



**UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001**

September 4, 2001

MEMORANDUM TO: File

FROM: Barry Westreich /RA/
Office of Enforcement

SUBJECT: SUMMARY OF AUGUST 16, 2001, DISCRIMINATION TASK GROUP
PUBLIC MEETING IN ROCKVILLE, MARYLAND

On August 16, 2001, a public meeting was held at the NRC Offices in Rockville, Maryland to discuss the Draft Discrimination Task Group Report and recommendations related to employee protection cases. The meeting was part of a series of meetings being held to solicit stakeholder comment on the draft report. A summary of the meeting presentations, materials and statements submitted and an attendance list are attached.

Attachments: As stated

cc: WKane, DEDR

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DISCRIMINATION TASK GROUP MEETING SUMMARY, AUGUST 16, 2001,
ROCKVILLE, MARYLAND

The meeting began at 9:30 a.m..

Mr. Frank Congel, Director Office of Enforcement summarized the Task Group activities and the Draft Recommendations. (Slides attached)

Comment period officially ends tomorrow 8/17/01, but as I have indicated at a number of meetings, we will accept comments for as long a period as possible.

Ralph Beedle, NEI (slides attached)

We characterize the draft report as disappointing. The disappointment that the comments raised were dismissed out of hand. The report is a simply a defense of the status quo.

There has been a considerable effort in preparing this report, but the group is so close to the issue that you are unable to view the comments objectively.

The public is just as confused and frustrated with the NRC in this area as the industry.

This is an opportunity to make some fundamental changes. Everyone is telling you that the process is broken and needs to be fixed.

The recommendations suggest a lack of subjectivity.

The report does not indicate that you performed a thorough review of other agencies. The NRC is the only agency that performs these types of activities.

The report fundamentally lacks an appreciation for stakeholder views.

The report does not address fundamental fairness, such as the impact of the investigative process. The investigative process has a more detrimental effect on the plants, greater than any other event.

Mr. Ed Baker - Speaking to the process, is going before an ALJ at DOL less of a burden than our investigation?

Mr. Beedle - Yes. But we have talked before about people going to DOL less frequently than NRC. I think that this is true because there is a different standard and they believe that you will give them money or force the licensee to give them money. Also , now you are going to be paying them to travel around the country.

The legal standard used is different from that used by DOL, and is based on the scintilla of evidence. That is not appropriate.

There is a continued failure to provide full explanation of the bases for the enforcement action.

The NRC should reconsider the impact of the investigation, threshold for initiation, legal standards, and openness and transparency.

The industry is different than it was 20 years ago. This has been totally discounted in the review of the process. Last year there was a 90% capacity factor in the industry. You don't do that with a staff that is not safety conscious.

Reform is needed. Fundamentally look at the DOL process and figure out how to harmonize these issues. The low safety significance and overall impact indicates that you are not solving problems, but I would say you are creating problems.

Withdraw the preliminary report and reconsider the input from the other stakeholders. Safety significance should be constantly in your thoughts.

George Edgar, Morgan Lewis Energy Practice Group.

The industry has had considerable experience in these retaliation claims.

Ralph made the point that industry productivity is improving by any measure. From a ground level perspective, the skill and understanding in this area has greatly improved. Managers that have created this performance record can be trusted to create a Safety Conscious Work Environment.

There are three minimum points that the task group needs to review:

- Legal standards used.
- Hearing rights for individuals.
- The recommendation for the removal of credit for settlements.

The rationale for the "in part" test remains unexplained and secret. If the NRC finds an employment action that is in any way due to protected activity, then 50.7 is violated. This conflicts with the DOL interpretation and the plain words of the statute and 50.7 d.

We believe that the statute should be applied as written. The commission should take this issue openly, and release the justification for the in part. There is no reasonable reason why this standard should be used.

Hearing rights- The individual in this process has no opportunity to go before a third party. We have reviewed a case that had an individual for two years waiting for a decision. When a violation was issued, and we got the report the only evidence was third party hearsay that DOL found incredible. NRC later withdrew the violation, but the individual was on hold for two years.

The report indicates that the reason for no hearing rights is due to cost. But the incremental cost, on top of the investigation, and enforcement process is worth it for a fundamental fairness issue.

Settlement - The report recommends removing credit for settlement. This is a longstanding process

that credits the parties settling. This runs counter to commission policy and runs against the stream of federal policy that encourages the use of alternate means to resolve differences. We are removing a motivation to settlement.

NRC is wrong on the legal interpretation, hearing rights, and the removal of settlement is misguided.

Harry Keiser, PSE&G (talking points attached)

PSE&G endorses the NEI comments.

We believe the process can be fairer, and more timely. We need one process with good thresholds established.

Eliminate having two governmental agencies, the current process is unfair. We have prevailed at DOL only to have an unfavorable ruling at NRC.

The investigation process does not work to resolve conflict, and in reality can increase the conflict. One sharp remark by a manager can result in an OI review and damage to a 20 year career.

The enforcement process needs to be transparent to support the conclusion. The industry's impression of recent decisions does not indicate that the preponderance of evidence standards is being used.

Reverse Chilling occurs when supervisors are afraid to do the right thing in fear of a regulatory hammer. We have had more than one occasion when a manger would not take the appropriate actions for fear of an investigation.

Transparency: I need current, accurate and complete information. During an OI investigation I have no information. When I finally find out, it may be years later.

The PEC process needs to be balanced, the licensees story is only heard after the NRC is biased by a sometime year long investigation by OI.

The contractors should not be subject to civil penalties, we are the licensee and are responsible for the activities at the site

R.S. Kundalkar; VP Nuclear Engineering , Florida Power and Light (slides attached)

I fully support the NEI remarks. We became interested in this area based on recent decisions by the NRC.

The proposals in process will make it difficult, and more burdensome.

It does not make sense to have a duplicative effort by DOL. Since there have only been a small number of cases , this duel process is not merited.

The OI process is in need of reform.

Re-sequencing of the process does not make sense. Once an action is taken, it is not conceivable that the NRC will change its mind, even if new facts are brought forward.

We are encouraged to see that some version of the OI report be released. We believe that we need all the findings available before a PEC.

This process has had a significant chilling effect on the management.

Hearing rights. If a person is issued a violation, they should be given hearing rights due to fundamental fairness.

Suggestions:

Task Group should revisit recommendations: Deferral to DOL, consider impact of the process.

Consider an independent review of this process.

Withdraw the report and start all over again.

Terry Morton, FPL and Carolina power and light, Progress Energy. (Slides attached)

We recognize the significance of this issue and the importance of employees being able to raise these concerns.

We have an employee concerns program to promote a Safety Conscious Work Environment (SCWE).

We also perform a survey of the employees to measure the SCWE.

Our mission is to provide two way communications between management and employees.

Our program has been in place since 1984. Reports to the corporate administrator go directly to the CNO.

Recommendations:

Minimize OI investigations- they are stressful to both the accused and those interviewed. This stress lingers until the issue is resolved.

The investigations are duplicative of DOL.

The investigation are often untimely.

NRC resources can be better utilized.

Recommend the NRC take an oversight role to look at DOL decisions, SCWE and ECP programs. Not get into an investigative role.

Report should be pulled back until a better product can be issued.

Jack Newman, Vice President of Nuclear Management Company:

I used to be involved with these 211 and 50.7 cases but I became so disgusted with the process that I asked not to be assigned any more. I agree wholly with the NEI comments.

Over the years, although my experience may not represent the universe of these cases, I never saw a case that represented a true case of retaliatory action. In at least two of cases I have seen, they were truly just gaming the system. That took a lot of time and money to maintain communication and interaction with the NRC.

We are dealing mostly with cases where an employee\management relationship has been misplaced.

It is an upsetting condition that is created when the NRC investigates.

It is extremely upsetting to read about the justification for not recommending hearing rights. There is a widespread industry and even NRC managers view that something is “a kilter” here.

The problem that has never been addressed by this task group or any others is what is the underlying nature of the problem. Consider whether the resources are appropriate for these cases. In 98% of cases this is an employee relations problem. The NRC comes with a peculiar view. If a person raises an issue, it is considered a willful, deliberate act.

It strike me as bizarre that if the problem is an employee relations problem, you send in criminal investigators. Are we sending in the right people to look at these cases? I would say no. OI is a dedicated professional group, but I don't believe they are the right group for this.

Bill Briggs, Attorney - Ross, Dixon, and Bell, L.L.P.

I talked to you last September about the impact and devastation for these individuals undergoing this process.

One of my concerns was addressed. OI reports will be release prior to PEC. That seems to be the only concern that was addressed that made me happy.

As I listened to the comments, as an ex NRC employee, the fundamental problem is how we look at the cases. The NRC is pushing the envelope on adverse actions, etc.

Fundamentally, we need a fair and impartial trier of fact to look at these cases. I embrace the comments regarding hearing rights to individuals, so that the slightest action can have an appeal to an unbiased individual. It may cost a little bit, but it will keep the system honest.

John Mcgaha, Entergy Nuclear

I endorse the NEI comments.

In general the management have created a good SCWE.

Although I get confused by some of these laws, does the result measure up to the adage of “let right be done”? In the cases I have seen, good employees have had their careers ruined, break down and cry from the stress, managers are fired for making the wrong statement once. I say there is something wrong with the process.

Saving a week here or there is not what we need. Status quo is not appropriate and the process needs to be re-engineered.

Question - Given what is heard today, do we think that the report will change or be similar to what was issued?

Mr Congel - We are still framing the final report. We do not intend to retract the draft report, but to replace it with the final report.

Mr. Beedle - The report is to be complete by the end of September. What is driving this schedule?

Mr. Congel - We had an original due date of about now. We revised the due date to allow more time to answer comments.

Mr. Beedle - Do you think you have sufficient time to review all the comments and come up with a thoughtful reasoned report?

Mr. Congel - We are going to do our best to get this done. If we feel that we can't get it done, we will have to get an extension from the EDO.

Ms. Pederson - We have heard that DOL is the correct process, what about the 70% of the people that come to us and not DOL.

Mr. Kaiser - The question is why don't people go to DOL? The NRC is the agency we see and hear about all the time, so that is where we see them go.

Mr. Baker - One of the reasons they come to us is because they can get a free investigation. What other accommodations could you give an employee that would allow them to go to DOL, to balance the process.

Mr. Beedle - This is not a question of my resources against yours.

Maybe the licensee should be given more to investigate, which we do with everything else, using some type of confidentiality.

Ms. Pederson - An employee may not go to the DOL for issues when there is little in financial gain. Like something in their employment jacket.

PSE&G - As an employee concerns program manager, I don't know of any case where the employee doesn't have a contingency agreement.

We have a question as to why do we need the NRC to address the other 70% of people that go the NRC and not DOL?.

The question is posed in a mystifying way. I don't understand why the NRC needs to investigate every case. Employees can go to the DOL at the cost of a stamp, and they get a DOL investigation. Perhaps the NRC should only get involved if there is a pattern of practice of discrimination.

Ms. Pederson - Chilling effect on individual managers: We have heard a lot of general statements but we are still looking for more specifics.

PSE&G - We had an employee that continued to go to the papers about supervisors. The individual disagreed with a manager about an issue and wrote an inappropriate CR, but the manager just sent the CR because he didn't want him to raise his name in the paper. The supervisor had a finger pointing session with the individual and was later violated for 50.7.

Ms. Pederson - We often hear in these forums that managers are chilled, but in some cases we have heard from managers that have been the subject of a violation was not chilled. So we are trying to understand this area.

Comment - The first thing to do at a site is to establish a SCWE. A plant that does not perform well is because the people don't perform well. Chilling effect on manager is something that degrades the performance of the plant, because they are not holding people accountable.

Mr. Powers - When supervising people is difficult. It is even more challenging at nuclear plant because there are higher standards. The process now is unfair. An individual has to make the decisions that he is going to risk his job and career if he makes a bad decision. It make people more reluctant to take on the tough issues.

The problem has been exacerbated by the NRC interpreting the statute incorrectly. The scintilla of evidence standard is being used, and the legitimate business reasons are not accounted for.

Mr. Briggs - Because these issues are anecdotal, it is impossible to measure. But most of my clients have told me they would not, in the future correct someone, no matter what circumstances. Some are blowing off steam, and some are not, many have left the industry.

One client, left the industry because of some small action a 30 year employee took resulted in the NRC taking this guy's side who has just skated by his whole career.

Mr. Dambly: If an employee makes a racial comment , he would be thrown out quickly. Why is this area different?

Mr. Briggs - Well, the difference is that it is the government going after the guy, marshaling its forces against him. An EEO case does not carry the same weight.

Mr. McGaha - I agree if someone made an overt racial comment, they would be in trouble. But in most of these cases, the infractions are much less overt or significant. More time than not the

people making the accusation are using it as a weapon to be used to combat poor performance or to get back at the manager or company. Managers feel that this is a kangaroo court and the process in general is unfair. It doesn't work right under the current setup.

Mr. Dambly - In 95% of the cases, they are not substantiated, and that is in addition to the 40% we throw out. I find it hard to believe that it is a process stacked against you when you prevail in over 95% or more of the cases.

Industry comment - It is the clandestine nature of the process that is important to consider. The fact that we don't know what is going on or how decisions are made that causes the problem.

Mr. Congel - In some meetings these statistics of us not substantiating but 3 or 4% of the total cases we get is seen by the public as the NRC not doing its job and taking the industry's side in most cases. This is some of the feedback we are also dealing with.