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Amendments to the Deliberate Misconduct Rule

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Deliberate Misconduct Rule and Hearings on Challenges to the Immediate Effectiveness of Orders

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General Comment

Comment of James Lieberman on Deliberate Misconduct rulemaking: NRC2013-0132

I appreciate the opportunity to provide comments on the Deliberate Misconduct Rule that was published in the February 11, 2014 Federal Register (79 FR 8097). My interest in this rulemaking is that as a key author of the various Commission enforcement policies from 1979 through 1999 and one of the key developers of the original 1991 rule (56 FR 40664, August 15, 1991) on deliberate misconduct. I am interested in the outcome of this rulemaking and how it will be applied in the future as it is important to continue having the ability to issue strong sanctions when warranted. In my view, there was and is no room in the nuclear industry for persons who deliberately violate NRC rules. Past conduct of deliberate misconduct by a person should cause the NRC to lose its requisite reasonable assurance that licensed activities will be conducted in accordance with requirements, should the person be engaged in licensed activities. Severe action is warranted in such cases.

My comments are in the attached file.

Attachments

comments on april 14 deliberate misconduct rule

Comment of James Lieberman on Deliberate Misconduct rulemaking: NRC2013-0132

I appreciate the opportunity to provide comments on the Deliberate Misconduct Rule that was published in the February 11, 2014 Federal Register (79 FR 8097). My interest in this rulemaking is that as a key author of the various Commission enforcement policies from 1979 through 1999 and one of the key developers of the original 1991 rule (56 FR 40664, August 15, 1991) on deliberate misconduct. I am interested in the outcome of this rulemaking and how it will be applied in the future as it is important to continue having the ability to issue strong sanctions when warranted. In my view, there was and is no room in the nuclear industry for persons who deliberately violate NRC rules. Past conduct of deliberate misconduct by a person should cause the NRC to lose its requisite reasonable assurance that licensed activities will be conducted in accordance with requirements, should the person be engaged in licensed activities. Severe action is warranted in such cases.

Prior to the rule of deliberate misconduct, NRC could issue an order to remove a person from licensed activities at the site where the conduct occurred but could not issue an order prohibiting the person from engaging in licensed activities for other licensees short of issuing an order to every licensee. In my view, a key purpose of the rule was to be able to issue orders to persons that would prevent them from engaging in activities for licensees other than the one where the person engaged in deliberate misconduct. The proposed misconduct rule included careless disregard. While certainly it is unacceptable for persons to engage in careless disregard and the Commission has considered such action to be willful, the final rule focused only on willful conduct that amounted to deliberateness as that was more serious. The Commission recognized the consequences from a finding of willful misconduct concluding it was important that the standard be clear. The Commission explained its limiting the rule to deliberateness by stating:

The Commission is focusing on those acts that are more serious and in which there is greater and more obvious need for regulatory action in order to protect the health and safety of the public. This will reduce the number of instances in which these sanctions should be applied and will eliminate, for purposes of the rule, cases in which the conduct, e.g., negligence or careless disregard, is difficult to characterize and thus more often a matter of dispute.

56 FR 40679. Cases involving careless disregard did not result in individual action though individuals could be impacted by orders removing individuals working for the licensee where the careless disregard occurred. I continue to support the rule on deliberate misconduct and I favor expanding the rule to include deliberate ignorance. I do so because the standard of deliberate ignorance requires a demonstration that the person

subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy

or

subjectively believes that there is a high probability of causing a violation... but takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

This is clearly more than may have known or should of or could of known. It is more than a reckless or careless indifference. It is more than blinding oneself to the realities of whether or not a violation may occur. By requiring a high probability of believing a violation may occur or inaccuracy or incompleteness of information may occur together with the deliberateness of remaining ignorant, this rule will apply to conduct that is more than careless disregard. Deliberate ignorance raises a substantial question as to whether a person evidencing such conduct should be engaged in licensed activities. The

Commission should have the authority to prohibit such persons from engaging in licensed activities anywhere in the nuclear industry.

I have no recommendations to make about the proposed language. However, I do recommend that the Commission provide in the statement of considerations for the final rule several hypothetical examples where the rule might and might not be applied. In my view based on more than 20 years involvement in the NRC enforcement program, this is extremely important to help address the challenges of characterizing the evidence and minimizing interpretation disputes. Doing so will allow the Commission to approve the guidance as to how the rule might be applied. This will be helpful to both the agency investigators and the agency enforcement staff, as well as, to the industry.

For example, in the past careless disregard was applied in a case where an engineer informed the NRC that its electrical connectors were qualified but it turned out that they were not. The person did not know for sure but informed the NRC that they were because he thought the company had purchased them from a reputable supplier. It turned out that the connectors were not qualified. (this case may be EA 78-009). In this case, he knew that the NRC was interested in the information, that it was important for the NRC, but deliberately made no attempt to check. This case in my view does not meet the threshold of deliberate ignorance because he did not subjectively believe there was a violation; to the contrary he thought the company was in compliance.

In another case a person informed the NRC that emergency sirens had been installed when one wasn't. Careless disregard was found to be involved because he did not check on the status before responding though knowing the NRC was very interested in the status. He knew he did not know the exact status but he knew the siren was at the site, knew it was supposed to be installed, but deliberately did not check on the installation status. (this may be EA 82-046). This case in my view does not meet the threshold of deliberate ignorance because subjectively he did not believe that there was a violation; to the contrary he thought the company was in compliance.

It is important, that the Commission make it clear how it will treat these types of cases as how the Commission will differentiate careless disregard from deliberate ignorance will be critical for the effective and efficient implementation of this rule.