NOTE:

This draft report contains the preliminary recommendations of the Discrimination Task Group members based on interactions and comments of various stakeholders.

These are the preliminary recommendations of the independent task group and have not received Commission or staff review or approval.

Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints

April 2001

U.S. Nuclear Regulatory Commission

Discrimination Task Group Report

Table of Contents

Executive Summary i

I. BACKGROUND 1
- A. Discussions with Other Agencies 2
- B. Regulatory Importance of a Safety Conscious Work Environment 2
- C. Legislative/Regulatory History 3
  - Atomic Energy Act Authority 3
  - The *Callaway* Case 3
  - Section 211 of the Energy Reorganization Act 4
  - NRC Employee Protection Regulations 5
- D. Current Process 6
- E. Discussion of Trends (allegations/investigations/enforcement actions) 6
- F. Use of a Risk Informed Approach 9
- G. Comparisons to Other Industries and Agencies 10
- H. Accountability for Individual Actions 10
- I. Relationship to OSHA/DOL 10
- J. Role of the Alleger 11
- K. Opportunity for Due Process 12

II LEGAL STANDARDS/RULEMAKING 12
- A. SCWE Rule 12
- B. Protection for the Concerned Individual 14
- C. Assessment of 10CFR50.7 Changes to Include Individual Actions 15
- D. Assessment of Support to Concerned Individual 16
- E. Individual Hearing Rights 16
- F. Employee Protection Training 17
- G. Standards of Proof 18
- H. Assessment of Decriminalizing 50.5 and 50.7 19
- I. Assessment of Changes to Allow Civil Penalties to Contractors 20

III. INVESTIGATIVE PROCESS 21
- A. Referral of Allegations of Discrimination to Licensees 22
- B. The Threshold Criteria for Initiation of an NRC Investigation 23
- C. The Investigative Techniques Employed by OI 23
- D. OI Presumption of Guilt or Innocence of Individuals or Entities Accused of Discrimination 24
- E. Scope of Investigation 24
- F. Technical knowledge of OI special agents 25
- G. OGC Legal Review of Draft OI Reports 25

IV. ENFORCEMENT 26
- A. Application of 10 CFR 50.5 26
- B. Distribution of Information prior to a Pre-decisional Enforcement Conference 27
- C. Sequencing of Predecisional Enforcement Conference 34
- D. Conduct of Predecisional Enforcement Conference 37
- E. Post Predecisional Enforcement Conference 39
- F. Communications with Licensee, Individual Accused of Discriminating, and Alleger In Unsubstantiated Cases 39
- G. Risk Informing the Enforcement Process for Discrimination Matters 40
- H. Early Licensee Notification, Use of Alternative Dispute Resolution (ADR) and Use of Chilling Effect Letters 41

I. Severity Level Factors 42
J. Discretion Criteria 44
K. Factors used to Escalate and Mitigate Civil Penalties 45
L. Signature Authority 47
M. Accountability For False Complaints 48
N. Impact of DOL Settlement 49
O. Willfulness of Discriminatory Acts 49

V. NRC Roles and Reponsibilities 50
A. NRC'S Interface with the Department of Labor 50
B. NRC Staff Participation 54
C. Communications with Licensee and the Individual Accused of Discriminating 55
D. Human Toll and Stress on the Accused 56
E. Management Chilling 57

APPENDIX A: DISCRIMINATION TASK GROUP CHARTER . . . . . A - 1

APPENDIX B: RECOMMENDATIONS . . . . . B - 1
II Legal Standards/Rulemaking . . . . . B - 1
III Investigative Process . . . . . B - 2
IV Enforcement . . . . . B - 3
V. NRC Roles and Reponsibilities . . . . . B - 7

APPENDIX C: NUREG-1499, Matrix of Actions Taken . . . . . C - 1

APPENDIX D: NRC ENFORCEMENT MANUAL, Discrimination Processes Section . . . . . D - 1

Executive Summary

On April 14, 2000, the NRC Executive Director for Operations approved the establishment of a task group to evaluate the NRC processes for handling discrimination cases. The purpose of the task group was to:

(1) evaluate the Agency's handling of matters covered by its employee protection standards,

(2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate,

(3) to ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise safety concerns in accordance with the Agency's employee protection standards, and

(4) to promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process.

This first draft of the task group report provides the group's preliminary recommendations for improving the Agency's processes. These recommendations were developed after conducting six public stakeholder meetings at various locations around the country, reviewing written comments and suggestions from stakeholders, conducting internal stakeholder meetings in headquarters and each of the regional offices, and meeting with Department of Labor (DOL) and other selected agencies. The purpose of these meetings was to help the task group identify stakeholder concerns with the current process and areas for improvement. Common themes included a need to improve timeliness, access to information, and a need to improve predictability of outcomes. The task group appreciates the sincere and thoughtful participation of all stakeholders throughout the process.

The proposed recommendations focus on potential improvements to the current process. Various stakeholders suggested that the NRC significantly modify its regulatory approach for dealing with discrimination issues including deferral of all individual cases to DOL, implementing a risk-based or risk-informed approach, or having the NRC serve as a dispute mediator between the employee and the employer. The task group evaluated these suggestions against the four agency performance goals, but as discussed in the report, concluded that they were not consistent with our regulatory responsibilities or with the agency goal of increasing public confidence.

This draft report is issued to solicit continued stakeholder input. Specifically, stakeholders are requested to provide their views on whether the task group has appropriately captured the issues raised during the stakeholder meetings and to comment on the proposed recommendations. A consolidated listing of preliminary recommendations can be found in Appendix B of the task group report. Future stakeholder meetings will focus on the proposed recommendations presented in this report and offer the opportunity for discussion of alternative approaches. Information related to the task group activities and the ability to provide comments and suggestions can be obtained by accessing the Office of Enforcement Website at www.nrc.gov/OE/.

Following stakeholder input on the preliminary recommendations, the task group expects to develop final recommendations for Commission consideration.

I. BACKGROUND

On April 14,2000, the NRC Executive Director for Operations approved the establishment of a working group to evaluate the NRC processes for handling discrimination cases. The purpose of the Task Group was to:

(1) evaluate the Agency's handling of matters covered by its employee protection standards,

(2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate,

(3) to ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise safety concerns in accordance with the Agency's employee protection standards, and

(4) to promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process.

The group's charter is enclosed as Appendix A.

The Task Group consisted of NRC representatives from each of the organizations with responsibility for handling employee protection matters. The individuals and their positions were:

Edward T. Baker	Agency Allegation Advisor
Richard W. Borchardt	Director, Office of Enforcement
Dennis Dambly	Assistant General Counsel for Materials Litigation and Enforcement, Office of General Counsel
J. Bradley Fewell	Regional Counsel, Region I
Barry Letts	Director, Office of Investigations Field Office, Region I
Cynthia D. Pederson	Director, Division of Nuclear Materials Safety, Region III
Barry C. Westreich	Senior Enforcement Specialist, Office of Enforcement

The review was begun in July 2000,and will continue through June 2001. The review consisted of reviews of current guidance, public meetings with stakeholders to obtain input and discuss Task Group recommendations, discussions with other Federal agencies to understand the processes and approach used by other agencies in the employee protection area, interaction with internal NRC organizations, and the development of Task Group recommendations. As a matter of historical background, in January, 1994, the NRC published the results of a related review entitled "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation" (NUREG-1499).

Public Meetings were held at a number of locations to solicit input from interested stakeholders on general impressions and specific recommendations to improve the NRC's process for the handling of employee protection enforcement cases. The meetings consisted of prepared presentations from the NRC and interested stakeholders as well as less formal discussions. The purpose of the meetings was to identify areas for the Task Group to evaluate, but not to problem solve or develop consensus recommendations.

The Task Group sincerely appreciates the participation of all stakeholders during this review effort. The Task Group found the stakeholder input to be extremely valuable in helping to understand and define specific areas for evaluation. The topics identified in these stakeholder meetings are discussed in the body of this report along with applicable recommendations developed by the Task Group. A wide variety of opinions and views were represented during the stakeholder meetings as well as through written submittals to the Task Group. It is not surprising that stakeholder

comments and suggestions are heavily influenced by an individual's specific experiences and background with respect to employee protection matters. In fact, there are areas in which one stakeholder comment is in direct opposition to a different stakeholder's comment. Notwithstanding this apparent conflict, the Task Group was impressed by the sincerity and thoughtfulness of each stakeholder's comments and suggestions. The following list shows the location and date of stakeholder meetings.

Rockville, MD	September 5, 2000
Chattanooga, TN	September 7, 2000
San Luis Obispo, CA	September 14, 2000
Chicago, IL	October 5, 2000
Paducah, KY	October 19, 2000
Waterford, CT	November 2, 2000

In addition to the public stakeholder meetings, the OE Website provided electronic access to relevant material and the opportunity to submit comments and suggestions to the Task Group.

Internal NRC stakeholders participated in the review effort through meetings at each regional office and with the Offices of NRR, NMSS, and OE.

A. Discussions with Other Agencies

Meetings and discussions via telephone were held with several federal agencies to discuss the activities of this Task Group and gain insight on their handling of discrimination complaints.

DOL, Occupational Safety and Health Administration (OSHA), January 30, 2001
EPA, Inspector General Office, Whistleblower Hotline, February 27, 2001
DOE, Office of Enforcement , April 25, 2001
Office of Special Counsel, March 16, 2001

Section IV of this report discusses the issues raised by internal and external stakeholders and provides applicable recommendations of the Task Group. However, to understand the scope and focus of the Task Group's efforts requires a basic knowledge of the nuclear work environment in which safety concerns are raised, the relevant regulatory framework, related processes for NRC and DOL actions, and issues of specific concern associated with those processes.

B. Regulatory Importance of a Safety Conscious Work Environment

The NRC seeks to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment by responsibly regulating the activities of its licensees. Through NRC inspection and evaluation, technical concerns are routinely discovered and resolved. However, as an agency of limited resources monitoring more than 100 nuclear power plants and over 5,000 nuclear materials licensees, the NRC can only individually review a small percentage of licensee activities. Licensees have the primary responsibility for the safe operation of their facilities. The NRC believes that a SCWE that encourages individuals to raise concerns directly supports the licensee's responsibility for safe operation, as well as the NRC's mission of adequate protection.

The NRC places a high value on nuclear industry employees feeling free to raise safety concerns to the facility organization and/or the NRC without fear of having an adverse action taken against them for having raised a concern. Similarly, employees must feel free to engage in other protected activities, such as participating in federal or state proceedings and providing information to the NRC without fear of reprisal. Throughout the Task Group's interactions with a wide range of

stakeholders, all stakeholders supported the importance a SCWE. Nonetheless, there are an equally wide variety of opinions regarding what the NRC's role should be relating to the establishment of employee protection requirements and associated enforcement.

While there are few issues within the area of employee protection that the stakeholders have universal agreement on, there are some generalizations that are broadly accepted. Namely, employee protection cases that result in being considered for NRC enforcement action normally begin as reasonable concerns or questions on the part of a well intentioned employee. Whether or not the original concern was valid, most discrimination complaints are brought to the NRC after the employee/employer relationship has been strained and frequently after there has been a near total breakdown of effective communication.

An effective and consistent NRC approach for dealing with discrimination complaints is an important feature of encouraging and ensuring a safety conscious work environment. Enforcement actions need to be predictable, fair, and able to withstand scrutiny, since they could result in civil penalties, orders, or actions against individuals and are viewed by stakeholders as an indicator of the seriousness with which the NRC views discrimination issues. The overall objective of the NRC regulations prohibiting discrimination is to promote an atmosphere where employees feel comfortable raising safety concerns. Industry management representatives have voiced the concern that the potential for NRC enforcement actions have impeded the ability of supervisors to address employee performance issues, if that employee had ever engaged in a protected activity. Conversely, individuals alleging discrimination voice the concern that the NRC is reluctant to find that discrimination occurred and that enforcement sanctions are too weak for those cases that are substantiated.

Historically, discrimination matters have been some of the most difficult cases for the staff to evaluate and process. These cases, unlike those based on technical inspection findings, typically involve conflicting statements and documentation and findings are often based on circumstantial evidence. It is frequently difficult to determine whether a violation occurred, if it was deliberate, and what the appropriate enforcement action should be.

C. Legislative/Regulatory History

Atomic Energy Act Authority

Subsections 161b, 161i, and 161o of the Atomic Energy Act (AEA) give the Commission broad authority to (1) establish by rule, regulation or order such standards as may be necessary for it to carry out its activities and protect the public health and safety; and (2) require the keeping of records and provide for such inspections as may be necessary to effectuate the purposes of the AEA. Under the authority of Section 161 of the AEA, the Atomic Energy Commission in 1973 promulgated 10 CFR 19.16(c) (later replaced by Section 19.20), which prohibited licensees from discrimination against any employee because such employee filed any complaint, instituted or caused to be instituted any proceeding under the regulations in Part 19, testified or was about to testify in such proceeding, or exercised any option afforded by Part 19. However, this provision by its terms only addressed radiological working conditions.

The *Callaway* Case

In 1977, the staff became aware of a concern by a construction worker that he had been fired because he raised a safety issue to an NRC inspector. The worker was employed by Daniel Construction Company, a contractor to the Union Electric Company on its Callaway project. Despite the lack of a regulation addressing construction workers, the NRC staff took the position that it had the legal authority under Sections 161c, 161o, and 186 of the AEA to investigate this

allegation and take appropriate enforcement action if the allegation was substantiated. (A construction permit holder is not subject to the regulations in 10 CFR Part 19, and, therefore, Section 19.16(c) was not applicable in this case.) Union Electric Company refused to permit the investigation, arguing that the reason for firing the construction worker was a management/labor issue not within the purview of the Commission. The staff responded by issuing an order to show cause why construction shouldn't be suspended until the investigation was permitted. The licensee requested a hearing on the order.

Both the Licensing and Appeal Boards held that the AEA provided the Commission with authority to take action where a licensee or its contractor discriminated against an employee for raising a safety issue. The Licensing Board held that under Subsections 161c and 161o of the AEA, the Commission had broad authority to effectuate the purposes of the AEA. The Licensing Board ordered that Union Electric's construction permits be suspended until the licensee submitted to such investigations as the Commission deemed necessary.[1]

The Appeal Board held that the AEA provides the NRC with the authority to investigate cases of potential discrimination for raising concerns and to take appropriate enforcement action. The Appeal Board explained that labor disputes could "engender radiation hazards to the public of the kind that the AEA was designed to guard against," and that the AEA provides authority for the Commission to investigate alleged discrimination and take appropriate enforcement action for such discrimination against a licensee employer.[2]

Section 211 of the Energy Reorganization Act

Although the AEA provides the Commission with authority to take action against a licensee for discrimination against an employee, it does not provide authority to order a personal remedy for such employee. Consequently, on November 6, 1978, Congress enacted Section 210 (now Section 211) of the Energy Reorganization Act (ERA). Pursuant to Section 210 (and 211), discrimination against any employee by a Commission licensee, applicant, or contractor or subcontractor of a licensee or applicant with respect to compensation, terms, conditions or privileges of employment is prohibited when such discrimination is prompted by the employee's having engaged in certain protected activities.[3]

---

[1] *Union Electric Company* (Callaway Plant, Units 1 and 2), LBP 78-31, 8 NRC 366, 374-79 (1978).

[2] *Union Electric Company* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 133-39 (1979).

[3] Under Section 210, "protected activities" were specifically defined as an employee's commencing, testifying, or participating in a proceeding or in any other action to carry out the purposes of the ERA or AEA. Under both Section 210 and 211, the term "protected activities" has been broadly defined to include an employee raising a nuclear safety concern to the Commission. As explained below, Section 210 was amended by the Energy Policy Act of 1992 (and renumbered as Section 211) to specifically clarify that protection is also extended to employees who notify an employer of an alleged violation of the AEA or ERA, refuse to engage in any practice made unlawful by those acts, or testify before Congress or at a Federal or State proceeding regarding any provision of these acts.

The Appeal Board in the *Callaway* decision, citing the remarks of Senator Hart, the Senate floor manager, urging his colleagues to accept then Section 210, emphasized that the legislative history revealed that this statute was not intended in any way to abridge the Commission's authority under the AEA to investigate an allegation of discrimination and take appropriate action against a licensee employer, nor was the statute passed because Congress thought that the Commission lacked such power.[4] Rather, as both Senator Hart and the Appeal Board stated, the purpose of the enactment of then Section 210 was to give the Department of Labor (DOL) new responsibilities which complemented the NRC's jurisdiction over such matters.[5] Following the enactment of Section 210, and in light of DOL's complementary responsibilities in the area of employee protection, the NRC and DOL entered into a Memorandum of Understanding (MOU) in 1982, to facilitate cooperation and timely exchange of information, and in 1983 developed "Working Arrangements" to implement the MOU.[6]

Subsequently, Congress enacted Section 2902 of the Energy Policy Act of 1992, which amended and renumbered Section 210 as Section 211. Among other things: (1) language was added to clarify that protection was specifically extended to employees who notified their employers of alleged violations of the AEA or ERA; (2) language was also added to clarify that protection was also extended to employees who refused to engage in any practice made unlawful by the AEA or ERA, and who testified before Congress or in a Federal or State proceeding regarding any provision of these acts; (3) language was added to include certain contractors or subcontractors of the Department of Energy as well as licensees of Agreement States within the statutory definition of the term "employer", and (4) the NRC was required to take "appropriate" action with regard to an allegation of a substantial safety hazard during the pendency of a Department of Labor (DOL) investigation, and to resolve any technical issues without waiting for the results of a DOL proceeding.

NRC Employee Protection Regulations

The Commission initially promulgated its regulations prohibiting discrimination in 1982. The reason for promulgating these regulations was that the staff took the view that, in the absence of a regulation, a violation of then Section 210 of the ERA was not a violation for which a civil penalty could be assessed under Section 234 of the AEA. However, since the regulations prohibiting discrimination implemented the Commission's authority under the AEA, they gave the Commission authority to issue civil penalties if these requirements were violated.

Presently, the Commission's regulations prohibiting discrimination are at 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, 72.10 and 76.7, and the text of the rules in each Part is identical. These regulations provide notice that discrimination against an employee for engaging in protected activities as defined in Section 211 of the ERA is prohibited, that civil penalties and other enforcement action may be taken against licensees for violations of these regulations by licensees or by their contractors or subcontractors, and that NRC Form 3, describing the rights of employees, must be posted. As explained above, because these regulations implement the Commission's authority under the AEA, they afford the Commission authority to issue civil penalties for violation of these regulations pursuant to Section 234 of the AEA. In addition, because these regulations

---

[4]ALAB 527 at 138.

[5]*Id.*; also, 124 Cong. Rec. S15318 (daily ed. September 18, 1978), remarks of Senator Hart.

[6]These procedures have been incorporated into the NRC's Enforcement Manual provisions.

were promulgated pursuant to Subsection 161i of the AEA, Section 223 of the AEA makes willful violations of these regulations subject to criminal sanctions.

Following the promulgation of its regulations prohibiting discrimination, the Commission became aware of the potential for settlement agreements, including those negotiated under Section 211 (then Section 210) of the ERA, to impose restrictions upon the freedom of employees or former employees to testify or participate in NRC proceedings or to otherwise provide information on potential violations or hazardous conditions to the Commission. Accordingly, in 1990, the Commission amended its Employee Protection regulations to specifically provide that no agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed with the Department of Labor pursuant to Section 211 (then Section 210) may contain any provision which would restrict an employee from participating in protected activity.

In addition, in 1991, the Commission promulgated its Deliberate Misconduct (e.g., 10 CFR 50.5). Pursuant to these regulations, the Commission may take action directly against individual employees of licensees or applicants and contractors or subcontractors of licensees and applicants who engage in deliberate misconduct that causes a licensee or applicant to be in violation of the Commission's regulations including those prohibiting discrimination.

D. Current Process

An understanding of the current NRC process for the handling of employee discrimination complaints is necessary to place stakeholder comments and the Task Group's recommendations into context. In addition to the legislative direction discussed above, agency policy and guidance can be found in the "General Statement of Policy and Procedure for NRC Enforcement Actions," (NUREG-1600) and the "NRC Enforcement Manual" (NUREG/BR-0195). Both of these documents can be found on the OE Website and applicable sections are enclosed in this report as Appendix D.

E. Discussion of Trends (allegations/investigations/enforcement actions)

Stakeholders have made numerous comments regarding a perceived recent increase in NRC enforcement activities related to employee protection. As shown below, the trend in enforcement actions issued to NRC licensees in the last 5 years does not indicate an increasing trend. The Task Group reviewed the data relating to allegations of discrimination, the resulting investigations, and enforcement actions. The focus of the review was from calendar year 1996, after the NRC increased its emphasis on employee protection, until 2000. In addition, certain data as far back as 1990 was reviewed to include information prior to the January 1994 issuance of NUREG-1499, specifically, the numbers of allegations and investigations per year. The Task Group noted that precise trending of data related to discrimination cases was difficult due to several factors, including the number of diverse offices involved in the process, the length of time each case takes to process, and the small number of enforcement actions taken. Therefore, caution must be used when analyzing trend data.

Since 1995, of the approximately 100 discrimination cases investigated per year, the NRC has substantiated and issued enforcement actions in approximately 10 percent of them, or about 6-10 cases a year. As a result, in approximately 90 percent of the cases, no action is taken. The current process utilizes a graded approach to the investigation and enforcement of the regulation, in which the most significant cases are taken through the process. The approximately 90 cases a year where no discrimination is substantiated are closed with no action taken. Where retaliatory conduct is egregious and the potential safety or work environment consequences are severe, a more significant enforcement outcome is produced. As a result, although all discrimination cases received are evaluated, the NRC focuses its attention and resources primarily on the more

significant cases where the evidence gained through an Office of Investigations (OI) investigation facilitates decision-making by establishing the facts.

Over a 10 year period (1990 - 2000), the total number of discrimination allegations numbered between 118 and 208 per year. The number of discrimination allegations averaged about 160 per year throughout the 1990's, with slightly fewer than average during the last 3 years. Prior to 1995, the Office of Investigations (OI) opened investigations for approximately 30 to 55 percent of the discrimination allegations. By 1995, the NRC had created and filled a full time position of Agency Allegation Advisor with a central focus on the agency's allegation process. As such, more focus was placed on ensuring the NRC was opening investigations and conducting initial interviews in discrimination cases. This increased emphasis was furthered by Staff Requirements Memorandum (SRM) 96-056, "Policy Statement 'Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation,'" which stated that "the NRC should exercise its authority by independently investigating high priority cases to determine whether retaliation occurred. . ." As such, in 1995 and 1996, the percentage of discrimination allegations investigated by OI increased dramatically. Since 1998, OI has investigated approximately 60 percent of the discrimination allegations received. This number reflects the number of allegations received that met the *prima facie* threshold for investigation.

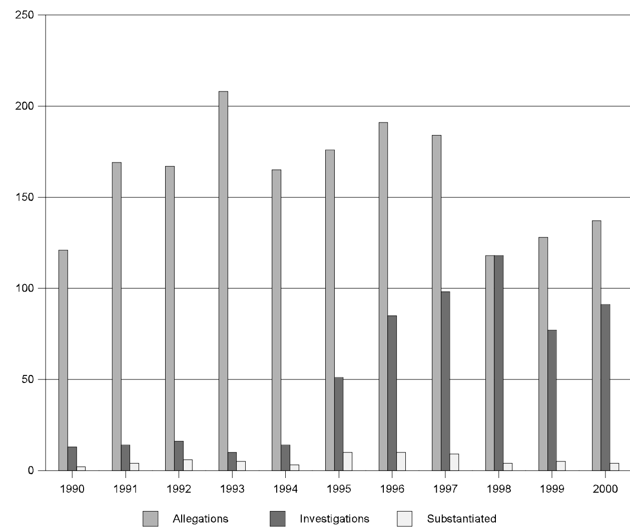


Figure 1: Discrimination Allegations, Investigations and Substantiated Cases

The number of discrimination allegations substantiated by OI investigations has not varied over the last decade. In fact, despite the larger percentage of allegations investigated by OI in recent years, the percentage of allegations substantiated is down but the total number in a given year has remained relatively steady. The Task Group believes that this is one indicator that there has not been an appreciable change in the NRC's standard regarding substantiated discrimination cases.

During calendar year 1996, the NRC issued 17 enforcement actions related to employee protection, many based solely on DOL ALJ decisions. Since that time, however, the NRC has issued eight or fewer employee protection related enforcement actions per year. Thus, in recent years, nominally 5 percent of the discrimination allegations received result in enforcement actions. The Task Group believes that since there are such a small number of enforcement actions related to discrimination issued each year, any "trend" in the number of actions issued would not be statistically significant. In fact, the Task Group believes that the consistently small number of enforcement actions issued each year is a second indicator that the NRC's standards have not changed significantly in recent years.

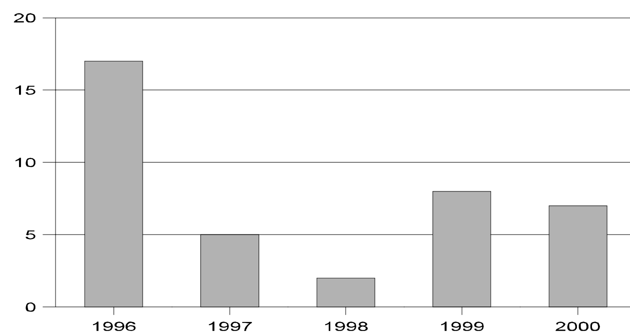


Figure 2: Number of Enforcement Actions for Employee Protection Violations Issued to NRC Licensees

Throughout the Task Group's discussions and interactions with internal and external stakeholders, numerous comments and recommendations were provided. The majority of these comments were

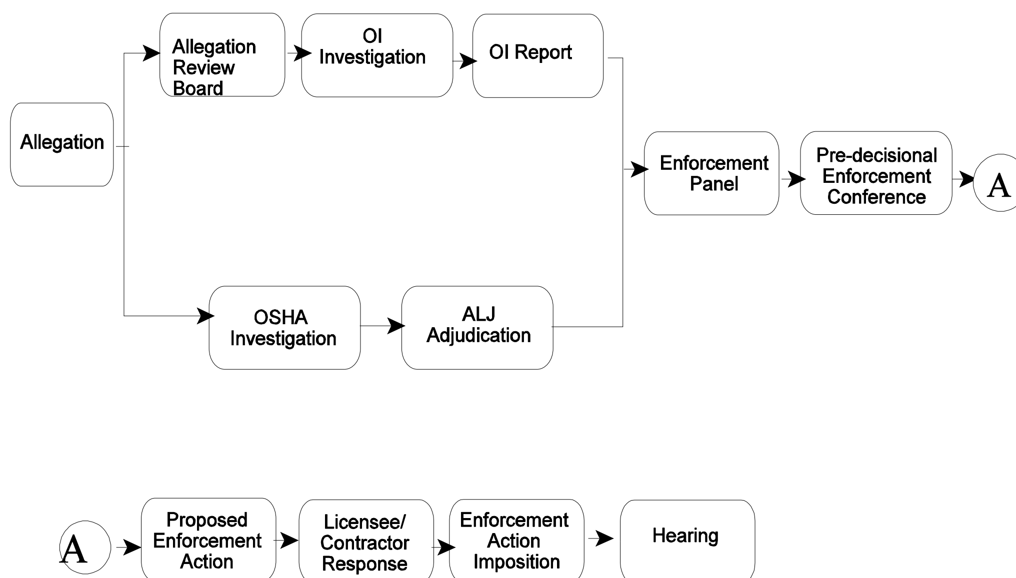
grouped into topic areas and are discussed within the body of this report, however others were more general in nature and are discussed below.

Overall when meeting with external stakeholders, it became clear that the comments from the industry were critical of many of the methods the NRC is currently using to satisfy its responsibilities to ensure that a SCWE exists and that employees are not discriminated against for raising safety concerns. Industry representatives suggest that the NRC discontinue the investigation and enforcement of individual discrimination complaints and primarily focus on the SCWE . However, without a SCWE rule, the staff believes this would be difficult to inspect and nearly impossible to enforce. Also, Congress has made it clear that the statute giving DOL authority to provide personal remedy, which was considered complimentary to the NRC's authority, was never intended in any way to abridge the Commission's authority under the AEA to investigate an allegation of discrimination and take appropriate action against a licensee, nor was the statute passed because Congress thought that the Commission lacked such power.

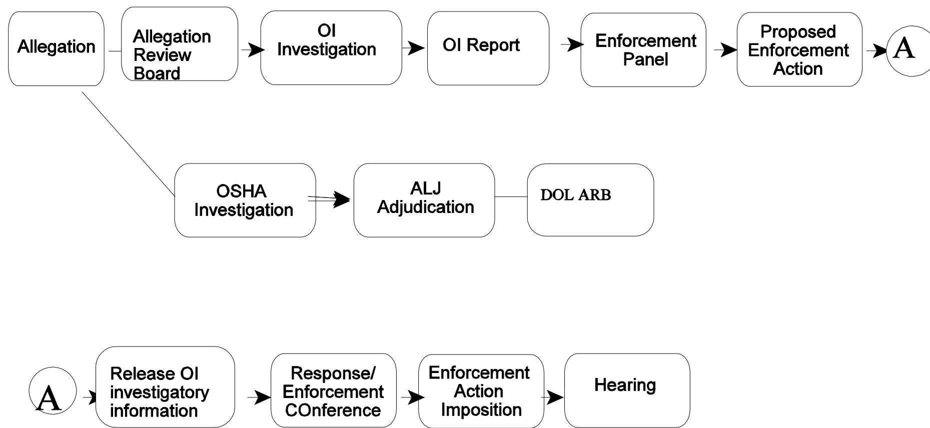
Many of the comments received from members of the public, who in a number of cases are past or current complainants, are in direct opposition to the industry comments. Some commentors stated that they do not want to see the NRC abandon it's pursuit of individual complaints, which they see as a means of getting identified technical issues corrected and resolving problems with discrimination or work environment at facilities. They see the DOL process as both lengthy and very expensive. Personal expense may be a factor which deters individuals who come to the NRC from going forth with a DOL discrimination complaint. Historically, approximately 60 percent of individuals that come to the NRC do not go to the DOL with a complaint. The employer has the greater financial means to continue with a case throughout the many appeals that the DOL process allows.

The recommendations provided by the Task Group in this paper involve making improvements to the current process. The recommended changes should make the process more fair, and open, and address many of the comments received from both the industry and other members of the public.

The following figure illustrates the current process:



The following figure represents the process with recommendations implemented



F. Use of a Risk Informed Approach

A number of industry representatives suggest that the NRC use a more risk-informed approach by focusing NRC resources on the underlying safety concerns and broader work environment issues. The industry specifically encourages the staff to leave individual discrimination cases to the Department of Labor. Specific facets of this issue are discussed in the following sections of this report, however a general discussion is provided here. The Task Group believes that the existence of a safety conscious work environment and the ability of individuals to engage in protected activities directly contributes to the agency's mission of protecting public health and safety and the agency's goal of enhancing public confidence. Nuclear safety and public confidence are enhanced when workers feel free to raise questions and concerns. This freedom to raise concerns should not be dependent on the risk or safety significance of the concern, nor should a well intentioned worker be penalized if the concern is eventually determined to be not valid or not risk significant.

An approach that focuses less on the individual discrimination case and more on the broader work environment presents several difficulties. First, there are no regulations in place governing the SCWE area, nor are the inspection procedures, guidance, standards or criteria for evaluating a licensee's SCWE adequate to serve as the primary indicator of a licensee's work environment. Second, discrimination cases are by their nature individual cases. Each case is important based upon its own merits, and each one sends a message to the work force. The NRC's response to alleged discrimination should be as consistent as possible from case to case. Treating each case on its own merits does not preclude the NRC from enhanced regulatory interaction with the licensee if problems are identified with the broad work environment. Third, a risk-informed approach in this area would be inconsistent with recent Commission decisions regarding staff treatment of technical allegations (SECY-00-0177, Implementing the Allegation Program Under the Revised Reactor Oversight Process). The goal of improving public confidence is supported by handling each case of discrimination on its own merits.

The industry asserts that the NRC's treatment of discrimination cases is inconsistent with the agency's revised approach to enforcement for reactor technical violations. While accurate as it relates to the fact that the safety and risk significance of the original technical concern raised by

the employee is not dominant factor in the agency's response, the Task Group disagrees with the industry's assertion on other bases. The NRC's treatment of discrimination cases is consistent with the ROP in that it evaluates issues on a case by case basis without aggregation. It is performance based and does not rely on programmatic or administrative reviews.

G. Comparisons to Other Industries and Agencies

A review of the enforcement history for all NRC licensees indicates that while each discrimination violation is a serious matter, discrimination does not appear to be a common or prevalent problem. NRC licensees generally seem to recognize the value of a SCWE and power reactor licensees, in particular, have created employee concerns programs. Although the Task Group did not perform a survey to validate its opinion, it appears that the nuclear industry is one of the more proactive industries with regard to soliciting concerns and feedback from the workforce. Similarly, based upon discussions with OSHA and other federal agencies, the NRC is unique in the level of effort and the manner in which it provides regulatory oversight of employee protection issues. This is a similar to the conclusion of the 1994 review of the program (NUREG-1499). Other regulatory agencies refer individuals alleging discrimination to OSHA and do not conduct any independent inspection, investigation, or enforcement activities. Nor do they consider the impact that findings of discrimination have on the work environment.

H. Accountability for Individual Actions

Industry representatives stated that licensees should not be held liable for the independent acts of individual employees. A fundamental principle of the NRC enforcement program is that licensees are responsible for the safe operations of their facility and for the conduct of their employees. Licensees benefit from the good performance of their employees and it is reasonable that they also be held responsible for the consequences of poor performance. For this reason, nearly all violations are issued to NRC licensees and only additionally to an individual when the violation was committed deliberately. The industry proposal would insulate the licensee from its responsibilities and interject the NRC into personnel management issues.

I. Relationship to OSHA/DOL

A number of comments raised by stakeholders relate to the relative responsibilities of the NRC and DOL/OSHA. Both agencies analyze the same type of evidentiary information relative to employee protection cases but the agencies' actions serve different purposes. The OSHA/DOL process is directed at determining if an individual deserves a personal remedy as a result of discrimination. If found to deserve remedy, the individual receives a benefit such as back pay or restoration of a job. In essence, the individual is "made whole" by compensating him/her for what was wrongfully removed. OSHA/DOL takes no punitive actions against the employer nor does it require corrective actions beyond the specific case.

On the other hand, the NRC has no authority to provide individual remedy. The NRC's focus is on the current and future SCWE and employees' ability and willingness to engage in protected activity. NRC enforcement actions are directed to the licensee and the individual who took the adverse action (when deliberate) in an effort to ensure corrective actions are taken to prevent future discrimination violations. Civil penalties associated with these violations are modest when compared with the resources of the licensee but are an effective tool in emphasizing the importance of employee protection issues.

The difference in responsibilities between NRC and DOL, on occasion, may lead to a perception that the same facts are treated differently. It is possible for DOL to find that an individual was discriminated against but does not deserve an individual remedy because there were also

legitimate, non-discriminatory reasons for the employer's adverse action against the individual. Conversely, in the same case the NRC may take an enforcement action against the licensee because a protected activity was (at least in part) the basis for taking an adverse action against the employee. The fact that the licensee work force may see that the protected activity was part of the reason for the adverse action has a "chilling effect" on their ability to bring issues forward and results in a negative impact on the SCWE. The NRC's interests are in ensuring that an individual's protected activity is not used against them in a discriminatory manner, and that a SCWE exists at the licensee's facility.

J. Role of the Alleger

Several stakeholder comments related to the role of the victim of the alleged discrimination. The comments ranged from proposing a more active role for the alleger, including the idea that the NRC should represent the alleger's interests, to the concern that some individuals abuse the system in an attempt to gain undue advantage over their employer. Unlike the DOL process, NRC enforcement actions do not provide personal benefit to the subject of the discrimination. The NRC actions are directed toward correcting the environment in which discrimination occurred. Obviously, the information provided by the alleger is an important factor in the NRC investigation and enforcement decision making process. The alleger is frequently able to provide a first hand perspective of the events leading up to the adverse action. The alleger is a valuable source of information to the NRC as it attempts to determine if a violation of the employee protection regulations occurred. However, the NRC process is directed toward the licensee and its SCWE. The NRC in the discharge of its responsibility to protect the public health and safety, is not designed to represent or serve the individual purposes of the alleged victim of discrimination.

Several stakeholders stated that PECs should be scheduled to ensure that the alleger is able to attend and that the alleger should be allowed to bring an expanded number of advisors/supporters to the PEC. The NRC has already made a preliminary conclusion that an apparent violation exists before it schedules a PEC. The PEC affords the licensee an opportunity to present their understanding of the issues associated with the apparent violation before the NRC makes a final determination. The alleger is invited to the PEC to allow the NRC staff to have the benefit of the alleger's reaction to the licensee presentation, as it could assist the staff in reaching a final conclusion. The PEC is a meeting between the NRC and the licensee and at no time is there direct interaction between the licensee and the alleger.

There is a clear benefit to the staff in having the alleger attend the PEC. As a result, it is appropriate that there should be some effort to include the alleger in the scheduling of the PEC. However, given that the staff has determined that there is an apparent violation (supporting the alleger's position), the staff does not believe it is appropriate to incur substantial delays in the scheduling of the PEC in order to accommodate the alleger's schedule. Conversely, once the PEC has been scheduled, and resulting travel plans have been made, the staff does not believe it is appropriate to delay the PEC to accommodate licensee and contractor participants unless there are unforeseen circumstance that involve someone that is vital to the PEC.

Several stakeholders stated that individuals can falsely claim discrimination to protect themselves from personnel action. The stakeholders stated that these individuals should be held accountable for reporting false complaints. While it is conceivable that an individual could falsely claim discrimination, the staff believes that this is a rare occurrence and that for the NRC to take enforcement action against the alleger in anything less than an extreme case would by itself create an industry wide chilling effect.

K. Opportunity for Due Process

Numerous commentors have criticized the current process as lacking due process and being unfair to the licensee and the individuals accused of discrimination. Discussions and recommendations found later in this report address specific aspects of this issue. In comparison to other regulatory agencies, the NRC's enforcement process provides extensive opportunity for the licensee to present their views before the NRC issues an escalated enforcement action. All activities and interactions prior to issuance of a notice of violation are considered part of the NRC fact gathering process. In fact, the NRC enforcement process could be shortened if the PEC were completely eliminated and the staff issued the final enforcement action based on inspection/investigation findings, without giving the licensee the opportunity to present their views on the apparent violation. Under this process, the licensee's first opportunity to address the issues would be to request a hearing. However, in an effort to ensure all relevant views are considered, the staff has been willing to expend more time and effort before issuing the enforcement action. It is important to note that neither the PEC nor any other activity that occurs before imposition of the NOV, with civil penalty, impacts the licensees right to request a hearing before the ASLB to resolve the issue. The hearing process provides the legal due process that seems to be the subject of the stakeholder comments. In reality, very few NRC licensees have taken advantage of this hearing opportunity with respect to employee discrimination cases.

II LEGAL STANDARDS/RULEMAKING

A. SCWE Rule

<u>Overview of current policy</u>

The NRC's current Safety Conscious Work Environment Policy is described in 61 FR 24336, effective May 14, 1996. That policy statement places responsibility for maintaining a safety-conscious work environment with each NRC licensee, as well as with contractors, subcontractors and employees in the nuclear industry. The policy statement also recognizes that a safety-conscious work environment is critical to a licensee's ability to safely carry out licensed activities. The Commission's expectation is that each licensee will establish a safety-conscious 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. The policy statement also makes a number of suggestions which licensees are encouraged to implement, such as the establishment of an employees concern program and conducting periodic training. The expectations and suggestions contained in the policy, however, did not establish any new NRC requirements. Of course, if a licensee has not established a safety conscious work environment, as evidenced by retaliation against an individual for engaging in a protected activity, whether the activity involves providing information to the licencee or the NRC, appropriate enforcement action may be taken against the licensee, its contractors, and the individual supervisors, pursuant to NRC regulations at 10 CFR 50.7 and 10 CFR 30.7, etc..

The primary means the NRC uses to assess SCWE is through the investigation of individual complaints of discrimination by the Office of Investigations. Along with determining whether a particular individual has been discriminated against, these investigations may disclose whether the discrimination appears to be an isolated instance or part of a culture which allows (either directly or indirectly) discrimination to occur.

The NRC through its inspection program also assesses the work environment at reactor licensees' facilities on a case-by-case basis. In Problem Identification and Resolution inspections, Inspection Procedure 71152, "Identification and Resolution of Problems", inspectors ask a series of questions to elicit feedback from licensee employees regarding whether they are comfortable raising safety issues. Based on such inspections or OI investigations, in situations where there appears to be a culture where individuals are reluctant to raise safety issues, the NRC may take regulatory action, for example issuing a chilling effect letter (CEL), encouraging or even ordering a licensee to conduct a survey of its SCWE, on its own or by a third party, and report the results to the NRC.

In addition, the NRC issues CEL to licensees when a concern arises regarding the SCWE. Chilling effect letters are issued after a DOL investigation or OI investigation has been completed and a finding of discrimination has been made or other indications that a chilling effect may exist, such as a large number of allegers coming to the NRC. The CEL requests that the licensee describe, among other things, the actions taken or planned to ensure that the matter is not having a chilling effect on the willingness of other employees to raise safety and compliance concerns within its organization and to the NRC.

Comments Received

Virtually all commentators stated that establishing a safety-conscious work environment is critical to the licensee's ability to safely carry out its licensed activities. Those commentators representing the industry stated that, generally, throughout the industry a safety conscious work environment exists. A number of commentators stated that the NRC's focus should be exclusively on ensuring the existence of a safety-conscious work environment, that DOL should be the sole investigator of individual acts of discrimination, and that the NRC should issue "chilling-effect" letters. There was a mix of comments on whether the NRC should establish a SCWE rule. Industry representatives stated that such a rule is not necessary. There were some comments which supported the promulgation of a SCWE rule.

Responses to Issues Raised

Efforts to promulgate a rule requiring a SCWE would be extensive. In addition, inspection, investigation, and enforcement, to ensure compliance with any such rule, would be resource intensive and very difficult to develop and implement. While the creation of a SCWE rule may increase public confidence, the Task Group does not believe, on balance, that the expenditure of effort to promulgate and implement a SCWE rule is warranted.

As stated above, OI investigations help address safety conscious work environment and frequently are helpful in understanding the SCWE at the licensee's facility. In addition, Problem Identification and Resolution inspections offer some insight into reactor licensees' SCWE.

Options

1. Develop SCWE rule
2. Don't develop SCWE rule.
3. Do not develop a SCWE rule , however evaluate SCWE in more detail through investigation or inspection.

Recommendation

The Task Group recommends that the NRC continue to evaluate the licensee's SCWE using the methods described above and not develop or implement a SCWE rule. The task force recommends that the NRC continue to implement the Commission direction on evaluating SCWE

as outlined in the SRM for SECY 98-0176, “Proposed Options for Assessing a Licensee’s Safety Conscious Work Environment”.

B. Protection for the Concerned Individual

Overview of Current Policy

The NRC has the authority to investigate allegations that employees of licensees or their contractors have been discriminated against for raising concerns and to take enforcement action against the licensees or contractors if discrimination is substantiated. Under Section 211 of the Energy Reorganization Act of 1974, the Department of Labor also has the authority to investigate complaints of discrimination and to provide a personal remedy to the employee when discrimination is found to have occurred. An employee who believes he or she has been discriminated against for raising concerns may file a complaint with the Department of Labor if the employee seeks a personal remedy for the discrimination. In situations where there has been a finding by DOL that discrimination has occurred, the individual is entitled to back pay and/or reinstatement as appropriate. The NRC is not authorized to provide a remedy to the individual such as that provided by the DOL. In addition, the NRC does not interfere in employment decisions made by licensees, rather the NRC will evaluate the actions of the licensee after the action is taken if an allegation of discrimination is raised.

Comments Received

A few of the commentors at public meetings expressed the concern that the NRC was not doing enough to protect the concerned individual. For example, one comment was that the NRC should issue an Order to the licensee or take other action to “protect” the complainant from an adverse action that will be taken because of a protected activity.

Response to Issues Raised

The NRC has no statutory authority to “protect” the individual. DOL has statutory responsibility to provide a remedy to an individual who has been discriminated against. In addition, offering to protect individuals by preventing the licensee from acting on employment decisions would put the NRC in the position of acting without knowing the facts of the case. Licensee’s make employment decisions with the knowledge that if the decision is illegally discriminatory the NRC will take enforcement action against the licensee and potentially against the individual who discriminated. Additionally, in SECY 96-056, the Commission considered and rejected establishing a “holding period” in which employees who claim discrimination would be kept in a paid state until an initial assessment was performed.

The NRC and DOL have, in the past Congress, jointly submitted proposed language to amend the Energy Reorganization Act to further protect nuclear industry employees from retaliation by their employers for raising safety issues with their employers or the NRC by providing them with earlier relief. The proposed language would strengthen a section of the Energy Reorganization Act of 1974 that provides a process under which employees (or former employees) in the nuclear industry who believe they have been discriminated against for raising safety concerns may seek reinstatement to their former position, or another remedy. DOL has responsibility for administering this section of the Act. The proposed language would revise Section 211 to afford more timely relief to complainants by providing for a preliminary order of reinstatement of the complainant, if the Secretary of Labor determines at the conclusion of the investigation conducted at the outset of the process that a violation has occurred. The Commission is considering whether to submit these changes to the current Congress.

Recommendation

The NRC does not have the statutory authority to directly protect the CI. The NRC should continue to support the joint NRC / DOL legislation that affords more timely relief to complainants by providing for a preliminary order of reinstatement of the complainant, if the OSHA determines at the conclusion of the investigation conducted at the outset of the process that a violation has occurred. The Task Group also recommends re-titling the "Employee Protection" regulations of 10CFR50.7, 10CFR30.7, etc to better reflect NRC's activities regarding prohibiting discrimination of employees.

C. Assessment of 10CFR50.7 Changes to Include Individual Actions

Overview of Current Policy

Currently, 10 CFR 50.7 states that discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. The regulation, as is the case with almost all NRC regulations, cannot be cited against an unlicenced individual. Individuals are held accountable by the NRC only in situations where they deliberately engage in misconduct which causes the licensee to be in violation of an NRC rule or regulation or in situations where the individual provides information to a licensee or the NRC which the individual knows to be false.

Comments Received

Comments were received that suggested 10 CFR 50. 7 should include individuals. This would allow the responsible individual to be cited for a violation of 10CFR 50.7 even if the discrimination was not deliberate. In addition, it was stated that such a change would increase the accountability of individual managers and that it would encourage training of all employees.

Response to Issues Raised

There does not appear to be a significant justification for treating this regulation any differently than any other regulation. If someone deliberately violates 50.7, as is the case with any other regulation, they are held accountable under 50.5. In some respects, given the nature of 50.7, there is already greater accountability on the individual than in other violations of NRC requirements, since an alleged violation of 50.7 is always considered potential wrongdoing and there is the impact of an OI investigation of the individual who is alleged to have discriminated. On the other hand, increased accountability for individuals would likely increase public confidence and have little effect on regulatory burden, maintaining safety, or increasing efficiency.

Options

1. Initiate a rulemaking to amend 10 CFR 50.7 so that it is applicable to individuals as well as licensees. However, orders against individuals should only be available under 50.5.
2. 50.7 should not be singled out from other requirements for individual action.

Recommendation

The Task Group recommends that 10 CFR 50.7 should not be singled out from other requirements for individual action, as a result, no changes are recommended to this rule.

D. Assessment of Support to Concerned Individual

Overview of Current Process

Currently, when an individual makes an allegation of discrimination and it is substantiated by the Office of Investigations, the concerned individual is invited to attend the predecisional enforcement conference. However, it is up to the individual to make arrangements to attend the conference and the individual is responsible for the cost of all such travel. In some instances the licensee has paid for the individual to attend the conference, but the licensee is not required to make such payments. If the discriminatory act was termination of employment, attending a PEC could be a significant financial hardship for the individual.

Comments Received

Commentors stated that it is an undue burden on the individual to have to pay to attend enforcement conferences and that due to financial limitations, many concerned individuals who would like to attend the PEC are unable to attend. Accordingly, it was suggested that either the NRC should pay for the travel and lodging for the concerned individual to attend the PEC or the NRC should compel the licensee to pay for the individual to attend the PEC.

Response to Issues Raised

The Task Group considers attendance at a PEC by the concerned individual to be an important part of the fact gathering process before the final determination of enforcement action is made. His or her presence may enable the NRC to make a more informed decision and, as a result, is of benefit to the NRC. In some cases the concerned individual's comments have changed the NRC's view of the licensee's presentation or understanding of the facts of the case. As a result, the Task Group agrees that it is appropriate for the NRC to determine if it is feasible to reimburse the concerned individual and his or her personal representative's travel expense to attend the PEC.

Recommendations

The Task Group recommends that the staff explore how funding could be provided to allow reimbursement for the CI and one personal representative to attend PECs.

E. Individual Hearing Rights

Overview of Current Process

Unless an individual is subjected to enforcement action that includes an Order or a Civil Penalty, he/she is not entitled to a hearing. Under these circumstances, if the individual received a Notice of Violation, he /she would not be entitled to a hearing. This provides the individual with the same rights which are provided to the licensee.

Comments Received

Comments were received that stated that individuals should be allowed hearing rights when an NOV is issued because of the substantial impact an NOV could have on the career of that individual. A petition for rulemaking which requested that the NRC amend its regulations to ensure that individuals be afforded the right to respond to the violation in a hearing, was received by the NRC and posted in the Federal Register on November 3, 1999. This issue is being processed under normal rulemaking procedures.

Response to Issues Raised

The Task Group is aware that the issuance of an NOV could impact an individual's career. However, the NRC does not require that licensees take any action against individuals who receive an NOV. Any negative action or impact taken is based on decisions made in licensee organizations independent of the NRC enforcement process. Offering hearing rights to such individuals would potentially have a large impact on NRC resources which would not be warranted given the nature of action taken by the NRC. Also, currently, individuals do have the ability to contest the violation by responding to the NRC as directed in the Notice of Violation. The staff reviews these responses and determines whether the violation should be modified, withdrawn or upheld. Because the NRC's action of issuing a violation does not in itself have any implications to the individual's career, and because of the resource considerations involved with granting hearing rights for this action, the Task Group does not believe that this change is warranted.

Recommendation

This issue is being handled under the normal rulemaking process. However, the Task Group does not recommend providing additional hearing rights to individuals.

F. Employee Protection Training

Overview of Current Process

Presently, the NRC does not require licensees to provide training to its employees on the NRC employee protection regulations. However, as part of its May 14, 1996 policy statement applicable to employee protection regulations, the NRC recommends, among other things, that licensees provide training to their employees regarding the NRC's employee protection regulations. Many reactor licensees do provide such training, however, the content and quality of the training is not uniform throughout the industry.

Comments Received

On August 13, 1999, the Union of Concerned Scientists submitted a Petition for Rulemaking to the NRC seeking to require NRC licensees to provide specific training to management (first-line supervisors, managers, directors, and officers) regarding the federal regulations for employee protection. UCS stated that they believe that this rulemaking is required based on a recent NRC staff position that the NRC is unable to take enforcement action against individuals who violate the employee protection regulations unless the NRC can prove that these individuals knew that their actions violated the regulations. Other commentors also supported the creation of an NRC rule to require licensees to provide such training to all of their employees

Response to Issues Received

Currently, in order to take enforcement action against an individual, the facts must show by a preponderance of the evidence, that an individual deliberately discriminated against the complainant due to engagement in protected activity. This regulation,(e.g., 10 CFR 50.5), involves a much higher standard than that needed to cite a licensee or contractor under the employee protection regulations. In order to show that a deliberate action was taken and to be able to cite against the deliberate misconduct regulations, the evidence must show that the individual understood: 1) the requirements of the employee protection regulations, 2) that the complainant's actions were protected, 3) that the action being taken against the complainant was an adverse action in the terms, conditions or privileges of employment, and 4) that the individual deliberately disregarded the regulations and took the adverse action anyway. As a result, the fact that a person

has been trained in the employee protection regulations, does not determine whether they understood the requirements or whether they understood the three additional requirements. Some protected activities and adverse actions are subtle and as a result, may give weight to the claim that they were not well understood. Because these elements go to the individual's state of mind and intent, it is typically difficult to prove and sustain a citation of the deliberate misconduct regulations.

In order to encourage the development of a training program on discrimination regulations, issues, and on the definition and importance of a safety conscious work environment, the Task Group considered whether it is appropriate to revise the enforcement policy to escalate enforcement sanctions to licensees that do not have a training program. The Task Group believes that this change would encourage both reactor and materials licensees to provide training without the increased regulatory burden of a formal rulemaking requiring a training program.

Recommendation

As discussed above the requested rulemaking would not correct the problem that was the basis for the petition. Although an employee may have received training on the discrimination regulations, this does automatically mean that any adverse action taken was deliberate The Task Group recommends denying the petition for rulemaking and implementing recommendations with regards to encouraging the development and implementation of training programs through changes in the enforcement policy.

G. Standards of Proof

Overview of current policy

The Supreme Court set out the basic allocation of the burden of proof for discrimination cases involving disparate treatment in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The appropriate burdens of proof were subsequently clarified in *Texas Dept. of Community Affairs v.Burdine,* 450 U.S. 248 (1981). Under *McDonnell Douglass* and *Burdine*, the complainant must initially establish a *prima facie* case of discrimination. In order to make out a *prima facie* case of discrimination, the complainant must show: (a) that he is in a protected group; (b) that he was negatively impacted by some employment decision; and (c) that similarly situated individuals who are not members of the same protected group as the complainant were treated differently with respect to the employment decision at issue. The Secretary of Labor has adopted the Supreme Court's prescription for the allocation of burdens of proof and production set out in Burdine, and applied it to whistleblower cases under the ERA. *See Darty v. Zak Company of Chicago,* 82-ERA-2 (Sec'y Apr. 25, 1983). The Secretary of Labor stated that the elements of a *prima facie* case require a showing that: (a) the individual engaged in protected activity; (b) that the individual was subjected to an adverse action; (c) that the employer was aware of the protected activity when it took the adverse action; and (d) there is some evidence to raise an inference that the protected activity was the likely cause of the adverse action. The employer may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer, however, bears only a burden of production of rebuttal evidence; the ultimate burden of persuasion of the existence of retaliatory discrimination rests with the complainant. Accordingly, the complainant must establish that the reason proffered by the employer is not the true reason. The complainant may persuade directly by showing that the unlawful reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is not credible.

Consistent with DOL analysis, the NRC does not end its inquiry at the establishing of a *prima facie* case by the complainant, rather the NRC looks at the proffered reason for the adverse action given

by the respondent to determine if, by a preponderance of evidence, the proffered reason was pretext for discrimination. However, it should be understood that the existence of a legitimate reason for the taking of adverse employment action against a complainant does not, by itself, necessarily require a conclusion that discrimination did not occur. Rather the record must establish that the respondent acted on the legitimate reason and the action was not due to the employee having engaged in protected activity.

Comments received

Numerous comments were received addressing the burdens of proof used by the NRC in processing cases of discrimination. One law firm stated that the "NRC standard is that it must demonstrate that there is some evidence that the adverse action was taken 'at least in part' because of protected activity to prove a violation of 50.7. Therefore, if there is any evidence of discriminatory motive - even if the weight of the evidence suggest that an employer was motivated by legitimate business reasons - NRC will find discrimination."

Related to the above, it was stated that the NRC should not focus on whether the decision maker in some employment action at some point in time in the corner of his or her mind considered the employees protected activity. Focus should be on whether the employer had a legitimate business reason for the employment decision being challenged. If the employer had a legitimate reason, why should it face a penalty.

Response to Issues Raised

While some of the comments reflect the belief that the NRC standard of proof is less than that articulated above, the reality is that the NRC, prior to taking enforcement action against a licensee, makes a determination that the preponderance of the evidence supports the conclusion that discrimination occurred. This means that not only must a *prima facie* case be established by a preponderance of the evidence, but also, the agency looks to determine whether the licensee's articulated reason for taking the adverse action is the real reason for the adverse action as opposed to a pretext. The standard for proof is a preponderance of the evidence.

Recommendation

The Task Group recommends that OGC continue to use the current established standards in determining whether discrimination occurred.

H. Assessment of Decriminalizing 50.5 and 50.7

Overview of Current Process

The NRC's employee protection regulations, such as 10 CFR 50.7 were issued under the authority of both Section 211 of the Energy Reorganization Act and under certain sections of 161 of the Atomic Energy Act. Section 223 of the AEA provides criminal penalties for whoever willfully violates, attempts to violate, or conspires to violate any regulation or order issued under such subsections of 161.

Comments Received

There were comments made suggesting that the NRC decriminalize the employee protection regulations. In support, it was stated that the NRC is the only Federal agency to have such regulations that subject individuals to criminal investigations and potential criminal sanctions. In addition, the commentors stated that the potential for criminal sanctions inhibits licensee

management from taking appropriate action to discipline or remove employees for cause, ultimately at the expense of safety because poor performing employees are not being dealt with.

Response to Issues Raised

There does not appear to be any other Federal agency where a violation of employee protection regulations could result in criminal sanctions. However, while deliberate violations of many of the NRC's regulations can result in the imposition of criminal sanctions, such sanctions are rare. Furthermore, making such a change would not change the manner in which OI investigates allegations of whistleblower retaliation. Decriminalizing 50.7 would result in this regulation being singled out and inconsistent with other NRC regulations. Since the imposition of such criminal sanctions is rare and reserved for especially egregious cases, there does not appear to be the need to change.

Recommendation

The Task Group recommends that the regulations remain consistent with the other regulations that are subject to criminal prosecution for a willful violation. As a result, the Task Group recommends not decriminalizing violations of 50.7 and similar employee protection regulations.

I. Assessment of Changes to Allow Civil Penalties to Contractors

Overview of Current Process

10 CFR 30.7, 40.7, 50.7 and 70.7 state explicitly that contractors may not discriminate against employees for reporting safety concerns. However, the NRC does not have the authority to impose civil penalties against contractors for violations of these requirements. Since activities of contractors can clearly affect the safe operation of a licensee's facility, it is important that contractors do not engage in illegal discrimination. The NRC has typically held licensees responsible for the actions of its contractors and issued civil penalties to the licensee when its contractors engage in conduct that violates NRC employee protection regulations.

Comments Received

A number of commentors stated that it is unfair to hold the licensee responsible for the deliberate actions of its contractors, especially in situations where the licensee takes prompt and comprehensive action to remedy the situation. The comments suggested that it would be more appropriate for the NRC to take action, including the issuance of a civil penalty, directly against the contractor.

Response to Issues Raised

The Task Group agrees that there are situations where contractors should be subject to civil penalties.

Recommendation

The Task Group recommends that the staff should initiate rulemaking to include contractors as subjects that can receive civil penalties.

III. INVESTIGATIVE PROCESS

Background/Overview of Current Policy

The Office of Investigations (OI) conducts investigations of alleged wrongdoing by individuals or organizations who are NRC licensees or certificate holders, applicants for NRC licenses or certificates, or vendors or contractors to these entities. OI is staffed by special agents with an average experience level of approximately 20 years Federal law enforcement service. During the past three fiscal years (1998, 1999, and 2000) OI opened 80, 86, and 98 investigations, respectively, into allegations of alleged discrimination. Those numbers represented 41 percent, 44 percent, and 44 percent of the total investigations opened by OI during those fiscal years. For the same three fiscal years (1998, 1999, and 2000), OI closed 85, 83, and 95 discrimination cases, respectively, with an average time to closure of 6.6, 7.1, and 6.7 months. The current NRC policy and/or practice for initiating and conducting investigations into claims of discrimination is as follows:

- Within 30 day of receipt of an allegation of discrimination by the NRC a review of the matter will be conducted by an Allegation Review Board (ARB) with OI participating;
- if a *prima facie* showing of discrimination has been articulated by the complainant, as largely determined by Regional Counsel's and/or OGC's legal assessment, an initial priority will be assigned by the ARB and OI will open an investigation, normally within two working days of the ARB;
- OI will attempt to contact the alleger within 15 days of opening the case, and normally interview or arrange for an interview of the alleger within 30 days of the case opening date;
- the OI interview of the alleger (which is usually transcribed) is provided to the staff for review and possible repanel at an ARB meeting;
- if, after the alleger has been interviewed, and with the additional information in hand the decision is made that the alleger has not made a *prima facie* showing of discrimination, OI will close its investigation as unsubstantiated;
- if the decision is that the alleger has articulated a *prima facie* showing of discrimination, the OI investigation moves forward, unless certain criteria for a deferral to DOL are met (which is utilized very infrequently) or the investigation is determined to be a normal priority, which could result in a closure for work on higher priority investigations; the priority can be adjusted during ARBs or at the monthly OI prioritization meeting with regional management;
- as a general rule, when scheduling interviews, OI special agents approach the interviewee directly, rather than through an intermediary or counsel, and OI offers the interviewee the opportunity to have the interview conducted away from the licensee's premises;
- if DOL/OSHA is involved, OI and DOL will coordinate their efforts and share results as necessary;
- if OI substantiates the complainant's claim of discrimination (and may also substantiate that the discrimination was deliberate), they will brief the staff at the conclusion of the field work, usually prior to issuing a report in order to determine whether a safety issue exists that requires immediate action;
- if discrimination has been substantiated the Report of Investigation (ROI) and attached exhibits are provided to the staff for review (Regional Administrator, OE, and OGC); the ROI only is provided to DEDR, Office of Nuclear Regulatory Research, and NRR or NMSS;
- if discrimination has been substantiated the matter is also referred to the Department of Justice (DOJ) or cognizant U.S. Attorney's Office, usually via an oral communication, although it may be in writing; DOJ's prosecutive opinion is immediately communicated to the staff;
- if the case has been substantiated, an enforcement panel is held to determine appropriate action, such as whether to hold a PEC and whether individual action should be considered;

- if discrimination has not been substantiated the ROI and exhibits are provided to the staff for review ;
- if the case is unsubstantiated, the case is normally closed.

Comments Received

Comments were received related to the current (or perceived current) investigative process during public meetings (i.e., for external stakeholders), internal NRC meetings, and in writing. The comments received have been summarized by the Task Group as follows:

A. Referral of Allegations of Discrimination to Licensees

Response to Issues Raised

The Task Group considered whether all allegations of discrimination or some allegations, under certain circumstances, could or should be referred to licensees. Public comments at the stakeholder meetings indicated that by the time an alleger comes to the NRC with a complaint, they see no other recourse for airing their complaint and there is usually already a near total breakdown in the relationship between the employee and employer. The practice of referring all discrimination allegations back to the licensee organization that has been accused of the discriminatory action would likely have a chilling effect on the employees in the organization and a negative impact on public confidence.

The Task Group sees only limited circumstances in which referring an allegation of discrimination to the licensee might be warranted. Such considerations might include: (1) the consent of the concerned individual (CI); (2) the severity/egregiousness of the adverse action (a negative comment in a performance appraisal vs. termination); (3) the potential severity level of the agency's enforcement action; (4) the agency's view of the site's safety conscious work environment; (5) if the potential violation is by a contractor; (6) The licensee has already performed an independent investigation and taken appropriate corrective action, or (7) if the allegation is determined to be below the threshold for initiating an OI investigation.

However, even applying such limiting subjective conditions is viewed by the Task Group as having a potentially negative impact on public confidence, and, at best, an unclear impact on decreasing regulatory burden and increasing NRC effectiveness and efficiency. An inadequate licensee investigation might only postpone the need for an NRC investigation, and, thus, negatively impact agency timeliness for dispositioning such matters.

Options

1. Refer all Allegations to licensee for review and corrective action.
2. Refer Allegations under certain limited circumstances (complainant agrees, contractor, potential severity level).
3. Refer none in accordance with the current practice.

Recommendation(s)

Consider when it may be appropriate under limited circumstances to refer allegations to licensees or use licensee investigations.

B. The Threshold Criteria for Initiation of an NRC Investigation

Response

Based on comments made during both the internal and external stakeholder meetings, it is clear that threshold for initiation of an NRC/OI investigation is unclear to many members of the public. The current standard is whether, in the view of the Allegation Review Board (ARB), the complainant has articulated a *prima facie* showing of discrimination. Specifically: 1) was there a protected activity; 2) some indication that the employer was aware of the protected activity; 3) is there evidence of an adverse action; and 4) the ability to draw an inference that the adverse action was taken because of the protected activity. However, the establishment of a *prima facie* case alone is insufficient to establish that discrimination occurred. This initial *prima facie* determination is usually made during an ARB meeting, with legal views expressed by Regional Counsel or an OGC representative.

To put the NRC's process for initiating investigations into perspective, it is important to understand that not all charges/complaints of discrimination are automatically referred to, or pursued by OI. Since FY 1994, OI has initiated investigations and/or assists to the staff on between 50 to 70 percent of the discrimination allegations received by the NRC. In FY 2000 this percentage was approximately 60 percent. The ARB reviews each case on its merits and against the threshold of the *prima facie* criteria before OI will initiate an investigation.

The Task Group believes that a better definition/explanation of what constitutes protected activity, adverse actions, and what constitutes a *prima facie* case may help clear up some of the misunderstanding in this area. The Task Group also believes that it may be appropriate to consider the age of the alleged adverse action in deciding whether an NRC investigation should be initiated. As the time between the alleged adverse action and the reporting of it increases, it becomes increasingly more difficult for investigators perform a meaningful investigation. Such considerations and timely reporting would likely have a positive effect on NRC effectiveness and efficiency, specifically in the application of resources, but may have a negative effect on public confidence.

Recommendation

The Task Group believes that the current threshold is appropriate. However, in order to make it clear what the threshold criteria are, provide a better explanation of what constitutes protected activities, adverse actions, and a *prima facie* case. Also, in order to ensure that the complaint reflects the current environment at the facility, establish the criteria that for a discrimination complaint to be pursued by the NRC, the concern must normally be brought to the NRC within one year of the alleged adverse action.

C. The Investigative Techniques Employed by OI

Response to Issues Raised

The Task Group recognizes how different OI investigations may appear to individuals more familiar with traditional inspection activities. Investigations dealing with alleged discrimination and potential wrongdoing by individuals are appropriately not played out in public. They differ from technical inspections conducted by the NRC in which the issues are discussed with licensee personnel and management throughout the inspection. All investigations are intrusive and burdensome, particularly those involving discrimination and wrongdoing cases. Statements are taken under oath and many are transcribed to ensure an accurate record of the interview is available. The Task Group understands that the administering of oaths, issuance of subpoenas to compel the production of testimony or documents, asking challenging questions, confronting interviewees with

contradictory information, and occasionally offering polygraph examinations may be unpleasant experiences. They are, however, fundamental, well established investigative techniques and vital to resolution of the matter under investigation, especially investigations often involving circumstantial evidence. Compelling cooperation (i.e.,use of subpoenas) is generally only used when voluntary cooperation is not forthcoming, and witnesses wishing legal representation are afforded that opportunity. The vast majority of OI interviews are conducted voluntarily, without the issuance of a subpoena.

Recommendation(s)

Because the results of NRC investigations are used in enforcement actions that are very significant to individuals, fundamental and well established federal investigative techniques are necessary and appropriate to the resolution of the matter under investigation. Continue to utilize the investigative techniques currently employed by OI.

D. OI Presumption of Guilt or Innocence of Individuals or Entities Accused of Discrimination

Response to Issues Raised

The Task Group is not aware of any corroborative information that would support the assertion that licensee supervision/management is presumed "guilty until proven innocent" in discrimination investigations. In fact, over the past ten years OI has concluded that discrimination occurred in approximately 8.5 percent of the cases it has investigated. Independent reviews of OI discrimination investigations and the resulting reports, initially by the NRC's Office of the Inspector General (OIG), and subsequently by the Millstone Independent Review Team (MIRT), comprised of Administrative Judges and lawyers, found the OI investigations to be thorough and comprehensive, with the pertinent investigative issues identified and appropriate witnesses interviewed.

Recommendations

The Task Group does not agree with the premise that OI presumes the accused are guilty until proven innocent and proposes no action on this comment.

E. Scope of Investigation

Response to Issues Raised

Currently, during investigations into alleged discrimination, OI routinely gathers information from peers and coworkers and evaluates whether it suggests that a chilled environment may exist, one where others may be reluctant to raise concerns. Although such information is not necessarily indicative of a violation of the employee protection provisions, it is clearly of interest and concern to the NRC. This type of information is reported in the "Supplemental Information" section of OI Reports of Investigation. Similarly, if on the initial agency review of an allegation there is insufficient information to conclude that a *prima facie* showing of discrimination has been articulated, but a "chilling effect" is suggested, OI has opened "Assists to the Staff" to acquire additional information. OI has also developed such information while pursuing other wrongdoing investigations (i.e., non-discrimination issues) and has used the "Supplemental Information" section of the report to document those findings. However, not all the OI offices are consistent in the extent to which they examine or evaluate these issues.

Recommendation

If there are differences between the way special agents in the different field offices look at a chilled environment, OI should consider developing guidance to the special agents cover this topic.

F. Technical knowledge of OI special agents

Response to Issues Raised

OI special agents typically enlist the assistance of technical staff when such expertise is material to pursuing a specific investigation, including discrimination investigations. OI has used technical support on many occasions, particularly during the interview of the alleger, to ensure that any underlying technical concerns/issues are properly developed and to help assess the reasonableness of the alleger's beliefs.

The Task Group believes that OI special agents should be familiar with the issues that form the predicate for an investigation, however, he or she need not be a subject matter expert (i.e., technical) or be expected to have an in depth understanding of the design and/or procedures for any one specific facility. Further, the complainant, who is viewed as a cooperating, non-hostile witness, should be willing to educate OI special agents on the particulars of his or her case, to include describing the sequence of events, identifying key personnel, and explaining why the complainant believes there is a connection between the protected activity and the adverse action.

Also, OI routinely consults with Regional Counsel and/or OGC staff when considering the legal nuances of the elements of proof necessary to establish a violation of the employee protection provisions. In addition, OI has requested and received training from Regional Counsel and OGC on the NRC's regulations prohibiting discrimination, as well as collateral DOL case law. OI special agents also have attended outside training regarding developments in discrimination law sponsored by the American Bar Association and other outside entities.

Recommendation

Continue the practice of OI requesting and utilizing staff expertise, as necessary, to thoroughly resolve any and all matters under investigation including discrimination concerns.

G. OGC Legal Review of Draft OI Reports

Response

The Task Group considered whether an OGC review of draft OI Reports for substantiated discrimination investigations before closure and issuance of the report by OI was needed. This review may help to ensure that the investigation of a case captures the needed information that will determine whether there is a legal basis for a discrimination violation. Considerations supporting such a review include the possibility that it might ensure more concurrence with an OI decision, potentially eliminating some of the sometimes lengthy discussions over OI findings of discrimination. Also, in support of such a practice is the belief that OGC might identify additional interviews that need to be conducted or questions that might reasonably be asked before closure of the investigation. This may also result in speeding up the enforcement process if OGC is already in agreement with the determination, having reviewed the supporting information and assessed the adequacy of evidence supporting the violation.

However, in the past OGC has not proposed to initiate greater involvement by OGC attorneys in the investigatory process. OGC continues to provide support to Regional Counsel and OI as

requested and to provide generic guidance or training as requested. Further, OI field offices continue to coordinate with regional counsel and/or headquarters OGC resources at the early stages of an investigation to better determine if a potential violation exists, and as additional evidence is uncovered, to better focus the direction of the investigation.

OI is concerned that if the requirement for an OGC review is made a procedural requirement, it may detract from OI's independence, which is an important factor in all OI efforts and directly related to the creation of OI in 1982. OI is responsible for developing information to enable the staff to make informed decisions impacting public health and safety and, if sufficient evidence of wrongdoing is developed, for presenting it to the U.S. Department of Justice (DOJ) and/or cognizant U.S. Attorney's Offices for independent review. Potential differences of opinion between OI and OGC on whether sufficient evidence exists to support a finding of discrimination, before closure of the investigation, would make an OI referral to DOJ complicated, if not, moot.

Recommendation

The Task Group recommends that an OGC legal review should be performed for all substantiated discrimination cases prior to issuance of the Report of Investigation.

A minority of the Task Group members dissent from this recommendation.

IV. ENFORCEMENT

A. Application of 10 CFR 50.5

Overview of Current Policy

The Commission's current regulations in 10 CFR 50.5 (and comparable provisions in other parts of 10 CFR) provide that enforcement actions against employees of licensees or contractors may only be taken for deliberate misconduct. Deliberate misconduct is defined to encompass only intentional actions which the individual knew would result in a violation of an NRC requirement (10 CFR 50.5(c)(1)). Thus, in order to take enforcement action against an individual for discrimination prohibited by 10 CFR 50.7, it is necessary to prove that the manager involved knew at the time that he/she acted that act was a violation of section 50.7. The manager must know that the individual's actions constituted protected activity. He/she must know that the action taken constituted an adverse action within the purview of section 50.7, and must base that adverse action at least in part on the protected activity of the individual. This frequently results in licensees being found to have violated section 50.7 through the actions of their managers with no violations being issued to the responsible managers.

Comments received

Comments were received which covered a broad spectrum of concerns. Some commentors expressed the belief that the present process was appropriate and balanced and should continue to be used with restraint. Others expressed the view that the personal impact on an individual manager being charged with deliberate discrimination was enormous, particularly in light of the possibility that the individual could receive an Order effectively barring them from working in the nuclear industry, and therefore 50.5 should be used with great restraint, if at all. Many industry comments indicated that 50.5 should never be used in discrimination cases and that the agency should rely solely on sanctions against licensees under 50.7. Other comments expressed the opinion that only 50.5 should be used and that no action should be taken against the licensee for

a manager's actions. Still others suggested that the NRC should always take a 50.5 action against the managers involved when it finds a violation of 50.7

Comments were also received which indicated that 50.5 should only be used in circumstances in which the individual's actions were both deliberate and egregious and that the standard should be raised for 50.5 actions involving discrimination to something higher than preponderance of the evidence.

Response

The Task Group agrees with the general proposition that there is a need to maintain accountability for individual managers in employment discrimination cases. To do away with individual accountability for discrimination could lead to decisions to violate 50.7 becoming strictly economic business decisions. On the other hand, given that the potential adverse impacts on individual managers are significant, the Task Group believes that Orders to individuals should continue to be judiciously applied.

While the Task Group understands the perception of some commentors that there is a disconnect between the way the NRC deals with licensees and individual managers on discrimination cases, as indicated earlier, the disconnect is the result of the different standards applicable to violations of the deliberate misconduct and discrimination regulations. The only way to hold both licensees and individuals accountable in all cases of discrimination would be to change 50.7 so that it applies to individuals as well as licensees. While this would solve the disconnect and remove "ignorance of the law" as a defense by individuals, it could lead to individuals being the subject of enforcement for actions which they did not understand to be discriminatory. This approach would also make the enforcement 10 CFR 50.7 different from other NRC regulations.

The Task Group does not agree with the suggestion that only actions against individuals should be taken in discrimination cases and that licensees should not be held accountable. As with other areas of NRC regulation, the Task Group believes that licensees should be held accountable for the actions of their employees and specifically, those that they put in supervisory positions.

The Task Group does not agree that there is a need to increase the burden of proof under 50.5. As indicated previously, it is already difficult to construct a 50.5 case against an individual given that deliberate intent to violate 50.7 must be established. To raise the bar higher would make it virtually impossible, absent an admission, to ever cite an individual under 50.5. As presently applied, Orders against individuals are rare and in the majority of cases the individual managers are not issued even an NOV.

Recommendations

The Task Group believes that 10 CFR 50.5 should continue to be applied to individual managers who have deliberately discriminated against a whistleblower.

B. Distribution of Information prior to a Pre-decisional Enforcement Conference

Overview of Current Policy

Section 5.2.2 of the Enforcement Manual describes the information that is given to participants prior to a Pre-decisional Enforcement Conference(PEC). The current guidance is that in cases involving OI reports, the licensee should normally be sent a factual summary of the report prepared by the staff. The factual summary provides notice to the conference participants of the factual basis for the staff's preliminary conclusion that NRC regulatory violations occurred. The summary is

intended to provide sufficient factual detail to fully apprize conference participants of the operative facts involved in the apparent violation. However, it is not intended to provide a full discussion of the evidence gathered in the course of the NRC's investigation.

The summary does not normally include the names of individuals involved in the potential enforcement matter, rather, titles or other generic descriptions are utilized. While the length of the summary in each case depends on the facts, it does not ordinarily exceed two single-space pages. Transcripts of interviews conducted to support enforcement action are not normally released to licensees or the public until after an enforcement action is issued. On the other hand, transcripts of interviews may be released to individuals, if an individual or the individual's attorney requests a copy of the transcript of their OI interview to prepare for a PEC in which they are the subject (i.e., a potential recipient of an enforcement action), provided that the related OI investigation is complete and closed.

Section 7.5.4.4 of the Enforcement Manual states that in certain cases, typically when the proposed enforcement action is based upon a decision by an Administrative Law Judge of the Department of Labor, no factual summary should be necessary, since the participants will be fully conversant with the facts to be discussed at the PEC. The region, in coordination with OI, should ensure that the identity of an alleger or confidential source will not be released to the public through the release of the factual summary or synopsis.

Generally, OI reports and exhibits are not available to the licensee or public until after the enforcement action has been issued. The full report may be requested under the FOIA. Reports will not normally be provided if OI concludes that disclosure could interfere with ongoing investigation activities. In addition, exhibits will normally be provided only if requested through the FOIA process.

Comments Received

Comments were received on this subject during all the public forums held by the Task Group. The majority of participants in these meetings (both the public and industry) were strongly in favor of releasing OI reports prior the PEC. The NEI comments below on this subject are representative of the overall feedback received on this matter.

"The industry strongly urges the NRC, as did many of the other stakeholders, to reexamine and change its policy regarding the release of OI reports prior to pre-decisional enforcement conferences. Notwithstanding prior industry comments, the Commission currently refuses to release these reports until an enforcement action is issued. This inhibits the participants in the PEC from having a meaningful opportunity to examine the factual and analytical foundation of the OI report and to respond to those fully at the conference. Given that the enforcement conference is the sole open process prior to an enforcement action, fundamental fairness and the need for transparency compel the release of this information.

The long-standing, stated purpose of predecisional enforcement conferences-with respect to all potential violations has been "to obtain information" and to reach "common understanding" of facts, root causes, corrective action, and the significance of issues. Withholding OI reports does nothing to further this purpose."

Other comments included:.

- Release OI reports and all exhibits prior to the PEC participants.
- If the NRC gives the OI reports to the licensee, they will have more time to fabricate a story.

– Give the licensee the "theory" of the case including the inferences used in making a case for discrimination, to participants prior to the PEC.

Evaluation

The staff has held discussions with various internal stakeholders regarding this comment. The Task Group has suggested releasing redacted versions of the OI report prior to the PEC, not to include the exhibits or other referenced information, for a one year trial period. After that time, the practice of releasing the reports will be evaluated based on the experience gained during the trial period. Although there was agreement by a majority of both internal and external stakeholders for the release of the OI report, there were some internal concerns with this proposal. The concerns and the corresponding discussion are addressed below:

Concern (1)

Fundamentally, is the Task Group confident that it has correctly interpreted the data provided through the public meetings on the subject matter. Were the commentors at the meetings saying, 'if the licensee is going to get it [the OI report] prior to the PEC, then we want it at the same time?' Or, were they of the view that the licensees should get it before the PEC out of fairness considerations, regardless of whether the public or the alleger got it at the same time?

Discussion

The comment from the majority of the participants at stakeholder meetings was that the OI reports should be released, prior to the PEC, to the parties that will be at the PEC, but not to the public. Both licensees and allegers were supportive of releasing these reports to allow them to properly prepare for these meetings. The Task Group believes that this comment should be addressed by the adoption of the recommendation to release such reports prior to PECs on a year trial basis.

Concern (2)

The alleger/whistleblower community may not be well served by this process. As proposed, the licensee will be provided with the NRC's evidence, the strengths and weaknesses of the case, and the names of witnesses who were interviewed by OI. Some of those witnesses may have been interviewed by OI off-site and unbeknownst to the licensee, but would then be known to the licensee and the licensee's attorney(s). This could create a potential 'chilling effect' and, quite possibly, adversely affect future cooperation with OI by licensee employees (also see Objection No. 3, below). It is not the NRC's goal to facilitate 'chilled environments' at licensee facilities or to inhibit cooperation with an OI or licensee investigation. The alleger/whistleblower who already perceives that the battle against the licensee and the licensee's attorneys is an uphill one, may now feel more disadvantaged.

Discussion

Valid concerns are raised regarding whether the release of such reports would potentially create a "chilled environment" at licensee facilities resulting from licensee management or licensee attorney(s) identifying employees who cooperate with OI investigators. However, the staff's proposal to release just the redacted OI investigatory reports, and not the underlying exhibits, should minimize the effect.

Should an allegation be substantiated that a licensee or contractor management identified cooperating employees and then took adverse action against such OI witnesses because they were identified in OI reports, or because these employees cooperated with OI investigations, the NRC

staff would take very significant enforcement action against the licensee. The staff intends to reinforce this issue with all licensees and PEC participants. These factors should ensure that the release of redacted OI investigatory reports does not create a chilled effect on employees' future cooperation with OI investigators.

Concern (3)

The proposal fails to account for the impact of the release of the report of investigation on third party witnesses. It only addresses the 'participants' of the PEC, presumably the licensee, the subject, and possibly the alleger in a discrimination case. Third party, or fact witnesses, generally do not have anything to gain by providing candid testimony to OI. However, there are risks associated with their cooperation. Experience with third party witnesses has left the impression that they provide testimony under the general expectation that the NRC will not release their identities, except if the matter is litigated. This proposal would quite possibly result in the need to advise these witnesses of OE's intent to release the report containing their identities before litigation. The impact of this is indeterminate; however, portions of the staff believe this could hamper the willingness of third parties to provide testimony and would only add to the 'chilling effect' discussed above. This would be counter-productive to the effectiveness and efficiency of the enforcement process.

Discussion

The effect on third party witnesses is a legitimate concern. However, even under the current process OI informs third party witnesses, if asked by the witness, that their identity and statements cannot be kept confidential if the issue is litigated. The identity of third party witnesses can be fully revealed to the licensee upon the NRC's release of investigatory reports and exhibits under FOIA requests after enforcement action has been taken or as part of discovery if the licensee requests a hearing. The proposal to release the entire redacted report, and not individual transcripts, should minimize the impact on third party witnesses.

Concern (4)

The proposal does not specifically address 'allegers' being provided with a copy of the OI report, but rather indicates that the PEC 'participants' will be provided with a copy. If the allegers in discrimination cases choose not to attend the PEC, or can't for other reasons attend the PEC, they apparently will not receive a copy of the OI report since they are not 'participants.' This could be viewed as unfair.

Discussion

The release of such redacted reports is to aid the PEC participants in their preparation for the PEC. In discrimination cases, the alleger is invited to attend the PEC to aid the staff in determining the facts of the case. The alleger has also been personally affected by the case, because there is enough evidence at the time of the PEC to preliminarily conclude that there was an adverse action taken as a result of protected activity. Because the alleger was affected in discrimination cases, the proposed program will include providing a copy of the report to the alleger in discrimination cases, if desired, regardless of whether the alleger plans on attending the PEC. The intent is to provide copies of the redacted OI reports to only those parties that will participate or have a personal interest in the outcome of the PEC.

Concern (5)

Allegers in non-discrimination cases do not participate in the PEC. Therefore, in accordance with this proposal, they would not be provided with a copy of the OI report and would have no recourse to acquire it at the time of the PEC. This would give the appearance that the licensee is receiving special treatment that is not being offered to the public/alleger.

Discussion

The proposal is to offer the redacted document to all PEC participants. The release of such redacted reports is to aid the PEC participants in their preparation for the PEC. Because the alleger in non-discrimination cases has not been the subject of discrimination or adverse action against them, the current policy is that they are not invited to participate in the PECs. As a result, under the proposed process they would not be provided with a copy of the redacted OI investigatory report prior to PECs.

Concern (6)

If the PEC is in fact an investigatory tool of the NRC staff and is the last stage of the agency's fact-gathering process, the routine release of a report, which includes the 'road map' of the evidence, before an adjudicatory hearing on the merits of the case, will likely result in degradation of its usefulness and could undermine the NRC's investigatory process. The PEC will likely become a venue to question the strengths and weaknesses of the evidence rather than a forum for the licensee to focus on the issues. Certainly the licensee's attorneys will attempt to discredit the investigation to claim their client's innocence. Other matters of significant interest to the staff, e.g., safety-conscious work environments, etc., would most likely not surface. As the staff points out in the proposal, while referencing SECY-99-019, this 'would clearly not further the goal of having the PEC.

Discussion

This comment is an identified vulnerability which has been one of the main reasons why reports have not been released in the past. If, when supplied with the OI report, PEC participants focus their presentations on a critique the OI investigator or report, instead of the relevant facts and circumstances underlying each case, then this practice will need to be re-evaluated at the end of the trial period.

Concern (7)

Again, if the PEC is part of the investigatory/fact-finding process, it is an inappropriate point in the process to offer discovery of the government's case, and "fairness" does not require disclosure at this time. Subsequently, if the staff determines that the evidence supports a regulatory violation and issues an enforcement action, the subject of such action may demand a hearing and obtain discovery, which could include OI's report of investigation, to assist in preparing a defense against the charges. This is 'due process' which equates with the concepts of 'fairness' and 'fair play'.

Discussion

The Task Group believes that the PEC participants can better conduct an objective internal investigation into the matter and presentation at a PEC if they are aware of the pertinent facts underlying the staff's preliminary conclusion that a violation has occurred. Not permitting the PEC participants to properly prepare for the PEC does not serve the interest of the NRC staff, or serve to increase public confidence in the NRC's Enforcement Program. Also, without a full exploration

of the facts of the case, the PEC participants may not come prepared to address all of the staff's questions and as a result the correct enforcement decision may not be made. The Task Group's recommendation is that only the redacted report to ensure the PEC participants are aware of the facts on the case.

Concern (8)

The proposal contemplates that OI's reports would be provided with the 'understanding' that the information in the reports 'should not' be disclosed to the general public until the NRC staff has made an enforcement determination, but it does not provide any description of the controls necessary to ensure this. Control of the OI investigative report would be completely lost since any of the recipients could make the report and its findings available to anyone, including the media. This could lead to unintended consequences for the alleger, subject, the licensee, and/or witnesses. This would be particularly troublesome and inappropriate if the subject is eventually exonerated.

Discussion

It is clear that even if the staff expects the reports to be withheld from the general public, once the redacted report is provided to PEC participants, control of who has access to the information is lost. It should be noted that currently, PEC participants can take notes or in some cases may be allowed to make recordings of the PEC proceeding which could be released to the public. Also, any recipient of the redacted OI investigative report who receives the document via a FOIA request could make the report and its findings available to anyone, including the media. The release of information discussed at a PEC or redacted OI investigative reports to the general public after the PEC via FOIA, has not been a problem in the past. Should this practice result in problems, it will weigh in the evaluation of whether to continue releasing the report following the end of the trial period.

Concern (9)

There may be a small set of cases where OI and the technical staff do not conclude that a violation occurred, but OGC concludes that a violation may have occurred. According to this proposal, the NRC would be providing OI's report of investigation (unsubstantiated) prior to the PEC, where it would obviously be used by the licensee against the NRC. In such a scenario, how would the NRC's goal of improving effectiveness and efficiency be furthered?

Discussion

Currently this issue exists when the staff releases the OI report synopsis and summary of facts in a case. The NRC staff routinely states at the PECs that the OI investigative conclusion does not necessarily reflect the staff's overall conclusion at the time of the PEC, and that all information obtained at the PEC will be factored into a final enforcement decision by the NRC staff. If adopted, the staff would emphasize that the redacted OI investigative report given to the participants is the conclusion of OI, and is not necessarily being adopted by the NRC staff. If the recommendation for OGC to review the investigative reports prior to release is adopted, this issue should be resolved.

Concern (10)

Having the report of investigation prior to the PEC will very likely lead to licensees, subjects and even allegers, requesting additional information, such as that contained in the exhibits listed in the report, to prepare for the PEC. Many exhibits, such as transcribed interviews, are rather lengthy

and contain information that would require additional redactions. Any additional redaction review by OI will only exacerbate timeliness concerns and further delay the enforcement process.

Discussion

The Task Group believes that releasing the OI report strikes the correct balance between providing the PEC participants enough information to participate in a meaningful way at the conference and the resource burden associated with redacting the entire OI record. The Task Group has little doubt, based on past history, that some parties will find the OI report insufficient. Nevertheless, the fact that some parties will request more information should not deter a trial program and the fact that the NRC chooses to release the report in no way places the Agency in a position to be required to supply more of the record prior to the PEC.

Concern (11)

In most cases when the NRC has received a Freedom of Information Act (FOIA) request for OI reports and associated documents at the PEC stage, but prior to the issuance of an NOV/Order, FOIA Exemption 7(A) has been invoked by the agency to withhold the materials. This is done because the PEC is considered an investigatory tool and part of the fact gathering process. Under this proposal, if OI's Reports of Investigation (ROIs) were to be released to the "participants" in PECs, are we weakening our legal argument to invoke Exemption 7(A) when a request is made by a non-participant to the PEC prior to issuing the NOV/Order, e.g. members of the public, media, other licensee employees, etc? Furthermore, if the ROI is released to the "participants" and they then request additional information, such as exhibits or other documents pertinent to the case, can Exemption 7(A) still be legally applied to prevent their disclosure prior to the issuance of the NOV/Order?

Discussion

Under the current process, the PEC participants are given a factual summary of the OI report. In the past, PEC participants were given the synopsis of the OI report. In both of those cases, although portions of information related to the case were released, the NRC maintained the ability to cite exemption 7(A) which allows withholding of records that could reasonably be expected to interfere with enforcement proceedings. The current proposal to release redacted OI reports does not appear to change that allowable exemption. However, at a minimum, the time required to redact and release the OI reports and exhibits can reasonably be expected to dramatically impact the timeliness of the enforcement process. As a result, Exemption 7(A) would continue to be used.

Resource Considerations

At this time, specific resource/timeliness impacts cannot be predicted if the proposed action is implemented. Should this occur, at the end of, or if necessary during a one-year trial period, evaluation of the need for additional resources would be included in the mid-year resource review process, or through the Planning, Budgeting, and Program Management process.

The Task Group believes that the proposed implementation of this process will minimize the resource and timeliness concerns. Only the OI report, and not the exhibits, would be released. The public's clearly articulated perception is that the release of the OI reports prior to the PEC would make the more fair and productive. These concerns warrant evaluating the resource implications at the end of a one year trial period to be able to better assess the validity of those perceptions

Options

Based on the comments received and the Task Group's review, the following options were considered:

1. Maintain the practice of limiting the release of OI reports.
2. Consider the Release of additional information prior to the PEC such as:

    a. The OI Report.
    b. The OI Report without Agent Analysis
    c. The legal theory of the case.
    d. OI Reports with exhibits.

Recommendations

If the recommendations related to changes to issuance of the proposed enforcement action prior to an enforcement conference are implemented, then this issue is resolved because all investigative materials would be released in order to allow for a written response or enforcement conference.

If the recommendations are not implemented, the Task Group believes that the release of the OI report may help PEC participant prepare for the PEC. As a result, the staff recommends that the release of redacted OI report should be adopted for a one year trial period. If experience shows that the release of the reports are counterproductive to the PEC then the practice can be suspended or modified. Other options that can be considered at that time include a determination for whether it is appropriate to release the reports without the agent's analysis or to expand the factual summaries that were being generated prior to the practice of releasing the report.

A minority of the Task Group members dissent from this recommendation.

C. Sequencing of Predecisional Enforcement Conference

Overview of Regulations and Guidance

10CFR2.205, *Civil Penalties*, states that before instituting any proceeding to impose a civil penalty, written notice shall be served upon the person charged. The written notice may be included in a notice of violation. The notice of violation shall also advise the person charged that the civil penalty may be paid in the amount specified or that the proposed imposition of the civil penalty may be protested in a written answer, either denying the violation or showing extenuating circumstances. Within 20 days of the date of the notice the person charged may either pay the civil penalty or answer the notice of violation which shall state any facts, explanations, errors, or arguments denying the violation or extenuating circumstances. If an answer is filed, the Executive Director for Operations or his designee, upon consideration of the answer, will issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty. The person charged may, within 20 days of the date of the order, request a hearing.

The current Enforcement Policy states that the NRC may provide an opportunity for a Predecisional Enforcement Conference (PEC) with the licensee, contractor, or other person before taking enforcement action. The NRC instituted the practice of holding a PEC to obtain information that will assist the NRC in determining the appropriate enforcement action, such as: (1) a common understanding of facts, root causes, and missed opportunities associated with the apparent violations; (2) a common understanding of corrective actions taken or planned; and (3) a common

understanding of the significance of issues and the need for lasting comprehensive corrective action.

If the NRC concludes that it has sufficient information to make an informed enforcement decision involving a licensee, contractor, or vendor, a PEC will not normally be held, unless the licensee requests one. However, the NRC will normally provide an opportunity for an individual to address apparent violations before the NRC takes escalated enforcement action against an individual.

If a PEC is held for a potential discrimination case, the employee or former employee who was the subject of the alleged discrimination (hereafter referred to as “complainant”) will normally be provided an opportunity to participate in the PEC with the licensee/employer. This participation will normally be in the form of a complainant statement and comment on the licensee’s presentation, followed in turn by an opportunity for the licensee to respond to the complainant’s presentation.

Comments Received

Comments were received related to conducting the PEC during internal NRC meetings, during public meetings, and in writing. The comments received can be summarized as follows:

1. The NRC should eliminate the PEC and proceed directly to issuance of the NOV or other action.

2. PECs should be held at the option of the NRC if the NRC determines further information is necessary to make an enforcement decision.

3. Continue to offer PEC as currently done in all potentially substantiated cases of discrimination.

Responses to Issues Raised

The Task Group considered the conflicting positions. Elimination of the PEC would speed up the process of issuing an enforcement action which has been a major complaint by virtually all stakeholders. However, having PECs has provided a number of advantages in that:

- the NRC has learned new information that has led to no enforcement action being taken;

- the NRC has confirmed information that supports that discrimination occurred;

- it is consistent with other types of NRC enforcement;

- gives NRC an opportunity to ensure the licensee and appropriate licensee personnel understand the significance of the issues being discussed;

- gives the licensee opportunity to present its case, including corrective actions; and

- allows NRC personnel the opportunity to interact with the person accused of doing the discriminatory act (hereafter referred to as “accused”), witnesses, and complainant.

The team does note, however, that elimination of the PEC would make the NRC process more similar to other agencies’ handling of discrimination cases.

Options

The Task Group has considered several options to address these comments.

1 Continue the current practice of conducting PECs followed by issuing an NOV and proposed civil penalty if appropriate.

2 Eliminate the PEC and proceed directly to issuing a proposed enforcement action along with release of all background and investigative information. Release the OI report and transcripts at this time and allow the licensee to respond in writing or, if they chose, in an enforcement conference before issuing the final action or the Order Imposing the action.

3 Release the redacted OI report prior to conducting the PEC followed by the proposed enforcement action, licensee's written response, and then the imposition of the enforcement action if warranted.

In considering these approaches, the Task Group notes that the regulations addressed in 10 CFR 2.205 do not specify that any enforcement conference is required. However, the Task Group believes that the enforcement conference allows the charged organization or individual a needed opportunity to address the issues and violations prior to the agency's final action and before there is a decision to request a hearing. In the interest of fairness and efficiency, the Task Group believes that this is a step that benefits all the parties involved. However, the current process results in extended periods of time before the final action is issued. Delays in holding a PEC due to personal availability and other factors are common. Additional delays occur when a FOIA request is processed in order for the organization to respond to the notice of violation are also common. The result is a process that can extend the issuance of the final action for months, or in some cases as much as a year. The current process allows two opportunities for the organization or individual to address the NRC, one in a PEC and the other in writing in various steps in the process.

The Task Group believes that by recommending Option 2 above and eliminating the PEC before the issuance of the initial action, and allowing the licensee to request a enforcement conference after the initial action is issued to discuss the facts of the case and their written response to the violation, prior to the final agency action, will effectively eliminate a step that routinely delays the process. This option maintains the benefit of allowing face to face discussion with the NRC before the final action is issued. The Task Group also believes that the OI reports and exhibits can be released when the initial action is issued which will improve overall timeliness because the delays associated with requesting the information via FOIA and the processing time of the request will be eliminated.

Recommendation

The Task Group recommends re-sequencing the PEC and proceeding directly to issuing a proposed enforcement action along with release of all background and investigative information. The licensee can then respond in writing, or if they chose, in an enforcement conference, prior to the final action or Imposition Order. The Task Group recommends conducting any enforcement conference similarly to the conferences currently being held and maintaining them closed to public observation. This recommendation eliminates one full step in the process which will improve timeliness of action and still allow the opportunity to respond to any issues prior to the final disposition of the case. This option may result in an impact on OI resources in order to redact investigatory reports in a time frame to support the enforcement process.

A minority of the Task Group members dissent from this recommendation.

D. Conduct of Predecisional Enforcement Conference

Overview of Current Policy

PECs are currently scheduled, based upon the availability of the licensee and NRC principals. The complainant is informed of the time and date and invited to attend.

The conduct of the PEC with the licensee is generally as follows:

- Opening remarks by NRC senior manager
- Brief discussion of apparent violation(s)
- Licensee presentation
- Complainant presentation
- Break to allow NRC to caucus
- Final questions by the NRC
- Summary of the enforcement policy and remaining steps of the process
- Closing remarks by NRC senior manager

No NRC enforcement decisions are made at this meeting. An individual accused of discriminating may choose to have an individual PEC. The process is the same as above with the exception that the complainant does not attend and does not have the opportunity to make a statement.

Comments Received

Comments were received related to scheduling and conducting the PEC during internal NRC meetings, during public meetings, and in writing. The comments received can be summarized as follows:

a. PECs should be scheduled considering the complainant's availability. Also, comments were received to maintain the current scheduling approach of not considering the complainant's availability.

b. Do not reschedule PECs after the initial date has been set since complainants or their representatives may have already made preparations for that day including non-refundable airline tickets and vacation days.

c. Do not invite the complainant. Also, comments were received to continue the practice of inviting complainants to the PEC.

d. Open the PECs to public observation.

e. Have no limitations on the representatives a complainant may bring, as there are no limitations on how many or who the licensee brings.

f. Allow interaction/cross examination between the complainant and the licensee.

g. Hold the PECs in the vicinity of the licensed facility to make the PEC more accessible to the complainant.

h. Allow the complainant to participate by telephone.

Responses to Issues Raised

If a PEC is held, the Task Group agrees that some changes to the PEC process may be beneficial. The scheduling of the PEC can be labor intensive and contribute to the length of time for the overall action. Frequently, agreeable dates can not be found until greater than a month in the future due to existing conflicts with the principles' schedules. This is compounded when a date is set and the licensee asks for more time to prepare and another date must be found. The time from the attempt to set up a PEC until the time the PEC is conducted can add weeks or months to the overall timeline. To schedule around the complainant's schedule will further add to the delay.

The Task Group concluded that if a PEC is held, it is worthwhile to have the complainant attend. The complainant has the opportunity to provide their perspective on what the licensee has presented. Often, the complainant has a different understanding of the "facts". Due to travel costs/difficulties, telephone participation by the complainant is a viable option. Routinely conducting the PEC in the vicinity of the licensee's facility greatly increases the resource cost on the part of the NRC and does not appear warranted. Also, this would make discrimination PECs inconsistent with PECs for other apparent violations.

Opening the PEC to public observation could be an invasion of personal privacy on the part of the complainant and the accused. The licensee will undoubtedly discuss the performance or conduct of the complainant and likely the performance of the accused. This type of information is generally protected from public disclosure.

The Task Group continues to believe the PEC should not be turned into an adversarial hearing process which would allow for cross-examination between the licensee and the complainant. If the licensee wishes a hearing, the NRC process allows for that after imposition of a civil penalty, if one was ordered.

Recommendations

- The NRC staff should establish two dates within 60 days of the OI Report Issuance which are mutually agreeable to the NRC and licensee. The complainant should be given the option of either of the two dates for the PEC. Once the date for the conference is established, there should be no changes to the date except under very limited and unforeseen circumstances involving a participant that is vital to the conduct of the conference. This will minimize the impact on timeliness of the final action and on financial costs associated with the cancellation of travel plans.

- Continue to limit the number of personal representatives the complainant may bring to PEC to one. Formally provide an opportunity for the CI to speak to the NRC in private during the conference.

A minority of the Task Group members dissent from this recommendation.

- Continue to use existing Enforcement Manual guidance to determine when the conference is open or closed to the public.

E. Post Predecisional Enforcement Conference

Overview of Current Process

In order to get all the information needed to make an informed enforcement decision, at times the NRC has specifically requested information be submitted following the PEC. Additionally, the licensee, the accused, and/or the complainant have requested they be allowed to submit additional information for NRC consideration.

For cases where the complainant was not in attendance, the complainant is given the option of reviewing the PEC transcript and providing written comments. The NRC will take this information into consideration during its deliberations.

Comments Received

Comments were received related to post-PEC information during internal NRC meetings, during public meetings, and in writing. The comments received can be summarized as follows:

a. If both the licensee and the complainant get the OI report (with exhibits) there should be no need for further information submittals after the PEC since the participants should be better prepared.

b. If the complainant is not in attendance, do not send the transcript to the complainant for review unless the NRC has specific questions where information is needed from the complainant since this unnecessarily adds at least 30 days to the timeline.

Responses to Issues Raised

The Task Group agrees that if the licensee and complainant receive the OI report prior to the PEC, and they thoroughly review it and prepare accordingly, in general, there should not be a need for submittals following the PEC. If complainants are allowed to participate in person or by telephone, there should be adequate opportunities to allow the complainant to participate which would obviate the need to send them the transcript.

Recommendations

If the Commission adopts the recommendation to allow written responses and hold enforcement conferences after the proposed action is issued, this comment is addressed.

If the recommendation is not adopted, post-PEC submittals would only be allowed for those rare cases where the NRC identifies the need for further information.

If the complainant does not attend a conference, transcripts of the conference would not normally be provided unless the staff considers the complainant's review of the transcripts necessary.

F. Communications with Licensee, Individual Accused of Discriminating, and Alleger In Unsubstantiated Cases

When the NRC's efforts to review a claim of discrimination result in a conclusion that the evidence does not support a finding that discrimination occurred, the staff informs the licensee and the alleger of that conclusion. A letter is sent to both parties informing them of the conclusion. If the conclusion is based on an investigation by OI, a copy of the synopsis from the report of investigation is also provided. The synopsis includes a brief statement of the allegation and the

conclusion. Neither the synopsis nor the letter provide the basis for the staff's conclusion. If either party wants more information on the basis for the conclusion, they must request a copy of the OI report of investigation under the FOIA.

Comments

The Task Group received several comments that allegers should be provided more information on the basis for the staff's decision.

Recommendation

The Task Group recommends that letters to the alleger and the licensee include a discussion of the factors necessary to prove discrimination occurred, i.e., protected activity, employer's knowledge of protected activity, adverse action, and the adverse action was taken, at least in part, because of the protected activity. The consideration of these factors is included in the OI report and would not have to be created just for the letter.

Providing a better explanation of how the NRC reached its conclusion will increase the transparency of the process and hopefully improve public confidence. Because the information is available from the OI report under FOIA, it will not have much impact on efficiency and will have a positive contribution to effectiveness.

G. Risk Informing the Enforcement Process for Discrimination Matters

Current Guidance

The current guidance related to risk informing the enforcement of the employee protection regulations is primarily related to the graded approach to severity levels based on the level of the individual that committed the discriminatory act. In this regime, the higher the individual is in the organization hierarchy the more significant the act is viewed and the resulting enforcement sanction is more significant.

Comments Received

Comments received were related to the desire to have the enforcement process for employee protection regulations more closely mirror the process used to assess the significance of technical issues in the reactor oversight process (ROP). One suggestion was that for reactor licensees, if performance indicators and findings are green, indicating acceptable performance, the NRC should take no action on discrimination cases. Also a comment was received suggesting that the NRC risk inform the process and only take action on those where the underlying technical issue was safety significant.

Other comments in this area included :

- The focus should be the safety basis for the concerns.
- The NRC should develop objective safety measures which consider actual total safety consequences for a specific situation.
- Consider risk informing the allocation of discrimination responsibility between the individual and the licensee for the determination of the appropriate regulatory response.
- Recognize specific behaviors that are unacceptable independent of risk.
- Integration of safety and behavior will provide predictable objective regulation.

Response

The Task Group believes there are significant differences in the ability to risk inform technical issues and discrimination issues. Reactor technical issues can be evaluated in terms of the direct effect the issue had on reactor safety and core melt probabilities. In discrimination cases, the direct ties are not as clear. Using the underlying technical issue to determine the significance ignores the effect that any discriminatory act had on the work environment. This type of policy would itself create a chilled environment if employees understand that no NRC action will be taken on the discrimination against them unless the underlying issue that they brought forward is, in the final analysis, determined to be risk significant. Based on the complex nature of performing risk analysis, it is likely that the majority of employees will be unable to determine the risk significance of their issue. As a result, knowing that it is likely that no NRC action will be taken if they are discriminated against, they will be chilled from bringing issues forward. It has been a longstanding policy that in order to promote an environment where employees feel the freedom to bring issues forward, the NRC will take action in response to all prohibited discrimination.

A related issue involving allegations has been previously addressed by the Commission. In SECY 00-0177 the staff submitted to the Commission options for handling allegations under the ROP. In that paper the staff gave the Commission the options of either attempting to risk inform the allegation program using the risk significance of the underlying issue or maintaining the current program, in which the staff reviews all technical issues, regardless of potential risk significance. On October 11, 2000, the Commission disapproved further pursuit of risk-informing the allegation program, even as a pilot, and directed that the staff should continue to implement the existing allegation program.

Recommendation

The Task Group does not believe that it is appropriate or feasible to use risk significance of the underlying technical issue as a factor in determining either the investigation priority or the final enforcement action and recommends that the enforcement program for discrimination not be risk informed.

H. Early Licensee Notification, Use of Alternative Dispute Resolution (ADR) and Use of Chilling Effect Letters

Comments

The industry, employees involved in discrimination complaints, and other stakeholders commented that actions taken by the NRC to address any adverse impact on the work environment are usually untimely. Enforcement actions for substantiated cases of discrimination are normally issued at least nine months after the initial claim of discrimination, and in some cases the enforcement action is issued two years, or more, after the initial complaint of discrimination. In that period of time, the work environment may have improved. If that is the case, any enforcement is viewed by the industry as punitive, versus reinforcing a good safety conscious work environment. Additionally, both the industry and the complainants commented that the investigative/enforcement process tends to further polarize the employer/employee relationship.

To address the timeliness concern, the industry and some complainants recommended that licensees be notified of complaints of discrimination received by the NRC early in the process. Both groups argued that this would provide an opportunity early in the process to repair the relationship between the employee and management and limit the damage to the work environment. However, other comments indicated that by the time an individual comes to the NRC, the relationship between the employer and employee is already severely damaged.

Response

The Task Group believes there is merit to providing licensees early notification of complaints of discrimination, if the primary goal is to promote a safety conscious work environment. The staff considered two options for implementing early licensee notification; 1) expand the use of chilling effect letters, and 2) allow a limited period of time for the licensee and the employee to try some form of alternate dispute resolution prior to initiating an investigation. The pros and cons associated with each of these options are similar and are discussed following the options.

In expanding the use of chilling effect letters, this option would involve sending a letter to the licensee notifying it that a complaint of discrimination has been received. The letter would provide the details on the events that occurred that are viewed as discriminatory by the employee and the parties involved. The letter would ask the licensee what actions it is taking, or will take, to ensure that the events described in the letter are not having a chilling effect on other employees. This letter would be sent to the licensee before any employees, other than the complainant, are interviewed. The purpose of the letter would be to allow the licensee to take actions to prevent a decline in the work environment early in the investigative/enforcement process. Under this proposal, formal notification to the licensee of the complaint would be with the understanding that an investigation of the complaint will continue, if appropriate.

This option would provide the organization involved with knowledge that an OI investigation may be forthcoming and would give them opportunity to interview and perhaps influence potential witnesses prior to the investigators arriving onsite. This approach would likely have a negative impact on the ability of the investigators to perform an effective review of the complaint.

The proposal to allow a period for ADR is a more radical departure from the current process than the one discussed above. Under this proposal, the employee complaining of discrimination would be asked if he or she would like to pursue some form of ADR (e.g., binding arbitration) prior to the NRC conducting an investigation of the complaint. If the employee is interested in pursuing ADR, the NRC would inform the licensee of receipt of the complaint, the employee's interest in ADR, and that the NRC will delay initiating an investigation for a set period of time, if the licensee agrees to pursue ADR. If the time allowed expires without the two parties reaching resolution, or the employee or employer states he, she, or it is not interested in ADR, the NRC would initiate an investigation of the complaint. If ADR is successful, the NRC would not have a record of the facts of the case, which would hamper the NRC's ability to take enforcement action. Also, ADR does not address the impact on the work environment, which is the NRC's interest in these cases, but deals with the specific employee.

Recommendations

The use of ADR misses the point of the NRC's interest, which is the SCWE, and not whether the employee is made whole. Based on the unclear impact of the proposals to issue a chilling effect letter when an allegation is received and on the use of ADR at the beginning of the process, the Task Group recommends no changes to the current process.

I. Severity Level Factors

Overview of current policy

The current Enforcement Policy, NUREG 1600, May 1, 2000, describes that violations in the discrimination area are normally categorized in terms of four levels of severity to show their relative importance or significance. Licensed activities will be placed in the activity area most suitable in light of the particular violation involved. Within each activity area, Severity Level I

has been assigned to violations that are the most significant and Severity Level IV violations are the least significant. The Commission also recognizes that there are other violations of minor safety or environmental concern that are below the level of significance of Severity Level IV violations.

Supplements in the Enforcement Policy provide examples and serve as guidance in determining the appropriate severity level for violations in each of eight activity areas. However, the examples are neither exhaustive nor controlling. In addition, these examples do not create new requirements. Each is designed to illustrate the significance that the NRC places on a particular type of violation of NRC requirements. Each of the examples in the supplements is predicated on a violation of a regulatory requirement. The current severity levels examples for the discrimination area are primarily related to the level of the individual that discriminated in the organization.

- A Severity Level I violation for example involves an action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee.
- A Severity Level II violations involves an action by plant management or mid-level management in violation of 10 CFR 50.7 or similar regulations against an employee or the failure of licensee management to take effective action in correcting a hostile work environment.
- A Severity Level III violation involves an action by first-line supervision or other low-level management in violation of 10 CFR 50.7 or similar regulations against an employee, or threats of discrimination or restrictive agreements which are violations under NRC regulations such as 10 CFR 50.7(f).
- Finally, a Severity Level IV violations involves discrimination cases which, in themselves, do not warrant a Severity Level III categorization.

Comments received

Comments were received related to the current severity level during internal NRC meetings, during public meetings and in writing. The comments received can be summarized as follows:

1. Appropriateness of Sanctions: The NRC should consider more factors than the level of the individual taking the action when deciding what the severity level should be.
2. The NRC process needs to be revised to recognize that there are circumstances where even if there is a substantiated violation, no enforcement action is warranted because the significance of the adverse actions is so low.
3. The NRC has too much flexibility in deciding what enforcement actions will be.

Responses to issues raised

The Task Group agrees that the Enforcement Policy Supplements should be revised in the discrimination area to account for more factors than the level of the person in the organization. The primary goal of the taking enforcement is to deter licensees and individuals from taking adverse actions for employees engaging in protected activities and to ensure that there is an environment at the facility that allows employees to feel free to raise concerns . As a result, the severity levels assigned to a particular act should be graded based on factors that promote that objective. Factors that should be considered include the severity of the adverse action taken and how well known the case and the adverse action are to other employees at the facility. In particular, to promote the ability to raise concerns, the severity level should be raised if the adverse action was taken because an employee came to the NRC or other government agency with a concern.

The Task Group agreed that the process should include provisions to recognize that there may be circumstances when even if there is a substantiated violation, no enforcement action is warranted because the severity of the adverse action is so low. When a legal violation of NRC discrimination regulations has been substantiated, but the facts of the case indicate that enforcement action may not be appropriate, the Enforcement Policy should provide a mechanism to disposition the violations. This can be accomplished by revising the supplements to take more factors into consideration when applying severity levels and when determining whether mitigation is appropriate.

Recommendations

The Task Group agrees that the Enforcement Manual Supplements should include more factors than currently exist. The group recommends that the Office of Enforcement revise the Enforcement Policy Supplements to include additional factors in assessing the severity of a violation of the discrimination requirements. Factors that should be considered include:

a The management level of the individual in the organization taking the adverse action.
b. The severity of the adverse action.
c. The notoriety of the adverse action and potential site or organizational impact.
d. If the protected activity involved coming to the NRC or participating in other government processes.
e. Whether there was a benefit (e.g. financial) to the individual or licensee to discriminate.

J. Discretion Criteria

The Enforcement Policy also has criteria for the use of enforcement discretion. In section VII.B.5., *Violations Involving Certain Discrimination Issues*, the decision to exercise enforcement discretion is based on the circumstances of the case.

- Enforcement discretion may be exercised for discrimination cases when a licensee who, without the need for government intervention, identifies an issue of discrimination and takes prompt, comprehensive, and effective corrective action to address both the particular situation and the overall work environment for raising safety concerns.
- Enforcement may not be warranted where a complaint is filed with the Department of Labor (DOL) but the licensee settles the matter before the DOL makes an initial finding of discrimination and addresses the overall work environment.
- Alternatively, if a finding of discrimination is made, the licensee may choose to settle the case before the evidentiary hearing begins. In such cases, the NRC may exercise its discretion not to take enforcement action when all of the following factors are met:
- The licensee has addressed the overall work environment for raising safety concerns and has publicized that a complaint of discrimination for engaging in protected activity was made to the DOL.
- The matter was settled to the satisfaction of the employee (the terms of the specific settlement agreement need not be posted),
- If the DOL Area Office found discrimination, the licensee has taken action to positively reemphasize that discrimination will not be tolerated.
- The NRC may refrain from taking enforcement action if a licensee settles a matter promptly after a person comes to the NRC without going to the DOL. However, such discretion would normally not be exercised in cases in which the licensee does not appropriately address:
- the overall work environment (*e.g.*, by using training, postings, revised policies or procedures,

- and, any necessary disciplinary action, etc., to communicate its policy against discrimination) or in cases that involve allegations of discrimination as a result of providing information directly to the NRC, or allegations of discrimination caused by a manager above first-line supervisor (consistent with Severity Level I or II violations),
- allegations of discrimination where a history of findings of discrimination (by the DOL or the NRC) or settlements suggests a programmatic rather than an isolated discrimination problem, or
- allegations of discrimination which appear particularly blatant or egregious.

Summary of Comments Received

The comments in this area were primarily related to the idea that if the licensee (or contractor) identifies and corrects the situation without NRC involvement they should be given credit in terms of eliminating the OI investigation and the NRC should use discretion to not issue any enforcement action. Also, the NRC should discontinue enforcement if a claim has resulted in a settlement.

Response

The current enforcement policy has guidance in place that enforcement discretion may be exercised if a licensee identifies and corrects a situation without any government intervention, or if a licensee corrects any work environment problems and settles with the complainant *before* DOL makes an initial finding of discrimination. If DOL has made an initial finding of discrimination and the licensee settles before the hearing begins, the NRC may also exercise its discretion not to take enforcement action if a number of factors are met. The Task Group believes that the fact a settlement was reached has no bearing on NRC's action. As a result, references to this process should be removed from the policy.

The Task Group agrees that the discretion criteria in the Enforcement Policy should be revised to include more specific factors for when discretion can be used to not to cite a violation.

Recommendations

The Task Group recommends amending the current Enforcement Policy guidance to include more discussion of factors that can be used to determine when it is appropriate not to cite a violation or mitigate the sanction imposed for a violation of NRC requirements. For instance, the criteria can include consideration of whether the licensee identified and corrected the violation and whether there are indications of that the SCWE has been affected. Other factors that can be considered could include whether the licensee had developed and implemented an effective training program on the discrimination regulations. Also, the guidance should eliminate the discussion of DOL settlements.

K. Factors used to Escalate and Mitigate Civil Penalties

Current Guidance

Chapter 5 of the Enforcement Manual describes processes used to determine civil penalties. Civil penalties are normally assessed for Severity Level I and II violations. Civil penalties are *considered* for Severity Level III violations. The steps used to determine whether a civil penalty should be proposed for the violation are:

Step 1: Determine the base civil penalty appropriate for the significance of the violation and the class of licensee.

Step 2: Complete the civil penalty assessment process, which considers:

a. whether (for a non-willful Severity Level III issue) the licensee has had any previous escalated enforcement action (regardless of the activity area) during the past 2 years or past 2 inspections, whichever is longer;
b. whether the licensee should be given credit for actions related to identification;
c. whether the licensee's corrective actions are prompt and comprehensive;
d. whether, in view of all the circumstances, the matter in question requires the exercise of discretion

Step 3: Compare the amount of the civil penalty resulting from the civil penalty process described above with the amount allowed by statute, to ensure that the civil penalty amount actually issued is within the statutory maximum .

Chapter 6 of the Enforcement Manual presents guidance to the staff in those cases where the agency chooses to exercise discretion and either escalate or mitigate the enforcement sanctions. Escalation of NRC sanctions is addressed in Section VII.A of the Enforcement Policy. The NRC considers violations categorized at Severity Level I, II, or III to be of significant concern. If the application of the normal guidance in the Enforcement Policy does not result in an appropriate sanction, the NRC may apply its full enforcement authority where the action is warranted. NRC action may include (1) escalating civil penalties; (2) issuing appropriate orders; and (3) assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of $120,000 per violation, per day.

Examples when this discretion should be considered include, but are not limited to the following:

a. Problems categorized at Severity Level I or II.
b. Situations involving particularly poor licensee performance, or involving willfulness.
c. When the licensee's previous enforcement history has been particularly poor, or when the current violation is directly repetitive of an earlier violation.
d. Where the licensee made a conscious decision to be in noncompliance in order to obtain an economic benefit.

The mitigation of NRC sanctions is addressed in Section VII.B of the Enforcement Policy.

Comments

The comments in this area related to the factors the NRC should use in determining whether an increase or decrease in civil penalty is appropriate. Comments included concerns that more factors should be used to give credit for actions taken by the licensee to identify and correct the violation. One comment was that if discrimination occurs, the Enforcement Policy implies that someone must be terminated or sacrificed in order to please the NRC. Other comments included the fact that the NRC has the authority to issue civil penalties based on each day the violation existed and this authority should be used more often. Another comment was that the base civil penalty should be increased for large organizations because the size of the fines are insignificant compared to what the company will make if they start up a facility, or keep it running instead of shutting down to resolve a complainant's safety concern.

Options

The Task Group considered a number of options related to these comments. The options considered were:

-Make no changes to the process.
-Change the process to give more credit for identification and corrective action.
-Ensure policy does not imply that termination or any other specific personnel action is required.
-Require that training programs be in place to ensure that managers and employees are aware of discrimination requirements.
-Revise the Policy to place more emphasis on past history of discrimination (including previous enforcement or chilled environment).
-Increase the size of civil penalty limits for discrimination cases.

Recommendation

The Task Group's recommendation is that the Enforcement Policy be revised to remove any statements that imply that a specific personnel action is required as an action needed to address a violation. The current Policy outlines a graded approach that gives credit for identification and corrective action of a violation. Section VII. B.5 allows the consideration of exercising discretion for these factors. The Policy also currently authorizes the use of daily civil penalties up to the statutory maximum of $120,000 for each day the violation occurs for reactor licensee. However, the Task Group concluded that the base civil penalty amounts for larger non-reactor licensee's such as hospitals and large companies warrant reconsideration to make them more significant and therefore more of an actual deterrent to discrimination. For large companies, consider the financial assets and use discretion to determine an appropriate civil penalty. The Task Group determined that the flexibility and graded approach for assessing civil penalties or discretion currently in the Policy is appropriate.

L. Signature Authority

Overview of current policy

Currently NOVs and proposed civil penalties for Severity Level III or higher discrimination cases are signed by the Regional Administrator. Impositions of civil penalties are signed by the Director of the Office of Enforcement. Regardless of who signs the action, currently OE, NRR or NMSS, OGC and the region review the action in detail. Concurrences on the document are OE and the region. OGC offers their formal "no legal objection".

Comments Received

Comments were received related to who signed out the enforcement action during internal NRC meetings. The comments received can be summarized as follows:

1. All discrimination enforcement actions should be signed out by the Director, OE, to improve timeliness and limit the number of needed participants in the decision-making process.

2. All discrimination enforcement actions should be signed out by Office of General Counsel, since these cases are predominantly legal issues not technical issues.

3. Maintain the current approach.

Responses to Issues Raised

The Task Group considered pros and cons of the existing process as well as for the suggested changes. Having the Regional Administrator sign the initial action is consistent with treatment of other types of escalated enforcement actions which provides for a single point of contact with the licensee for escalated enforcement. This also facilitates continuity and integration of enforcement cases should the facility have multiple enforcement actions pending. The current process does take longer in that more people (i.e. regional staff) are involved with the decision-making to support the Regional Administrator's approval of the action.

Centralizing the signature function in the Office of Enforcement or the Office of General Counsel would reduce the time it takes to issue the action due to the need for fewer people necessary to support the action. In addition, the people dealing with the discrimination case would likely be more proficient due to handling a greater number of discrimination cases. Disincentives to this approach include the possible lack of regional support of the action and lack of single point of contact with the licensee.

Recommendations

The Task Group concluded that the best option is continuing with the current process, so no change is recommended. However the enforcement policy should be revised to highlight the fact that OGC is responsible to make the determination of whether a there is sufficient evidence to support a violation and the staff is responsible for determining the enforcement sanction.

M. Accountability For False Complaints

Current Policy

Under 10 CFR 50.5, Deliberate misconduct, the staff can pursue an enforcement action against an employee of a licensee, applicant, contractor, or subcontractor who deliberately submits to the NRC information the person knows to be incomplete or inaccurate in some respect material to the NRC. For discrimination complaints, if an employee knowingly submits information that is incomplete or inaccurate and that information causes the NRC to initiate an investigation, the information would be considered material. Submitting such information would constitute a violation of §50.5.

Comments

One of the comments submitted by the industry is that some individuals are disingenuous in submitting complaints of discrimination and that, in such cases, the NRC should pursue enforcement action against the complainant. The industry points to the low percentage of substantiated cases of discrimination, approximately ten percent, to support its position.

Response

Because discrimination is a matter of perception, a low percentage of substantiated cases does not necessarily mean that the individual was disingenuous in submitting the complaint. In cases of complaints of discrimination, it is rare that the employee and the employer share the same perception of whether an adverse action was taken or why it was taken. Therefore, the staff does not believe that a low substantiation rate, in and of itself, is a valid indicator that the allegations of discrimination are disingenuous.

Over the past four years, the staff has received and reviewed 547 complaints of discrimination. Within that population, there were several complaints in which the staff either suspected or

concluded that the complainant had knowingly provided incorrect or false information that caused the staff to initiate an investigation of the complaint. In these cases, had the staff known the information was incorrect or false, it might have concluded that the threshold for initiating an investigation had not been reached.

In the few cases mentioned above, the staff considered the pros and cons of pursuing enforcement action against the complainant under §50.5. In each case the staff struggled with establishing the appropriate balance between the deterrent that would be created by taking an enforcement action and the potential for discouraging other individuals from filing complaints in the future. The staff determined that based on the limited number of instances in which incomplete or inaccurate information had knowingly been submitted, the benefits of taking an action against a complainant for providing false information were significantly less than the risk of creating such an environment.

Recommendations

The NRC currently has the capability in 10CFR50.5.a.(2) to take action against CIs for providing false information. However, based on negative public confidence considerations, and potential chilling effect on the work environment, the Task Group recommends that the agency consider the specific facts of any given case and use this only in the most egregious cases.

N. Impact of DOL Settlement

The task force recommends that a DOL settlement not be considered as a factor in the enforcement decision. Guidance documents should be revised to reflect this. (The broader issues of DOL interaction are discussed later in the report.)

O. Willfulness of Discriminatory Acts

Current Guidance

In the Enforcement Policy, the first decision block of the “Metro Map” is used to determine whether identification will be considered to determine the civil penalty. The decision is whether the violation has been the 1st non-willful escalated enforcement in the last 2 years or 2 inspections. If the answer to the question is yes, only corrective action credit and not identification credit will normally be considered.

Comments

The comments received in this area were primarily from internal stakeholders. When reviewing the circumstances of a particular case the answer to the question of whether the violation was willful, whether all violations of employee protection requirements are by definition willful, or whether the violation must be deliberate to be willful is needed to answer the question in the first decision block of the Enforcement Policy Metro Map. Other comments were that if an adverse action was taken because of protected activity; the act was willfully taken. Comments suggested that all discrimination cases should assess Identification and Corrective Action.

Recommendations

The Task Group agreed that in the first decision block of the enforcement “Metro map”, willfulness does not refer to whether the violation was deliberate, but whether the adverse action was taken willfully. In that regard, nearly all violations involving discrimination are considered to be willful. The adverse action, (e.g. termination, counseling, removal from duties, removal of site access, pay cut, etc) had to be considered and willfully taken in order for the action to occur. That is, no adverse

action is taken by accident or as a result of a misunderstanding or interpretation of a requirement. The decision to the take action the action must be taken pro-actively. As a result, the Task Group recommends that the first decision block in the Enforcement Policy be changed to read "1st non-discriminatory or non willful SL III violation in 2Y/2I". As a result, cases involving discrimination would consider both identification and corrective action to assess the amount of civil penalty.

V. NRC Roles and Reponsibilities

A. NRC'S Interface with the Department of Labor

Current Process

The Department of Labor (DOL) is authorized by the Energy Reorganization Act to provide personal remedies for an individual found to have been discriminated against by an NRC licensee, applicant, contractor, or subcontractor, hereafter referred to as licensee, for engaging in protected activities. While the DOL provides a personal remedy for the individual when discrimination is found to have occurred, it does not take action to correct the underlying cause of the discrimination. Under the Energy Reorganization Act, the DOL does not cause the licensee to address the employer/employee relationship that resulted in the discrimination or the work environment at the employer's facility.

On the other hand, while the NRC is not authorized to provide personal remedies, it is responsible for regulating the nuclear industry and ensuring that industry employees are comfortable raising safety concerns without fear of retaliation. The NRC can take enforcement action against a licensee for discriminating against an employee for engaging in protected activities and can cause the licensee to address the employer/employee relationship or the work environment that resulted in the discrimination at the employer's facility. In accordance with these different responsibilities, an action by one agency is not redundant of the action of the other.

A complicating factor in the interface is the difference between how the NRC and DOL reach a conclusion on whether discrimination occurred. DOL only takes action based on decisions reached within its own process. It does not adopt decisions made by the NRC in determining whether discrimination occurred or a personal remedy should be awarded. However, in some cases the NRC does adopt decisions by DOL as to whether discrimination occurred and has based enforcement actions on that decision.

DOL Process

To initiate action by the DOL, an individual must file a complaint with the Occupational Safety and Health Administration (OSHA) within 180 days of the discriminatory act. OSHA investigates claims of discrimination filed with DOL under the Energy Reorganization Act and other statutes. As part of the investigation process, OSHA will also inquire whether the parties are interested in settling the complaint. If a settlement is not reached, the OSHA Area Director will issue a decision on the merits of the case. Either the employer or the employee may appeal the finding of the Area Director to a DOL Administrative Law Judge (ALJ). If an appeal is filed, the OSHA Area Director's finding has no standing with regard to the hearing.

The ALJ will set a schedule for the hearing and will offer another opportunity for settling the complaint. If a settlement is not reached, the ALJ will issue a decision based on the merits of the case following completion of the hearing. Following a ruling by the ALJ, either the employer or the employee may appeal the decision to DOL's Administrative Review Board (ARB). Once again, there is an opportunity to settle the complaint. If a settlement is not reached, the DOL ARB will issue a finding regarding the appeal. This completes the DOL process. However, either the employer or the

employee can file an appeal with the U. S. Court of Appeals. If the employer or the employee chooses to pursue a complaint through all the available appeals, a complaint can be pending for many years before DOL. It is possible that the complainant will not have received any remedy during this period while having to retain legal counsel throughout the process.

NRC Process

It is not surprising that more that 60 percent of the discrimination complainants that come to the NRC do not also take their complaint to DOL. Both the time and monetary considerations are a disincentive to that process.

The NRC will start a review of a complaint of discrimination if an individual files a complaint with the NRC or when NRC becomes aware the individual filed a complaint with OSHA. Under both circumstances, the NRC staff will hold an Allegation Review Board within 30 days of becoming aware of the complaint and determine whether the information submitted supports the elements of a *prima facie* case of discrimination. As presented earlier in this report those elements include: (a) the individual engaged in protected activity; (b) the individual was subjected to an adverse action; (c) the employer was aware of the protected activity when it took the adverse action; and (d) there is some evidence to raise an inference that the protected activity was the likely cause of the adverse action. If these four elements are satisfied, the NRC will initiate an investigation and interview the concerned individual. The staff reaches this decision independent of whether OSHA initiates an investigation.

Unlike DOL, the NRC does not have a requirement that a complaint must be filed within a certain period of time from the date of the adverse action. However, the staff does not typically investigate a complaint that is based on an adverse action that occurred more than about three years before the complaint is filed. This is because of the difficulty of conducting an investigation when that much time has passed. Usually, there is little documentary evidence in a case of discrimination. Most of the evidence is witness testimony concerning whether the employer was aware of the protected activity and why an adverse action was taken. As time passes, the ability of the parties involved to accurately recall events related to the complaint declines which makes reaching a conclusion on whether discrimination occurred very difficult.

Additionally, if the period between the protected activity and the adverse action is more than two years, it is difficult to support a nexus between the protected activity and the adverse action. In these circumstances, the staff is likely to decide to not initiate an investigation because a *prima facie* case has not been established.

Following the interview of the complainant, the NRC staff will determine whether the additional information continues to support a *prima facie* case of discrimination. If it does, the staff will then determine whether the individual also filed a complaint with the DOL. If the individual has not filed a complaint with DOL, the NRC will continue its investigation to the point where a conclusion can be reached as to whether discrimination occurred. If the individual has filed a complaint with DOL, the NRC staff will consider whether it will suspend its investigation and wait for the results of the OSHA investigation. This decision is based on: 1) whether there is an indication of a deteriorating work environment at the licensee's facility, 2) whether there was a finding of discrimination against the licensee in the previous two years, and 3) the egregiousness and notoriety of the adverse action. If any of the three criteria are met, the NRC staff will not defer the investigation. As a practical matter, the staff also considers the status of its own investigation of the complaint. If the NRC's investigation is almost complete, the staff may decide to finish the investigation even though the other factors support deferring the investigation.

If the staff decides to continue its investigation, it will continue to monitor the progress of the DOL process. The NRC investigators and the OSHA investigators share information as appropriate to

ensure a complete investigation. If the NRC completes its report of investigation prior to OSHA completing its investigation, OSHA is provided a copy of the NRC's report. Conversely, if OSHA completes its investigation first, that information is considered in the NRC's investigation.

If the staff decides to defer its investigation, it monitors the DOL process closely. If the complaint is settled before OSHA issues a decision and the NRC staff has concluded that a *prima facie* case exists, the staff will reopen its investigation and proceed until a conclusion can be reached as to whether discrimination occurred. If a settlement is not reached and OSHA issues a finding on the merits of the case, the staff will review the finding and the OSHA investigator's report to determine whether any action is warranted at that time. If there is sufficient evidence to support an enforcement action, the staff may initiate the enforcement process at that time. Also, if OSHA found that discrimination occurred, the staff normally issues a letter to the licensee at this time requesting that the licensee describe actions it is taking to minimize the potential for a chilling effect.

If OSHA found that discrimination did not occur and the complainant appeals, the NRC staff will monitor the progress of the hearing. If the complaint is subsequently settled before the ALJ issues a finding, the NRC usually adopts the finding by OSHA and closes the allegation. If the complaint is not settled and the ALJ also finds that discrimination did not occur and an appeal is not filed, the NRC usually adopts the finding by the ALJ and closes the allegation. If the finding by the ALJ is appealed, the staff will continue to monitor the DOL proceedings. If there is a subsequent finding that discrimination occurred, the staff will review the available evidence and usually initiate the enforcement process.

If OSHA found that discrimination occurred and the employer appeals, the NRC staff will usually not initiate the enforcement process at that time. The NRC staff will monitor the progress of the hearing. If the complaint is subsequently settled before the ALJ issues a finding the NRC will review the available evidence and usually initiate the enforcement process based on the OSHA finding, balanced against a review of any relevant OI findings. If the ALJ also finds that discrimination occurred and an appeal is not filed, again, the NRC will review the available evidence and usually initiate the enforcement process. If the finding by the ALJ is appealed, the staff will continue to monitor the DOL proceedings. If there is a subsequent finding that discrimination did not occur, the staff will review the available evidence and consider withdrawing any previously issued enforcement action.

Comments

1. Stop deferring to DOL investigations
2. Defer all investigations of individual complaints of discrimination to DOL

Response

During the public meetings, the staff received several comments that it should investigate every complaint of discrimination. The stakeholders thought NRC should stop deferring to investigations conducted by DOL. The basis for their position was that DOL does not address the work environment or cause the employer to take action to correct the problems in the employer/employee relationship. Additionally, the stakeholders expressed concern that they are on their own in the DOL process. To have a chance of prevailing with either OSHA or an ALJ, they felt they needed to hire an attorney to represent them. This would be a financial hardship, particularly if their employment had been terminated.

The NRC's practice of deferring to DOL investigations results from direction from the Commission in Staff Requirements Memorandum(SRM) for SECY 97-147. In the SRM the Commission directed that when DOL and the NRC conduct investigations of the same complaint, the NRC should defer its

investigation unless one of the criteria discussed above is met. Following the issuance of the guidance implementing the direction from the Commission, there have been approximately 102 cases in which the NRC and DOL have initiated investigations of the same complaint. The NRC deferred its investigation for 12 of the 102 cases. In about one third of the cases deferred, the NRC resumed its investigation because the complaints within the DOL process were settled without a finding on the merits of the case. In those cases, the investigations were more difficult than usual to complete because the settlements occurred at least a year after the NRC had deferred its original investigation.

The industry has proposed that the NRC stop investigating individual complaints of discrimination all together. The basis for their proposal is that DOL is better staffed and has more experience in investigating and conducting hearings concerning complaints of discrimination. The industry believes the NRC should focus on the safety significance of the safety issue that constitutes the protected activity and the potential impact of the claim of discrimination on the willingness of other workers to raise issues. However, the industry is not in favor of a regulatory requirement to have a SCWE. Nor is it in favor of NRC developing any tools to assess the SCWE. In addition, the industry has taken the position that a finding of discrimination is not indicative of a problem in the work environment. However, the industry has not expressed any details about how they believe the NRC should proceed to assess the work environment when DOL issues a finding of discrimination. Since employees that raise a concern about their work environment usually do so after they or another employee perceive an adverse action had been taken after having engaged in a protected activity, it is would be difficult to assess the work environment without an investigation of the events leading up to the adverse action.

The NRC receives many more complaints than are filed with DOL for acts of discrimination within the NRC's jurisdiction. In the period from January 1997 through December 2000, the NRC received 547 complaints of discrimination. In each of these allegations, the individual initially stated that he or she had been discriminated against for involvement in protected activities within NRC's regulatory jurisdiction. Over the four year period, only about 35 percent of the time did the individual also file a complaint with DOL. For 25 percent of the complaints, the NRC and DOL both initiated investigations. The ten percent difference is attributable to complaints in which the NRC's ARB determined that a *prima facie* case had not been presented.

<u>Recommendations</u>

Given the relatively small number of cases in which both agencies conduct investigations, the smaller number of cases that have been deferred, and the difficulty of restarting an investigation after the passage of six months or more, the Task Group believes the Commission should reconsider its policy of deferring investigation to DOL. Also, given the timeliness considerations involved, and the fact that a settlement can occur anywhere in the process, the NRC may find itself in a position to have no record with which to take action, sometimes years after the event, the practice of deferring cases to DOL should be stopped.

Given that 1) only 35 percent of complainants file with DOL, 2) DOL does not evaluate the work environment or cause the licensee to correct the underlying problem that resulted in the discriminatory act, and 3) the possible adverse reaction from stakeholders if NRC did not investigate cases of discrimination that meet the criteria for a *prima facie*, the Task Group believes that NRC should continue to investigate individual complaints of discrimination.

B. NRC Staff Participation

Current Policy

The Enforcement Manual outlines the responsibilities of the staff in processing potential violations of NRC requirements, which includes the employee protection regulations.

The OE staff is responsible for the review of the enforcement strategy for proposed escalated enforcement actions to ensure technical adequacy and conformance to established policy, guidance, and precedents, coordinates the headquarter's review and concurrence process for escalated enforcement actions proposed by the regions, reviews Office of Investigations' (OI) reports and coordinates with the region, OGC, and the applicable program office to determine whether enforcement action is appropriate, participates in enforcement panels to provide enforcement perspectives, participates in predecisional enforcement conferences, participates in enforcement caucuses, and coordinates with the Occupational Safety and Health Administration (OSHA) on the resolution of enforcement issues involving both NRC and OSHA jurisdiction at NRC facilities.

Regional staff are responsible for implementing the enforcement program subject to the overall policy and implementation guidance of OE. Along with other duties, the regional offices normally prepare and issue non-escalated enforcement actions; schedule and conduct enforcement panels, predecisional enforcement conferences, and enforcement caucuses; and prepare and issue escalated enforcement actions after concurrence by the Director, OE. Resident and region-based inspectors, attend enforcement panels, predecisional enforcement conferences, and enforcement caucuses as warranted by their supervisors. Regional Counsel reviews and provides legal advice on all regional escalated enforcement action recommendations submitted to headquarters for review and approval, reviews OI reports promptly and notifies OE whenever an OI field office director concludes during or after an investigation that willfulness is involved. In addition, Regional Counsel makes recommendations to OE for enforcement action, including immediate action, when warranted. Regional Administrators are responsible for issuance of non-escalated enforcement actions, recommend escalated enforcement actions to headquarters, conduct enforcement panels, predecisional enforcement conferences, and enforcement caucuses.

The Office of the General Counsel (OGC) reviews and provides legal advice on civil penalty actions, enforcement actions involving OI findings, and represents the staff in NRC adjudicatory hearings on enforcement actions.

Comments

Comments in this area were received during both the public stakeholder meeting and the internal meetings. Comments included:

a. Line management should be more directly involved in the enforcement decisions.

b. Some technical staff feel uncomfortable dealing with employee protection regulations because they are very complicated issues dealing with legal thresholds and personal motivations outside the experience of many regional and program office staff.

c. A technical person can provide a perspective on the technical aspects of the issues and whether the issue is significant, which may provide some insight on the motivations. It is better that in some way technical staff stay plugged in.

d. The enforcement guidance should be revised to strengthen the message that the determination of whether there is sufficient evidence to support a finding that discrimination occurred is an OGC

decision. Technical staff should review cases for technical issues and to give clarification on site specific issues.

Recommendations

Under the current guidance, regional staff, as well program office staff, OE, and OGC are involved in determining the enforcement action that will be taken in a case. The Task Group recommends that Enforcement Manual guidance should be revised to more clearly delineate the roles of the various offices in processing employment protection regulations. The guidance should more specifically include the message that the determination of the sufficiency of the evidence to support a violation of the discrimination regulation is to be made by OGC. Following a determination by OGC that sufficient evidence exists that discrimination has occurred, the staff is responsible to determine the appropriate enforcement action, if any. The technical inspection staff's primary role should primarily be to review cases for the significance of any underlying technical issues and to give clarification on site specific issues.

C. Communications with Licensee and the Individual Accused of Discriminating

Overview of Current Policy

Prior to a PEC, the NRC issues a 1-2 page summary of the discrimination case along with the letter inviting the licensee to the PEC. The accused receives a similar personal letter. This letter is generally sent to the individual's home. Following the PEC, the NRC sends a document to the licensee and a separate document to the accused with the results and basis of the enforcement decisions. If the individual is cleared of wrongdoing (deliberate misconduct), the associated documentation to the individual is withheld from public distribution. However, all documents are potentially publicly releasable through the Freedom of Information Act (FOIA) with appropriate redaction.

Comments Received

Comments were received related to conducting the PEC during internal NRC meetings, during public meetings and in writing. The comments received can be summarized as follows:

1. There is a great need for much more detailed information than is contained in the summaries. The current level of information provided by the NRC is insufficient. The PECs are less effective because the licensee and accused are uncertain about the specifics of the case and are unable to prepare adequately.

2. The OI report should be released before the PEC as a means to satisfy No. 1 above.

3. The NRC should explain in greater detail the basis for the enforcement decision. The brevity of the enforcement action documentation does not allow the reader to understand how the NRC weighed the evidence and came to its decision.

Responses to Issues Raised

Providing the OI reports would allow for all PEC participants to have additional information to prepare for the conference thus making the PEC more effective. However, due to the need to review the OI report for redaction of personal privacy or proprietary information, there would be an additional delay prior to the PEC. In addition, instead of the PEC being focused on hearing the licensee's and complainant's views on the facts, the PEC could turn into a critique of the OI report.

Recommendations

The Task Group recommends that the regions send a closeout letter to the targets of an investigation if a case is not substantiated. Section IV.B of this report makes recommendations regarding the release of OI reports prior to the PEC.

D. Human Toll and Stress on the Accused

Comments

Comments received at many of the stakeholder meeting included statements related to the personal toll the current process has on the accused individual. Typically managers that have been the subject of individual actions for discrimination have many years of unblemished service in the nuclear industry with no previous problems in the discrimination area. The manager is accused of "criminal misconduct", a lengthy period after the alleged discriminatory action was taken. The evidence against them is unknown since the OI reports are not released and they have no ability to challenge the evidence. In many cases they become a scapegoat for the employer, since the employer must defend themselves against the action. Individuals can be subject to violations, fines and orders banning employment in licensed activities. The fact that orders banning employment is rarely used is a good thing.

Other comments include:

a. Severely limit use of 10CFR50.5 in conjunction with 10CFR50.7.
b. The PEC which usually includes an accused individual should not. The NRC should let the employer handle any personal action against the individual.
c. 10CFR50.5 as written and intended is extremely narrow. In the end the agency gets it right, but it takes to long to get to that answer and costs too much pain and money.
d. Honest mistakes can be made, deliberate misconduct is not a serious problem in this industry.
e. It is wrong to take away a person's livelihood without giving the individual the evidence.
f. If any individual action is taken, the NRC should guarantee hearing rights.
g. Provide opportunity for Alternative Dispute Resolution (ADR), with or without NRC as a participant. Provide choice of whether to use ADR to alleger.
h. Past complainants commented that the OI interview felt more like an interrogation that what they would expect for someone coming forth to bring up a safety complaint.

Response

The investigation and enforcement of employee protection regulations by their nature can result in a high level of stress to both the alleger and the accused. As previously discussed, the Office of Investigations uses accepted and well established investigatory practices when looking into these cases. Typically, by the time an individual comes to the NRC with an allegation of discrimination, the employment relationship has already been severely damaged. Allegers feel that by coming forward they may be irreparably damaging their careers and, as a result, have a high degree of stress. The accused individual is justifiably under stress when being interviewed under oath and possibly being criminally liable for their actions.

The CI is usually the first person interviewed in a discrimination investigation, specifically to allow the individual the opportunity to fully describe his/her complaint and create a record that NRC staff can review to assess whether any underlying technical and/or safety issues are associated with the claim of discrimination. As with all investigative interviews, probing questions are asked of the CI, corroborative information sought, and an initial assessment made as to the individual's credibility, with the clear expectation that the CI be treated professionally throughout his/her contact with NRC

representatives. The Commission continues to place great importance on the willingness of individuals to bring issues forward to help ensure safety in the commercial use of radioactive materials.

The Task Group believes that the NRC is responsible, under its obligations to promote a SCWE, to investigate and enforce the employee protection regulations. The alternative is to investigate only the SCWE, and leave all individual complainant remedies to the Department of Labor. As previously discussed, the Task Group considers a shift to this process would be extremely difficult without the development of a SCWE rule that would define standards and provide a regulatory framework. The industry does not support an effort to develop a SCWE rule and the Task Group believes that it would be extremely difficult to develop such a rule that would be clear and enforceable. The agency rarely uses the full breadth of its enforcement tools in discrimination cases against individuals to ban or fine them and criminal prosecution has rarely been pursued by the Department of Justice.

With regard to the use of ADR, the agency is currently reviewing the use of these techniques in all enforcement cases. However, if this were to be adopted in the employee protection area, a resolution using ADR would not likely address the SCWE, and may negatively impact public confidence due to the closed and confidential nature of ADR. Positive aspects of using an ADR process include a potential increase in the timeliness of completing cases and the fact that it may allow licensees to evaluate the claim and come to an agreement with the complainant.

Recommendations

The Task Group recommends that the Agency continue to investigate and enforce the employee protection regulations. Implementation of recommendations in this report that will improve the timeliness of resolution of these cases and the release of OI reports will minimize, to the extent possible, the impact on the individual.

A minority of the Task Group dissents from this recommendation.

E. Management Chilling

Comments

A number of presenters at stakeholder meetings indicated that the threat of taking individual actions against supervisors is having a chilling effect on them and making it difficult to manage. Managers feel vulnerable because almost every action at a nuclear plant can be defined as safety related and protected. In addition, any time an employee fears there may a personnel action pending against them for legitimate business reasons, they may raise some type of issue and are immune from the action. This results in managers feeling that they are unable to take any action against employees for poor performance or other legitimate reasons and may actually decrease safety.

Response

The Task Group acknowledges the comments, but has been unable to identify any actual evidence that managers are being "chilled" other than non-specific comments made by presenters. Although this may be a perception, it is not supported by the statistical evidence of the number of actions actually taken. Also, stakeholder meeting feedback from past discriminators does not support this. Additionally, there are a myriad of government regulations involving the protection of employees, including protections based on sex, race, age, disability and harassment. Given that hundreds of management personnel actions are taken every year throughout the industry which do not result in alleged discrimination, it is unclear how the claim of a "chilled environment" in this one small area can be claimed.

Licensees have the tools to deals with potential discrimination. Training managers on how to manage employees who have performance problems and who have engaged in protected activity can resolve this perceived problem.

Recommendations

The Task Group does not agree with the premise of this comment and recommends no actions to address this area.

APPENDIX A: DISCRIMINATION TASK GROUP CHARTER

WORKING GROUP FOR REVIEW OF AGENCY PROCESSES RELATED TO CHARGES OF DISCRIMINATION AT LICENSED OR CONTRACTOR FACILITIES

Purpose:

To establish a working group to; (1) evaluate the Agency's handling of matters covered by its employee protection standards, (2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate, (3) to ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise safety concerns in accordance with the Agency's employee protection standards, and (4) to promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process.

Group Composition:
Bill Borchardt, Director, Office of Enforcement, Group leader
Barry Letts, Office of Investigations Field Office Director, Region I
Dennis Dambly, Assistant General Counsel for Materials Litigation and Enforcement, Office of General Counsel
Ed Baker, Agency Allegation Adviser
Cynthia D. Pederson, Director, Division of Nuclear
Materials Safety, Region III
Brad Fewell, Regional Counsel, Region I

BACKGROUND:

The NRC has traditionally relied on the openness of employees to identify issues. As a result, an effective and consistent NRC approach for dealing with discrimination cases is an important feature of encouraging and ensuring a safety conscious work environment. Enforcement actions need to be predictable, fair and able to withstand scrutiny, since they could result in civil penalties, orders, or actions to individuals and are viewed by stakeholders as an indicator of the seriousness with which the NRC views discrimination issues. The overall objective of the NRC employee protection regulations is to promote an atmosphere where employees feel comfortable raising safety concerns.

Historically, discrimination matters have been some of the most difficult cases for the staff to evaluate and process. These cases, unlike most based on technical inspection findings, typically involve conflicting statements and documentation. It is frequently difficult to determine whether a violation occurred and what the appropriate enforcement action should be. Because these cases are of great interest to the NRC, a review of the processes used in these matters is appropriate.

GROUP OBJECTIVES:

-To clearly articulate the current NRC Process for handling discrimination cases.

- To identify potential improvements in the processes through interaction with internal and external stakeholders.

- To develop a Commission Paper which outlines the findings of the group and any recommendations for improvements in the process.

The Review will include:

1.Interacting with other agencies (such as Federal Aviation Administration, Department of Labor, Food and Drug Administration, Department of Agriculture, National Institutes of Health, Center for Disease Control, Department of Energy, Office of Special Counsel) to understand how they process these issues.

2.Conducting external stakeholder meetings to solicit input.

3.The review should:

a) Evaluate the current NRC processes for dealing with discrimination matters.

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

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

d) Evaluate the process used for DOL deferrals.

e) Evaluate the release of documents prior to final action being taken.

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

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

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

i) Review the role of the complainant in the process.

REVIEW OF INTERNAL NRC PROCESSES

1) Evaluate action signature authority

2) Consider the standards for when an investigation is initiated.

3) Better define the roles and responsibilities of participants in the process.

GROUP OUTPUT

1) Develop recommendations for revisions to the enforcement policy or other agency guidelines as appropriate.

2) Produce a Commission Paper outlining possible recommendations for NRC offices (OI, OE, OGC, NRR and NMSS and the Regions) to consider in making changes to their processes. The Commission Paper is to be issued by June 30, 2001.

GROUP TIME-LINE

The group's proposed schedule is:

-Identification of working group membership.	June, 2000
-Evaluation of current NRC processes.	July- Sept., 2000
-Stakeholder meetings.	August, 2000-April, 2001
-Review of other federal agency processes.	Oct.-Dec., 2000
-Develop recommendations for process improvements.	Jan.- March, 2001.
-Provide Commission draft recommendation.	April, 2001
-Draft recommendations issued for comment.	May- June, 2001
-Issue Report with recommendations.	June 30, 2001

APPENDIX B: RECOMMENDATIONS

II Legal Standards/Rulemaking

A. SCWE rule

Recommendation

The Task Group recommends that the NRC continue to evaluate the licensee's SCWE using the methods currently in place and not develop or implement a SCWE rule. The task force recommends that the NRC continue to implement the Commission direction on evaluating SCWE as outlined in the SRM for SECY 98-0176, "Proposed Options for Assessing a Licensee's Safety Conscious Work Environment".

B. Protection for the Concerned Individual

Recommendation

The NRC does not have the statutory authority to directly protect the CI. The NRC should continue to support the joint NRC / DOL legislation that affords more timely relief to complainants by providing for a preliminary order of reinstatement of the complainant, if the OSHA determines at the conclusion of the investigation conducted at the outset of the process that a violation has occurred. The Task Group also recommends re-titling the "Employee Protection" regulations of 10CFR50.7, 10CFR30.7, etc. to better reflect NRC's activities regarding prohibiting discrimination of employees..

C. Assessment of 10CFR50.7 changes to include Individual Actions

Recommendation

The Task Group recommends that 10CFR50.7 should not be singled out from other requirements for individual action, as a result, no changes are recommended to this rule.

D. Assessment of Support to Concerned Individual

Recommendations

The Task Group recommends that the staff explore how funding could be provided to allow reimbursement for the CI and one personal representative to attend enforcement conferences.

E. Individual Hearing Rights

Recommendation

This issue is being handled under the normal rulemaking process. However, the Task Group does not recommend providing additional hearing rights to individuals.

F. Employee Protection Training

Recommendation

This rulemaking would not correct the problem that was the basis for the petition. The Task Group recommends denying the petition for rulemaking and implementing recommendations with regards to encouraging the development and implementation of training programs through changes in the enforcement policy.

G. Standards of Proof

Recommendation

The Task Group recommends that OGC continue to use the current established standards in determining whether discrimination occurred.

H. Assessment of Decriminalizing 50.5 and 50.7

Recommendation

The Task Group recommends that the regulations remain consistent with the other regulations that are subject to criminal prosecution for a willful violation. As a result, the Task Group recommends not decriminalizing violations of 50.7 and similar employee protection regulations.

I. Assessment of changes to allow Civil Penalties to Contractors

Recommendation

The Task Group recommends that the staff should initiate rulemaking to include contractors as subjects that can receive civil penalties.

III Investigative Process

A. Referral of allegations of discrimination to licensees

Recommendation

Consider when it may be appropriate under limited circumstances to refer allegations to licensees or use licensee investigations.

B. The threshold criteria for initiation of an NRC investigation

Recommendation

The Task Group believes that the current threshold is appropriate. However, in order to make it clear what the threshold criteria are, provide a better explanation of what constitutes protected activities, adverse actions, and a *prima facie* case. Also, in order to ensure that the complaint reflects the current environment at the facility, establish the criteria that for a discrimination complaint to be pursued by the NRC, the concern must normally be brought to the NRC within one year of the alleged adverse action.

C. The investigative techniques employed by OI

<u>Recommendation</u>

Because the results of NRC investigations are used in enforcement actions that are very significant to individuals, fundamental and well established federal investigative techniques are necessary and appropriate to the resolution of the matter under investigation. Continue to utilize the investigative techniques currently employed by OI.

D. OI presumption of guilt or innocence of individuals or entities accused of discrimination

<u>Recommendation</u>

The Task Group does not agree with the premise that OI presumes the accused are guilty until proven innocent and proposes no action on this comment.

E. Scope of Investigation

<u>Recommendation</u>

If there are differences between the way special agents in the different field offices look at a chilled environment, OI should consider developing guidance to the special agents in this area.

F. Technical knowledge of OI special agents

<u>Recommendation</u>

Continue the practice of OI requesting and utilizing staff expertise, as necessary, to thoroughly resolve any and all matters under investigation including discrimination concerns.

G. OGC legal review of draft OI reports

<u>Recommendation</u>

The Task Group recommends that an OGC legal review should be performed for all substantiated discrimination cases prior to issuance of the Report of Investigation.

A minority of the Task Group members dissent from this recommendation.

IV Enforcement

A. Application of 10 C.F.R. 50.5

<u>Recommendation</u>

The Task Group believes that the deliberate misconduct rule should continue to be applied to individual managers who have deliberately discriminated against a whistle blower.

B. Distribution of Information prior to a Pre-decisional Enforcement Conference

Recommendation

If the recommendations related to changes to issuance of the proposed enforcement action prior to an enforcement conference are implemented, then this issue is resolved because all investigative materials would be released in order to allow for a written response or enforcement conference.

If the recommendations are not implemented, the Task Group agrees that the release of the OI report may help PEC participant prepare for the PEC. As a result, the staff recommends that the release of redacted OI report should be adopted for a one year trial period. If experience shows that the release of the reports are counterproductive to the PEC then the practice can be suspended or modified. Other options that can be considered at that time include a determination for whether it is appropriate to release the reports without the agent's analysis or to expand the factual summaries that were being generated prior to the practice of releasing the report.

A minority of the Task Group members dissent from this recommendation.

C. Sequencing of Predecisional Enforcement Conference

Recommendation

The Task Group recommends re-sequencing the PEC and proceeding directly to issuing a proposed enforcement action along with release of all background and investigative information. The licensee can then respond in writing, or if they chose, in an enforcement conference, prior to the final action or Imposition Order. The Task Group recommends conducting any enforcement conference similarly to the conferences currently being held and maintaining them closed to public observation. This recommendation eliminates one full step in the process which will improve timeliness of action and still allow the opportunity to respond to any issues prior to the final disposition of the case. This option may result in an impact on OI resources in order to redact investigatory reports in a time frame to support the enforcement process.

A minority of the Task Group members dissent from this recommendation.

D. Conduct of Predecisional Enforcement Conference

Recommendation

- The NRC staff should establish two dates within 60 days of the OI Report Issuance which are mutually agreeable to the NRC and licensee. The complainant should be given the option of either of the two dates for the PEC. Once the date for the conference is established, there should be no changes to the date except under very limited and unforeseen circumstances involving a participant that is vital to the conduct of the conference. This will minimize the impact on timeliness of the final action and on financial costs associated with the cancellation of travel plans.

– Continue to limit the number of personal representatives the complainant may bring to PEC to one. Formally provide an opportunity for the CI to speak to the NRC in private during the conference.

A minority of the Task Group members dissent from this recommendation.

– Continue to use existing Enforcement Manual guidance to determine when the conference is open or closed to the public.

E. Post Predecisional Enforcement Conference

Recommendation

If the Commission adopts the recommendation to allow written responses and hold enforcement conferences after the proposed action is issued, this comment is addressed.

If the recommendation is not adopted, Post-PEC submittals would only be allowed for those rare cases where the NRC identifies the need for further information.

If the CI does not attend a conference, transcripts of the conference would not normally be provided unless the staff considers the Complainant’s review of the transcripts necessary.

F. Communications with Licensee, Individual Accused of Discriminating, and Alleger In Unsubstantiated Cases

Recommendation

The Task Group recommends that letters to the alleger and the licensee include a discussion of the factors necessary to prove discrimination occurred, i.e., protected activity, employer’s knowledge of protected activity, adverse action, and the adverse action was taken, at least in part, because of the protected activity. The consideration of these factors is included in the OI report and would not have to be created just for the letter.

Providing a better explanation of how the NRC reached its conclusion will increase the transparency of the process and hopefully improve public confidence. Because the information is available from the OI reportunder FOIA, it will not have much impact on efficiency and will have a positive contribution to effectiveness.

G. Risk Informing the Enforcement Process for Discrimination Matters

Recommendation

The Task Group does not believe that it is appropriate or feasible to use risk significance of the underlying technical issue as a factor in determining either the investigation priority or the final enforcement action and recommends that the enforcement program for discrimination not be risk informed.

H. Early Licensee Notification, Use of Alternative Dispute Resolution (ADR) and Use of Chilling Effect Letters

Recommendation

The use of ADR misses the point of the NRC’s interest, which is the SCWE, and not whether the employee is made whole. Based on the unclear impact of the proposals to issue a chilling effect letter when an allegation is received and on the use of ADR at the beginning of the process, the Task Group recommends no changes to the current process.

I. Severity Level Factors

Recommendation

The Task Group agrees that the Enforcement Manual Supplements should include more factors than currently exist. The group recommends that the Office of Enforcement should revise the Enforcement Policy Supplements to include additional factors in assessing the severity of a violation of the discrimination requirements. Factors that should be considered include:

a The management level of the individual in the organization taking the adverse action.
b. The severity of the adverse action.
c. The notoriety of the adverse action and potential site or organizational impact.
d. If the protected activity involved coming to the NRC or participating in other government processes.
e. Whether there was a benefit (e.g. financial) to the individual or licensee to discriminate.

J. Discretion Criteria

Recommendation

The Task Group recommends amending the current Enforcement Policy guidance to include more discussion of factors that can be used to determine when it is appropriate not to cite a violation or mitigate the sanction imposed for a violation of NRC requirements. For instance, the criteria can include consideration of whether the licensee identified and corrected the violation and whether there are indications of that the SCWE has been affected. Other factors can also be considered could include whether the licensee had developed and implemented an effective training program on the discrimination regulations. Also, the guidance should eliminate the discussion of DOL settlements.

K. Factors used to Escalate and Mitigate Civil Penalties

Recommendation

The Task Group's recommendation is that the Enforcement Policy be revised to remove any statements that imply that a specific personnel action is required as an action needed to address a violation. The current Policy outlines a graded approach that gives credit for identification and corrective action of a violation. Section VII. B.5 allows the consideration of exercising discretion for these factors. The Policy also currently authorizes the use of daily civil penalties up to the statutory maximum of $120,000 for each day the violation occurs for reactor licensee. However, the Task Group concluded that the base civil penalty amounts for larger non reactor licensee's such as hospitals and large companies warrant reconsideration to make them more significant and therefore more of an actual deterrent to discrimination. For large companies, consider the financial assets and use discretion to determine an appropriate civil penalty. The Task Group determined that the flexibility and graded approach for assessing civil penalties or discretion currently in the Policy is appropriate.

L. Signature Authority

Recommendation

The Task Group concluded that the best option is continuing with the current process of having the regions sign out enforcement actions, so no change is recommended. However the enforcement policy should be revised to highlight the fact that OGC is responsible to make the determination of

whether a there is sufficient evidence to support a violation and the staff is responsible for determining the enforcement sanction.

M. Accountability For False Complaints

Recommendation

The NRC currently has the capability in 10CFR50.5.a.(2) to take action against CIs for providing false information. However, based on negative public confidence considerations, and potential chilling effect on the work environment, the Task Group recommends that the agency consider the specific facts of any given case and use this only in the most egregious cases.

N. Impact of DOL Settlement

Recommendation

The Task Group recommends that a DOL settlement not be considered as a factor in the enforcement decision. Guidance documents should be revised to reflect this. (The broader issues of DOL interaction are discussed later in the report.)

O. Willfulness of Discriminatory Acts

Recommendation

The Task Group agreed that in the first decision block of the enforcement “Metro map”, willfulness does not refer to whether the violation was deliberate, but whether the adverse action was taken willfully. In that regard, nearly all violations involving discrimination are considered to be willful. The adverse action, (e.g. termination, counseling, removal from duties, removal of site access, pay cut, etc) had to be considered and willfully taken in order for the action to occur. That is, no adverse action is taken by accident or as a result of a misunderstanding or interpretation of a requirement. The decision to the take action the action must be taken pro-actively. As a result, the Task Group recommends that the first decision block in the Enforcement Policy be changed to read “1st non-discriminatory or non willful SL III violation in 2Y/2I”. As a result, a cases involving discrimination would consider both identification and corrective action to assess the amount of civil penalty.

V. NRC Roles and Reponsibilities

A. NRC’S Interface with the Department of Labor

Recommendation

Given the relatively small number of cases in which both agencies conduct investigations, the smaller number of cases that have been deferred, and the difficulty of restarting an investigation after the passage of six months or more, the Task Group believes the Commission should reconsider its policy of deferring investigation to DOL. Also, given the timeliness considerations involved, and the fact that a settlement can occur anywhere in the process, the NRC may find itself in a position to have no record with which to take action, sometimes years after the event, the practice of deferring cases to DOL should be stopped.

Given that 1) only 35 percent of complainants file with DOL, 2) DOL does not evaluate the work environment or cause the licensee to correct the underlying problem that resulted in the discriminatory act, and 3) the possible adverse reaction from the stakeholders if NRC did not

investigate cases of discrimination that meet the criteria for a *prima facie*, the Task Group believes that NRC should continue to investigate individual complaints of discrimination.

B. NRC Staff Participation

Recommendation

Under the current guidance, regional staff, as well program office staff, OE, and OGC are involved in determining the enforcement action that will be taken in a case. The Task Group recommends that Enforcement Manual guidance should be revised to more clearly delineate the roles of the various offices in processing employment protection regulations. The guidance should more specifically include the message that the determination of the sufficiency of the evidence to support a violation of the discrimination regulation is to be made by OGC. Following a determination by OGC that sufficient evidence exists that discrimination has occurred, the staff is responsible to determine the appropriate enforcement action, if any. The technical inspection staff's primary role should primarily be to review cases for the significance of any underlying technical issues and to give clarification on site specific issues.

C. Communications with Licensee and the Individual Accused of Discriminating

Recommendation

The Task Group recommends that the regions send a closeout letter to the targets of an investigation if a case is not substantiated. Other recommendations have been made elsewhere in this report regarding the release of OI reports prior to the PEC.

H. Human Toll and Stress on the Accused

Recommendation

The Task Group recommends that the Agency continue to investigate and enforce the employee protection regulations. Implementation of recommendations in this report that will improve the timeliness of resolution of these cases and the release of OI reports will minimize, to the extent possible, the impact on the individual.

A minority of the Task Group member dissents from this recommendation.

E. Management Chilling

Recommendation

The Task Group does not agree with the premise of this comment and recommends no actions to address this area.

APPENDIX C: NUREG-1499, Matrix of Actions Taken

CHART 1
RECOMMENDATIONS AND RESULTING ACTIVITIES REGARDING THE REASSESSMENT OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION (NUREG-1499, Published January, 1994)- Section II.A; Section II.B

	Recommendation:	Activity:	Date:
1	**Licensee Responsiveness to Concerns- Section II.A** The Commission should issue a policy statement emphasizing the importance of licensees and their contractors achieving and maintaining a work environment conducive to prompt, effective problem identification and resolution, in which their employees are and feel free to raise concerns, both to their management and to the NRC, without fear of retaliation. This Commission policy statement should include the following: (1) Licensees should have the means to raise issues internally outside the normal process; and (2) Employees (including contractor employees) should be informed of how to raise concerns through normal processes, alternative internal processes, and directly to the NRC. The Commission policy statement should also emphasize that licensees (1) are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation; and (2) should incorporate this responsibility into applicable contract language.	**Completed** Proposed Policy Statement The final Commission Policy Statement "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns without Fear of Retaliation."	Proposed published on February 8, 1995. Final Published in the Federal Register on May 14, 1996
2	The regulations in part 19 should be reviewed for clarity to ensure consistency with the Commission's employee protection regulations.	**Completed** A direct final rule revising 10 CFR Part 19 was issued in February, 1996.	February, 1996

3	**NRC Responsiveness to Concerns- Section II.B** The NRC should incorporate consideration of the licensee environment for problem identification and resolution, including raising concerns, into the Systematic Assessment of Licensee Performance (SALP) process.	**Completed** MD 8.6, "Systematic Assessment of Licensee Performance," was revised adding guidance in this area. SALP Process was discontinued. This matter is now considered as a cross-cutting issue under the Reactor Oversight Program.	January 27, 1995
4	The NRC should develop inspection guidance for identifying problem areas in the workplace where employees may be reluctant to raise concerns or provide information to the NRC. This guidance should also address how such information should be developed and channeled to NRC management.	**Completed** Inspection Procedure 40500 was revised to include guidance in this area. This matter is now considered under the ROP as a PI&R inspection issue.	October 3, 1994

5	The NRC should develop a survey instrument to independently and credibly assess a licensee's environment for raising concerns.	**Completed-Not adopted** The Commission accepted the staff's recommendation not to develop a survey instrument as proposed in the November 16, 1994 status report. After the GAO recommended that the staff consider this recommendation, the EDO tasked RES with reviewing existing methodologies for evaluating SCWE's. In 1997 RES was evaluating existing methodologies for conducting surveys and the possibility of crafting a survey for industry use. RES was tasked to make a recommendation to the EDO. SECY 98-176- options paper for assessing the SCWE at licensee's facilities. SRM on SECY 98-175. Commission decided not to survey SCWEs at licensee faciltiies.	November 16, 1994 Letter to Congress-March, 1997 July 21, 1998
6	Allegation follow-up sensitivity and responsiveness should be included in performance appraisals for appropriate NRC staff and managers.	**Completed** Appropriate NRC employees elements and standards contain this criteria.	October, 1995

7	The NRC should place additional emphasis on periodic training for appropriate NRC staff on the role of allegations in the regulatory process, and on the processes for handling allegations.	**Completed** Revision to MD 8.8 requires refresher training every year for NRC staff.	Approved May 1, 1996
8	The NRC should develop a readable, attractive brochure for industry employees. The brochure should clearly present a summary of the concepts, NRC policies, and legal processes associated with raising technical and/or harassment and intimidation (H&I) concerns. The brochure should also discuss the practical meaning of employee protection. In addition, the NRC should consider developing more active methods of presenting this information to industry employees.	**Completed** Brochure Completed A copy is mailed to each alleger as an attachment to the letter acknowledging receipt of his or her allegation.	October, 1996.
9	Management Directive 8.8 should include specific criteria and time-frames for periodic feedback to allegers, in order to ensure consistent agency practice.	**Completed** Revision to MD 8.8 requires a letter to be sent to an alleger within 30 days of receipt of an allegation, every six months thereafter, and within 30 days of completing the inspection or investigation.	May 1, 1996

10	The NRC should develop a standard form to be included with alleger close-out correspondence, to solicit feedback on the NRC's handling of a given concern.	**Completed** The staff informed the Commission this survey would be conducted on a trial basis with a sample of allegers. The staff completed mailing survey forms to 145 allegers soliciting feedback on the NRC's handling of their concerns. Responses received from 44 individuals, 25 complimentary of the process and 19 dissatisfied with the NRC's handling of their allegations. Staff has taken action to address timeliness and review quality issues raised by the survey. The Allegations Program has started a one year trial program of surveying allegers on performance of the Program.	 November 16, 1994 December, 1995 October, 2000
11	The NRC should designate a full-time, senior individual for centralized coordination and oversight of all phases of allegation management, designated as the agency allegation manager, with direct access to the EDO, program office directors and regional administrators.	**Completed** Full-time senior allegations advisor was selected.	 Started on February 6, 1996.
12	All program office and regional allegation coordinators should participate in periodic counterpart meetings.	**Completed** Allegation Staff Counterpart meetings are held on an annual basis.	

13	The allegation manager should conduct audits of the quality and consistency of ARB decisions, allegation referrals, inspection report documentation, and allegation case files.	**Completed** As of 1998, three rounds of audits of NMSS, NRR, and the four regions have been completed and will continue on an annual basis.	
14	Criteria for referring allegations to licensees should be clarified to ensure consistent application among ARBs, program offices, and the regions.	**Completed** Criteria providing for clarification on referring allegations to licensees were included in a revision to MD 8.8.	May 1, 1996
15	The NRC should revise the Allegation Management System to be able to trend and monitor an allegation from receipt to the completion of agency action.	**Completed** The software for AMS to trend and monitor allegations was installed and is currently in use.	October, 1996
16	Using AMS, the NRC should monitor both H&I and technical allegations to discern trends or sudden increases that might justify the NRC questioning the licensee as to root causes of such changes and trends. This effort should include monitoring contractor allegations-both those arising at a specific licensee and those against a particular contractor across the country.	**Completed** The staff currently monitors allegations against licensees and contractors for adverse trends in this area.	
17	The NRC should resolve any remaining policy differences between OI and NRR on protecting the identity of allegers (including confidentiality agreements) in inspection and investigation activities.	**Completed** Policy differences have been resolved and included in a revision to MD 8.8. Commission policy statement on protecting identity of allegers was published in the Federal Register.	May 1, 1996 May 23, 1996

18	The NRC should periodically publish raw data on the number of technical and H&I allegations (for power reactor licensees, this should be per site, per year).	**Completed** The NRC first published raw data in an AEOD annual report. Such raw data is published in the annual Status of Allegation Program Annual Report.	July, 1996
19	Regions should provide toll-free 800 numbers for individuals to use in making allegations.	**Completed** Toll Free Service was implemented.	October 1, 1995

CHART 2

RECOMMENDATIONS AND RESULTING ACTIVITIES REGARDING THE REASSESSMENT OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION (NUREG-1499, Published January, 1994)- Section II.C; Section II.D

	Recommendation:	Activity:	Date:
1	**NRC Investigations During the DOL Process- Section II.C** The Commission should support current considerations within DOL to transfer Section 211 implementation from the Wage & Hour Division to OSHA.	**Completed** DOL completed the transfer of investigation of all Section 211 complaints to OSHA.	February, 1997
2	The Commission should support legislation to amend Section 211 as follows: (1) Revising the statute to provide 120 days (from the filing of the complaint) to conduct the DOL investigation; 30 days from the investigation finding to request a hearing; 240 additional days to issue an ALJ decision; and 90 days for the SOL to issue a final decision when an ALJ decision is appealed. This would allow 480 days (from when the complaint is filed) to complete the process. (2) Revising the statute to provide that reinstatement decisions be immediately effective following a DOL finding based on an administrative investigation. (3) Revising the statute to provide that the DOL defend its findings of discrimination and ordered relief in the adjudicator process if its orders are being contested by the employer. This would not preclude the complainant from also being a party in the proceeding.	**Completed** The Commission has drafted proposed legislative changes and has repeated contacts with DOL encouraging its review of the proposed legislation. The staff met with DOL. DOL provided comments on the proposed changes. DOL had a rulemaking underway to implement (3). Letter to the Senate and House from DOL and NRC with the Enclosed Draft Bill amending Section 211 as outlined. **Changes to Section 211 have not yet been implemented.**	Draft provided to DOL on November 11, 1996 March & September, 1997 December, 1997 March 14, 2000
3	The NRC should recommend to the SOL that adjudicatory decisions under Section 211 be published in a national report or computer based system.	**Completed** DOL has made ALJ decisions and SOL/ARB decisions available on its website.	

4	The NRC should take a more active role in the DOL process. Consistent with relevant statutes, Commission regulations, and agency resources and priorities, the NRC should normally make available information, agency positions, agency witnesses that may assist in completing the adjudicatory record on discrimination issues. Such disclosures should be made as part of the public record. The NRC should consider filing *amicus curiae* briefs, where warranted, in DOL adjudicatory proceedings.	**Completed** Revision to MD 8.8 contains guidance to the NRC staff on this issue.	May 1, 1996
5	The NRC should designate the agency allegation manager as the focal point to assist persons in requesting NRC information, positions, or witnesses relevant to DOL litigation under Section 211. Information on this process, and on how to contact the NRC focal point, should be included in the brochure for industry employees as specified in Chart 1, #8.	**Completed** The AAA has assumed these duties. The revision to MD 8.8 includes these duties as the responsibility of the AAA. The public brochure contains information on this topic.	May 1, 1996
6	The NRC should work with the DOL to establish a shared data base to track DOL cases.	**Completed- Not adopted** Due to the cost associated with this recommendation and the improved communication between the NRC and OSHA, the staff decided not to pursue this option. OSHA provides a list of complaints to the NRC on a quarterly basis. The list provides a status of previous cases.	

7	The NRC should revise the criteria for prioritizing NRC investigations involving discrimination. The following criteria should be considered for assigning a high investigation priority: (1) Allegations of discrimination as a result of providing information directly to the NRC; (2) Allegations of discrimination caused by a manager above first-line supervisor; (3) Allegations of discrimination where a history of findings of discrimination or settlement suggests a programmatic rather than an isolated issue; (4) Allegations of discrimination which appear particularly blatant or egregious.	**Completed** Revised criteria for prioritizing OI investigations of H&I concerns was issued. New criteria included in revision to MD 8.8.	October 12, 1995 May 1, 1996
8	OI investigators should continue to interface with the DOL to minimize duplication of effort on parallel investigations. Where the NRC is conducting parallel investigations with the DOL, OI procedures should provide that its investigators contact the DOL on a case-by-case basis to share information and minimize duplication of effort. The DOL process should be monitored to determine if NRC investigations should be conducted, continued, or priorities changed. In that regard, settlements should be given special consideration.	**Status of OI implementation?**	
9	When an individual who has not yet filed with the DOL brings an H&I allegation to the NRC, the NRC should inform the person: (1) that a full-scale investigation will not necessarily be conducted; (2) that the DOL and not the NRC provides the process for obtaining a personal remedy; and (3) of the method for filing a complaint with the DOL. If after the ARB review, OI determines that an investigation will not be conducted, the individual should be so informed.	**Completed** Recommendation implemented by revision to MD 8.8.	May 1, 1996

10	OI should discuss cases involving Section 211 issues with DOJ as early as appropriate so that a prompt DOJ declination, if warranted, can allow information acquired by OI to be used in the DOL process.	**Status of OI implementation?**	
11	The implementation of the MOU with the TVA Inspector General should be reconsidered following the completion of the ongoing review.	**Completed** The MOU with the TVA IG was terminated by letter to the TVA-IG from the Director, OI.	August 30, 1994
12	**Related NRC Enforcement Actions-Section II.D** For case that are appealed and result in DOL ALJ adjudications, the NRC should continue the current practice of normally initiating the enforcement process following a finding of discrimination by the DOL ALJs. However, the licensee should be required to provide the normal response required by 10 CFR 2.201.	**Completed** A revision to the Enforcement Manual implementing this recommendation was issued.	December 31, 1994
13	Additional Severity Level II examples should be added to Supplement VII of the Enforcement Policy to address hostile work environments and discrimination in cases where the protected activity involved providing information of high safety significance. Supplement VII should also recognize restrictive agreements and threats of discrimination as examples of violations at least at a Severity Level III. Supplement VII should also provide that less significant violations involving discrimination issues be categorized at a Severity level IV.	**Completed** The Enforcement Policy was revised (59 FR 60697) to incorporate new examples in Supplement VII to describe discrimination by individuals above first line supervisor as SLII, threats of discrimination and restrictive agreements as SLIII, and fewer significant acts of discrimination as SLIV.	November 28, 1994
14	The Commission should seek an amendment to Section 234 of the AEA of 1954 to provide for a civil penalty of up to $500,000 per day for each violation. If this provision is enacted into law, the Enforcement Policy should be amended to provide that this increased authority should normally be used only for willful violations, including those involving discrimination.	**Completed-Not implemented** The Enforcement Policy Review Team did not recommend seeking an increase to the CP levels. The Comm'n agreed.	

15	Pending an amendment to Section 234 of the AEA, the flexibility in the EP should be changed to provide that the base penalty for willful violations involving discrimination, regardless of the severity level, should be the amount currently specified for a Severity Level I violation.	**Completed-Not implemented** The Enforcement Policy Review Team did not recommend seeking an increase to the base CP levels. The Comm'n agreed.	
16	The Enforcement Policy should be changed, for civil penalty cases involving discrimination violations, to normally allow mitigation only for corrective action. Mitigation for corrective action should be warranted only when it includes both broad remedial action as well as a personal remedy to address the potential chilling effect. Mitigation or escalation for corrective action should consider the timing of the corrective action.	**Completed** The Enforcement Manual was modified to specify that civil penalties in discrimination cases will be mitigated only if the licensee takes prompt and extensive corrective action. Change also incorporated as a revision to the Enforcement Policy,	December, 1994 November 28, 1994
17	For violations involving discrimination issues not within the criteria for a high priority investigation, citations should not normally be issued nor OI investigations conducted if: (1) discrimination, without a complaint being filed with the DOL or an allegation made to the NRC, is identified by the licensee and corrective action is taken to remedy the situation, or (2) after a complaint is filed with the DOL, the matter is settled before an evidentiary hearing begins, provided the licensee posts a notice (a) that a discrimination complaint was made, (b) that a settlement occurred, and (c) if the DOL's investigation found discrimination, that remedial action has been taken to reemphasize the importance of the need to be able to raise concerns without fear of retaliation.	**Completed** Recommendation incorporated in a revision to the Enforcement Policy.	November 28, 1994
18	In taking enforcement actions involving discrimination, use of the deliberate misconduct rule for enforcement action against the responsible individual should be considered.	**Completed** Recommendation implemented in a revision to the Enforcement Manual	December 31, 1994

CHART 3

RECOMMENDATIONS AND RESULTING ACTIVITIES REGARDING THE REASSESSMENT OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION (NUREG-1499, Published January, 1994)- Section II.E

	Recommendation:	Activity:	Date:
1	**Treatment of Allegations of Actual or Potential Discrimination- Section II.E** Regional Administrators and Office Directors should respond to credible reports of reasonable fears of retaliation, when the individual is willing to be identified, by holding documented meetings or issuing letters to notify senior licensee management that the NRC: (1) Has received information that an individual is concerned that retaliation may occur for engaging in protected activities; (2) Will monitor actions taken against this individual; and (3) Will consider enforcement action if discrimination occurs, including applying the wrongdoer rule.	**Completed** Revision of MD 8.8 includes guidance on this issue.	May 1, 1996
2	Before contacting a licensee as proposed in #1 above, the NRC should: (1) Contact the individual to determine whether he or she objects to the disclosure of his or her identity; and (2) Explain to the individual that provisions of Section 211 and the DOL process (e.g., that it is the DOL and not the NRC that provides a personal remedy).	**Completed** Revision of MD 8.8 includes guidance on this issue.	May 1, 1996

3	The Commission should include in its policy statement outlined in Chart #1 expectations for licensees' handling of complaints of discrimination, as follows: (1) Senior management of licensees should become directly involved in allegations of discrimination; (2) Power reactor licensees and large fuel cycle facilities should be encouraged to adopt internal policies providing a holding period for their employees and contractor's employees that would maintain or restore pay and benefits when the licensee has been notified by an employee that, in the employee's view, discrimination has occurred. This voluntary holding period would allow the licensee to investigate the matter, reconsider the facts, negotiate with the employee, and inform the employee of the final decision. Note- NUREG-1499 includes multiple requirements on what this holding period should include. The NRC would not consider the licensee's use of a holding period to be discrimination even if the person is not restored to his or her former position, provided that the employee agrees to the conditions of the holding period, and that the pay and benefits are maintained; (3) Should it be determined that discrimination did occur, the licensee's handling of the matter would be considered in any associated enforcement action. While not adopting a holding period would not be considered as an escalation factor, use of the holding period would be considered a mitigating factor in any sanction.	**Completed** The final Commission Policy Statement on Freedom to Raise Safety Concerns addressed these issues.	Published in the *FR* on May 14, 1996

4	In appropriate cases, the EDO (or other senior NRC management) should notify the licensee's senior management by letter: (1) Bringing the matter to the attention of senior licensee management, noting that the NRC has not taken a position on the merits of the allegation but emphasizing the importance the NRC places on a quality-conscious environment where people believe they are free to raise concerns, and the potential for adverse impact on this environment if this allegation is not appropriately resolved; (2) Requesting the personal involvement of senior licensee management in the matter, to ensure that the employment action taken was not prompted by the employee's involvement in protected activities, and to consider whether action is needed to address the potential for a chilling effect; (3) Requesting the licensee to place the employee in a holding period, as described above; (4) Require a full report of the actions that senior licensee management took on this request within 45 days; and (5) Noting that the licensee's decision to adopt a holding period will be considered as a mitigating factor in any enforcement decision should discrimination be determined to have occurred. In such cases, prior to issuing the letter, the employee should be notified (a) that the DOL and not the NRC provides personal remedies; and (b) that the NRC sill be sending a letter revealing the person's identity to the licensee, requiring an explanation from the company and requesting a holding period in accordance with the Commission's policy statement.	**Completed** The final Commission Policy Statement, as described above, addresses the holding period. A revision to MD 8.8 addresses contacting the alleger.	May 14, 1996 May 1, 1996
5	The NRC should normally issue a chilling effect letter if a licensee contests a DOL Area Office finding of discrimination, and a holding period is not adopted. A letter would not be needed if Section 211 is amended to provide for reinstatement following a DOL administrative finding of discrimination. When a chilling effect letter is issued, appropriate follow-up action should be taken.	**Completed** A revision to the Enforcement manual implements this recommendation.	December 31, 1994

6	A second investigative finding of discrimination within an 18 month period should normally result in a meeting between the licensee's senior management and the NRC Regional Administrator.	**Completed** A revision to the Enforcement manual implements this recommendation.	December 31, 1994
7	If more than two investigative findings of discrimination within an 18-month period, the NRC should consider stronger action, including issuing a Demand for Information.	**Completed** A revision to the Enforcement manual implements this recommendation.	December 31, 1994
8	The NRC should consider action when there is a trend in settlements without findings of discrimination.	**Completed** A revision to the Enforcement manual implements this recommendation.	December 31, 1994

APPENDIX D: NRC ENFORCEMENT MANUAL, Discrimination Processes Section

7.7 Discrimination for Engaging in Protected Activities

The NRC places a high value on nuclear industry employees being free to raise potential safety concerns, regardless of the merits of the concern, to both licensee management and the NRC. Therefore, one of the goals of the NRC's Enforcement Policy is to ensure, through appropriate enforcement action against a licensee or licensee contractor (and when warranted, against the individual personally responsible for the act of discrimination), that employment actions taken against licensee or contractor employees for raising safety concerns do not have a chilling effect on the individual or others on the reporting of safety concerns.[7] For purposes of this guidance, discrimination should be broadly defined and should include intimidation or harassment that could lead a person to reasonably expect that, if he or she makes allegations about what he or she believes are unsafe conditions, the compensation, terms, conditions, and privileges of employment could be affected.

Section 211 (formerly 210) of the ERA provides that no employer may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in certain protected activities. These protected activities include notifying an employer of an alleged violation of the AEA or ERA, refusing to engage in any practice made unlawful by those acts, testifying before Congress or in a Federal or State proceeding regarding any provision of these acts, or commencing, testifying, assisting, or participating in a proceeding under these acts. NRC regulations that are related to the protection of whistle blowers include: 10 CFR 19.20, 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, 72.10, and 76.7. In addition, 10 CFR Part 50, Appendix B, Criterion I provides that persons and organizations performing quality assurance functions shall have sufficient authority and freedom to identify problems and provide solutions.

Allegations of discrimination can be made directly to the NRC or to the Department of Labor (DOL) or both. This section describes:

H. The Memorandum of Understanding between the NRC and the DOL (Section 7.7.1),
I. how to handle discrimination complaints filed directly with the NRC (Section 7.7.2),
J. the process for dispositioning discrimination complaints filed with the DOL (Section 7.7.3),
K. the action the NRC should take to address the potential chilling effect at a licensee's facility when discrimination complaints are raised (Section 7.7.4),
L. the documentation of the analytical process in discrimination matters (Section 7.7.5),
M. the preparation of NRC enforcement actions for discrimination violations (Section 7.7.6),
N. the options for exercising discretion for discrimination violations (Section 7.7.7),
O. the handling of continuing violations involving discrimination (Section 7.7.8),
P. whether to take enforcement action against contractors and individuals for acts of discrimination (Section 7.7.9), and
Q. application of the *Corrective Action* civil penalty assessment factor (Section 7.7.10).

[7] Although licensees will be held responsible in enforcement actions for the discriminatory actions of their contractors, they are not required to specifically report allegations of harassment, intimidation, or discrimination.

7.7.1 Memorandum of Understanding (MOU) Between NRC and DOL

The MOU between the NRC and DOL is included on OE's Website. The MOU describes the responsibilities of the NRC and DOL in protecting the rights of employees as specified in Section 211 of the Energy Reorganization Act (ERA) of 1974, as amended. Section 3 of the MOU provides that the two agencies will "...cooperate with each other to the fullest extent possible in every case of alleged discrimination involving employees of Commission licensees, applicants, or contractors or subcontractors of Commission licensees or applicants."

Under the MOU between NRC and DOL, if DOL receives a complaint concerning a possible violation of Section 211, it will promptly notify the NRC and inform the NRC whether DOL intends to investigate the matter. DOL also will notify the NRC of the results of the Occupational Safety and Health Administration's (OSHA's) Notice of Determination (the results of the DOL investigator's conciliation effort and investigation), of the Recommended Decision and Order of the Administrative Law Judge (if the Notice of Determination is appealed by either party), and of the Final Order of the Secretary of Labor, rendered by the Administrative Review Board. The NRC will facilitate DOL's investigations by taking all reasonable steps to assist DOL in obtaining access to licensed facilities and any necessary security clearances.

The two agencies also developed procedures for implementing the MOU to ensure prompt notification, investigation, and follow up of complaints involving alleged discrimination against employees who have contacted or attempted to contact the NRC. These procedures are also included in the MOU.

The division of responsibilities between the two agencies for processing discrimination complaints that have been filed with the DOL is detailed in the Sections 7.7.3.1 and 7.7.3.2.

7.7.2 Processing Discrimination Complaints Filed With NRC

If an employee does not file an allegation of discrimination with DOL, but instead raises the concern directly to an NRC employee, then that NRC employee should be sensitive to the NRC responsibilities in this area and should make sure that the alleger understands that the NRC is concerned about these complaints. The NRC employee who receives the complaint is to follow the guidance in MD 8.8.

7.7.3 Processing Discrimination Complaints Filed With DOL

The division of responsibilities between the two agencies for processing discrimination complaints that have been filed with the DOL is detailed in the Sections 7.7.3.1 and 7.7.3.2.

7.7.3.1 Department of Labor Process

The Department of Labor is authorized by the Energy Reorganization Act to order personal remedies for an individual found to have been discriminated against by an NRC licensee. On the other hand, the NRC is not authorized to order personal remedies, but is responsible for regulating the nuclear industry and can take enforcement action against a licensee for discriminating against an employee for engaging in protected activities. In accordance with these different responsibilities, whereas the NRC may receive an anonymous allegation which it may decide to investigate and could later act on the findings, the DOL process starts when an individual files a complaint with the DOL seeking personal remedies.

The following guidance describes the steps in the DOL process. In accordance with the MOU between DOL and NRC, the DOL will send copies of official correspondence and decisions to the NRC to assist the NRC in tracking complaints of discrimination at licensed facilities. The NRC tracks these complaints through NRC-6, "Discrimination Cases", a system of records that has been noticed in the Federal Register.

a. **OSHA**

In accordance with Section 211, a complaint filed with the Department of Labor is first reviewed by OSHA to determine whether the complainant has established a *prima facie* case. If he or she has, OSHA will acknowledge the complaint by letter and assign a compliance officer to investigate the allegation. The compliance officer will interview individuals associated with the allegation of discrimination, compile a "narrative report" of these interviews, and make a recommendation as to whether discrimination occurred. **[NOTE: The information provided by DOL to the NRC, especially the compliance officers' narrative reports, should not be publicly released without the permission of DOL other than documents NRC knows to be public.]**

OSHA will then issue a decision and will send copies of this decision to the complainant and his or her employer. Note that sometimes the employer of record is a licensee contractor and, in some cases, the licensee may not know at this point that a complaint was even filed against its contractor.

b. **Appeal**

An appeal of OSHA's decision can be filed within 5 days of the decision with the Office of Administrative Law Judges (ALJ). If no appeal is filed within that time, OSHA's decision is considered a final decision of the Secretary of Labor.

c. **Administrative Law Judge**

If there is an appeal, an "ERA" number will be assigned by DOL and the ALJ assigned to the case will schedule and conduct a hearing on the issues involved in the complaint. The ALJ will then issue a Recommended Decision and Order which can be appealed to the Secretary of Labor. If no appeal is sought by either party, the ALJ's decision becomes the final DOL decision.

d. **Secretary of Labor**

The Secretary of Labor will review the ALJ's Recommended Decision and Order, if one of the parties requests review. Where the Recommended Decision and Order finds discrimination and recommends relief, the Secretary is required to issue a preliminary order providing that relief, not including compensatory damages, pending the Secretary's decision on the matter. The Secretary, on May 3, 1996, delegated this authority to the Administrative Review Board of the Department of Labor.

e. **Additional Appeals beyond the Secretary of Labor**

The party against whom the Secretary rules may appeal the decision to U.S. Court of Appeals.

f. **Settlements**

The individual and the employer may settle the matter after a complaint is filed with the Department of Labor but before a final decision is reached by the DOL.

7.7.3.2 NRC Process

The following guidance describes the steps of the NRC enforcement process in terms of the steps of the DOL process identified in Section 7.7.3.1 above. It should be noted that if OI investigated the matter, it may not be necessary to wait until DOL completes its process.

a. **OSHA**

If the complaint is withdrawn or settled before OSHA issues a finding, or if OSHA concludes that the complaint was not timely filed, the NRC should review the complaint and any associated documents and an Allegation Review Board should be convened to determine whether an OI investigation is necessary. If additional information is needed from the DOL, it can be requested using Form 29.

If OSHA concludes that discrimination occurred and:

R. the licensee or contractor appeals the decision, the region should request a copy of the DOL compliance officer's narrative report and should prepare a chilling effect letter (CEL) (see Section 7.7.4.1), or

S. the licensee or contractor does not appeal the decision, it is considered a final order of the Secretary of Labor and enforcement action may be appropriate. Before initiating enforcement action, the region should request a copy of the DOL compliance officer's narrative report and should coordinate the matter with OE and OE will consult OGC to determine if a CEL or enforcement action should be issued (see Section 7.7.6).

If OSHA concludes that no discrimination occurred and:

T. the individual does not appeal the decision, the region should request a copy of the DOL compliance officer's narrative report. This report should be reviewed to ensure that the NRC can close the matter with no further action, or

U. the individual appeals the decision, the region should request a copy of the DOL compliance officer's narrative report to determine if some action, e.g., a CEL, is necessary while the NRC awaits the ALJ's Recommended Decision and Order.

b. **Appeal**

If OSHA's finding of discrimination is appealed by the licensee or contractor, the region should prepare a CEL (see Section 7.7.4.1). If OSHA's finding of no discrimination is appealed by the individual, the NRC should await the ALJ's Recommended Decision and Order.

c. **Administrative Law Judge**

After conducting a hearing, the ALJ will issue a Recommended Decision and Order. The Energy Policy Act of 1992 revised Section 211 of the Energy Reorganization Act to, among other things, require the Secretary of Labor to issue a preliminary order providing certain relief

specified by the ALJ while awaiting the final order of the Secretary. The Secretary of Labor has delegated responsibility for reviewing ALJ determinations to the Administrative Review Board (ARB).

If the ALJ finds that discrimination occurred, the region should request an EA number and initiate the enforcement process. The appropriate enforcement action should be issued following the issuance of the ALJ's Recommended Decision and Order. If a civil penalty is proposed, the enforcement action will require a response in accordance with the provisions of 10 CFR 2.201. However, the action should delay the licensee's response to the provisions of 10 CFR 2.205 (i.e., payment of any civil penalty) until 30 days after the DOL decision becomes final. If no appeal from an ALJ's Recommended Decision and Order is filed, the 30 day period should commence 10 business days after the ALJ's decision is rendered..

The region should also consider whether it would be appropriate to take some action against the contractors or individual(s) found by the ALJ to be responsible for the discrimination. (See Section 7.3 for guidance on enforcement actions involving individuals.

If the ALJ finds no discrimination, the NRC should await issuance of the Secretary of Labor's decision, if an appeal is filed.

If the ALJ dismisses the complaint for procedural reasons (withdrawal, settlement, or untimely), the region should review the record, including the earlier OSHA decision, and determine whether it is appropriate to initiate the enforcement process, to request additional OI investigation, or wait for the ARB's ruling, if an appeal is filed.

d. **Administrative Review Board (ARB)**

If, on a timely appeal, the ARB affirms the ALJ's finding of discrimination, the licensee is expected to respond to any civil penalty already issued by the NRC. Although no specific action is required by the NRC at this point, the region should ensure that the licensee has received notice of the ARB Order, especially in cases in which the Respondent is a licensee contractor, to avoid a delay in the licensee's response.

If the ARB affirms the ALJ's finding of no discrimination, the region would normally close the case without further action. If the ARB reverses the ALJ's finding that discrimination occurred and dismisses the case, normally NRC would withdraw the enforcement action if it was based solely on the DOL process (i.e., without independent findings from an OI investigation that discrimination had occurred).

If the ARB reverses the ALJ's finding that no discrimination occurred, concluding instead that discrimination did occur, the region should request an EA number and initiate the enforcement process.

If the ARB dismisses the case for procedural reasons, (withdrawal, settlement, or untimely), the region should review the record, including the earlier ALJ's decision, and determine whether earlier enforcement was appropriate, whether to impose the civil penalty, or withdraw the proposed civil penalty.

e. **Additional Appeals beyond the Secretary of Labor**

The party against whom the Secretary rules may appeal the decision to U.S. Court of Appeals. Absent a stay issued by the Court, the NRC enforcement action is not stayed. Therefore, the region should consult with OE in such cases.

f. **Settlements**

The individual and the employer may settle the matter after a complaint is filed with the Department of Labor but before some final decision is reached by the DOL. In such cases, the NRC will normally need to develop the evidence to support an enforcement action if it is to prevail.

7.7.4 Chilling Effect of Actual or Potential Discrimination

In addition to concerns about the appropriate enforcement action in cases of actual discrimination (Section 7.7.3.2), the NRC must also consider the impact of such discrimination in the workplace, i.e., whether the awareness of the discriminatory act will discourage other licensee and contractor employees from raising safety concerns.

Section 7.7.4.1 describes the use of chilling effect letters; Section 7.7.4.2 describes the action the NRC should take when there are repetitive findings of discrimination at a licensed facility; and Section 7.7.4.3 describes the action the NRC should take when there are numerous settlements without findings of discrimination at a licensed facility.

7.7.4.1 Chilling Effect Letter (CEL)

In each case of a finding of discrimination, the NRC should bring the matter to the attention of the licensee. This correspondence, referred to as a chilling effect letter (CEL), serves three purposes: (1) to notify the licensee of the NRC's concern, (2) to understand the basis for the licensee's position on whether or not discrimination occurred, and (3) to obtain a description of any remedial action the licensee plans to take to address the potential chilling effect. Remedial action may be warranted, even if the licensee disagrees with the finding of discrimination, because of the potential for a chilling effect.

The NRC should normally issue a CEL after the DOL investigation has been completed and a finding has been made of discrimination. However, if the licensee settles a case soon after the DOL finding and does not challenge the finding in an adjudication, the chilling effect may be minimized and a CEL need not be issued.

The CEL requires that the licensee describe: (1) its position regarding whether the actions affecting the individual violated 10 CFR 50.7 (or other requirement) and the basis for its position, including the results of any investigations it may have conducted to determine whether a violation occurred, and (2) the actions taken or planned to ensure that the matter is not having a chilling effect on the willingness of other employees to raise safety and compliance concerns within its organization, and as discussed in NRC Form 3, to the NRC.

The licensee's response to the CEL is mandatory under the provisions of the AEA, 10 CFR 2.204 (Demand for Information), and the provision of the applicable part of 10 CFR implementing Section 182 of the AEA. A sample CEL is included in Appendix B, as Form 28.

When a CEL is to be issued, the region should request an EA number which allows OE and the region to track CELs for each licensee. Since the EA should be closed upon issuance of

the CEL itself, the region must send a copy of the letter to OE. Any subsequent enforcement action proposed will be given a separate EA number.

➜**NOTE**: There may be special cases involving allegations of a chilled work environment (i.e., no DOL complaint or finding) where issuance of a CEL is appropriate. The region should consult with an OE Enforcement Specialist to discuss the issuance of a CEL and determine the appropriate coordination with OE. If a CEL is to be issued, the region should request an EA number. Because the CEL in this case is in response to an allegation versus a DOL finding, NRC OI investigation, or NRC inspection, the letter should not include the mandatory licensee response language in a traditional CEL (i.e., DFI). Form 28 should NOT be used to draft the CEL. The CEL should address the NRC's concerns and *request* a response from the licensee.

7.7.4.2 Repetitive Findings of Discrimination

As additional findings of discrimination are reached, the NRC's response (in addition to any enforcement action) should escalate on the premise that a pattern may be developing.

If two investigative findings of discrimination by the same licensee are made within 18 months (either by OI or OSHA), the region should request an EA number and schedule a multi-office enforcement panel to discuss the agency's strategy for requesting the licensee to ascertain whether a cultural problem exists and to identify any particular areas within the workplace in which supervisors do not appreciate the importance of raising concerns. To do this, the NRC can require the licensee's senior management to meet with the Regional Administrator to explain the employment actions in question, and to address what actions the licensee is taking to ensure that employees are not "chilled." The licensee should also be expected to address: (1) whether it has confidence that remedial actions have been effective; and (2) the basis for this view. The letter establishing this meeting can be in lieu of, or combined with the CEL.

If more than two investigative findings of discrimination occur within an 18-month period, the NRC should consider stronger action. As part of that consideration, a DFI might be issued as to why the licensee should not be ordered to obtain an outside independent contractor (1) to review the licensee's programs for maintaining a safety-conscious work environment or safety culture; (2) to survey employees to determine whether they feel free to raise concerns without fear of retaliation; and (3) to develop recommendations, if warranted, to improve the workplace environment. If an adequate response is not received to this DFI, then the NRC should consider an order.

7.7.4.3 Numerous Settlements Without Findings of Discrimination

If a licensee has numerous cases which end in settlement agreements before DOL reaches a finding of discrimination at any level, the region should consider whether this is: (1) indicative of true, though uninvestigated, discrimination, or (2) a chilling effect. The NRC must be careful in such considerations not to be perceived as discouraging settlements.

7.7.5 Documented Analytical Process in Discrimination Matters

In every discrimination matter the staff considers for enforcement action, it will prepare, prior to and for purposes of the enforcement panel discussion, a written summary of the evidence that may support each element of a discrimination case. Those elements are as follows:

1. Did the employee engage in "protected activity" as that term is defined in Section 211 of the Energy Reorganization Act of 1974, and the Commission's discrimination requirements, e.g., 10 CFR 50.7(a)(1), and interpreted by the Department of Labor and the courts?

2. Was the employer (an NRC licensee, applicant for an NRC license, contractor or subcontractor of a licensee or applicant) aware of the protected activity at the time of the adverse action?

3. Was an adverse action taken by the employer against the employee, which affected the employee's terms, conditions or privileges of employment?

4. Was the adverse action taken, at least in part, because of the protected activity?

The purpose of the written analysis is to reach a determination in each discrimination matter as to whether, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of the Commission's discrimination requirements, e.g., Section 50.7, can be shown by a preponderance of the evidence. The written analysis should include a statement of OGC's position, if available, as to whether the evidentiary standard is satisfied. The written analysis for each matter should be utilized as a basis for the enforcement panel discussion and will be placed in the enforcement file.

The analysis may well be revised during the deliberative process, as the matter is further considered by all NRC components involved in the enforcement process. Revised analyses should be distributed to the principal participants in the deliberative process. The length of the analysis should normally be limited to one or two pages. Its purpose is to summarize the basic facts of the case as it relates to the required elements. It is not intended to serve as a full analysis of all of the evidence reviewed by the staff. OGC should work with the staff in preparing and revising the analysis.

Appendix E includes a sample written analysis of a discrimination matter that the staff may use as a guide in preparing summaries.

OE will coordinate with the region to determine who will prepare the analysis on a case-by-case basis. The staff and OGC's conclusion may be added after the panel.

7.7.6 Preparing NRC Enforcement Action and Severity Level Categorization for Discrimination Violations

The particular sanction to be issued for a discrimination violation should be determined on a case-by-case basis. Examples of sanctions that may be appropriate include NCVs, NOVs, civil penalties, orders, or DFIs.

Supplement VII of the Enforcement Policy includes examples of Severity Level I, II, and III violations based on discriminatory acts by senior corporate management, plant management or mid-level management, and first-line supervision or other low-level management, respectively. Notwithstanding an individual's specific job title or relationship to the person subject to

discrimination, severity level categorization should consider several factors, including the position of the individual relative in the licensee's organization, the individual's responsibilities relative to licensed activities, and the potential chilling effect that the action could have on the licensee's organization based on the individual's position.

Where the level of a supervisor is concerned, e.g., first-line supervisor versus plant management, the supervisor's sphere of influence is a guide to determining the appropriate severity level. While a vice president is the first-line supervisor for his or her personal secretary, the vice president's sphere of influence is great and the impact of his or her decision could affect the atmosphere throughout the site. The examples in Supplement VII are provided as a guide; the final severity level categorization for discrimination actions should reflect the regulatory concern the cases represent. For example, a second-line supervisor may not necessarily be appropriately categorized at Severity Level II.

Supplement VII of the Enforcement Policy also includes an example of a Severity Level II violation involving a hostile work environment. Such a violation may be very significant because the failure by a licensee's management to correct a hostile work environment can have a potentially significant adverse impact on employees raising issues. In such cases, employees may not believe that they are free to raise concerns.

Supplement VII of the Enforcement Policy also includes an example of a Severity Level III violation involving threats of discrimination or restrictive agreements, both of which are violations under NRC regulations such as 10 CFR 50.7(f). This type of violation is categorized at a Severity Level III because the potential impact on future protected activity may be of significant regulatory concern.

Some discrimination cases may occur which, in themselves, do not warrant a Severity Level III categorization. Example D.6 of Supplement VII is an example of a Severity Level IV violation to address these situations. An example of such a case might be a single act of discrimination involving a first-line supervisor, in which the licensee promptly investigates the matter on its own initiative, takes prompt, decisive corrective action to limit the potential chilling effect, and thereby provides a clear message to other supervisors and employees that such conduct will not be tolerated. Another example might involve a threat of adverse action against an employee for going around the supervisor to raise a concern; if the licensee took prompt, aggressive corrective action before any adverse action was taken toward the employee, such a case might be considered as having minimal potential for a widespread chilling effect. These cases would be categorized at a Severity Level IV because they are of more than minor concern and, if left uncorrected, could lead to a significant regulatory concern. Severity Level IV violations would normally be considered for exercising enforcement discretion if warranted under Section VII.B.5. However, citations would normally be made if one of the four exceptions in that section were applicable.

If the staff believes that a predecisional enforcement conference is necessary, the region should prepare a letter to the licensee using Form 1-I in Appendix B and include a factual summary of the report as described in Section 7.5.4.4 and included in Appendix E. Normally the complainant will be provided an opportunity to participate in the predecisional enforcement conference with the licensee/employer. This participation will usually be in the form of a complainant statement and comment on the licensee's presentation, followed in turn by an opportunity for the licensee to respond to the complainant's presentation. The complainant will be allowed a personal representative of their choosing, typically an attorney, spouse, or relative. The personal representative will not normally participate in the conference unless they are providing comments for the complainant, such as an attorney responding to legal arguments put forward by the licensee.

When the enforcement action is prepared, the transmittal letter to the licensee should note that the licensee is not required to respond to the 10 CFR 2.201 questions until after the DOL ALJ decision and the 10 CFR 2.205 questions (if a civil penalty has been proposed) until 30 days after a final DOL decision has been made. If no appeal from an ALJ's decision is filed, the 30-day period should commence 10 business days after the ALJ's decision is rendered. The response paragraphs in the citation should also note this provision.

If a Commission paper is required for the enforcement action and the action is based on a decision and finding of discrimination by the DOL, the Commission paper must contain a brief but reasonably precise description of the acts of discrimination, a brief summary of the DOL's (ALJ or Secretary of Labor) reasoning, copies of the DOL decisions, and, in cases where the staff differs with the DOL decision, the staff's reasons for differing.

7.7.7 Discretion For Violations Involving Discrimination

It is recognized that there are some cases of discrimination where enforcement action may not be warranted. Section VII.B.5 of the Enforcement Policy provides an explanation of the types of cases in which the NRC may refrain from taking enforcement action and those in which the NRC normally would not exercise such discretion. See Section 6.3.5 for specific guidance on the issue of exercising discretion for violations involving discrimination.

7.7.8 Continuing Violations Involving Discrimination

Most violations of prohibitions on discrimination (e.g., 10 CFR 50.7), such as a discriminatory termination or a failure to grant a promotion as the result of engaging in protected activities, are not considered "continuing."

An exception may apply to cases involving a hostile work environment. Usually acts of discrimination or a pattern of activities or events would need to be identified as having produced a hostile work environment. If, following the initiating event, the hostile environment persisted, a continuing violation may exist such that daily civil penalties may be appropriate for each day that the hostile work environment continued. This is an area in which the law is evolving. OE will consult with OGC on cases involving a hostile work environment or the potential for "continuing" discrimination.

7.7.9 Enforcement Actions In Cases Involving Contractors

This section provides guidance concerning taking enforcement action in cases in which a contractor of the licensee discriminates against an individual.

7.7.9.1 Enforcement Actions Against Licensees For Actions of Contractors

The Commission's long-standing policy has been and continues to be to hold its licensees responsible for compliance with NRC requirements, even if licensees use contractors for products or services related to licensed activities. Thus, licensees are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation.

Nevertheless, certain NRC requirements apply directly to contractors of licensees (see, for example, the rules on deliberate misconduct, such as 10 CFR 30.10 and 50.5 and the rules

on reporting of defects and noncompliances in 10 CFR Part 21). In particular, the Commission's prohibition on discriminating against employees for raising safety concerns applies to the contractors of its licensees, as well as to licensees (see, for example, 10 CFR 30.7 and 50.7).

Accordingly, if a licensee contractor discriminates against one of its employees in violation of applicable Commission rules, the Commission intends to consider enforcement action against both the licensee, who remains responsible for the environment maintained by its contractors, and the employer who actually discriminated against the employee. In considering whether enforcement actions should be taken against licensees for contractor actions, and the nature of such actions, the NRC intends to consider, among other things:

a. the relationship of the contractor to the particular licensee and its licensed activities;

b. the reasonableness of the licensee's oversight of the contractor environment for raising concerns by methods such as licensee's reviews of contractor policies for raising and resolving concerns and audits of the effectiveness of contractor efforts in carrying out these policies, including procedures and training of employees and supervisors;

c. the licensee's involvement in or opportunity to prevent the discrimination; and

d. the licensee's efforts in responding to the particular allegation of discrimination, including whether the licensee reviewed the contractor's investigation, conducted its own investigation, or took reasonable action to achieve a remedy for any discriminatory action and to reduce potential chilling effects.

7.7.9.2 Enforcement Actions Against Contractors and Individuals

The region should consider in each case application of the deliberate misconduct rule against an individual or contractor found to have committed the act of discrimination. See Section 7.3 for guidance on enforcement actions involving individuals. A Demand for Information or a predecisional enforcement conference should normally be used for each case in which discrimination is found, to put the burden on the licensee and the individual supervisor to explain why they believe that an individual enforcement action should not be taken. In addition, predecisional enforcement conferences or a Demand for Information should normally be used with contractors and their personnel where discrimination is caused by contractor personnel.

7.7.10 Application of Corrective Action Civil Penalty Assessment Factor for Discrimination Violations

Application of the *Corrective Action* factor is generally discussed in Section 5.4.2.4. Section VI.C.2.c of the Enforcement Policy provides an explanation of the *Corrective Action* factor as applied to discrimination cases. The NRC can require broad remedial action to improve the workplace environment, but it cannot require a licensee to provide the individual with a personal remedy. DOL has the authority to require that a personal remedy be provided. A violation involving discrimination is not completely corrected without the personal remedy, and the chilling effect may well continue if a personal remedy is not provided. Thus, the Commission does not believe that any proposed penalty should be mitigated if a personal remedy is not provided (59 FR 60697, November 28, 1994). Credit for *Corrective Action* should normally only be

considered if the licensee takes prompt, comprehensive corrective action that (1) addresses the broader environment for raising concerns in the workplace; and (2) provides a remedy for the particular discrimination at issue. In the determination of whether or not a remedy has been provided, the NRC considers whether a settlement has been reached or if a remedy ordered by DOL has been implemented. Where a remedy has been accepted by DOL, NRC intends to defer to DOL on the adequacy of the remedy. Cases where a licensee offers an employee a reasonable remedy, but the employee declines, will be handled on a case by case basis.

The promptness and scope of corrective action should also be considered in applying the *Corrective Action* factor. If settlement occurs early in the administrative process, credit may be warranted based on corrective actions as the chilling effect may have been minimized by the promptness of the remedy and remedial action. However, if settlement occurs after the evidentiary record closes before the Administrative Law Judge, then any existing chilling effect may have existed for a substantial time, and the complainant may have had to spend substantial resources to present his or her case. Under such situations, credit normally would not be warranted. If the licensee does not take broad corrective action until after a Secretary of Labor’s decision, and the Secretary’s decision upholds an Administrative Law Judge’s finding of discrimination, corrective action may be untimely making credit unwarranted. If the licensee chooses to litigate and eventually prevails on the merits of the case, then enforcement action will not be taken and, if already initiated, will be withdrawn. Assuming that evidence of discrimination exists, enforcement action that emphasizes the value of promptly counteracting the potential chilling effect is warranted.