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PETITION RULE PRM 30-62
(64FR57785)

By Hand

Mr. David L. Meyer, Chief
Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mail Stop: T6D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Petition of the Union of Concerned Scientists for Rulemaking on Employee Protection Regulations (64 Fed. Reg. 57785)

Dear Mr. Meyer:

Enclosed are the comments of Winston & Strawn on the Petition for Rulemaking filed by the Union of Concerned Scientists, as noticed in the *Federal Register* on October 27, 1999. UCS petitions for a rule that would mandate training of licensee supervisory and management personnel concerning the NRC's employee protection regulations. For the reasons set forth in the enclosed comments, no rulemaking is justified or appropriate.

Thank you for your attention to this matter.

Respectfully submitted,



Donn C. Meindersma

Encl.

PDR PRM 30-62

COMMENTS OF WINSTON & STRAWN ON THE
UNION OF CONCERNED SCIENTISTS' PETITION FOR
RULEMAKING MANDATING EMPLOYEE PROTECTION TRAINING

January 10, 2000

Winston and Strawn submits these comments on the petition for rulemaking filed on August 13, 1999 by the Union of Concerned Scientists (UCS). *See 64 Fed. Reg. 57785* (October 27, 1999). The petition requests that the NRC amend its rules to require that all licensees provide a specific form of training to supervisors and managers—namely, training on the Nuclear Regulatory Commission's (NRC) regulations that prohibit discrimination against an employee because the employee raised a safety concern.

For the reasons that follow, the petition should be rejected. First, UCS fails to offer any meaningful justification to support its petition. In addition, amending the NRC's rules to mandate a specific form of training would be inconsistent with the NRC's approach that, while licensees are expected to foster safety conscious work environments at their licensed facilities, they should have flexibility in determining how to achieve that objective. Indeed, the NRC has already indicated that licensees may use training as a tool to foster safety conscious work environments. A rule *mandating* training is neither warranted nor appropriate.

BACKGROUND

Licensees have already taken significant steps to assure that workers feel free to raise nuclear safety concerns without fear of retaliation. In tailoring their efforts to foster safety conscious work environments (SCWE), licensees have taken into account site-specific needs and circumstances. For example, some licensees have established formal employee concerns programs as safety nets to assure that an avenue for voicing safety concerns is available to all employees, even those who may be reluctant to utilize, or have not been satisfied in using, the "chain of command" for reporting concerns.

While no NRC rule requires licensees to foster SCWEs, the NRC's 1996 Policy Statement does set forth the agency's expectations in this regard. *Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation: Policy Statement*, 61 *Fed. Reg.* 24336 (May 14, 1996). Moreover, 10 C.F.R. § 50.7 and similar NRC employee protection regulations have long made clear that discrimination against an employee because the employee engaged in protected

activity is prohibited and will lead to enforcement penalties. The Policy Statement and regulations provide clear incentives to licensees to promote safety conscious workplaces and to implement measures designed to minimize the risk that discrimination will occur.

The NRC in the past has—quite properly in our view—refrained from attempting to prescribe specific workplace policies and practices to foster safety conscious workplaces. In the Policy Statement, the NRC conveyed its policy expectation that licensees should promote a SCWE. Rather than prescribe specific SCWE measures, the Policy Statement identified "attributes" of a SCWE and identified voluntary tools that "may" contribute to a safety conscious workplace.

For example, the NRC chose not to mandate that all licensees establish employee concerns programs (ECPs). Rather, the NRC concluded that each licensee should be free to consider the factors specific to their sites, including "the number of employees, the complexity of operations, potential hazards, and the history of allegations made to the NRC or licensee." *Id.* at 24338. As a result, a variety of ECPs have matured. Each program has been structured to accommodate a site's particular workforce and is designed and staffed in light of the frequency with which concerns are raised. Because the NRC has not been prescriptive with regard to ECPs, licensees remain free to fine-tune their ECP's as circumstances warrant—and even to eliminate such a program if another mix of "SCWE tools" would more effectively foster the desired work environment.

The NRC specifically addressed training in its Policy Statement. The NRC recognized that initial and periodic training of employees and supervisors could serve as a tool to foster a SCWE. As with ECPs, however, the NRC did not mandate or prescribe training. Nor did the NRC suggest that "required" training would necessarily promote a SCWE better than voluntary training. Rather, the NRC recognized, as a general matter, that "the most effective improvements to the environment for raising concerns will come from *within* a licensee's organization." *Id.* at 24337 (emphasis added).

In sum, in adopting its policy in this area, the NRC expressly rejected the notion of a mandated approach to fostering a SCWE and in minimizing the risk of incidents of discrimination:

The intent of this policy statement is to emphasize the importance of licensee management taking an active role to promptly resolve situations involving alleged discrimination. Because of the complex nature of labor-management relations,

any externally-imposed resolution is not as desirable as one achieved internally.
61 Fed. Reg. 24339.

The NRC's rationale should not be disturbed, as licensees are best suited to establish and promote safety conscious workforces and workplaces, and to determine how discrimination, perceived or actual, can best be avoided.

THE UCS PETITION

Notwithstanding the NRC's consistent regulatory approach in this area, the UCS petitions the NRC to amend its regulations to mandate training of first-line supervisors, managers, officers and directors "about their obligations with respect to employee protection regulations," such as Section 50.7. This request should be denied as it represents an unnecessary departure from the NRC's approach in setting SCWE expectations.

As a basis for the proposed rule, the UCS petition generally contends that the NRC fails to hold employees who engage in discrimination "accountable" for their actions. In an attempt to support this, the petition asserts that only four out of more than a hundred recent enforcement actions against individuals were based on employee protection violations. (In its petition, UCS concedes that less than a quarter of these one-hundred-plus enforcement actions involved discrimination claims in the first place. UCS also discounts Letters of Reprimand in this statistical "analysis.") From this data, UCS concludes in its petition that "the agency seldom imposes enforcement actions against individuals even when it concludes that individuals were responsible for illegal discriminatory actions."

In an effort to demonstrate that more frequent individual enforcement is desirable, the petition compares discrimination enforcement actions and enforcement sanctions for fitness for duty violations. According to the petition, the NRC typically issues a Notice of Violation (NOV) to the licensee (but not the individual "wrongdoer") in discrimination cases, but issues an NOV to the individual (but not the licensee) in fitness for duty cases.

Beyond its statistics, the immediate basis for the UCS's broad conclusion that the NRC "is not holding individuals who violate the employee protection regulations accountable" appears to be the NRC's decision not to take individual enforcement action against a manager in connection with a recent Section 50.7 violation cited against FirstEnergy Nuclear Operating Company for an incident of discrimination at the Perry Nuclear Power Plant. *FirstEnergy Nuclear Operating Co. (Perry Nuclear Power*

Plant), EA 99-012 (May 20, 1999). After the NRC declined to cite the manager for "deliberate misconduct," UCS filed a Section 2.206 petition requesting that the manager be banned from participating in licensed activities for five years. In denying that petition, the NRC noted it had considered taking enforcement action against the manager but decided not to do so because the manager lacked knowledge of Section 50.7. While in the NRC's view such knowledge did not preclude enforcement action against FirstEnergy under Section 50.7, it did preclude action against the manager under the deliberate misconduct rule, Section 50.5, because "knowledge and understanding of the law" are relevant factors in determining whether deliberate misconduct occurred. As explained below, neither this isolated incident nor UCS's other arguments justify the rulemaking for which UCS petitions.

COMMENTS

I. UCS Fails to Present Justification for the Proposed Rule.

A. *The NRC has clearly and effectively communicated its expectations regarding the prohibition against discrimination.*

The NRC's prohibition against discrimination, as reflected in Section 50.7 and elsewhere in the regulations, coupled with the NRC's Policy Statement regarding the freedom of employees to raise safety concerns, together have sent a clear message to licensees. Based on our experience, senior officers and managers at licensed plants are well aware of the NRC's expectation that employees who raise safety concerns are not discriminated against for doing so. These officers and managers have taken extensive actions to minimize the risk of discriminatory actions, including communicating to workers the rights and responsibilities respecting employee concerns.¹

Nothing in the UCS petition challenges the effectiveness of the NRC's regulations in this area. For example, the petition does not point to any rise in discrimination allegations, much less an increase in the number of findings of discrimination, based on a lack of workplace knowledge about employee protection requirements. The petition offers no evidence that significant percentages of licensee workplace populations are ignorant of the prohibitions on discrimination. The petition does not contend that acts of discrimination go undiscovered or unpunished. Instead, the

¹ External requirements, such as required posting of information concerning the NRC's employee protection regulations (Form 3) and the posting of the terms of the federal statute prohibiting discrimination (Section 211 of the Energy Reorganization Act), also communicate expectations in this area to the workforce.

petition focuses only on who receives enforcement sanctions after discrimination has occurred.

Indeed, the petition is based primarily on the isolated situation involving a single manager at the Perry Nuclear Power Plant. This is not a meaningful showing that the NRC's regulatory requirements on employee protection have not been effectively communicated to and within licensee workforces. Accordingly, the rule that UCS now demands is simply not warranted.

B. UCS fails to present any policy justification for the additional "accountability" that it contends could be achieved through the proposed rulemaking.

The petition should also be denied on the ground that it advances no specific policy justification for its objective: more frequent enforcement sanctions against individuals who are found to have discriminated against employees for engaging in protected activity.

While UCS generally notes that just four of twenty-odd discrimination actions in recent years included enforcement action specifically directed to individuals, UCS fails to explain why this "rate" of individual enforcement action is problematic or how the Commission's policy objectives under Section 50.7 and parallel employee protection provisions would be furthered by more frequent individual enforcement actions. Instead, UCS offers only an unsubstantiated assertion that discrimination will be abated only if individuals are held "accountable." Notably, that assertion runs counter to the most significant federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, which have the objective to prevent discrimination based on race, gender and other characteristics, but under which individual managers and supervisors do not have personal liability.

UCS's petition appears designed only to serve the objective to encourage additional "punitive" actions against individuals by the NRC when discrimination findings are made. In our view, this objective is misguided. Enforcement actions citing discrimination typically are based entirely on circumstantial evidence. In many instances where it is inferred that a personnel action was taken due to an employee's protected activity, it is apparent that the action was also motivated by legitimate reasons. *See* 10 C.F.R. § 50.7(d). It is also important to note that, where actions are based on NRC investigations, the individual accused of discrimination has had no prior opportunity to cross-examine his or her "accuser" and is otherwise deprived of

the due process rights normally guaranteed through a system of on-the-record adjudication.

Enforcement actions against individuals impose a burden on the individual "wrongdoer" that is altogether different than the burden on corporate licensees, including the threat of lost job opportunities and the personal stigma of having been accused of discrimination. Particularly where the action is based on circumstantial evidence, the NRC should proceed with deliberateness in taking individual enforcement action.

UCS's argument that the NRC should pursue individual enforcement actions in discrimination cases because the NRC does so in fitness for duty cases fails to account for important differences in context. A fitness for duty violation is usually "cut-and-dried" and is not based on circumstantial evidence. Fitness for duty violations may also stem entirely from individual behavior not connected with workplace responsibilities or actions (e.g., off-the-job activities). Discrimination findings, however, depend on inferences and circumstantial evidence. Discrimination cases also flow from actions that are inherently related to workplace decisionmaking (such as performance evaluations and termination decisions). Thus, when an individual engages in proscribed drug use, he or she does so apart from any workplace authority he or she may have. In taking action found to be discriminatory, in contrast, a supervisor or manager is exercising authority granted to that person only by virtue of his or her status within the licensee's organization. For these reasons, taking action against individuals in fitness for duty cases and against licensees in discrimination cases is a logical practice.

Finally, in any given case, enforcement action may not be warranted against an individual supervisor or manager based on the totality of the circumstances. For example, despite a finding that a manager was motivated to take employment action in part by an employee's protected activity, the circumstances contemplated by 10 C.F.R. § 50.7(d) may be in play, or the manager may otherwise have a history of being receptive to employee concerns and may have been a strong contributor to a SCWE. For that reason and many others, enforcement action against the individual may not be the appropriate course of action. In sum, UCS's premise that the NRC does not frequently enough impose individual enforcement sanctions in discrimination cases is itself flawed. Certainly, UCS's petition does not provide justification for more frequent individual enforcement action.

C. *As a general matter, licensees already offer appropriate training.*

As already noted, it is the NRC's expectation that licensees will foster safety consciousness through voluntary efforts, including training programs and ECPs as warranted, specific to their facilities. The industry has closely followed both NRC enforcement practices in this area and events such as the NRC's 1996 Order to Northeast Utilities requiring third-party review of employee concerns resolution at Millstone. Although training on employee protection issues is by no means new, these events, coupled with individualized assessments by licensees of their workforces, have inspired training as one of several tools used to foster safety conscious workplaces.

For instance, although training is not required, it is our experience that most licensees offer training for supervisors and managers on the freedom of employees to raise safety concerns and on the prohibition against discrimination, when it is appropriate to do so. Many licensees offer a training segment on these matters in connection with General Employee Training. Many licensees also provide special supervisory training courses designed to address employee rights and responsibilities regarding employee concerns. Other licensees may choose to offer this training on particular occasions and/or to particular departments on an as-needed or "just-in-time" basis. The variety of voluntary measures demonstrates that a broad prescriptive measure in response to isolated incidents of discrimination is unwarranted.

It is also our experience that the voluntary provision of training programs itself signals to the workforce that senior management places a high priority on employee concern resolution and the avoidance of discrimination. Were the NRC to mandate training, it would run the risk that employees would perceive management as providing the training only because it was "forced to" by regulation—not because the licensee has a sincere resolve to foster a workplace culture that is safety conscious.

D. *UCS's "Justification" for the proposed mandatory training would apply to any NRC regulation.*

UCS's argument that training will prevent an employee who causes a violation of NRC requirements from avoiding citation for deliberate misconduct should also be rejected because it "proves too much." Presumably every violation of NRC requirements by a licensee is attributable to the act or omission of some individual(s). Taken to its logical conclusion, UCS's argument is that every individual should receive training on every specific NRC regulation so that when a violation of the

regulation occurs, the responsible individual(s) may be cited for "deliberate misconduct."

Such a scheme would mark a dramatic change in NRC enforcement policy—a change not warranted by anything that appears in the UCS petition. Further, if it is not the intent of UCS to promote such a drastic re-focus in enforcement policy, UCS has not identified why employee protection rules should be singled out for a special training requirement and more frequent "deliberate misconduct" enforcement. The NRC has appropriately set forth its expectations regarding non-discrimination in its rules, and UCS has failed to provide a sufficient basis for mandating special training on that rule.

II. Mandated Training Is Inconsistent with the NRC's Regulatory Approach in the SCWE Arena.

A. *The NRC should not mandate training because it is something best achieved through a licensee-designed program to address concerns specific to the licensee's organization.*

As the NRC has already recognized, the licensee is in the best position for deciding how to foster a SCWE and for making periodic adjustments to enhance safety consciousness. UCS proposes a mandated tool—a proposal that should be rejected because it is inconsistent with the NRC's position that SCWE efforts are most effective if they develop from within the licensee's organization and are tailored to meet the licensee's needs.

Licensees are best able to identify the scope of training, the substance of the training, and the target "audience" for training, taking into account "the number of employees, the complexity of operations, potential hazards, and the history of allegations made to the NRC or licensee"—the same factors that the NRC cited as justifying a licensee-based approach to a SCWE. For these reasons, licensees should retain their discretion to determine when, how, and to whom they offer training on employee protection issues.

As noted above, most (if not all) licensees already have voluntarily initiated training programs in this regard. An NRC mandate likely would cause these licensees to tailor their programs not to fit their specific needs, but rather with an aim to prevent enforcement action under a new training rule. This risk would be particularly significant were the NRC to adopt a rule containing detailed training requirements. Licensees might thus consider abandoning existing training efforts—even if those

efforts have been entirely satisfactory—to meet NRC requirements that, by their nature as a rule, would not be tailored to the specific needs of an individual workplace. In short, a training rule would add unnecessary regulatory burdens, as well as financial burdens, without a clear benefit and possibly diminishing the effectiveness of existing programs.

B. *Mandated training would not necessarily address the types of discrimination that may occur.*

UCS's petition offers no basis for its assumptions that training will prevent findings of "discrimination" and, in the event that discrimination is found to have occurred, will render such action "deliberate" within the meaning of Section 50.5.

While licensees undoubtedly offer training with the expectation that it will minimize the risk that discrimination might occur, discrimination enforcement actions increasingly are not based on simple fact situations in which a manager or supervisor is angered by an individual's protected activity; instead, such actions often flow from more complex situations where the employment action was not clearly motivated by discriminatory animus, where there may have been dual motives for the employment action (including legitimate reasons), or where it was not clear until enforcement action was taken that protected activity was an issue in the case. Discrimination findings arising from complex circumstances may not be foreseeable and cannot be addressed in training programs.²

For example, in an enforcement action against a contractor foreman at Seabrook earlier this year, the NRC determined that the foreman had selected an electrician for layoff at least "in part" because the electrician had notified one of the licensee's Quality Assurance (QA) representatives of a safety concern. *North Atlantic Energy Service Corp. (Seabrook)*, EA 98-165 (Aug. 3, 1999). Yet as the NRC acknowledged in its correspondence in that case, "legitimate reasons supporting the layoff may [have existed]." To the extent the foreman believed he had a legitimate basis for the layoff, training on the employee protection regulations would not necessarily have produced

² This is not to say that training programs are without benefit. Training on employee protection regulations can provide important information about licensee and NRC expectations in this regulatory arena. The concern addressed here is that even with training, a manager or supervisor may find himself or herself facing a difficult personnel issue, the circumstances of which are unique enough that training could not have contemplated it. For example, a manager or supervisor may be called on to address an employee who raised safety concerns in a caustic or insubordinate manner. Even with training, the supervisor might conclude that discipline against the employee is in order, only to be told later that an inference was drawn that he was acting "in part" with retaliatory motive—in violation of Section 50.7.

a different outcome. Notably, according to the NRC's correspondence to the foreman in the case, he had a history of being "supportive of workers raising safety concerns" to him.

For the same reasons, the fact that an employee has received employee protection training does not and should not transform every case in which the NRC finds that discrimination occurred into a case of "deliberate misconduct." The "gray" lines often involved in discrimination cases, the presence of a legitimate basis for an employment decision, and other factors may merit a determination that a Section 50.5 violation did not occur. Accordingly, the premise of UCS that mandatory training will justify more frequent individual enforcement action is not a valid one.

CONCLUSION

For the foregoing reasons, the NRC should decline to engage in rulemaking as UCS requests. We appreciate your consideration of these comments.

— *WINSTON & STRAWN*