March 26, 2003

COMMISSION VOTING RECORD

DECISION ITEM: SECY-02-0166

TITLE: POLICY OPTIONS AND RECOMMENDATIONS FOR REVISING THE NRC'S PROCESS FOR HANDLING DISCRIMINATION ISSUES

The Commission (with all Commissioners agreeing) disapproved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of March 26, 2003.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

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Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

VOTING SUMMARY - SECY-02-0166

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE		X				1/16/03
COMR. DICUS		X			X	1/2/03
COMR. DIAZ		X			X	3/11/03
COMR. McGAFFIGAN		X			X	3/11/03
COMR. MERRIFIELD		X			X	3/6/03

COMMENT RESOLUTION

In their vote sheets, all Commissioners disapproved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on March 26, 2003.

Commissioner Comments on SECY-02-0166

Chairman Meserve

The Commission has received considerable commentary from stakeholders criticizing its current procedures for handling "discrimination" cases -- cases concerning allegations that workers have been harassed, intimidated or subject to retaliation for raising safety concerns with their employers or with the NRC. As a result, the Executive Director for Operations formed the Discrimination Task Group (DTG), which has recommended a number of changes in the process. The Senior Management Review Team (SMRT), which was established to review the DTG's work, has proposed that the Commission adopt the DTG's recommendations only as an interim step until a rule is developed to regulate the establishment of a safety conscious work environment (SCWE) -- an environment in which workers are encouraged to raise safety-related concerns.

The avoidance of discrimination is a component of a SCWE, just as a SCWE, in turn, is a component of safety culture. Because of the scope and depth of the concerns in this area and the different thrust of the recommendations of the DTG and the SMRT, I shall discuss each of these elements.

1. Safety culture. Although the components of safety culture are somewhat amorphous, there is agreement that the concept includes an organizational commitment to safety at all levels, as well as individual commitment that is manifested in personal accountability, a questioning attitude, and procedural adherence. The importance of an appropriate safety culture in power plants is reflected in the recurrent finding that failures in safety culture are at the root of problems at plants in difficulty. The recent inspections associated with the vessel-head degradation at the Davis-Besse Plant are consistent with the theme: they show a degraded safety culture as a fundamental cause of the problem. See Davis-Besse Reactor Vessel Head Degradation Lessons-Learned Task Force Report, 60-64 (Sept. 30, 2002).

The Commission in the past has chosen not to undertake the direct regulation of safety culture.[1] The reasons for the Commission's reluctance stem from the recognition that any attempt to evaluate safety culture is necessarily subjective, would intrude on management practices that should be the responsibility of the licensee, would stifle licensee initiative, and might even be unnecessary given the steadily improving safety performance of the industry.[2] Indeed, there is a certain inefficiency in creating a regulatory system to address safety culture

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[1] Various measures of some of the components of safety culture are a part of routine inspection -- such as the evaluation of a licensee's corrective action program. Moreover, the supplemental inspections that occur when a significant problem is detected can include examination of safety culture if safety culture is an underlying cause of the problem. Thus, the Commission does regulate various aspects of safety culture and does explore it in detail when the circumstances warrant. Nonetheless, we have not established broad regulatory requirements directed at safety culture per se.

[2] These justifications are explored in greater depth in my remarks at the 2002 INPO CEO Conference in Atlanta Georgia on November 8, 2002. These statements may be found at http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2002/s-02-033.html.

when such regulation is believed to be unnecessary for most plants. In any event, neither the staff nor any other stakeholder has suggested that we revisit this conclusion and intrude in this broad area.

Although I concur that the arguments against direct and routine regulation of safety culture remain persuasive, I am concerned by the fact that inadequacies in safety culture are a recurrent issue at troubled plants. Some means to encourage an appropriate safety culture should be developed, even if outside a regulatory framework. I thus commend the efforts by the Institute of Nuclear Power Operations (INPO) to address issues relating to safety culture through its monitoring of licensees. In addition, in light of the efforts by foreign regulators to measure and regulate safety culture, the staff should monitor developments abroad so as to ensure that the Commission remains informed about these efforts and their effectiveness. In particular, because subjectivity is a principal objection to the direct regulation of safety culture, the staff should also monitor efforts to develop objective measures that serve as indicators of possible problems with safety culture.

2. SCWE. The SMRT recommends that the NRC develop a regulation for oversight of a SCWE over a period of years, with a transitional program to improve effectiveness and efficiency in the handling of discrimination complaints in the interim. Its major justification for this approach is that it would enable the NRC to be "pro-active" through the imposition of an affirmative requirement on licensees to develop and implement SCWE programs, rather than reactive through its current program of investigation of discrimination claims.

Although the SMRT's aspirations are commendable, the concerns that have caused the Commission to reject the direct regulation of safety culture apply with full force to the proposal to regulate a SCWE. The staff expresses the view that objective and appropriate means for regulation of a SCWE could be developed during the course of the rulemaking, but there is little concrete basis to conclude that the staff's efforts will be successful at this juncture. Accordingly, I conclude that the SMRT's recommended option should be rejected.

Nonetheless, efforts to accomplish the SMRT's goal of encouraging a SCWE could be furthered by building on the Commission's 1996 policy on the subject. "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," 61 Fed. Reg. 24,336 (May 14, 1996). In this connection, the staff should pursue a suggestion advanced by the representative of the nuclear industry at the recent Commission meeting concerning the policy issues now before the Commission. The NEI representative stated:

> The NRC, industry, and other stakeholders may find common ground by focusing on practical programs, processes and performance measures that have been used to improve the work environment. . . . The results of such an effort could be made part of or otherwise supplement the current NRC policy statement encouraging licensees to maintain a safety conscious work environment.[3]

Although such an action would not have the full force of a regulation, it might serve to encourage an appropriate industry response to the concerns prompting the SMRT's recommendation. Accordingly, I endorse the suggestion that the staff develop guidance that would identify best practices to encourage a SCWE.

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[3] Briefing on Policy Options for Revision NRC's Process for Handling Discrimination Issues (Remarks of R.E. Beedle, Nuclear Energy Institute) at 6 (Dec. 17, 2002).

3. Discrimination. The Discrimination Task Group (DTG) developed a series of recommendations for the improvement of the process for handling discrimination claims, most of which were endorsed by the SMRT. At the outset, however, there is the question of whether the NRC should continue to pursue the investigation of individual discrimination claims.

The principal argument against an NRC role is that NRC involvement is redundant and unnecessary: other federal agencies refer such matters for resolution by the Department of Labor (DOL).[4] It may be claimed as well that vigorous scrutiny is unwarranted because discrimination does not appear to be a prevalent problem; in recent years, only 5 to 10 percent of discrimination investigations result in enforcement actions. DTG Report at 14 (Att. 1 to SECY-02-0166). Moreover, if the efforts to enhance a SCWE environment are successful, these figures should diminish further.

Although these arguments have considerable force, I am reluctant to jettison the NRC's scrutiny of discrimination matters. Although protection of whistleblowers may be only a small aspect of safety culture, these protections are uniquely important because of the central role of open communications within licensee organizations and with the NRC in ensuring that safety issues are addressed and resolved. Absent freedom of employees to discuss concerns without the threat of retaliation, an important window into licensee performance might be closed. And, although the incidences of discrimination may be rare, they can be uniquely important when they are substantiated. The Commission's experience with the difficulties at Millstone demonstrates that the NRC should not lightly eliminate its regulatory oversight in this area. See Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of Millstone Station Employees' Safety Concerns, 61 Fed. Reg. 58,253, 58,254 (1996). See also Millstone Independent Review Group--Handling of Employee Concerns and Allegations at Millstone Nuclear Power Station, Units 1,2, and 3, at 23-30 (Sept. 1996).

Nonetheless, efforts to reform the process to ensure more prompt, fair, and accurate resolution of discrimination complaints are warranted. As a general matter, the various recommendations of the DTG, as revised by the SMRT, are an appropriate step in this direction.

I have comments, however, on a several individual items:

- Both the DTG and SMRT recommend that the threshold for independent investigation of discrimination complaints be raised so that only those allegations that raise concerns of Security Level III or above are investigated, with other allegations of lesser significance to be referred to the licensee for action with the whistleblowers' consent. Although I agree with this suggestion, it might be most appropriate to defer to a licensee only in circumstances in which the licensee has established an appropriate employee concerns program consistent with the 1996

[4] Section 211 of the Energy Reorganization Act authorizes the Department of Labor to provide a personal remedy to an employee who has been subject to discrimination at NRC licensed facilities. The NRC, which does not have authority to provide a personal remedy, has exercised jurisdiction over these same claims so as to ensure that employees are free to raise safety issues without fear of retaliation. See Union Electric Company (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 133-39 (1979). NRC exercises this authority as an aspect of its general authority to ensure adequate protection of the public health and safety.

policy. See 61 Fed. Reg. at 24,338. The opportunity for deferral would establish the incentives for a licensee to follow the SCWE policy and any guidance.

! The Commission has heard convincing testimony as to the value of training of management as to its obligations under the employee protection regulations. Tr. of Dec 17, 2002 Meeting, 82-83, 105-106, 132 (testimony of Billie Garde, Clifford, Lyons & Garde). The proposed guidance to licensees associated with encouragement of a SCWE might appropriately emphasize such training and provide information as to its recommended content.

! Given the fact that substantiated discrimination cases are rare, the NRC should reduce its regulatory footprint in the investigation of allegations. Aggressive and intrusive investigatory techniques should be imposed when the circumstances warrant them, not as a matter course. I thus support an assessment of the investigative techniques used by the Office of Investigations (OI). In this connection, I understand that DOL generally undertakes its investigations using informal interviews and does not commonly resort to criminal investigative techniques. Although the evaluation of OI practices might start with a self-assessment, advice from an independent group should also be sought.

! Alternative Dispute Resolution (ADR) is an important tool that is now used for the resolution of all sorts of disputes in an efficient and expeditious manner. It should be employed in the resolution of discrimination cases as well. The DTG's recommendation for continued evaluation of ADR is acceptable, but the effort should be aimed at ensuring that ADR is a real and meaningful option.

! I agree with the DTG that centralizing the enforcement process for discrimination cases is likely to lead to a more consistent, timely, and effective process, with a core group of staff members familiar with both the legal and factual issues involved in discrimination cases. Of course, the headquarters group should consult closely with the relevant Region.

! The DTG recommends that individuals issued notices of violation (NOV) for deliberate violations of our employee protection regulations should not be afforded a right to a hearing unless an Order is issued. See SECY-02-0166, Att. 1 at 64. I understand that due process considerations do not require that an individual be offered a hearing where no direct action against that individual is contemplated. See Paul v. Davis, 424 U.S. 693 (1976). Nonetheless, the DTG acknowledges that issuance of an NOV "may affect an individual's reputation and indirectly the ability to earn a living." SECY-02-0166, Att. 1 at 63. There is therefore unfairness in not permitting an individual the right to challenge the issuance of the NOV before a neutral third party. The staff should fully explore the policy and resource implications of providing hearing rights (either formal or informal) to individuals subject to a NOV in connection with violations of the employee protection regulations. My proposal in this matter is not intended to discourage NOVs against individuals where warranted.

! I disagree with the DTG's recommendation to resequence the enforcement conference so as to hold such a conference after the issuance of a proposed enforcement action. The DTG justifies this recommendation by claiming

resequencing will improve the timeliness of enforcement actions. Id. at 79. Although there may be delays associated with a predecisional enforcement conference (PEC), the benefits of holding a PEC are sufficient to justify the cost. A PEC provides an opportunity for the staff to gain new information and insights before a decision concerning enforcement action has been formalized. The PEC thus helps to ensure that an enforcement action is appropriate. See id. at 78. Staff should explore other options to facilitate the timely scheduling of PECs and to minimize delays.

- I agree with the DTG's recommendation that the OI report, with appropriate redactions and without the supporting documentation, should be provided to the participants before the PEC. See id. at 61. Such Information should be exchanged so the PEC is productive in crystallizing issues and removing misunderstandings.

- I agree with the DTG's recommendation to eliminate deferral of the NRC's investigation of complaints where both the NRC and DOL are investigating the same case. See id. at 72. There are a relatively small number of cases in which there is both a DOL and an NRC investigation and deferral can needlessly delay, and thereby compromise, an NRC investigation. While the industry raises the concern that parallel investigations may yield inconsistent results,[5] the NRC can always modify its findings in light of a significant DOL determination.

The various streamlining recommendations of the DTG, as modified by the SMRT and the comments above, should serve to modify the discrimination requirements in a productive way.[6]

The reports by the DTG and the SMRT clearly reflect an enormous amount work. The efforts by the DTG and the SMRT are appreciated.

Commissioner Dicus

I wish to commend the staff, both those who served on the discrimination task force and those who served on the Senior Management Review Team, for their efforts in this area. I also wish to thank the stakeholders who participated in the discrimination task force activities and the Commission Meeting on December 17, 2002. SECY-02-0166 represents the culmination of what was obviously a great deal of thought and labor which would not have been possible without the earnest effort and participation by both the staff and our stakeholders.

As was exhibited at the Commission Meeting, the subject of how the NRC handles discrimination issues elicits strong emotions from all parties, as well it should. The ability of workers in the nuclear arena to raise nuclear safety issues without reprimand, both to their

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[5] Attachment to Letter to B. Westreich from R.E. Beedle at 5 (Aug. 17,2001).

[6] I am not commenting on issues relating to the appropriate legal standards to apply to discrimination cases as these issues may be presented in an adjudicatory context for Commission review. See Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3).

management and to the NRC, is of paramount importance. Without this ability, I believe there would be a significant degradation in both the safety of the industry and the effectiveness of the NRC's oversight. Consequently, when this ability appears to be in jeopardy, the NRC must have the ability as well as the capability to respond quickly, decisively and appropriately in light of the circumstances surrounding a particular case.

It is for these reasons that I do not support development of a Safety Conscious Work Environment Rule. Several of our stakeholders, including members of the NRC staff, believe that it would be difficult to develop, define, inspect, and enforce a rule requiring a safety conscious work environment. I agree with these stakeholders. I additionally believe that such a rule unnecessarily emphasizes a "one size fits all" approach and would result in unnecessary resources being spent with the potential for a decrease in effectiveness. The NRC has heard several concerns that we are not fully equipped to evaluate safety culture and I believe these concerns would be exacerbated by having the oversight of licensees' safety culture put in the hands of our inspectors. Not that I question our inspectors' ability, but I do question how we would effectively train our inspectors, many of who have no previous experience in this area, on how to effectively inspect and evaluate safety culture.

While I do not believe that the NRC is currently equipped to "regulate" safety culture, I believe that we do currently have an appropriate set of tools to evaluate, the **symptoms** of a poor safety culture. These tools are our existing employee protection regulations, the Commission policy statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," and the ability of the Office of Investigations to evaluate individual instances of discrimination. As I have stated above, the NRC must have the ability to respond quickly, decisively and appropriately in light of the circumstances surrounding a particular case. I believe our current tools support this ability while a Safety Conscious Work Environment Rule could potentially inhibit it.

However, it is clear to all stakeholders that the current system is not flawless. I believe the discrimination task force performed a thorough evaluation of the weaknesses in the current system and developed a series of common-sense recommended improvements including improved timeliness, use of Alternative Dispute Resolution, and additional financial and moral (in the form of a personal representative) support for whistleblowers. Additionally, the discrimination task force indicated that our Office of Investigations should assess its investigation techniques as part of an internal self-assessment. I believe this activity is paramount to the continued success of our handling of discrimination issues because I believe a number of complaints may stem from a lack of discipline during these investigations. These improvements are best embodied in Option 4 of SECY-02-0166, which I approve as the appropriate course of action for the staff.

Commissioner Diaz

I appreciate the staff's very substantial effort in reviewing stakeholder concerns and identifying options for improving the NRC's process for handling discrimination issues. Many proposals are put forward to further objectives of greater efficiency, effectiveness or fairness. Therefore, I find merit in, and generally support, the recommended modifications and streamlining measures, subject to comments provided below. I disapprove, however, the staff's principal recommendation to develop a safety-conscious-work-environment (SCWE) rule.

At the outset, I think it is important to recognize that many stakeholders, including some who carefully scrutinize the industry, believe that the commercial nuclear industry is very advanced, if not the most advanced industry, in its treatment of employee allegations, including allegations of discrimination. The number of discrimination cases opened by OI decreased by 33% between 2001 and 2002 (97 to 65), and only five to ten percent of discrimination investigations have resulted in enforcement action in recent years. Moreover, findings of a pervasive problem have been rare. Therefore, I disfavor proposals with the potential to increase the intrusiveness or costs associated with routine NRC oversight in this area.

I believe that staff has failed to justify the Senior Management Review Team (SMRT) recommendation of rulemaking to develop a SCWE rule. I have opposed such an effort in the past, and I disapprove the current proposal. In particular, I do not see a demonstrated likelihood that the contemplated approach would increase the assurance that individuals will be free to raise safety concerns. As the staff has observed, many licensees have already established employee concerns programs, which would appear to be the major implementing action under the SMRT proposal. Moreover, it is clear that the rulemaking would be costly and, as the Discrimination Task Group (DTG) observed, "would be difficult to develop, define inspect and enforce." I recognize that the SMRT envisions an ultimate outcome in which all or nearly all complaints would be handled adequately by DOL or licensee programs, but such an outcome seems far from certain.

I am mindful of the industry's view that the NRC should discontinue investigation of individual discrimination claims in light of the availability of the DOL forum and the industry's attention to the issue. I acknowledge and applaud the multiple mechanisms used by industry to support the freedom of workers to raise safety concerns, including employee concerns programs, hotlines, and training, as well as -- when found needed -- executive and independent oversight boards, surveys and other tools. I also note that the industry is proposing additional initiatives regarding training and other "best practices." These initiatives should further enhance the assurance of the freedom of workers in the industry to raise safety concerns, and they may ultimately strengthen the case for a significant alteration of NRC's program. In this regard, I note that the NRC has supported efforts to increase the efficiency and effectiveness of the DOL process, the length and cost of which has been cited as an impediment to greater reliance on that forum. At this time, however, I do not believe the agency is prepared to, or should, entirely discontinue individual case investigation and enforcement.

Clearly, some of the proposed streamlining measures would address stakeholder concerns and appear to enhance the NRC program. I support the measures outlined in option 4, subject to the following comments:

-I support the use of alternative dispute resolution in discrimination cases, in lieu of an investigation by OI, when all parties consent;

-I disapprove resequencing the enforcement conference as I do not see a convincing case for foregoing the benefits of the predecisional enforcement conference (PEC);

-I support release of OI reports prior to the PEC, after OGC review of the sufficiency of the evidence, but agree to limiting release initially to the OI report while the staff explores ways to gain efficiencies in redacting information before releasing associated documents;

-I support the proposed assessment of OI investigative techniques, which both the accusing and the accused have found to be unnecessarily burdensome, and agree with the Chairman that advice from an independent group should be sought (although evaluation might start with a self-assessment);

-I support further evaluation, as proposed by the Chairman, of the policy and resource implications of providing formal or informal hearing rights to individuals subject to a notice of violation (NOV) in connection with violations of the employee protection regulations;

-I do not approve the proposal on imposition of civil penalties on contractors as I do not believe that the potential benefits clearly outweigh the costs of the proposed rulemaking and its implementation;

-I do not object to the staff determining the feasibility and cost of reimbursing the whistleblower and a personal representative's travel expenses to attend the conference and making a recommendation, based on this information, to the Commission;

-I agree with the SMRT regarding centralization of the enforcement process, in view of the benefits of the current role of the Regions and the consistency of that approach with the Presidential directive to place decision making close to the regulated entity;

-I disagree with the proposal to eliminate deferral to DOL as currently presented. A principal basis for eliminating deferral is that the NRC deferred to DOL in only 12 of 102 cases in which investigations were initiated by both agencies since the staff implemented the current criteria (set by the Commission in 1997) for deferral. Before altering the current policy on deferral, however, I believe that the Commission needs information and analysis of the specific bases and the costs for the high percentage of cases in which the NRC has not deferred.

Commissioner McGaffigan

The Commission has repeatedly stressed the importance of a strong "safety culture" at licensee facilities. Efforts to strengthen this area by regulatory oversight have been explored repeatedly since I joined the Commission in 1996. I approved publishing for public comment the staff's proposed (SECY-96-255) mechanisms for establishing and maintaining a safety-conscious work environment (SCWE). Even at that time, however, I expressed doubt that any regulation that would "require" (emphasis in original) SCWE would be inspectable or enforceable. Indeed, after reviewing public comments, the staff requested (and the Commission approved) the withdrawal of their SCWE proposals (SECY-97-260).

As described in the current SECY, the staff also addressed aspects of SCWE in SECY-97-147 and SECY-98-176. Both papers included updates and revisions to the staff's conduct of SCWE monitoring activities. In the first SECY, the staff requested (and was granted) more resources for SCWE cases and, in my vote, I called for the staff to "minimize the NRC's duplication of DOL investigative activities." I remain of that view, and believe that the staff should continue to defer to ongoing DOL investigations.

In SECY-98-176, external stakeholders' comments suggested that the necessary mechanisms

were already in place to ensure that licensees maintained a safety conscious work environment. It is worthwhile to note that those same stakeholders reiterated those same views at the recent Commission public briefing on discrimination issues on December 17, 2002.

I join with my fellow Commissioners in rejecting proceeding with SCWE rulemaking. I disapprove going forward with such rulemaking armed solely with the hope that objective and appropriate regulatory means and measures will be discovered along the way. Similarly, I also agree with the Chairman that the NRC should continue to have a presence in the scrutiny of discrimination matters. This is in accord with my vote on SECY-98-176. Also, I have long held concerns (expressed in my vote on SECY-97-147) regarding the impact of OI investigations, as necessary as they may sometimes be, and thus I support the Chairman's call for assessment and advice from an independent group on OI practices. In that regard, I am mindful of the graph in the current SECY (Attachment 1, page 13) that shows that, despite the increased OI resources which allowed the opening of more investigations, the number of cases substantiated has remained at a fairly constant low level. The staff should continue efforts to make Alternative Dispute Resolution a viable option.

I disapprove the DTG's recommendation to issue proposed enforcement actions prior to an enforcement conference ("resequencing"). The staff's observation that such conferences often (40%, per SECY-02-0166, Attachment 1, page 79) lead to the NRC withdrawing the proposed action provides a decisive basis for the NRC to continue to exercise great care, caution, and restraint in publishing what might turn out to be an inaccurate accusation against an individual. In this same regard, I agree with the Chairman that the staff must work to maximize the OI Report information provided prior to the Predecisional Enforcement Conference.

I agree with the comments of Chairman Meserve on the Discrimination Task Group (DTG) recommendations not specifically addressed above with one amplification. I agree with Commissioner Merrifield that the centralization of the enforcement process for discrimination cases recommended by the DTG and approved by Chairman Meserve should be in the NRC Office of Enforcement.

Commissioner Merrifield

The Nuclear Regulatory Commission's handling of discrimination cases has been an issue of great interest to me as long as I have served on this Commission. I have had numerous meetings and discussions with representatives of the nuclear industry, the whistleblower community and the NRC staff on this very difficult and often contentious issue. While I disapprove the staff recommendation to develop a rule for the oversight of a safety conscious work environment, I believe we can improve upon the current process and thus I support many of the streamlining recommendations of the Discrimination Task Group.

The ability of employees to raise regulatory and safety concerns to their management or the NRC, without fear of retaliation, is critical to the nuclear industry's ability to carry out licensed activities safely. Establishing and maintaining a safety conscious work environment to allow this free flow of communication of safety concerns is the responsibility of our licensees. The Commission's expectation that licensees and other employers subject to NRC authority establish and maintain a safety conscious work environment was addressed in the Commission's 1996 policy, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," 61 Fed. Reg. 24,336 (May 14, 1996). In that policy

statement, the Commission emphasized that each licensee should establish a safety conscious work environment where employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees.

I believe the Commission's 1996 policy has laid the foundation for a generally successful overall approach, including the appropriate attributes for an effective safety conscious work environment program. The Commission received testimony at the December 17, 2002 Commission briefing that the NRC was far ahead of other health and safety agencies in other industries in fostering safety conscious work environment. That being said, however, there is always room for improvement. I believe that we can build upon the foundation set forth in 1996 without tearing it down and starting from scratch.

I have learned from my discussions with people who have been involved in investigations of intimidation and harassment cases of their general distaste for the process. Whether they be the alleger or the individual against whom the allegations have been charged, they have expressed concerns over the length of time that it takes to conduct the investigation, the resultant uncertainty of their status within their organization, and sometimes, the heavy handedness on the part of NRC investigators. The Office of Investigations (OI) workforce is highly dedicated and well trained. The investigative techniques of a good criminal investigator, however, do not easily translate to a setting where the activities being investigated are hardly ever prosecuted and where a quick decision would be best for all individuals involved. Consequently, after dozens of hours of conversations with individuals who have been caught up in our investigations, I am convinced that the "tried and true investigative practices" utilized by our OI staff are frequently not the right practices for the allegation process we are attempting to oversee.

It was partly as a result of these criticisms that the EDO chartered the Discrimination Task Group to, among other things, evaluate the NRC handling of matters covered by its employee protection regulations and to propose recommendations for improving NRC's process for handling such matters. I commend the EDO for initiating this review and the staff and the many stakeholders who participated in the Discrimination Task Group effort. The Task Group has recommended a number of suggestions to modify and streamline the current process many of which I support.

I do not support the Senior Management Review Team recommendation to pursue rulemaking for the oversight of a safety conscious work environment. I oppose such a rulemaking for many of the same reasons which were identified by the Task Group and the various stakeholders. Such a rulemaking would not only be difficult to develop, but the rule would be subjective in nature, difficult to inspect and enforce, would likely intrude on management prerogatives and may well cause a chilling effect on the most effective safety culture element -- the commitment of management to a safety conscious work environment. The Commission's 1996 policy states: "A safety conscious work environment is reinforced by a management attitude that promotes employee confidence in raising and resolving concerns." As I mentioned earlier, the 1996 Commission policy has set a good foundation, upon which we can build to improve the current process.

Overall, I agree with Chairman Meserve's comments on the Discrimination Task Group recommendations, which he outlines beginning at the bottom of page 3 of his vote, but I would like to emphasize several additional points.

I am a strong advocate of alternative dispute resolution (ADR), in general, and in particular in cases of alleged intimidation and harassment. It is my impression that many of these cases result from a miscommunication between an employee and his or her management, which could be resolved satisfactorily through ADR prior NRC investigation. ADR offers a unique approach to resolve these differences. While the number of investigations conducted by OI has more than quadrupled between 1991-2001, the number of substantiated cases of discrimination has remained relatively unchanged during the same time period. Therefore, despite a significant increase in OI resources dedicated to investigating these allegations, there has been no commensurate increase in substantiated claims. In view of these circumstances, I agree with proposals to initiate ADR, in lieu of an investigation by OI, in cases where all parties agree. I understand the staff will be proposing a pilot program on ADR in the near future. I look forward to receiving the staff's recommendation.

I endorse the Discrimination Task Group recommendation that the Office of the General Counsel perform a legal review, earlier rather than later, of the sufficiency of evidence of all substantiated discrimination cases prior to issuance of the OI Report of Investigation. I agree that this review would help to ensure, in a timely fashion, that evidence is sufficient to provide a legal basis for a discrimination violation. As recommended by the Discrimination Task Group, this change should improve timeliness and efficiency without affecting OI's independence.

While I agree with the Chairman's suggestion to seek advice from an independent group for an assessment of OI's investigative techniques and recommendations for improvements, I believe this group should report its recommendations to the Commission through the EDO. I do not believe self-assessment by OI would provide the same benefit.

I want to echo the Chairman's comments of the value of training of management as to its obligations under the employee protection regulations. Training should be a key part of a program for a safety conscious work environment.
I approve the recommendation to centralize the enforcement process for discrimination cases in the Office of Enforcement. It seems to me that such a consolidation can only help to improve consistency, efficiency and timeliness of NRC's consideration of these matters.

I also endorse the Discrimination Task Group recommendations for the scheduling and conduct of the enforcement conferences. The changes suggested should improve timeliness and increase efficiency and effectiveness as a result of more timely scheduling and completion of the enforcement conference. I also believe it is incumbent on the Commission to carefully monitor progress in this area.

I am open to the staff reviewing the feasibility of reimbursing whistleblowers to attend enforcement conferences, but only in those cases where their presence would assist the NRC in evaluating the credibility of a licensee's presentation.

In summary, while I believe that NRC's handling of discrimination issues has served the agency well, it is also clear that we cannot maintain an investigation and enforcement system that not only is needlessly painful for all concerned, but which receives near unanimous support for its reform. The legitimate goal of providing a safety conscious work environment does not justify the blunt instrument we now employ. We can and should do better. It is my belief that the reforms provided by the Discrimination Task Group and other participants that I have endorsed in my vote will lead to a more balanced system, yet preserve and enhance our ultimate goal: the safe use of nuclear materials.