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Report to Congressional Requesters

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NUCLEAR EMPLOYEE SAFETY CONCERNS

Allegation System Offers Better Protection, but Important Issues Remain

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Health, Education, and
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The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

The Honorable Joseph I. Lieberman
United States Senate

A nuclear power plant accident could result in severe harm or death not only for workers but also for thousands of people living in the surrounding area. Although the Nuclear Regulatory Commission (NRC) is directly responsible for monitoring the nation's more than 100 nuclear power plants, as well as over 6,000 individuals and organizations licensed to possess and use nuclear materials and wastes,[1] it is physically impossible for NRC inspections to detect all health and safety hazards. For this reason, it is critical that nuclear plant employees feel free to raise health and safety concerns without fear of retribution.

Federal laws prohibit retaliation by power plant operators (licensees) or their contractors against employees who "blow the whistle" by surfacing health and safety issues. Protection is provided as follows: If discrimination occurs, employees are to receive restitution and sanctions may be imposed against employers. If employees believe the system established by these laws adequately protects them, they will be more willing to report hazards. Similarly, if licensees believe they will receive burdensome sanctions or other negative consequences when they discriminate against these employees, they will be unlikely to retaliate and the atmosphere at their plants will be one in which employees feel free to raise these concerns.

You expressed concern that these laws, as they have been implemented by NRC and the Department of Labor, may not adequately protect nuclear power industry workers who raise health and safety issues. Your concern was based, in part, on problems surfaced in several recent studies that recommended improvements to the system. For these reasons, you asked us to

[1]Another 15,000 individuals and organizations licensed to use nuclear materials and wastes are regulated by state agencies under agreements with NRC.

- describe how federal laws and regulations protect nuclear power industry employees from discrimination for raising health and safety concerns and
- determine the implementation status of recommendations made in recent NRC and Labor internal reviews and audits of the system for protecting workers and assess the resulting changes to the system.

To do our work, we reviewed the provisions of the Energy Reorganization Act (ERA), as amended, pertaining to protection for employees who raise health and safety concerns and related legislation; the Code of Federal Regulations sections pertaining to processing allegations of discrimination;[2] and pertinent NRC and Department of Labor internal directives. We discussed the processes for protecting these employees with (1) cognizant NRC and Labor officials in both headquarters and field offices, (2) employees who had alleged discrimination and filed complaints with NRC and Labor, (3) managers at three licensees who had been involved in resolving numerous discrimination allegations, (4) attorneys who had represented both employees and licensees in these proceedings, and (5) advocates for both employees and licensees. We obtained and analyzed databases on discrimination allegations from all NRC and Labor offices involved in investigating and resolving these cases. We reviewed studies pertaining to allegations issues performed by the NRC program staff and by the NRC and Labor Offices of Inspector General (OIG) and obtained information on changes that are being made to improve the process. (See app. I for details of our scope and methodology.)

Results in Brief

NRC has overall responsibility for ensuring that the nuclear plants it licenses are operated safely, and the Department of Labor also plays a role in the system that protects industry employees against discrimination for raising health and safety concerns. More specifically, the Atomic Energy Act, as amended, gives NRC responsibility for taking action against the employers it licenses when they are found to have discriminated against individual employees. NRC can investigate when a harassment and intimidation allegation is filed with NRC or when it receives a copy of a discrimination complaint filed with Labor. An NRC review panel discusses whether an allegation warrants investigation and recommends the investigation priority. Once the panel and NRC's Office of Investigations complete initial inquiries, the Investigations staff, in coordination with the regional administrator, decides the case's priority and whether they will do

[2]"Harassment and intimidation allegation" and "discrimination complaint" are NRC's and Labor's respective terms for what this report calls discrimination allegations.

a full investigation. NRC's Office of Enforcement may use the results of the NRC investigation or a decision from Labor to support enforcement action.

In addition, the ERA, as amended, authorizes the Secretary of Labor to order employers to make restitution to the victims of such discrimination. Restitution can include such actions as reinstatement to a former position, reimbursement of all expenses related to the complaint, and removal from personnel files of any adverse references to complaint activities. At Labor, an order for restitution usually comes at the end of a three-stage process: (1) an investigation by the Occupational Safety and Health Administration (OSHA); (2) a hearing before an administrative law judge (ALJ) if the OSHA determination is appealed; and (3) a review of the recommended decision by the Administrative Review Board (ARB), which issues the Secretary of Labor's final decision. Settlements may occur at any point in the process and often are made to minimize the cost and time of continuing a case for both employee and licensee.

Concerns raised by employees about a lack of protection under the existing process led to studies begun by NRC and Labor in 1992 and by a review team established by the NRC Executive Director for Operations in 1993. These concerns included the inordinate amount of time it took Labor to act on some discrimination complaints and NRC's lack of involvement in cases during Labor's decision process. In response to recommendations in reports from these groups, both NRC and Labor have taken actions intended to improve the system for protecting employees. For example, NRC has established a senior position to centrally coordinate and oversee all phases of allegation management, and it has taken other actions to improve overall management of the system, such as establishing procedures to improve communication and feedback among employees, NRC, and licensees. It has also increased its involvement in allegation cases through several actions, including investigating a greater number of allegations. Within Labor, responsibility for two of the three stages—the initial investigation and the Secretary's final decision—has been transferred from one organizational unit to another. Transfer of responsibility for the initial investigation from the Wage and Hour Division to OSHA as of February 1997 was part of an exchange of responsibilities to better use program expertise and resources, while delegation to ARB of the authority for signing the final order was expected to improve timeliness. Additionally, a backlog of cases that had been awaiting a final decision in the Secretary's office for an average of 2.5 years—which included 129 discrimination complaints by employees that were based on health and safety concerns—has been eliminated, as recommended by the Labor OIG.

While NRC and Labor have been responsive to these recommendations, other recommendations, which could be implemented through administrative procedural changes and would further improve the system, still need to be addressed. These recommendations pertain to overall timeliness of decisions at Labor; an automated system for tracking both individual allegations and aggregate trends, such as settlements; and knowledge of whether nuclear plant employees feel free, given their work environments, to raise health and safety concerns. In addition, NRC and Labor have yet to complete action on recommendations requiring statutory and regulatory changes. These include recommendations to reduce the financial burden on workers with cases pending and to increase the dollar amount of civil penalties.

Background

NRC is an independent agency of the federal government. Its five commissioners are nominated by the president and confirmed by the Senate, and its chairman is appointed by the president from among the commissioners. The current Chairman was sworn in as a commissioner in May 1995 and became Chairman that July. NRC's mission includes ensuring that civilian use of nuclear materials in the United States—in the operation of nuclear power plants and in medical, industrial, and research applications—is done with adequate protection of public health and safety. NRC carries out its mission through licensing and regulatory oversight of nuclear reactor operations and other activities involving the possession and use of nuclear materials and wastes.

Because it is impossible for NRC's inspections to detect all potential hazards, NRC must also rely on nuclear licensee employees to help identify such problems. Actions taken to respond to employee concerns raised in the past have significantly contributed to improving safety in the nuclear industry. Although most employee concerns are raised directly to licensee managers and are resolved internally by licensees, employees may choose to bring allegations directly to NRC. An employee generally raises a concern with NRC if he or she is not satisfied with the licensee's resolution of the concern or is not comfortable raising the concern internally. Employees may be discouraged from raising these issues internally if they believe their employer discriminates against those who do so. This phenomenon in the working environment is termed the "chilling effect."

Some observers believe that certain developments in the nuclear power industry increase the vulnerability of power plants to hazards, which would increase the importance of employee vigilance in noting and

reporting hazards. For example, the electrical power industry may soon face deregulation, which would allow customers to choose a supplier and create competition in the industry that did not exist before. This has led to increased concern by NRC about safety because of the potential pressure on utilities to minimize operating costs. Preparation for deregulation has already resulted in downsizing at some nuclear plants and the closing of others because of their comparatively high operating costs. Furthermore, the nation's over 100 nuclear power plants are aging (most were built before 1980), which puts them increasingly at risk for certain kinds of hazards.

Labor administers a variety of laws affecting conditions in the nation's work places, including laws to protect employees who report work place hazards. OSHA's responsibilities include investigating employee discrimination complaints under these laws, including the ERA.[3] Investigations of employee discrimination cases are performed by a cadre of about 60 investigators. ERA cases make up a small percentage of the investigators' workload.

In response to complaints by employees who raised health and safety concerns that they were not being protected from discrimination, NRC has studied and reported on the employee protection system. In 1992, NRC's OIG initiated a review to examine and better understand the nature of the complaints and the magnitude of this problem. In a July 1993 report, the OIG noted that employees who had raised concerns believed NRC did little to protect them from retaliation or to investigate in a timely manner their allegations of retaliation.[4] In response to hearings before what was then the Subcommittee on Clean Air and Nuclear Regulation of the Senate Committee on Environment and Public Works, the NRC OIG issued a report in December 1993 that found NRC was primarily reactive to harassment and intimidation allegations and did not have a program to assess the work environment at licensees' facilities except when serious problems occurred.[5] On July 6, 1993, NRC's Executive Director for Operations formed a review team to reassess NRC's process for protecting against retaliation those employees who raise health and safety concerns. The review team

[3]Until February 3, 1997, responsibility for investigating complaints under a number of such laws, including the ERA, rested with the Wage and Hour Division in Labor's Employment Standards Administration.

[4]NRC, OIG, NRC Response to Whistleblower Retaliation Complaints, Case No. 92-01N (Washington, D.C: NRC, July 9, 1993).

[5]NRC, OIG, Assessment of NRC's Process for Protecting Allegers From Harassment and Intimidation, Case 93-07N (Washington, D.C.: NRC, Dec. 15, 1993).

solicited input from employees who had alleged discrimination, licensees, and the public and, in a January 1994 report,[6] concluded that the existing NRC and Labor processes, as then implemented, did not provide sufficient protection to these employees.

In addition, in a May 1993 report, the Labor OIG referred to the office responsible for preparing the Secretary of Labor's final decisions as a "burial ground" for cases on which the Secretary and other Labor officials did not issue a final decision. The oldest 26 cases had been pending at this final stage for an average of 7.5 years, and there was a backlog of 178 cases—129 of them involving complaints under the several laws Labor enforces pertaining to discrimination of workers who raise health and safety concerns—that had been in that office for an average of 2.5 years.[7]

System for Protecting Employees Involves Multiple Steps in Two Agencies

NRC has the overall responsibility for ensuring that the nuclear plants it licenses are operated safely. This entails informing licensees and individual employees about the discrimination prohibitions of the law and of the steps an employee can take if he or she feels unjustly treated, and ensuring that employees are comfortable raising health and safety concerns. Once an employee raises an allegation of discrimination or harassment, however, both NRC and Labor have roles in processing the allegation. Under the Atomic Energy Act, as amended, NRC may take action against the employers it licenses when they are found to have discriminated against individual employees for raising health and safety concerns. Accordingly, NRC has established a process for investigating discrimination complaints and, if appropriate, taking enforcement action against licensees. The ERA, as amended, authorizes the Secretary of Labor to order employers to make restitution to the victims of such discrimination, and Labor has instituted a process for investigating and adjudicating discrimination complaints. In 1982, NRC and Labor entered into a Memorandum of Understanding that recognized that the two agencies have complementary responsibilities in the area of employee protection.

[6]NRC, Reassessment of the NRC's Program for Protecting Allegers Against Retaliation (Washington, D.C.: NRC, Jan. 7, 1994).

[7]Department of Labor, OIG, Audit of the Office of Administrative Appeals, Report No. 17-93-009-01-010 (Washington, D.C.: Department of Labor, May 19, 1993).

Laws Establish Separate Responsibilities for NRC and Labor

Under the Atomic Energy Act, NRC has implied authority to investigate cases in which an individual may have been discriminated against for raising health or safety concerns, and to take appropriate enforcement action against licensees for such discrimination. The act does not, however, specifically authorize NRC to order restitution, such as reinstatement or back pay, for an employee who has been subjected to discrimination.

It was not until 1978, when the Congress enacted section 211[8] of the ERA, that statutory remedies were provided for individuals when discrimination occurs. Section 211 prohibits employers from discriminating against employees who raise health or safety issues to NRC or its licensees and authorizes the Secretary of Labor, after an investigation and an opportunity for a public hearing, to order restitution. According to Labor, restitution can include reinstatement of the complainant to his or her former position with back pay, if warranted; award of compensatory damages; payment of attorney fees; and purging personnel files of any adverse references to the complaint. The Secretary is required to complete an initial investigation within 30 days and issue a final order within 90 days of the filing of the complaint. Federal regulations allow for extensions, which, in effect, waive the 90-day time frame.

In 1982, NRC issued regulations implementing section 211. These regulations notify licensees that discrimination of the type described in the law is prohibited and incorporate NRC's implied authority to investigate alleged unlawful discrimination and take enforcement action, such as the assessment of civil penalties. The regulations also require licensees to post notices provided by NRC describing the rights of employees.

As part of the Energy Policy Act of 1992, section 211 was amended to give employees more time to file a complaint, modify the burden of proof in Labor administrative hearings by requiring the complainant to show that raising a health and safety concern was a contributing factor in an unfavorable personnel practice, specifically protect employees who raise health or safety issues with their employers, and allow the Secretary of Labor to order relief before completion of the review process that follows an ALJ finding of discrimination.

[8]Originally enacted as section 210.

Memorandum of Understanding Explains How Labor and NRC Coordinate Activities

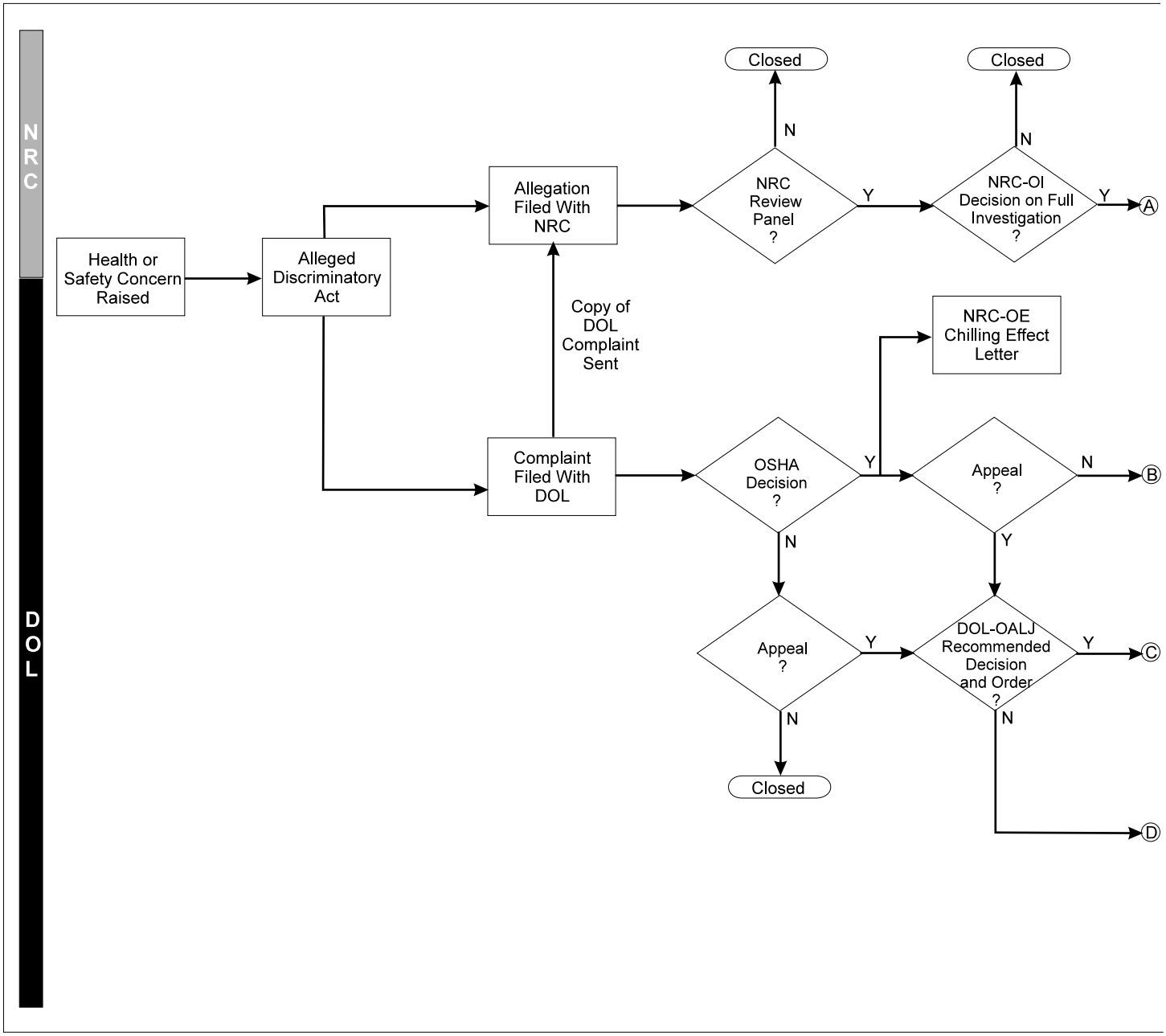
NRC and Labor recognized that in view of Labor's complementary responsibilities, coordination was warranted. Consequently, Labor and NRC entered into a Memorandum of Understanding in 1982. Under the memorandum, NRC and Labor agreed to carry out their responsibilities independently, but to cooperate and exchange timely information in areas of mutual interest. In particular, Labor agreed to promptly provide NRC copies of ERA complaints, decisions, and orders associated with investigations and hearings on such complaints. NRC agreed to assist Labor in obtaining access to licensee facilities.

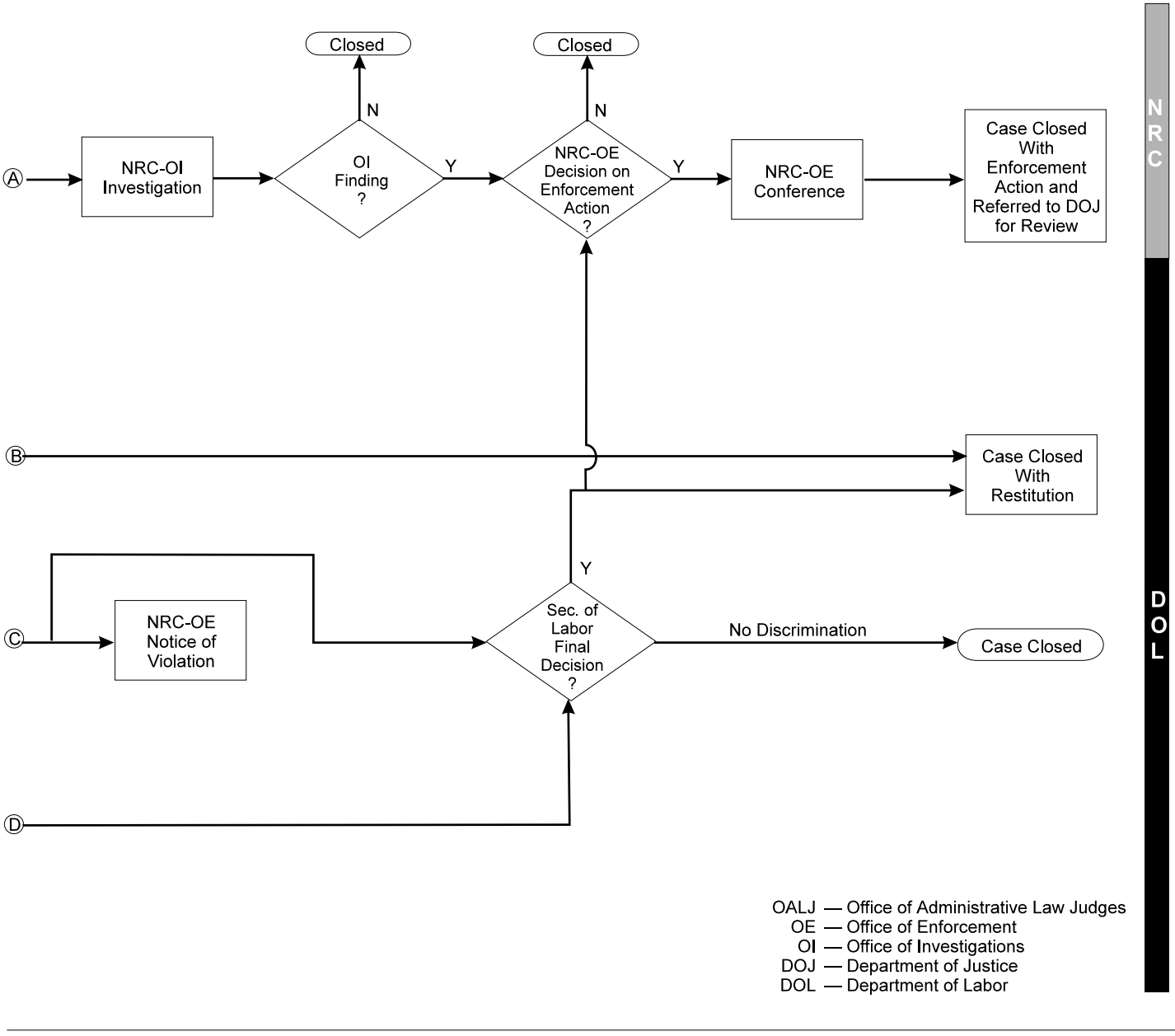
Working arrangements formulated to implement the memorandum specified that NRC will not normally initiate an investigation of a complaint if Labor is already investigating it or has completed an investigation and found no violations. If Labor finds that a violation has occurred, however, NRC may take enforcement action. Normally, NRC considers Labor's actions before deciding what enforcement action, if any, to take.

Joint Process to Investigate Discrimination Allegations Involves Several Steps

The joint process for investigating discrimination allegations is shown in figure 1. A series of steps involving three components in Labor can lead to restitution for an employee discriminated against for raising health and safety concerns. A separate set of steps in NRC can lead to enforcement action against a licensee who discriminates.

Figure 1: Joint NRC-Labor Process for Action on Allegations of Discrimination by Nuclear Power Industry Employees Who Raise Health and Safety Concerns




NRC
DOL
Closed
Closed
N
N
Y
Y
A
NRC-OI Investigation
OI Finding ?
NRC-OE Decision on Enforcement Action ?
NRC-OE Conference
Case Closed With Enforcement Action and Referred to DOJ for Review
B
Case Closed With Restitution
C
NRC-OE Notice of Violation
Y
Sec. of Labor Final Decision ?
No Discrimination
Case Closed
D
OALJ — Office of Administrative Law Judges
OE — Office of Enforcement
OI — Office of Investigations
DOJ — Department of Justice
DOL — Department of Labor

The three components in Labor's allegation process perform the following activities. Settlements between the parties may occur at any point in this process and are often made to minimize the expense and time involved for both the employee and the licensee in continuing a case. (The actual times for these steps are discussed in the next section under timeliness standards.)

- OSHA: To receive restitution for being discriminated against by a licensee, an employee must file a complaint with OSHA within 180 days of the alleged discriminatory act. OSHA must complete the initial investigation within 30 days, under the law. However, under Labor procedures, when necessary and preferably with the agreement of both parties, the 30-day limit may be exceeded. If either party does not agree with the OSHA decision, it may be appealed to Labor's Office of Administrative Law Judges (OALJ) within 5 calendar days.
- OALJ: Within 7 days of the appeal, the ALJ assigned to the case is to schedule a hearing. All parties must be given at least 5 days notice of the scheduled hearing. Federal regulations state that requests for postponement of the ALJ hearing may be granted for compelling reasons. The ALJ is required to submit a recommended decision within 20 days of the hearing.
- Office of the Secretary: The ALJ's recommended decision is automatically reviewed by the ARB within the Secretary of Labor's office.[9] Either party may appeal the final Labor decision to the appropriate federal court of appeals within 60 days. Pursuant to the ERA, a final decision is not subject to judicial review in any criminal or other civil proceeding.

For discrimination allegations filed directly with NRC or Labor, an NRC review panel, located in each regional office and headquarters, decides whether to request an investigation by NRC's Office of Investigations. The Investigations staff, in coordination with the regional administrator, decides the case's priority and whether they will do a full investigation. If Investigations determines that a violation occurred, or if a final determination of discrimination is received from Labor, NRC assesses the violation in accordance with its enforcement policy, which defines the level of severity and the appropriate sanction. Severity levels range from severity level I for the most significant violations to severity level IV for those of lesser concern. Minor violations are not subject to formal enforcement actions. One factor that determines the severity of a discrimination violation is the organizational level of the offender. For

[9]Prior to May 1996, ALJs' recommended decisions were reviewed by the Office of Administrative Appeals, and the final decision was signed by the Secretary. Since that time, the final decision has been signed for the Secretary by the Chairman of the ARB.

example, discrimination violations by senior corporate management would be severity level I, whereas violations by plant management above the first-line supervisor and by the first-line supervisor would be severity levels II and III, respectively. Another factor that might determine severity level is whether a hostile work environment existed.

There are three primary enforcement actions available to NRC: Notice of Violation, civil penalty, and order. The Notice of Violation is a written notice used to formalize the identification of one or more violations of a legally binding requirement. The civil penalty is a monetary fine. Orders modify, suspend, or revoke licenses or require specific actions of the licensee.

Many Recommendations Have Been Implemented, but Some Important Issues Remain

Complaints by current and former nuclear licensee employees about, among other things, the allegations process led NRC and Labor to study the system for protecting employees who raise health or safety concerns. In response to recommendations and concerns raised in NRC's January 1994 review team report and NRC and Labor OIG reports, many changes have been made in an effort to improve the employee protection system. Employees we spoke with who had made allegations of discrimination for raising safety issues generally supported these changes to improve protection. However, several recommendations that could significantly improve protection, and the perception of protection, for employees have not been implemented.

Recommendations Implemented Should Improve the System

Many of the implemented recommendations from these studies led to actions at NRC to improve monitoring of cases, expand communication with employees about their cases, and increase the agency's involvement in allegation investigations; they also led to changes at Labor to improve its timeliness in processing allegation cases. These recommendations addressed concerns expressed by many of the allegers we interviewed.

Regarding case monitoring, NRC has designated a full-time, senior official to centrally coordinate allegation information from NRC and Labor, and oversee the management of and periodically audit the allegation process at NRC. NRC established the position of Agency Allegation Advisor in February 1995, and since then, two rounds of audits of the allegation process have been completed. In September 1996, the Agency Allegation Advisor issued the first annual report on the status of the allegation system, which addressed issues previously identified through audits and

data gathered on allegations. These actions give NRC a focal point for gathering and publishing information on how its allegation process is working and enable it to recognize problems.

Some recommendations implemented by NRC should improve communication. One of these recommended improving feedback to employees on the status of their cases. As of May 1996, new procedures established time frames for NRC to periodically report case status to employees. The procedures required NRC to inform the alleger in writing of the status of his or her case within 30 days of NRC's receipt of the allegation, every 6 months thereafter, and again within 30 days of completing the investigation. NRC has also established a hotline through which employees can report problems and issued a policy statement emphasizing the importance of licensees maintaining an environment in which employees are comfortable raising health and safety concerns. These new procedures address issues allegers raised with us about not being informed on the status of their cases. However, some allegers told us that because the policy statement is directed only at the licensees' responsibilities for maintaining a good work environment and does not include specific responsibilities for NRC, it is not adequate.

To increase NRC's involvement in the allegation process, the January 1994 study recommended that NRC revise the criteria for selecting complaints to be investigated in order to expand the number of investigations. Before October 1993, NRC had investigated few discrimination complaints and usually waited for the Labor Secretary's final decision, which generally took longer than an NRC investigation, before taking enforcement action. In October 1993, NRC Investigations' policy was changed to require that field offices open a case and conduct an evaluation of all matters involving discrimination complaints, regardless of Labor's involvement. In April 1996, NRC issued a policy statement directing its Office of Investigations to investigate all high-priority allegations of discrimination, whether the Labor Secretary's final decision has been made or not, and to devote the resources necessary to complete these investigations. As a result, the number of high-priority investigations NRC opened has increased significantly. By applying the new criteria, the percentage of cases opened that were high priority increased from 37 percent in May 1996 to 81 percent in July 1996. These actions should address the dissatisfaction employees expressed to both NRC's OIG and us about NRC's lack of involvement in the investigation of cases. However, NRC has identified a need for more resources at the Office of Investigations to handle the greater number of investigations, and as of December 1996, this need had

not been addressed. Therefore, it is unclear whether the investigations can be completed as quickly as hoped.

Labor has also improved its timeliness in processing cases, as recommended in the Labor OIG's May 1993 report. Labor has eliminated a backlog of cases awaiting decision in the Office of the Secretary and has developed and implemented a management information system to monitor case activity. Since these changes were implemented, the average time for the Secretary's office to decide cases has been reduced from about 3 years in fiscal year 1994 to about 1.3 years in fiscal year 1996. A Labor official told us that as of December 1996, the average case took only about 4 months to clear the Office of the Secretary, due partially to the elimination of the backlog.

In addition, to better use program expertise, Labor has transferred responsibility for investigation of allegation cases from the Wage and Hour Division to OSHA, which has a staff with experience investigating allegations of discrimination against employees who raise health and safety concerns. The Assistant Secretary of Labor for Employee Standards commented that the primary purpose of reassigning initial investigations from Wage and Hour to OSHA was part of an exchange of responsibilities. Prior to the reassignment, OSHA had responsibility for the employee protection, or "whistleblower," provisions of certain laws and the staff devoted to the enforcement of these provisions. The Wage and Hour Division was responsible for certain employee protections affecting farm workers and would be able to make field sanitation inspections as part of its regular investigations. These responsibilities were exchanged in order to better use program expertise and promote effective and efficient use of resources. This transfer was effective February 3, 1997.

Some Recommendations Not Implemented Could Significantly Improve Protection

In spite of NRC's and Labor's overall responsiveness to the reports' recommendations, some recommendations that address concerns raised not only by the NRC review team but also by other NRC staff, the OIG, and allegers we interviewed have not yet been implemented. Some recommendations, which could be implemented through administrative procedural changes, could significantly improve the system; these address timeliness standards, case monitoring, and NRC's knowledge of the employee environment in licensees' facilities. Other recommendations, which require statutory changes or are controversial as to their effectiveness, have also not been implemented.

Timeliness Standards

When allegation cases take several years to complete, significant negative effects accrue. Lengthy cases increase attorney fees, prolong the time an employee may be out of work, and have a chilling effect on other employees. Under past policies, which provided for few NRC investigations, long cases delayed NRC's ability to impose enforcement actions as they waited for Labor decisions. Some cases that allegers have filed have continued for over 5 years, and during that time the employee may be out of work, paying attorney fees, and exhausting his or her financial resources. Furthermore, the January 1994 NRC report noted that delays in processing cases at the Office of the Secretary of Labor had, in some cases, prevented NRC from taking enforcement action against licensees because the time limits under the statute of limitations had run out.[10]

The Labor OIG report recommended that Labor establish a timeliness standard for the issuance of Secretary of Labor decisions and conduct an analysis to determine operational changes and resources necessary to meet the new standard. Establishing a standard was intended to provide a means to objectively measure Labor's performance during the final step of its process and help meet legal requirements and customer service expectations. In September 1995, in its closing comments on this review, the OIG stated that Labor would need time to develop data on which to base a realistic timeliness standard and that the standard would be developed in the future when the data are available. A Labor official told us the standard is now being developed and that Labor expects to have a standard soon, although no date for implementation has been established. According to the Chairman of the ARB, the ARB is continuing to work on putting procedures in place to collect data that could be used to establish a standard.

In addition, the NRC review team report recommended that Labor develop legislation to amend the law to establish a realistic timeliness standard for the entire Labor process. As of December 1996, NRC was drafting legislation for Labor's approval that would establish a new timeliness standard of 480 days to complete the Labor process. This would allow 120 days for the administrative investigation, 30 days to appeal the decision to the OALJ, 240 days for the OALJ to recommend a decision, and 90 days for a

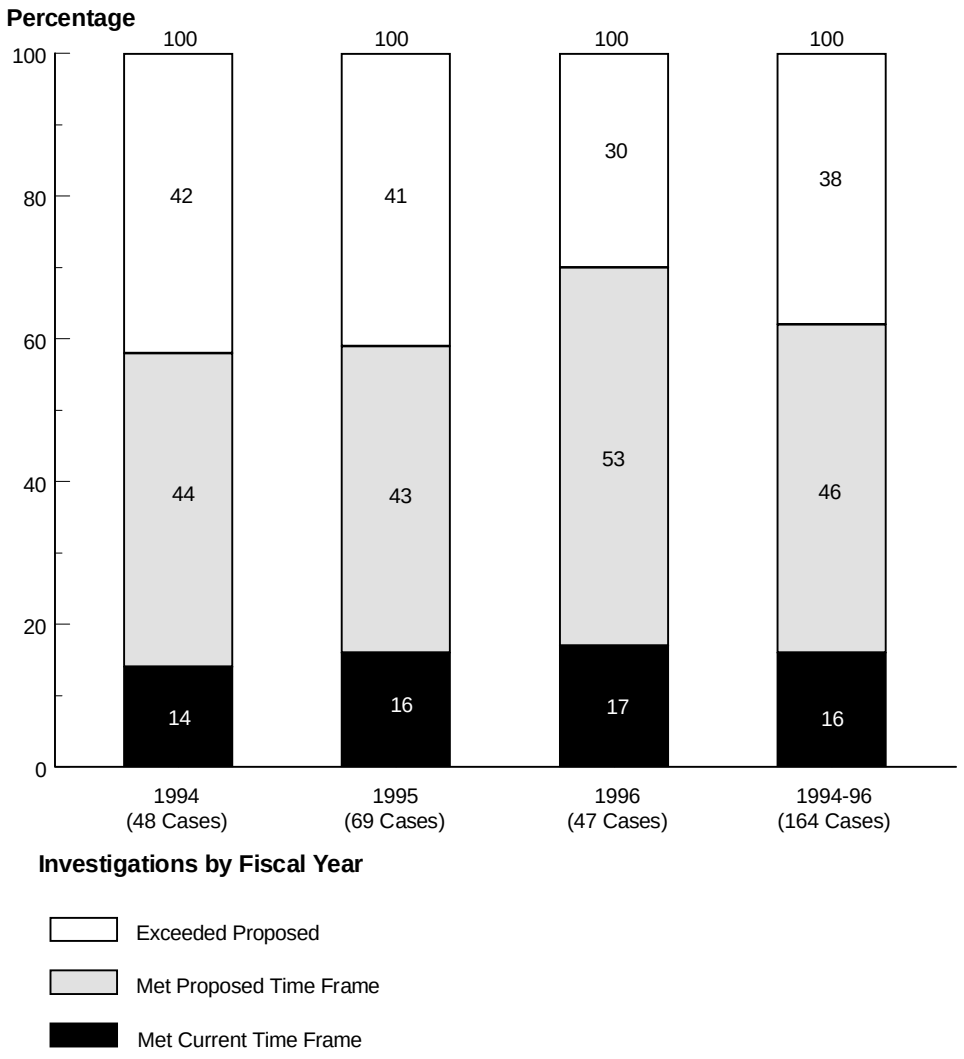
[10]The government has 5 years from the date a violation occurs to bring an action to enforce a civil penalty against a licensee. (See 28 U.S.C. 2462.) Since 1992, NRC's enforcement policy has been to initiate enforcement action after an ALJ finding of discrimination. However, when the ALJ does not decide in favor of the complainant, but the Secretary's final decision does find discrimination, if NRC does not find discrimination based on its investigation, NRC has no reason to take enforcement action until the Secretary's decision has been issued. Delays in the Secretary's decisions in such cases have precluded civil penalties when the Secretary's determination occurred more than 5 years after the violation.

final decision from the Secretary. According to NRC, the intent in proposing more realistic timeliness standards is that there is more incentive to try to meet standards that are achievable than those that normally cannot be met. These proposals were based on comparisons with baseline data from investigations done under other related statutes and proposed legislation considered in the 101st Congress. For example, the review team reported that OSHA investigations under other employee protection statutes took, on average, 120 days. Labor officials have indicated that they would support this legislation.

Our review of processing times in each of Labor's three offices showed that meeting the new standards would require a significant change in how these cases are processed. For cases processed in fiscal year 1994 through the first 9 months of fiscal year 1996, the proposed time frames were not met for all cases in any of the three offices. For 164 cases investigated by the Wage and Hour Division during this period,[11] only 16 percent of the investigations were completed within the 30 days currently mandated by law and an additional 46 percent would have met the proposed time frame of 120 days. (See fig. 2.) These investigations took an average of 128 days, with a range of 1 day to over 2 years, to complete. OSHA officials said that during the pilot study for transferring the initial investigative responsibility to their office from Wage and Hour, they found it very difficult to meet the 30-day mandate and had to ask for extensions in several cases.

[11]Includes 11 investigations performed by OSHA investigators under a pilot program.

Figure 2: Percentage of Wage and Hour Division Investigations Completed Within the Current and Proposed Statutory Time Frames in Recent Years

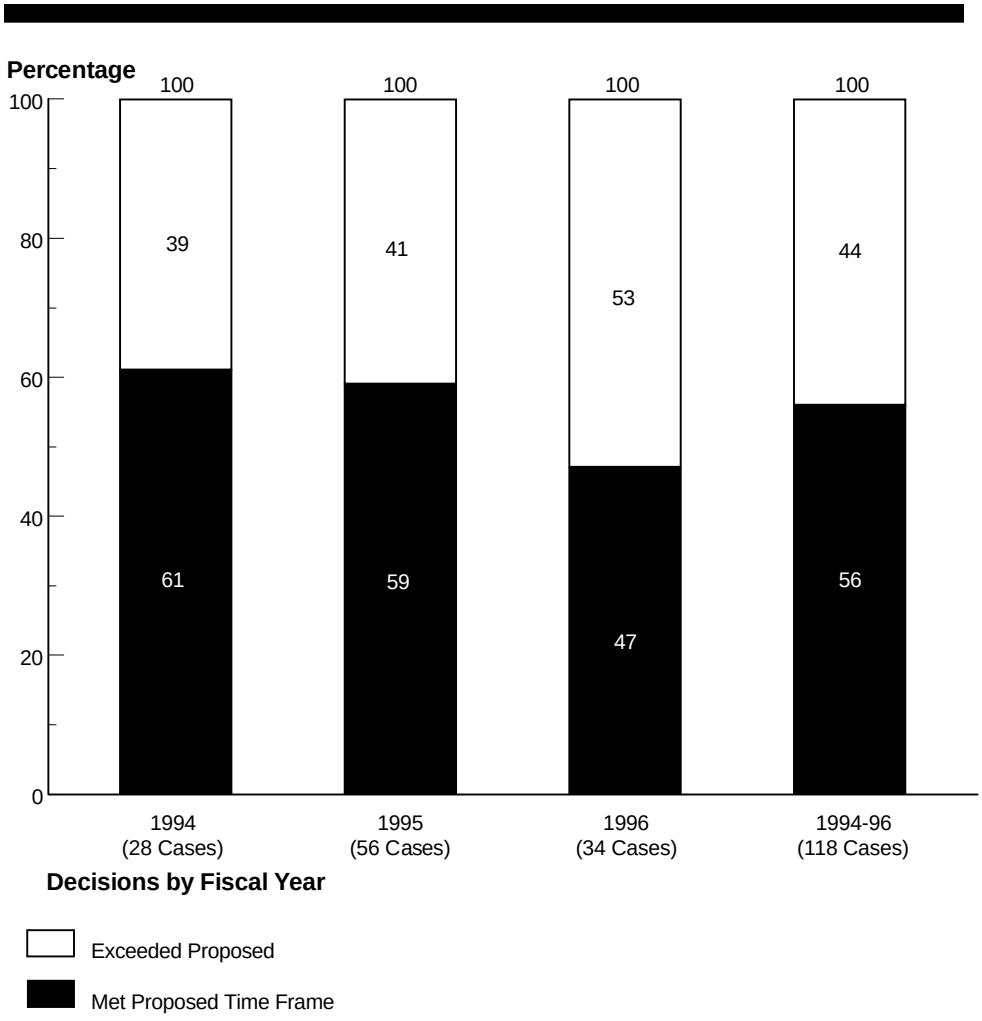


During this same period, 56 percent of OALJ's recommended decisions and orders would have met the proposed time frame of 240 days. OALJ took an average of 271 days (9 months) to issue 118 recommended decisions and orders. The time for these decisions ranged from less than 30 days to over 3 years. Currently, there is no time frame specifically for the OALJ step of the process. Even though the act provides for a 90-day time frame for moving from initial investigation to a final decision, extensions were

requested by the parties in virtually all cases we reviewed. One reason for this is that the OALJ hearing is de novo—it essentially starts the process over again because it does not consider the results of the Wage and Hour investigation. In addition, Labor officials told us that these extensions were necessary to allow additional time for discovery and review of evidence by legal counsels of both parties in preparation for the hearing. In commenting on a draft of this report, Labor's Chief Administrative Law Judge stated that 240 days is an achievable goal if the following factors are addressed:

- establishment of a mechanism to extend the time frame in appropriate circumstances,
- recognition that existing case law conflicts with a strict time limit on discovery and hearing, and
- availability of adequate staff.

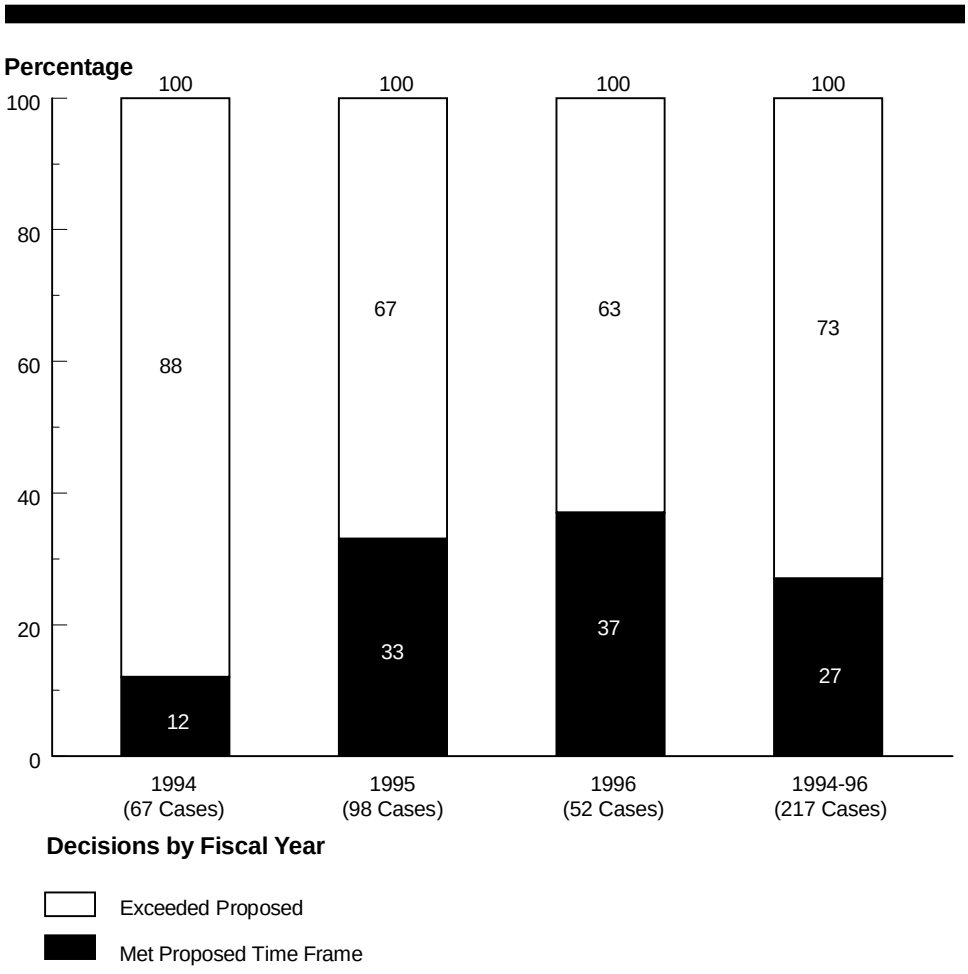
Figure 3: Percentage of OALJ's Recommended Decisions Completed Within the Proposed Statutory Time Frame in Recent Years



For the final step in the process, our data showed significant improvement in the time it took to obtain decisions from the Secretary of Labor, but even in the most recent year we analyzed, only 37 percent would have met the proposed 90-day time frame. (See fig. 4.) The average time to decide 217 cases in the Secretary's office decreased from about 3.3 years in fiscal year 1994 to about 1.3 years (16 months) in fiscal year 1996. In commenting on a draft of this report, the Chairman of the ARB noted that the current policy gives the parties 75 days to file all the briefs. In most cases, an extension is requested by at least one of the parties. Therefore, in

his opinion, a 90-day timeliness standard is unrealistic unless ARB severely restricts the parties' ability to properly brief the issues pressed.

Figure 4: Percentage of Secretary of Labor Decisions Completed Within the Proposed Statutory Time Frame in Recent Years



Monitoring of Allegation Cases and Trends

Both monitoring of individual cases and monitoring trends in allegations are important oversight activities. Monitoring the individual cases as they progress is a way to determine whether cases are being resolved in a timely way. Monitoring trends in allegations would help NRC's Agency Allegation Advisor in overseeing the system's effectiveness.

The NRC report recommended that NRC improve its Allegation Management System to be able to both monitor allegations from receipt to the

completion of agency action, and to analyze trends. It could also help improve agency responsiveness, such as when monitoring reveals sudden increases in the time for cases to be resolved, and helps identify licensees who may warrant closer scrutiny, such as a licensee that shows a sharp increase in the number of cases against it or settled by it. NRC agrees with the recommendation and has implemented a new system in its regional offices and in the two headquarters offices with direct regulatory oversight, which officials say will have the capability to track cases through each step of the process. However, at the time of our review, the system did not yet include data from the Offices of Investigations and Enforcement, nor did it include on-line Labor investigation data.

Our findings highlight the need for the data tracking system to include the period of time that a case is at Labor. For example, Labor has separate databases and case identifiers at Wage and Hour and OALJ, and the cases cannot easily be matched. As a result, neither Labor nor we can describe the total time it takes cases to be resolved at Labor. In addition, of the 217 cases for which the Secretary of Labor had made a final determination, 22 had no such decision recorded in NRC files. While only one of these cases resulted in a decision of discrimination, this is significant because NRC's policy is to hold open its enforcement action on complaints until notified that the Secretary has made a final determination. However, without an NRC investigation or an ALJ finding of discrimination, the 5-year limit on civil penalties could be exceeded. NRC officials told us that they have contacted Labor and requested copies of the 22 decisions to update their files.

The number of settlements found in our analysis also underscores the significance of the NRC review team report's recommendation that NRC should track trends in cases closed with a settlement without a finding of discrimination. NRC currently has no systematic way of knowing the extent to which settlements are made by individual licensees or when in the process they occur. Yet, our data showed that numerous settlements occurred at all steps in the process: Wage and Hour settled 22 of its 164 cases; the OALJ recommended settlement approval for 49 of the 118 cases on which it issued recommended decisions; and the Secretary of Labor approved settlements in 74 of the 217 allegations on which final decisions were issued. Labor's policy is to attempt to conciliate allegations in every case; only if conciliation fails does it proceed with a fact-finding investigation.

NRC Knowledge of Work Environment

NRC acknowledges that employee identification of problems is an important part of its system to ensure nuclear power plant safety. NRC also recognizes that the perception of discrimination may be even more important than actual findings in terms of affecting employees' willingness to report health and safety concerns. Therefore, NRC needs not only factual findings of discrimination but also a way to measure employee perception of discrimination.

NRC's December 1994 OIG report, however, noted that although NRC's management of discrimination issues focuses on encouraging licensees to foster a retaliation-free work environment, NRC has no program to assess licensees' work environments except when a serious problem such as a discrimination suit has already occurred. At about the same time, NRC's review team also concluded that NRC did not have a quantitative understanding of the number of employees who were hesitant to raise these kinds of concerns. Consequently, the review team commissioned Battelle Human Affairs Research Center to study methods for credibly assessing employee feelings about raising health and safety concerns. The Battelle study recommended a three-part strategy for development, implementation, and follow-up validation of the results of a mail-out workforce survey of a sample of nuclear power plants. This approach was then reflected in the NRC review team report's recommendation that NRC develop a survey to assess a licensee's work environment.

The review team report's recommendation was prompted, in part, by its recognition of the limitations of some of the assessments NRC had done in the past, such as one-on-one interviews of licensee employees conducted by NRC inspectors. The problem with having NRC inspectors conduct such interviews was illustrated by a September 1996 NRC-chartered study[12] of how employee concerns and allegations are handled at the Millstone power plant. This study concluded that NRC inspectors, in general, understated the extent of the chilling effect at plants and therefore are not qualified to independently detect or assess the work environment at licensee facilities. The Millstone report concluded that NRC's efforts to gain information on the work environment had not been effective and furthermore cited NRC's failure to develop a credible survey instrument as one example of the lack of progress toward this end that has lowered public confidence in NRC's commitment to improve its performance in addressing employee concerns.

[12]Millstone Independent Review Group, Handling of Employee Concerns and Allegations at Millstone Nuclear Power Station Units 1, 2, & 3 From 1985 -Present (Waterford, Conn.: Sept. 1996).

Nevertheless, NRC's September 1996 annual report on the status of the allegation system stated that NRC had decided not to implement the recommendation to develop a survey instrument. The report cited a staff recommendation made in November 1994 to not develop a survey because of the cost to develop and process it and the expectation that other actions implemented as a result of the review team report would yield the needed information on work environment.

Because employees' feelings about how NRC handles its allegations process would also affect their willingness to raise health or safety concerns, the review team report recommended that NRC develop a standard form and include it with alleger close-out correspondence to solicit feedback from employees on the way NRC handled their allegations. NRC developed the form and conducted a pilot in December 1995 in which it sent the form to 145 employees; it received feedback from 44. It analyzed comments and acted to address concerns raised. An NRC official said the agency plans to again send the form in 1997 to another sample of employees. After analyzing the 1997 responses, NRC will decide whether to routinely include the form in all close-out correspondence and thereby fully implement the recommendation.

In addition, when a finding of discrimination results from an administrative investigation at Labor, NRC issues a "chilling effect" letter asking the licensee to describe actions it has taken or plans to take to remove any chilling effect that may have occurred. The review team and OIG reports both noted that NRC does little follow-up on the actions reported by licensees in response to these letters. This follow-up is necessary not only to verify a licensee's actions but also to enable NRC to learn the effect of the discrimination finding on the plant's work environment. Both reports also noted that guidance is needed on when additional NRC action may be necessary if a licensee receives more than one chilling effect letter over a relatively short period of time because this may indicate a serious problem at the plant. NRC has issued guidance that each chilling effect letter should carry an enforcement number so that it can be tracked, but systematic tracking is not currently done. NRC has not developed guidance on how it will follow up on licensee actions or on what actions it should take when a licensee receives multiple chilling effect letters. NRC officials told us they intend to fully implement the recommendation to establish follow-up procedures for chilling effect letters, but they have no schedule for doing so.

Relief of Financial Burden

Allegers and agency officials expressed strong concern about the financial burden on employees in the current protection process. They attributed this burden to the extensive time it took to obtain a final decision, during which the alleger must pay attorney fees and, in some cases, go without pay.

One NRC review team report recommendation would provide relief through a statutory change to provide that Labor defend its findings of discrimination from the initial investigation at the ALJ hearing if Labor's decision is appealed by the employer. The review team noted that this would avoid the perception that the government is leaving the employees to defend themselves after being retaliated against for raising health and safety concerns. After soliciting comments on this proposal in the Federal Register in March 1994 to do by regulation what the recommendation proposed be done by statute, Labor again stated in a March 26, 1996, letter to NRC that it supports having this authority. But Labor also stated that because of the resources needed to meet this added responsibility, if it is granted, Labor expects to exercise this authority selectively and cautiously.

The NRC review team report also recommended that the law be amended to allow employees to be reinstated to their previous positions after the initial investigation finds discrimination, even if the case is appealed to the OALJ. Currently, section 211 provides that Labor may order reinstatement following a public hearing. As of January 1997, NRC was drafting legislation that would implement this recommendation.

In addition, the review team report recommended that, in certain cases, NRC should ask the licensee to provide the employee with a holding period that would maintain or restore pay and benefits until a finding is issued. A holding period would basically maintain current pay and benefits for the period between the filing of a discrimination complaint and an initial administrative finding by Labor. NRC ultimately decided not to require licensees to establish holding periods. However, a May 1, 1996, policy statement on licensees' responsibilities for maintaining a safety-conscious work environment stated that if a licensee does provide a holding period, NRC would consider such action as a mitigating factor in any enforcement decisions if discrimination is found to have occurred. Allegers we interviewed generally had mixed responses to the holding period recommendation. Although they generally supported the financial relief that would be provided, some expressed concern that licensees could misuse the holding period to remove an employee from operational duties

when this is not warranted. Both the report and allegers believed safeguards should be established for the proper implementation of this recommendation. Licensees also again had reservations about being required to retain an employee who could later be found to be justifiably dismissed. While NRC officials told us the agency is considering requesting the holding period under some conditions, the original position not to implement the recommendation has not changed.

Increased Penalties

The NRC review team report recommended that NRC seek an amendment to the Atomic Energy Act to increase the civil penalty from $100,000 to $500,000 a day for each discrimination violation. The maximum penalty in effect at the time of the report was $100,000,[13] established in 1980. This recommendation was meant to make the civil penalty a more effective deterrent to licensee discrimination. In May 1994, NRC ordered a review of the agency's enforcement process, part of which focused on civil penalty increases in the context of enforcement. This review concluded that increasing incentives for strong self-monitoring and corrective action programs would be better accomplished by revising the overall civil penalty assessment process than by raising the penalty amounts and that therefore no increase was needed.[14] Recommendations made by the review team report to revise the assessment process were accepted and implemented through agency directives. NRC agreed with the report's conclusion and decided not to seek an increase in civil penalties.

Allegers and some others we interviewed agreed with the review team report that a $100,000 penalty was not an effective deterrent. They had mixed opinions, however, as to whether even an increase to $500,000 would be a sufficient deterrent. Some said the only sanction that really had an impact on licensees was shutting down a plant. Others said that negative publicity had a stronger impact than a civil penalty.

The review team report also recommended that NRC make the penalty for all willful violations[15] equal to the penalty currently reserved for the most

[13]This amount was raised in November 1996 to $110,000 as a result of a mandate by the Congress, which adjusts all civil penalties periodically for inflation (P.L. 104-134).

[14]NRC, Assessment of the NRC Enforcement Program, NUREG-1525 (Washington, D.C.: NRC, Apr. 1995).

[15]According to NRC, the severity level of a violation may be increased if the circumstances surrounding the matter involve careless disregard for requirements, deception, or other indications of willfulness. In determining the specific severity level of a violation involving willfulness, consideration is given to such factors as the position and responsibilities of the person involved in the violation, the significance of the underlying violation, the intent of the violator, and the economic or other advantage gained as a result of the violation. The level of penalty for various offenses is established in NRC Enforcement Policy, NUREG 1600, July 1995.

severe violations. For example, under current procedures, discriminatory actions by a first-line supervisor are considered lesser violations, and receive lesser penalties, than violations that involve a higher level manager, even if they are found to be willful violations. For the same reasons cited for not requesting an increase in civil penalties, NRC decided not to implement this recommendation.

Conclusions

The joint NRC and Labor process for resolving allegations of discrimination by nuclear licensees against employees who raise health and safety concerns is intended to discourage discrimination, thereby fostering an atmosphere in which employees feel free to report hazards. But it is unrealistic to expect employees to raise such issues if they believe they may be retaliated against for doing so, the process for seeking restitution will be expensive and lengthy, and they will receive minimal attention and support from the federal government. In response to these concerns, both NRC and Labor have acted on OIG and agency recommendations to enhance their management of nuclear employee discrimination cases. The resulting changes should improve monitoring of the process, increase NRC involvement, and augment licensees' responsiveness to employee concerns. However, recommendations that would establish standards for timely decisions, permit monitoring of individual cases from start to finish and assessment of overall trends, and enable NRC to measure the work environment at nuclear plants for raising concerns have not been implemented.

Improvements in the timeliness of decisions would not only help ensure that employees feel more comfortable in reporting hazards and expedite information to NRC for enforcement actions, but also decrease the financial burden on allegers. At this point, it is unclear whether the time standard recommended by NRC would decrease that burden sufficiently or whether other recommendations for decreasing the financial burden would also need to be implemented to address allegers' concerns. Nevertheless, establishing and meeting some standard that prevents cases from languishing for many years would greatly improve the present system.

Many changes made by NRC were intended to increase its involvement in the protection system and to make the agency proactive in its role. In order to do this, NRC needs more knowledge of the process than it has had in the past. For example, the Agency Allegation Advisor needs a revised tracking system that will monitor trends so that the agency can address problems suggested by those trends. Although this revised tracking system

was recommended over 3 years ago and NRC has begun its implementation, the system still does not incorporate vital elements. These elements include current data on cases in the Labor process, data on all settled cases, and information on NRC headquarters inspection and enforcement. It is crucial that NRC management follow through to full implementation of this system so that it can develop trend data for better monitoring and make better-informed decisions on investigations and enforcement actions. Including the Labor data, however, will also require commitment from Labor as well as NRC, and effective coordination between the two agencies.

Because information from employees on health and safety problems is critical for NRC to ensure public safety, NRC must know whether employees at nuclear plants are comfortable raising such concerns. Determining the existence of a perception is not an easy task and may require the use of more than one method of gathering information to obtain such knowledge. Several methods, including surveying, developing indicators to flag possible problems, tracking cases and settlements in individual plants, using feedback forms to find out how employees believe their allegations have been handled, and following up on chilling effect letters have been recommended to NRC, but none of these methods have been implemented to date.

Recommendations

To improve the timeliness of Labor's allegations processing, we recommend that the Secretary of Labor establish and meet realistic timeliness standards for all three steps in its process for investigating discrimination complaints by employees in the nuclear power industry.

To improve NRC's ability to monitor the allegation process, we recommend that the Chairman, NRC, complete implementation of the NRC review team's recommendation to establish and operate the revised Allegation Management System in all organizational components within NRC. We also recommend that the Chairman, NRC, and the Secretary of Labor coordinate efforts to ensure that NRC's Allegation Management System includes information on the status of cases at Labor.

To improve NRC's knowledge of the work environment at nuclear power plants, we recommend that the Chairman, NRC, ensure the implementation of recommendations to provide information on the extent to which the environment in nuclear plants is favorable for employees to report health or safety hazards without fear of discrimination. This would include

recommendations on tracking and monitoring allegation cases and settlements, routinely providing feedback forms in allegation case close-out correspondence, systematically following up on chilling effect letters, and using a survey or other systematic method of obtaining information from employees.

Agency Comments and Our Evaluation

In commenting on a draft of this report, NRC's Executive Director for Operations stated that the report presents an accurate description of the process for handling discrimination complaints and of NRC's efforts to improve in this area. He also provided some specific concerns and observations and clarified several technical matters in the draft report. NRC's comments did not address the recommendations included in the report. NRC's comments appear in appendix IV.

We did not receive comments from the Secretary of Labor on our draft report. The Chairman of the ARB, Labor's Chief Administrative Law Judge, the Assistant Secretary for Employee Standards, and a senior program official in OSHA did, however, provide comments. Comments by these officials addressed the report's recommendations about Labor's timeliness standards only from the perspective of their individual offices.

The Chairman of the ARB stated that the ARB, as a first step in establishing performance standards, is currently working with union officials to overcome the concern that tracking the date an attorney begins work on a case may constitute an attorney time-keeping requirement. He expects to resolve this concern soon. The Chairman added that the suggested timeliness standard of 90 days for ARB to review ERA cases is not realistic unless the Board severely restricts the parties' ability to properly brief the issues presented. ARB's comments appear in appendix V.

Labor's Chief Administrative Law Judge stated that our draft report appeared to provide a fair assessment of NRC's and Labor's handling of ERA cases. He agreed that the suggested timeliness standard of 240 days for ALJs to hear a case and issue a recommended decision is a reasonable benchmark, but stated that, in designing any legislation or regulation to implement the benchmark, several factors should be addressed: (1) in appropriate circumstances, there must be provisions to extend the time limit, (2) existing case law conflicts with a strict time limit on discovery and hearing, and (3) timeliness standards are only reasonable if the responsible agency has adequate staff. He also pointed out that ALJs are currently directed to provide NRC information on ERA discrimination cases,

information on all ALJ decisions is available on the OALJ Home Page on the World Wide Web, and, if requested, OALJ will work with NRC to improve its monitoring program. OALJ's comments on our draft report appear in appendix VI.

The Assistant Secretary of Labor for Employee Standards commented that the primary purpose of reassigning initial investigations from the Wage and Hour Division to OSHA was part of an exchange of responsibilities. Before the reassignment, OSHA had responsibility for the employee protection, or "whistleblower," provisions of certain laws and the staff devoted to the enforcement of these provisions. Wage and Hour was responsible for certain employee protections affecting farm workers and made field sanitation inspections as part of its regular investigations. These responsibilities were exchanged in order to better use program expertise and promote effective and efficient use of resources. The Assistant Secretary also clarified several technical matters in the draft report. The Employment Standards Administration's comments on our draft report appear in appendix VII.

A senior OSHA headquarters official responsible for overseeing OSHA investigations of employment discrimination commented that, since OSHA had only recently been assigned responsibility for conducting these investigations, our report should state that almost all the initial Labor investigations discussed were conducted by the Wage and Hour Division.

We have considered these comments and revised our report as necessary.

As agreed with your office, we will make no further distribution of this report until 15 days from the date of this letter. At that time, we will send copies to interested congressional committees, the Secretary of Labor, and the Chairman of NRC. We will make copies available to others on request.

If you have questions about this report, please call me on (202) 512-7014. Other GAO contacts and staff acknowledgments are listed in appendix VIII.

Carlotta C. Joyner
Director, Education and
Employment Issues

Contents

Figures

Abbreviations

ALJ	administrative law judge
ARB	Administrative Review Board
ERA	Energy Reorganization Act
NRC	Nuclear Regulatory Commission
OAA	Office of Administrative Appeals
OALJ	Office of Administrative Law Judges
OIG	Office of Inspector General
OSHA	Occupational Safety and Health Administration
TVA	Tennessee Valley Authority

Scope and Methodology

To determine the legal protection afforded employees in the nuclear power industry who claim they have been discriminated against for raising health or safety concerns, we reviewed the employee protection provisions of the Energy Reorganization Act (ERA), as amended, and the Atomic Energy Act of 1954. We also examined the legislative history of these provisions. We examined federal regulations relating to Labor's handling of employee complaints under the ERA, and to NRC's protection of employees from discrimination by licensees. We also examined the appropriate sections of NRC's and Labor's procedure manuals and management directives. We discussed the provisions of these laws and regulations with NRC officials in headquarters and NRC regions I, II, and IV and with Labor officials in headquarters and in the Philadelphia, Atlanta, and Dallas regions. Finally, we obtained and examined regional directives for the management of allegation cases from the three NRC regional offices we visited.

We asked NRC and Labor officials, as well as employees who had filed discrimination complaints, licensees, and attorneys who represented them, to identify studies of the process for resolving cases of alleged discrimination. We reviewed those generally acknowledged to be the major studies related to the process.[16] We discussed the status of the recommendations included in these reports with cognizant officials in Labor and NRC and examined available documentary support. We did not independently assess the merit of specific recommendations made in these reports nor audit actual agency implementation of the recommendations.

In order to measure the effects of the recommendations on the timeliness of the system, we gathered information on cases closed at each stage of Labor's process between October 1993 and June 1996. We chose to begin our analysis with October 1, 1993, since that would cover the impact of changes made to the process as a result of the studies we reviewed. Furthermore, NRC's OIG had already reported on cases through April 1993. Specifically, we selected and analyzed the cases as follows:

[16]Studies we reviewed included NRC, Reassessment of the NRC's Program for Protecting Allegers Against Retaliation (Washington, D.C.: NRC, Jan. 7, 1994); Department of Labor, OIG, Audit of the Office of Administrative Appeals, Report No. 17-93-009-01-010 (Washington, D.C.: Department of Labor, May 19, 1993); NRC, OIG, Review of NRC's Allegation Management System, IG/91A-07 (Washington, D.C.: NRC, Apr. 3, 1992); NRC, OIG, NRC Response to Whistleblower Retaliation Complaints, Case No. 92-01N (Washington, D.C.: NRC, July 9, 1993); NRC, OIG, Assessment of NRC's Process for Protecting Allegers From Harassment and Intimidation, Case 93-07N (Washington, D.C.: NRC, Dec. 15, 1993); and NRC, OIG, Implementation of Recommendations to Improve NRC's Program for Protecting Allegers Against Retaliation, Case No. 96-01S (Washington, D.C.: NRC, Mar. 5, 1996).

- We obtained automated records from the Wage and Hour Division in Washington, D.C., on all "whistleblower" cases closed between October 1, 1993, and February 28, 1996. We did not independently validate the accuracy or completeness of these records. Since we could not always determine the whistleblower laws under which discrimination complaints were filed, we asked Labor to contact field personnel to identify the cases filed under the ERA. We later obtained data covering a more recent period—March 1, 1996, through June 30, 1996. We also obtained data on 11 ERA cases investigated by OSHA investigators in a pilot project during this period.
- We obtained a listing of all ERA cases that had received a recommended order between October 1, 1993, and June 30, 1996. We reviewed the timeliness and outcomes of these cases using information posted by the Office of Administrative Law Judges on the World Wide Web.
- We compiled a listing of all cases that had received a Secretary of Labor decision by using information provided by Labor and NRC for the same period.

In addition, we discussed with numerous knowledgeable individuals issues concerning protection of nuclear power industry employees who have raised safety concerns. We spoke with Labor and NRC officials both in headquarters and in the field who had responsibilities relevant to the discrimination complaint process. To obtain the perspective of employees and licensees, we visited two nuclear power plants and, at those facilities and elsewhere, spoke with (1) 10 nuclear industry employees who had filed discrimination complaints with Labor, NRC, or both, including members of the National Nuclear Safety Network;[17] (2) 8 attorneys who have represented employees and licensees in the process; (3) officials of 3 nuclear licensees that have been the subject of numerous discrimination complaints; and (4) officials of the Nuclear Energy Institute, a nuclear power industry association.

We performed our work between January and December 1996 in accordance with generally accepted government auditing standards.

[17]The National Nuclear Safety Network is a group of individuals concerned about the safety of nuclear plants. Members include employees who have raised safety concerns and their attorneys, as well as other interested parties.

Status of Recommendations in the NRC Review Team Report

This appendix lists the recommendations from NRC's January 7, 1994, report, Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation, and the agency action taken on each. The recommendations have been divided into three categories: implemented, partially implemented, and not implemented. The recommendations are identified with the same number used in the NRC report, to allow for cross-referencing.

Recommendations Implemented

Recommendation II.A-1

The Commission should issue a policy statement emphasizing that it is important for licensees and their contractors to achieve and maintain a work environment conducive to prompt, effective problem identification and resolution, in which employees feel free to raise concerns both to management and to NRC without fear of retaliation

Action

A final policy statement implementing this recommendation was published in the Federal Register on May 1, 1996.

Recommendation II.A-2

The Commission policy statement proposed in recommendation II.A-1 should include the following:

- licensees should have a means to raise issues internally outside the normal process and
- employees (including contractor employees) should be informed how to raise concerns through the normal processes, alternative internal processes, and directly to NRC.

Action

The final policy statement implementing this recommendation was published in the Federal Register on May 1, 1996.

Recommendation II.A-3

Regulations in 10 C.F.R. part 19 should be reviewed for clarity to ensure consistency with the Commission's employee protection regulations.

Action

A final rule revising 10 C.F.R. part 19 was issued in February 1996.

Recommendation II.A-4	The policy statement proposed in recommendation II.A-1 should 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.
Action	The final policy statement implementing this recommendation was published in the Federal Register on May 1, 1996.
Recommendation II.B-1	NRC should incorporate consideration of the licensee environment for problem identification and resolution, including raising concerns, into the Systematic Assessment of Licensee Performance process.
Action	The final revised Management Directive 8.6, which was issued on January 27, 1995, includes consideration of the work environment in the Systematic Assessment of Licensee Performance process. However, an independent agency team that reviewed NRC actions at the Millstone plant looked at the results of NRC inspections on work environment and reported that NRC inspectors generally are not qualified to assess environment and that, therefore, the results of these assessments were not reliable.
Recommendation II.B-2	NRC should develop inspection guidance for identifying problem areas in the work place where employees may be reluctant to raise concerns or provide information to NRC. This guidance should also address how such information should be developed and channeled to NRC management.
Action	NRC Inspection Procedure 40500 was revised accordingly in October 1994.
Recommendation II.B-4	Allegation follow-up sensitivity and responsiveness should be included in performance appraisals for appropriate NRC staff and managers.
Action	The elements and standards in NRC's employee performance appraisals were revised to implement this recommendation as of October 1995.
Recommendation II.B-5	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.

Action	Refresher training has been required annually since May 1996.
Recommendation II.B-6	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 harassment and intimidation concerns. It should also discuss the practical meaning of employee protection, including the limitations on NRC and Labor actions. In addition, NRC should consider developing more active methods of presenting this information to industry employees.
Action	The brochure was issued in November 1996.
Recommendation II.B-7	Management Directive 8.8 should include specific criteria and time frames for initial and periodic feedback to allegers, in order to measure consistent agency practice.
Action	The criteria and time frames were incorporated in Management Directive 8.8 as of May 1, 1996, and audits have been conducted to ensure compliance.
Recommendation II.B-9	NRC should designate a full-time senior individual for centralized coordination and oversight of all phases of allegation management as the Agency Allegation Manager, with direct access to the Executive Director for Operations, program office directors, and regional administrators.
Action	The position of Agency Allegation Advisor was filled on February 6, 1995, and the Advisor issued the first annual report on the allegation program to the Executive Director for Operations in September 1996.
Recommendation II.B-10	All program office and regional office allegation coordinators should participate in periodic counterpart meetings.
Action	Three meetings have taken place, and continued annual meetings are planned.

Recommendation II.B-11	The Agency Allegation Manager should conduct periodic audits of the quality and consistency of review panel decisions, allegation referrals, inspection report documentation, and allegation case files.
Action	Two rounds of audits have been completed, and audits will be conducted annually to implement this recommendation.
Recommendation II.B-12	Criteria for referring allegations to licensees should be clarified to ensure consistent application among review panels, program offices, and the regions.
Action	The criteria were clarified in Management Directive 8.8, issued May 1, 1996.
Recommendation II.B-15	NRC should periodically publish raw data on the number of technical and harassment and intimidation allegations (for power reactor licensees, this should be per site, per year).
Action	A report containing these data, Office for Analysis and Evaluation of Operational Data, Annual Report, FY 1994-95: Reactors, was issued in July 1996.
Recommendation II.B-16	NRC should resolve any remaining policy differences between the Office of Investigations and the Office of Nuclear Reactor Regulation on protecting the identity of allegers (including confidentiality agreements) in inspection and investigation activities.
Action	Alleger protection was defined in the revised Management Directive 8.8 and in the revised NRC policy statement of May 1996, which implemented the recommendation.
Recommendation II.B-17	Regional offices should provide toll-free 800 numbers for individuals to use in making allegations.
Action	A toll-free number was activated on October 1, 1995.

Recommendation II.C-1	The Commission should support current consideration within Labor to transfer section 211 implementation from the Wage and Hour Division to OSHA.
Action	The order to transfer section 211 cases to OSHA was signed by the Secretary of Labor in December 1996 for implementation on February 3, 1997; NRC supported this change.
Recommendation II.C-3	NRC should recommend to the Secretary of Labor that adjudicatory decisions under section 211 be published in a national reporting or computer-based system.
Action	Office of Administrative Law Judges (OALJ) and Secretary of Labor decisions are now available on the World Wide Web.
Recommendation II.C-4	NRC should take a more active role in the Labor process. Consistent with relevant statutes, Commission regulations, and agency resources and priorities, NRC should normally make available information, agency positions, and agency witnesses that may assist in completing the adjudication record on discrimination issues. Such disclosures should be made as part of the public record. NRC should consider filing amicus curiae briefs, where warranted, in Labor adjudicatory proceedings.
Action	NRC's Executive Director for Operations issued the revised criteria for use by the staff in October 1995. Management Directive 8.8, issued in May 1996, contains revised guidance on this issue.
Recommendation II.C-5	NRC should designate the Agency Allegation Manager as the focal point to assist people in requesting NRC information, positions, or witnesses relevant to Labor litigation under section 211 (or state court litigation concerning wrongful discharge issues). Information on this process, and on how to contact the NRC focal point, should be included in the brochure for industry employees (see recommendation II.B-6).
Action	This responsibility was given to the Agency Allegation Advisor through Management Directive 8.8 as of May 1996.

Recommendation II.C-7	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 (consistent with current Enforcement Policy classification of severity level I or II violations); (3) allegations of discrimination where a history of findings of discrimination (by Labor or NRC) or settlements suggests a programmatic rather than an isolated issue; and (4) allegations of discrimination that appear particularly blatant or egregious.
Action	Management Directive 8.8, issued in May 1996, implemented this recommendation.
Recommendation II.C-8	NRC investigators should continue to interface with Labor to minimize duplication of effort on parallel investigations. Where NRC is conducting parallel investigations with Labor, Office of Investigations procedures should provide that its investigators contact Labor on a case-by-case basis to share information and minimize duplication of effort. Labor's process should be monitored to determine if NRC investigations should be conducted or continued, or priorities changed. In that regard, settlements should be given special consideration.
Action	This recommendation was implemented through the Investigation Procedure Manual, section 3.2.2.10.1.
Recommendation II.C-9	When an individual who has not yet filed with Labor brings a harassment and intimidation allegation to NRC, NRC should inform the person (1) that a full-scale investigation will not necessarily be conducted; (2) that Labor and not NRC provides the process for obtaining restitution; and (3) of the method for filing a complaint with Labor. If, after the Allegation Review Board review, the Office of Investigations determines that an investigation will not be conducted, the individual should be so informed.
Action	Guidance in Management Directive 8.8, as of May 1996, implemented this recommendation.
Recommendation II.C-10	The Office of Investigations should discuss cases involving section 211 issues with the Department of Justice as early as appropriate so that a

	prompt Justice declination, if warranted, can allow information acquired by the Office of Investigations to be used in the Labor process.
Action	The Investigation Procedure Manual, section 8.2.3, implemented this recommendation.
Recommendation II.C-11	The implementation of the Memorandum of Understanding with the Tennessee Valley Authority (TVA) Inspector General should be reconsidered following the completion of the ongoing review.
Action	The Memorandum of Understanding with TVA was terminated on August 30, 1994.
Recommendation II.D-1	For cases that are appealed and result in Labor administrative law judge (ALJ) adjudication, NRC should continue the current practice of initiating the enforcement process following a finding of discrimination by the ALJ. However, the licensee should be required to provide the normal response required by 10 C.F.R. 2.201.
Action	This recommendation was implemented through a revision to the Enforcement Policy on December 31, 1994.
Recommendation II.D-2	Additional severity level II examples should be added to the Enforcement Policy to address hostile work environments and discrimination in cases where the protected activity involved providing information of high safety significance. The policy should recognize restrictive agreements and threats of discrimination as examples of violations at least at a severity level III. It should also provide that less significant violations involving discrimination issues be categorized at a severity level IV.
Action	This recommendation was implemented through a revision to the Enforcement Policy on December 31, 1994.
Recommendation II.D-5	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 restitution to

address the potential chilling effect. Mitigation or escalation for correction should consider the timing of the corrective action.

Action

A final revision of the Enforcement Policy in November 1994 implemented this recommendation.

Recommendation II.D-6

For violations involving discrimination issues not within the criteria for a high priority investigation (see recommendation II.C-7) citations should not normally be issued nor NRC investigations conducted if (1) discrimination, without a complaint being filed with Labor or an allegation made to NRC, is identified by the licensee and corrective action is taken to remedy the situation or (2) after a complaint is filed with Labor, the matter is settled before an evidentiary hearing begins, provided the licensee posts a notice that (a) a discrimination complaint was made, (b) a settlement occurred, and (c) if Labor's investigation found discrimination, remedial action has been taken to reemphasize the importance of the need to be able to raise concerns without fear of retaliation.

Action

The Enforcement Policy was revised on November 28, 1994, to implement this recommendation.

Recommendation II.D-7

In taking enforcement actions involving discrimination, use of the deliberate misconduct rule for enforcement action against the responsible individual should be considered.

Action

This recommendation was implemented through a revision to the Enforcement Policy on December 31, 1994.

Recommendation II.E-1

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 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.

Action

This recommendation was implemented through guidance in Management Directive 8.8 issued in May 1996.

Recommendation II.E-2	Before contacting a licensee as proposed in recommendation II.E-1, NRC should (1) contact the individual to determine whether he or she objects to disclosure of his or her identity and (2) explain to the individual the provisions of section 211 and the Labor process (e.g., that it is Labor and not NRC that provides restitution.)
Action	This recommendation was implemented through guidance in Management Directive 8.8 issued in May 1996.

Recommendation II.E-3	The Commission should include in its policy statement (as proposed in recommendation II.A-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 contractors' employees that would maintain or restore pay and benefits when the licensee has been notified by an employee that, in the employee's views, 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. After the employee has been notified of the licensee's final decision, the holding period should continue for an additional 2 weeks to allow a reasonable time for the employee to file a complaint with Labor. If the employee files within that time, the licensee should continue the holding period until the Labor finding is made on the basis of an investigation. If the employee does not file with Labor within this 2-week period, then the holding period would terminate. (Notwithstanding this limitation on the filing of a complaint with Labor to preserve the holding period, the employee clearly would retain the legal right to file a complaint with Labor within 180 days of the alleged discrimination). The holding period should continue should the licensee appeal an adverse Labor investigative finding. 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 pay and benefits are maintained. (3) Should it be determined that discrimination did occur, the licensee's handling of the matter (including the extent of its investigation, its effort to minimize the chilling effect, and the promptness of providing restitution to the individual) would be considered in any associated enforcement action. While not adopting a holding period would not be considered an

escalation factor, use of a holding period would be considered a mitigating factor in any sanction.

Action

An NRC policy statement published in May 1996 implemented this recommendation.

Recommendation II.E-4

In appropriate cases, the Executive Director for Operations (or other senior NRC management) should notify the licensee's senior management by letter, noting that NRC has not taken a position on the merits of the allegation but emphasizing the importance 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 the allegation is not appropriately resolved; 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 activity, and to consider whether action is needed to address the potential for a chilling effect; requiring a full report of the actions that senior licensee management took on this request within 45 days; and 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 that (a) Labor and not NRC provides restitution and (b) NRC will 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.

Action

NRC's policy statement and the revision of Management Directive 8.8 in May 1996 implemented this recommendation. Regarding the 45-day time limit of this recommendation, although NRC has not established this requirement in the Management Directive, an official told us the agency does, in fact, give licensees a time limit within which they must reply.

Recommendation II.E-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.

Action

The Enforcement Manual was revised on December 31, 1994, to include this wording.

Recommendation II.E-7	If more than two investigative findings of discrimination occur within an 18-month period, NRC should consider stronger action, including issuing a Demand for Information.
Action	The Enforcement Manual was revised on December 31, 1994, to include this wording.

Recommendations Partially Implemented

Recommendation II.B-8	NRC should develop a standard form to be included with alleger close-out correspondence to solicit feedback on NRC's handling of a given concern.
Action	NRC developed a feedback form that it sent to a sample of allegers in December 1995, and it plans to send the form again to another sample in 1997. After that survey, the agency will decide whether to provide feedback forms routinely with close-out correspondence.
Recommendation II.B-13	NRC should revise the Allegation Management System to be able to trend and monitor an allegation from receipt to the completion of agency action.
Action	On November 1, 1996, NRC installed a revised Allegation Management System in the regional offices. The system is not yet linked to the Office of Investigations and Office of Enforcement information systems, but NRC plans to do this. Because the system was so recently installed and is not fully linked, monitoring trends through the new system has not yet begun.
Recommendation II.B-14	Using the Allegation Management System, NRC should monitor both harassment and intimidation and technical allegations to discern trends or sudden increases that might justify its questioning the licensee as to the 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.
Action	As described for recommendation II.B-13, the system was just recently installed, and more time needs to pass before trends can be tracked using the new system.

Recommendation II.C-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 Labor investigation, 30 days from the investigation finding to request a hearing, 240 additional days to issue an ALJ decision, and 90 days for the Secretary of Labor to issue a final decision, thus allowing a total of 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 Labor finding based on an administrative investigation; (3) revising the statute to provide that Labor defend its findings of discrimination and ordered relief in the adjudicatory process if its orders are contested by the employer (this would not preclude the complainant from also being a party in the proceeding).
Action	Legislation has been drafted by NRC and submitted for Labor's review and approval before submission to the Congress for (1) and (2). The recommendation on Labor's defense of allegers at the ALJ hearing (3) is awaiting the Secretary's signature, but implementation would be selective, depending on resource availability.
Recommendation II.C-6	NRC should work with Labor to establish a shared database to track Labor cases.
Action	This action was delayed pending the transfer of section 211 duties from the Wage and Hour Division to OSHA. The transfer took place on February 3, 1997, and NRC and OSHA are currently discussing how to implement this recommendation.
Recommendation II.E-5	NRC should usually issue a chilling effect letter if a licensee contests a Labor 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 Labor administrative finding of discrimination. When a chilling effect letter is issued, appropriate follow-up action should be taken. (See recommendations II.E-3 and II.C-2.)
Action	A revision to the Enforcement Manual on December 31, 1994, requires that NRC assign an enforcement number to each chilling effect letter sent. Systematic tracking by NRC has been started, but guidance for follow-up actions and monitoring of trends in plants has not been issued.

Recommendation II.E-8	NRC should consider action when there is a trend in settlements without findings of discrimination.
Action	The Enforcement Manual was revised on December 31, 1994, to implement this recommendation.

Recommendations Not Implemented

Recommendation II.B-3	NRC should develop a survey instrument to independently and credibly assess a licensee's environment for raising concerns.
Action	This recommendation will not be implemented, according to NRC's Annual Report on the Allegations Program, September 1996, because of disagreement among NRC staff about its effectiveness. A current staff proposal, however, contains actions to partially implement the recommendation.
Recommendation II.D-3	The Commission should seek an amendment to section 234 of the Atomic Energy Act of 1954 to provide for a civil penalty of up to $500,000 per day for each violation. If this provision is enacted, the Enforcement Policy should be amended to provide that this increased authority should usually be used only for willful violations, including those involving discrimination.
Action	This recommendation will not be implemented because NRC believes that increasing incentives for strong self-monitoring and corrective action programs would be better accomplished by revising the overall civil penalty assessment process than by raising civil penalty amounts.
Recommendation II.D-4	Pending an amendment to section 234 of the Atomic Energy Act, the flexibility in the enforcement policy should be changed to provide that the base penalty for willful violations involving discrimination, regardless of severity level, should be the amount currently specified for a severity level I violation.

Action	This recommendation will not be implemented because NRC believes that increasing incentives for strong self-monitoring and corrective action programs would be better accomplished by revising the overall civil penalty assessment process than by raising civil penalty amounts.
Recommendation II.E-4(3)	The Executive Director for Operations or another senior official at NRC should request, in appropriate cases, that the licensee place an employee in a holding period as described in the Commission's policy statement (see recommendation II.E-3).
Action	This part of recommendation II.E-4 will not be implemented, according to NRC's Annual Report on the Allegations Program, September 1996; however, a staff proposal is being considered that would implement it.

Status of Recommendations From the Labor OIG's Report, May 1993

This appendix contains the recommendations and their implementation status from the Labor OIG's May 1993 report, Audit of the Office of Administrative Appeals.[18]

Recommendation	The Director of the Office of Administrative Appeals (OAA) should conduct an immediate review of cases pending in OAA to resolve the issues that have prevented these cases from being completed and bring these cases to completion as quickly as possible.
Action	OAA has cleared the backlog of cases, thus implementing this recommendation.
Recommendation	The Director of OAA should establish timeliness standards for OAA's case processing and the issuance of decisions, which will meet the requirements of due process, the intent of the Administrative Procedures Act, and customer service expectations of the Secretary.
Action	Action on this recommendation is pending. The Director is currently involved in discussions to obtain agreement on timeliness standards.
Recommendation	The Director of OAA should develop and implement management information systems to include case management and time distribution data.
Action	The agency has developed and implemented a management information system for cases.
Recommendation	The Director of OAA should conduct analysis to identify operation changes and resource requirements necessary to achieve and maintain compliance with the newly established case processing standards and present that information in OAA's planning and budgeting documents.

[18]Report No. 17-93-009-01-010 (Washington, D.C.: Department of Labor, May 19, 1993). As previously mentioned, the Office of Administrative Appeals function is now performed by the Administrative Review Board in the Department of Labor.

Action	Action is pending. Because timeliness standards have not been established, resource needs cannot be evaluated.

Comments From the Nuclear Regulatory Commission and Our Evaluation

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

February 21, 1997

Carlotta C. Joyner
Director, Education and
Employment Issues
General Accounting Office
Washington, D.C. 20548

Dear Ms. Joyner:

Thank you for the opportunity to review the draft of your proposed report, Nuclear Employee Safety Concerns: Allegation System Offers Better Protection, but Important Issues Remain. Our comments on the report are enclosed. Overall, we believe the report presents an accurate description of the process for handling discrimination complaints and the NRC's efforts to improve in this area.

Sincerely,

L. Joseph Callan
Executive Director
for Operations

Enclosure:
As stated

NRC Comments On GAO Report GAO/HEHS-97-51
NUCLEAR EMPLOYEE SAFETY CONCERNS:
Allegation System Offers Better Protection, but Important Issues Remain

Now on p. 2.

1. In the first paragraph of page 3, the report states that, "After the review panel and the NRC's Office of Investigations complete initial inquiries, the Investigations staff decide whether they will complete a full investigation."

See comment 1.

The decision of whether to conduct a full investigation is made by the NRC Office of Investigations in coordination with the regional administrators. The decision is based on the priority assigned to a particular investigation and the investigatory workload in a region. Full investigations are performed for almost all high priority investigations and a majority of the normal priority investigations.

Now on p. 3.
See comment 1.

2. In the second paragraph on page 3, the report in discussing the DOL process refers to investigations by OSHA. The full transfer to OSHA only occurred February 3, 1997, and therefore it may be appropriate to add a footnote to the statement that recognizes that Wage & Hour conducted the investigations in the period covered by the report.

Now on p. 4.

3. In the second paragraph of page 4, the report states, "In addition, NRC and Labor have yet to act on recommendations requiring statutory changes."

See comment 1.

The sentence implies that no action has been taken on the statutory changes. This is not correct. The NRC has drafted legislative changes and submitted them to DOL for review. The changes will be submitted to the Congress after NRC and DOL reach agreement on the proposal.

Now on p. 10.
See comment 2.

4. On the second line on page 1 of Figure 1, the decision block that reads, "NRC-OSHA Decision," should be revised to read, "OSHA Decision." The NRC is not involved in OSHA's decision-making process.

Now on p. 11.
See comment 2.

5. On the top line on page 2 of Figure 1, the flow chart is missing a decision block between the "NRC-OI Investigation" block and the "NRC-OE Decision on Enforcement Action." There should be a block for the results of the OI investigation, i.e., whether OI substantiated the allegation. If OI does not substantiate that discrimination occurred, there is no enforcement to be taken. Additionally, the chart does not reflect that when discrimination is found to have occurred, the finding is referred for review by the Department of Justice (DOJ). NRC coordinates its civil enforcement action with DOJ.

Now on p. 12.
See comment 1.

6. The staff's comment concerning decisions on full investigations in 1. above applies to the third line of the third paragraph on page 11.

Now on p. 12.
See comment 1.

7. In the fifth line of the third paragraph on page 11, a footnote should be added following, "... a final decision from Labor,..." that points out that, "pursuant to Section 211(c)(2) of the Energy Reorganization Act, final decisions by the ARB are not subject to judicial review in any other proceeding."

Now on p. 13.
See comment 3.

Now on pp. 13-14.

See comment 1.

Now on p. 14.

See comment 1.

Now footnote 10.

See comment 1.

Now on p. 17.

See comment 1.

8. In the paragraph on p. 12, it is stated that "Civil penalties will normally be imposed for Severity Level I and II violations." Because of the nature of discrimination violations (usually considered to be willful, usually identified by the DOL or NRC and not by the licensee) and the treatment of discrimination under the NRC Enforcement Policy, even Severity Level III violations frequently result in civil penalties. It is suggested that the quoted sentence be modified to read: "Civil penalties will normally be imposed for Severity Level I and II violations and, under NRC's Enforcement Policy, are frequently imposed for Severity Level III violations involving discrimination."

9. In the last line on page 13 and the first line on page 14, the report states, "These actions give NRC a focal point for gathering and publishing information on how the allegations process is working in NRC and enable it to recognize problems as they occur."

While the actions do provide a focal point for gathering and analyzing the information, the information will in all likelihood lag the actual problem and therefore any recognition of the problems will be after the problems have occurred.

10. The second paragraph on page 14 states, " In an effort to increase NRC's involvement in the allegations process, the January 1994 study recommended that NRC revise the criteria for discrimination complaints that are to be investigated and to expand the number of investigations. Previously, NRC investigated few discrimination complaints and usually waited for the Labor Secretary's final decision."

Actually, the NRC increased investigations of discrimination cases in October 1993. At that time, the Office of Investigations decided to investigate discrimination complaints independent of DOL. This resulted in an increase in investigations of discrimination complaints prior to revision of the priority assigned to discrimination complaints in October 1995.

11. Footnote 8 on page 16 does not recognize that the NRC may take enforcement action based on an OI investigation prior to a final DOL finding. We recommend that the third sentence of the footnote be revised to read, "However, if the ALJ does not decide in favor of the complainant, but the ARB ultimately does find discrimination, in the absence of an NRC finding of discrimination based on an OI investigation, the NRC has no reason to take enforcement action until the ARB's decision has been issued."

12. In the first full paragraph on page 17, the report discusses the draft legislative changes to amend the law to establish realistic timeliness standards for the entire DOL process. However, the paragraph does not discuss the rational for the proposal. We recommend that the following sentence be added following "...a final Secretary's decision.," "The intent in proposing more realistic timeliness standards is that there is more incentive to try to meet standards when they are achievable than standards that normally can not be met."

Now on p. 22.

See comment 1.

13. On page 19, the first paragraph discusses both the DOL and NRC processes for handling discrimination complaints. After reading the paragraph, one could infer that NRC's monitoring of discrimination complaints will influence DOL's timeliness in processing complaints. We believe this creates a misperception of NRC's ability to influence the DOL process. We recommend that the last two sentences of the first paragraph be moved to the end on the second paragraph.

Now on p. 22.
See comment 1.

14. In the second paragraph on page 19, the report states that the NRC has started to implement the new Allegation Management System in the regions. The system has also been implemented in the two headquarters offices with direct regulatory oversight. The system is available to all NRC offices.

Now on p. 22.

15. In the fifth line of the last paragraph on page 19, the report states, "In addition, of the 217 cases for which the Secretary of Labor had made a final determination, 22 had no final Secretary of Labor decision recorded in NRC records and files."

See comment 1.

We agree it is important to receive the decisions in a timely manner. However, one could infer from the language in the report that the NRC would have taken an enforcement action in each of these cases had we received the decisions. Based on the information provided us by GAO during the audit, the 22 cases noted in the report did not result in decisions that discrimination occurred. We have contacted DOL and requested copies of the Secretary decisions to update our files.

Now on p. 22.

16. In the last sentence on page 19, the report states, "This is significant because, since NRC's policy is to delay final enforcement action on complaints until notified that the Secretary had made a final determination, the 5-year limit on civil penalties could be exceeded." This may lead the reader to believe that the NRC has not taken an action, which may be incorrect. Also, the NRC's policy is to initiate enforcement action after a finding by DOL's ALJ of discrimination. In such cases, the statute of limitations for NRC action is not exceeded even if the Secretary's final decision is issued more than 5 years after the discriminatory act.

See comment 1.

Therefore, we recommend that the sentence be revised to read, "This is significant since NRC's policy is to hold open its enforcement action on complaints until notified that the Secretary has made a final determination."

Now on p. 22.
See comment 4.

17. We recommend that the second sentence of the first paragraph on page 20 be revised to read, "Because DOL does not systematically notify NRC of settlements, NRC currently has ...."

Now on p. 25.
See comment 1.

18. In the fourth sentence of the third paragraph on page 23, the report states, "However, a May 1, 1996, policy statement on licensee's responsibilities for maintaining a good working environment ...." The phrase used in the policy statement was "safety conscious work environment."

Now on p. 26.
See comment 5.

19. In the fifth sentence of the second paragraph on page 24, we recommend that you add a footnote following, "This study, ..." that notes that the study referred to is NUREG 1525.

Now on p. 26.
See comment 1.

20. In Footnote 12 on page 25, we recommend that you change "Enforcement Manual" to "Enforcement Policy" and add (NUREG 1600) following "... Enforcement Policy (NUREG 1600)" at the end of the last sentence.

Now on p. 28.

See comment 1.

21. On page 26, last paragraph, the report states that, "Although this revised tracking system was recommended over 3 years ago and NRC has not begun its implementation ..." (emphasis added). The NRC implemented the revised tracking system in the four regions and in headquarters on November 1, 1996.

Now on p. 42.
See comment 1.

22. On page 42, we recommend that the action associated with Recommendation II.C-4 be revised to read, "The NRC's Executive Director for Operations issued the revised criteria for use by the staff in October 1995. Management Directive 8.8, issued May 1996, included the revised guidance on this issue."

Now on p. 44.
See comment 1.

23. On pages 46 and 47, the Action descriptions for Recommendations II.D-2, II.D.-5, and II.D-6 should refer to the November 1994 revision to the Enforcement "Policy" rather than revisions to the Enforcement "Manual".

Now on p. 48.
See comment 1.

24. On page 53, the report provides the status of Recommendation II.B-14 as follows: "... the system has just recently been installed, and more time needs to pass before trends can be tracked." While it is true that the new system was recently installed, the status provided ignores the fact that the NRC staff has been tracking allegations using the existing AMS. The Agency Allegation Advisor's annual report, issued October 1996, clearly indicates that the staff is currently tracking and trending allegations.

Now on p. 49.
See comment 1.

25. On page 54, the Action description for Recommendation II.C-2 should state that the NRC has drafted the legislative changes discussed in Items (1) and (2) and forwarded them to DOL for review.

See comment 6.

26. A few minor typographical corrections are noted in the following marked-up pages of the draft GAO report.

The following are GAO's comments on the Nuclear Regulatory Commission's letter dated February 21, 1997.

GAO Comments

1. Wording revised.

2. Figure revised as suggested.

3. Discussion of when civil penalties are imposed was deleted from this section.

4. Comment not incorporated. According to Labor procedures, NRC is supposed to receive copies of settlement agreements. We did not obtain evidence on whether these procedures were followed.

5. Incorporated as footnote 14.

6. Corrections made.

Comments From the Administrative Review Board, Department of Labor

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

February 20, 1997

Carlotta C. Joyner, Director
Education and Employment Issues
Health, Education and Human Services Division
General Accounting Office
1 Massachusetts Avenue, N.W.
Suite 650
Washington, D.C. 20548

Dear Director Joyner:

Our office -- the Administrative Review Board, United States Department of Labor (DOL) -- has received and reviewed the General Accounting Office's Draft Report to Congressional Committees, *Nuclear Employee Safety Concerns: Allegation System Offers Better Protection, but Important Issues Remain*. We make the following two comments regarding aspects of the Draft Report which concern our function in the resolution of DOL "whistle blower" cases filed under the Energy Reorganization Act.

1) DOL's Inspector General recommended that the Administrative Review Board establish "reasonable, reliable and fair performance standards" for the processing of final decisions, but recognized that the establishment of such standards is not possible at this time due to the absence of recorded case processing experience. The Inspector General recommended that such information could be gathered for future implementation of performance standards by keeping track of the date an attorney commences work on a particular case (to document the actual time each type of case requires to complete). We are currently working with union officials to overcome the concern that tracking such information would constitute an attorney time-keeping requirement. We expect to resolve this union concern and begin keeping track of when an attorney commences work on a particular case within the next sixty days;

2) The suggested timeliness standard of ninety days for the Administrative Review Board to issue final decisions in Energy

Reorganization Act "whistleblower" cases is not realistic. The problem is not just a lack of resources. Our standard briefing schedule gives the parties seventy-five days to file all the briefs (thirty days for the initial brief, thirty days for a response brief and fifteen days for a reply brief). In most cases an extension is requested by at least one of the parties. Therefore, unless we severely restrict the parties' ability to properly brief the issues presented, a ninety-day timeliness standard is unrealistic.

Thank you for the opportunity to respond to the Draft Report. If we may be of further assistance in this project, please contact me at the above address (Room S4309) or by telephone at (202) 219-4728.

Sincerely,

David A. O'Brien
Chair

Comments From the Office of Administrative Law Judges, Department of Labor

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: FEB 21 1997

To: CARLOTTA C. JOYNER
Director, Education and Employment Issues
United States General Accounting Office
Health, Education, and Human Services Division

From: JOHN M. VITTONE
Chief Administrative Law Judge

Subject: **GAO Draft Report:**
NUCLEAR EMPLOYEE SAFETY CONCERNS

The GAO Draft Report on Nuclear Employee Safety Concerns appears to provide a fair assessment of the NRC and DOL handling of Energy Reorganization Act whistleblower cases. The report recognizes that DOL has taken significant action recently to improve the handing of ERA complaints, but recommends that the Secretary of Labor establish realistic timeliness standards for processing of ERA whistleblower complaints, and coordinate with the NRC Chairman "to ensure that NRC's Allegation Management System includes all information on the status of cases at Labor."

The comments below are confined to the recommendations' impact on the Office of Administrative Law Judges.

I. TIMELINESS STANDARDS

The timeliness standard of 240 days for issuance of a recommended decision and order is a reasonable benchmark. According to the GAO report OALJ takes, on average, 274 days to render a recommended decision and order, although in individual cases, it has taken as long as over three years. Thus, OALJ would need to shorten the hearing process to meet the time standard, but 240 days is certainly an achievable goal.

Although 240 days is a reasonable benchmark, in designing any legislation or regulation to implement the benchmark, several factors must be addressed:

A. ***The time limit must contain a mechanism for enlargement of the decision deadline in appropriate circumstances.***

The time for hearing and recommended decision in a whistleblower case is dictated more by the schedule and desires of the parties than the schedule of the ALJ. Where parties need more time for trial preparation, a rigid time limit would not serve the interests of

employee protection. Several examples of appropriate delays in the hearing process are:

1. *The parties' election to use a settlement judge.* Where good faith efforts are being made in a settlement judge proceeding, such a process should be encouraged, and the time frame for hearing and recommended decision should be tolled.

2. *Mental or physical disability of the complainant or an important witness.* Where a complainant is mentally or physically incapable of proceeding to hearing, a reasonable enlargement of the time limit is warranted. Similarly, accommodations may be warranted if an important witness is incapacitated.

3. *Complex litigation.* Where the matter involves complex litigation, such as multi-complainant cases, additional time may be necessary to provide an adequate hearing.

B. *Recognition that existing caselaw conflicts with a strict time limit on discovery and hearing.*

In order to achieve a timeliness standard for hearing and issuance of a recommended decision, an ALJ undoubtedly would be required to set strict deadlines for completion of discovery, and may need to control the volume of evidence and witnesses presented at the hearing.

Such judicial control of the hearing process, however, conflicts with decisions of the Administrative Review Board, such as *Timmons v. Mattingly Testing Services*, 95-ERA-40 (ARB June 21, 1996), in which the Board indicates that an ALJ errs in limiting discovery or the length of a hearing in order to comply with statutory or regulatory time limitations, and *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB Sept. 27, 1996), in which the Board found that an ALJ could not limit the receipt of evidence based on the "undue delay, waste of time, or needless presentation of cumulative evidence" standard of the OALJ Rules of Practice at 29 C.F.R. § 18.403, but rather could only limit "unduly repetitious" evidence pursuant to the whistleblower regulation at 29 C.F.R. § 24.5(e)(1).

We recognize that the Board's rulings in *Timmons* and *Seater* are based on the principle that employee discrimination cases are often difficult to prove, therefore requiring an opportunity for extensive discovery, and hinging, perhaps, on the cumulative effect of circumstantial evidence rather than direct evidence of discrimination. If, however, an equally important principle is achieving a reasonable timeliness standard, the *Timmons* and *Seater* rulings must be modified by statute or regulation to provide more discretion to the presiding ALJ to control discovery and admission of evidence.

C. *Adequate staff to meet proposed time constraints.*

Timeliness standards are only reasonable if the responsible agency has adequate staff. Whistleblower hearings often involve complex legal issues, difficult discovery and evidentiary issues, and parties with a great deal of personal animosity. They require intense involvement by the presiding ALJ through several months of discovery and days or weeks of hearings. Thus, OALJ would need to add ALJs and attorney-advisors in order to reduce the time it takes to complete a hearing and issue a recommended decision.

II. INFORMATION SHARING

OALJ has long had a computerized case tracking system that encompasses all program areas adjudicated by this office. Each case type is easily identified by the Docket Number. Thus, we have been able to track case development with precision in any case area for many years.

The integrity of the case tracking system would be jeopardized if whistleblower cases were removed from this system, and OALJ would be opposed to setting up a different system for this one case type. We would be willing, however, to work with OSHA, the ARB, and the NRC on exchange of information.

I note that OALJ has long directed ALJs to serve the NRC in ERA whistleblower cases. Recommended decisions relating to settlements are also served on the NRC, and all ALJ and ARB decisions are available on the OALJ Home Page on the World Wide Web. Thus, I am not quite certain why the NRC has difficultly tracking the progress of DOL adjudications. Moreover, I am not aware of any requests by NRC for access to additional information or to participate in the adjudicatory process at the ALJ level. If OALJ can assist the NRC in its monitoring program, we will be willing to provide the NRC with any information from our case tracking system that it may need.

JMV/trs

-3-

Comments From the Employment Standards Administration, Department of Labor, and Our Evaluation

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

FEB 27 1997

Ms. Carlotta C. Joyner
Director, Education and
Employment Issues
U.S. General Accounting Office
Washington, D.C. 20548

Dear Ms. Joyner:

This is in reply to your letter to the Acting Secretary of Labor requesting comments on the GAO report entitled Nuclear Employee Safety Concerns: Allegation System Offers Better Protection, but Important Issues Remain. The enclosed comments are the concerns of the Employment Standards Administration.

The Department appreciates the opportunity to provide comments on this report.

Sincerely,

Bernard E. Anderson

Enclosure

Comments of the Employment Standards Administration

Now on p. 1.

See comment 1.

On page 1, the first sentence of the second paragraph states that "Federal laws prohibit retaliation by power plant operators (licensees)...." The employee protection provisions of the Energy Reorganization Act provide that "No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant" may discharge or discriminate against an employee. Thus, the protections are applicable to all employers, not just licensees.

Now on p. 3.
See comment 2.

The first line on page four states that "employees were concerned about it taking years for Labor to complete action on discrimination complaints." This statement is made before the process of filing a complaint, a possible review by an administrative law judge, and review by the Secretary of Labor, is outlined. We suggest outlining the process at this point so that a reader unfamiliar with the process will understand that there may be several distinct actions involved.

Now on p. 3.
See comment 1.

Beginning in line ten of paragraph one on page four, the report indicates that the purpose for the reassignment of responsibilities between the Occupations Safety and Health Administration (OSHA) and the Wage and Hour Division (WHD) was "to improve the quality and timeliness of investigations." This is not an accurate characterization of the primary purpose of the reassignment or of the results of the pilot project. Prior to the reassignment, OSHA had responsibility for employee protection or whistleblower provisions of certain laws and staff devoted to the enforcement of these provisions. The WHD had responsibilities for certain employee protections affecting farm workers and would be able to make field sanitation inspections as a part of regular investigations. A pilot project was initiated to test the proposition that the Department as a whole would make better use of its resources, and therefore better serve the public, by consolidating these responsibilities in separate agencies. The Secretary's Orders making the exchange noted that the pilot project conducted in the Dallas Region "resulted in a determination that the respective agencies would make better use of their program expertise, and therefore, that the Department of Labor would more effectively and efficiently utilize its resources, by a permanent transfer of specific enforcement activities between the Assistant Secretaries for ESA and OSHA." It would be more accurate to characterize the exchange as being for the purpose of better use of program expertise and effective and efficient use of resources.

Now on p. 4.
See comment 1.

Line eight in the last paragraph on page four states "NRC and Labor have yet to act on recommendations requiring statutory changes." We believe this should read "regulatory changes."

Now on p. 3.
See comment 1.

The footnote on page six provides the first detail on the exchange of responsibilities between OSHA and WHD. We suggest that this information

be provided earlier and in the body of the report rather than in a footnote so that readers unfamiliar with the exchange will not be confused by the references made up to that point.

Now on p. 7.

A statement is made in the last sentence on page eight regarding federal regulations allowing extensions that waive the 90-day time frame required in the statute. There is no such provision currently in the regulations. If WHD was unable to meet the 30-day statutory deadline, it attempted to get the parties to agree to an extension. In all instances, WHD completed the investigative phase as quickly as possible.

See comment 3.

Now on p. 15.
See comment 1.

On page 15 in the third paragraph, the statement is again made regarding the OSHA/WHD exchange being made to "improve the quality of investigations." Please see our earlier comments regarding this statement.

Now on p. 49.
See comment 1.

The action for Recommendation IIC-6 on page 54 states that the transfer "is due to take place February 1, 1997." This should be changed to read that the transfer took place effective February 3, 1997.

The following are GAO's comments on the Assistant Secretary of Labor for Employee Standard's letter dated February 27, 1997.

GAO Comments

1. Wording revised.

2. Wording unchanged. We believe that the description of the process in the preceding paragraph adequately conveys that there may be several actions involved at Labor.

3. Wording unchanged. Although the regulation does not specifically state that the 90-day time frame can be waived, current procedures have the same effect as waiving the time frame: Cases are not completed in 90 days. We do not disagree with the Assistant Secretary's comment that the Wage and Hour Division completed the investigative phase as quickly as possible.

GAO Contacts and Staff Acknowledgments

GAO Contacts

Larry Horinko, Assistant Director, (202) 512-7001
Bob Sampson, Senior Evaluator, (202) 512-7251

Staff Acknowledgments

In addition to those named above, the following individuals made important contributions to this report: Joan Denomme and Mary Roy gathered and analyzed essential information and drafted the report; Elizabeth Morrison contributed extensively to development and presentation of the report's message; and Gary Boss and Philip Olson provided technical advice concerning Nuclear Regulatory Commission activities.

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