effort teaming audit and investigative staff.

The scope of this review was limited to OI's involvement in discrimination allegations. In conducting this evaluation, the OIG evaluation team reviewed Commission documents, legislation, legal briefs, and other relevant reports and documentation to gain a historic as well as a current perspective of OI's role in the discrimination review process. The evaluation team also met with the NRC Chairman and Commissioners, the Executive Director for Operations, and internal stakeholders, such as officials from the Office of Investigations, the Office of Enforcement, and the Office of the General Counsel. In addition, the evaluation team garnered input from various external stakeholders, such as officials from the Department of Energy, the Department of Justice, the Department of Labor, the Nuclear Energy Institute, and the Union of Concerned Scientists.

The major contributors to this report were Anthony Lipuma, Team Leader; James Coady, Team Leader; Veronica Bucci, Senior Special Agent; and Sherri Miotla, Audit Manager. This work was conducted from December 2003 through June 2004.