United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Commerce, House of Representatives

September 1997

NUCLEAR POWER SAFETY

Industry Concerns With Federal Whistleblower Protection System

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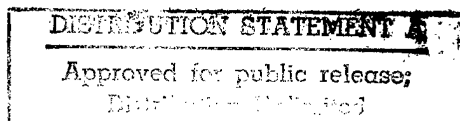

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GAO/HEHS-97-162

United States
General Accounting Office
Washington, D.C. 20548

Health, Education, and
Human Services Division

B-275364

September 2, 1997

The Honorable Joe Barton
Chairman, Subcommittee on Oversight
and Investigations
Committee on Commerce
House of Representatives

Dear Mr. Chairman:

Few issues have so engaged the attention of nuclear industry regulators and industry officials as the operation of the federal system to protect employees who raise safety concerns. The actions that a utility takes in response to employee concerns affect its reputation with regulators, which, in turn, influences the amount of trust that regulators afford the utility when employee allegations are made against it. This is especially true for a utility that is a regulated organization licensed to operate a nuclear reactor—a "licensee." The Nuclear Regulatory Commission (NRC), as the government agency responsible for the regulation of the nuclear power industry, asserts that establishing and maintaining a safety-conscious work environment that encourages employees to identify and help resolve concerns is crucial for maintaining plant safety.

Protection processes were established within NRC and the Department of Labor to encourage nuclear industry employees to raise safety concerns with their employers or with NRC or others without fear of discrimination. Section 211 (formerly section 210) of the Energy Reorganization Act of 1974 (ERA), as amended (42 U.S.C. 5851), makes it unlawful for an employer to discriminate against an employee who has "blown the whistle" by engaging in one or more "protected activities" related to reporting safety concerns.[1]

Some members of the Congress recently expressed concern that the laws, as implemented by NRC and Labor, have not adequately protected nuclear power industry workers who raise health and safety issues. Our report

[1]The terms "blowing the whistle" and "whistleblower" are used throughout the industry to refer to voicing a safety concern or alleging a safety problem. The six specific protected activities listed in the act are notifying an employer of an alleged violation of the ERA or the 1954 Atomic Energy Act (AEA); refusing to engage in any practice made unlawful by the ERA or AEA if the employee has identified the alleged illegality to the employer; testifying before the Congress or at any federal or state proceeding regarding any provision or proposed provision of the ERA or AEA; commencing a proceeding under the ERA or AEA or a proceeding for the administration or enforcement of any requirement imposed under those acts; testifying or being about to testify in such proceedings; or assisting or participating in any other manner in such a proceeding or in any other action to carry out the purposes of the ERA or AEA.

entitled Nuclear Employee Safety Concerns: Allegation System Offers Better Protection, but Important Issues Remain (GAO/HEHS-97-51, Mar. 31, 1997) detailed recent actions NRC and Labor have taken to strengthen whistleblower protection and reviewed other recommendations made by an NRC review team that, if implemented, might further improve the system. However, that study did not include a discussion of how these changes and proposals for additional change have been received by the nuclear power industry. Industry officials point out that this recent concern for whistleblowers comes at a time when (1) competitive pressures may lead to workforce changes that have historically resulted in an increase in whistleblower allegations, (2) industry managers perceive both increased regulatory pressure on licensees and broadened protections for whistleblowers, and (3) industry believes it has succeeded in developing and maintaining an effective safety culture.

Given your concerns about the tension between providing adequate protections for whistleblowers and not overburdening industry with a system that intrudes upon industry's ability to manage its operations, you asked us to obtain the perspective of nuclear industry officials on

- how NRC and Labor have implemented federal processes to protect whistleblowers,
- whether Labor's rulings on protected activities have had any effect on industry's ability to manage its workforce and comply with NRC regulations, and
- whether abuse of the federal whistleblower protection system exists.

To respond to your request, we interviewed industry and federal government officials and asked for their views about the whistleblower protection processes and selected rulings made by the Secretary of Labor. We interviewed NRC officials, officials from Labor's Administrative Review Board (ARB), Labor administrative law judges (ALJ), selected licensee managers, attorneys for industry licensees and employees, and advocates for licensees and the nuclear power industry. We reviewed recent Labor rulings related to whistleblower complaints, pertinent sections of the ERA and other statutes, the Code of Federal Regulations, and NRC's and Labor's guidance and policy directives on whistleblower investigations and other processes.

To determine which industry officials to interview, we discussed the areas of concern with representatives of the Nuclear Energy Institute (NEI), an industry organization whose members include the chief executives of the

nation's nuclear power companies, and with attorneys with experience in defending companies in whistleblower cases.[2] We specifically sought licensees that had been parties to significant rulings by the Secretary of Labor and asked industry representatives to suggest other industry sources who might want to provide comments. From these discussions, we chose industry officials that represent from 52 of the 110 generating units that use nuclear power to produce electricity in the United States today, including licensees involved in whistleblower cases decided by the Secretary of Labor from 1992 to 1996. (See app. I for details of our scope and methodology and app. II for the list of licensees we interviewed.)

Results in Brief

While industry officials have no disagreement with the policy underlying the federal whistleblower protection system, some say that the current NRC and Labor processes take too long to complete, are redundant, consume large amounts of managers' time and other resources, interfere with effective management, and are often used to resolve issues only marginally related to nuclear safety. Those officials are most concerned about the overlapping actions of NRC and Labor in the whistleblower protection system, which they believe contribute to lengthy and unnecessarily contentious proceedings. Our March 1997 report noted that many of these issues have previously been raised and that corrective actions are under way to improve several of these areas. However, some industry officials believe that few of these actions will help solve the problems that they have with the system.

These officials also say that some of Labor's rulings during the 1990s broadened whistleblower protections and undermined industry's confidence in the system's ability to resolve issues fairly for employers. Officials claim that Labor's decisions have expanded the definition of "protected activities" so much that management now has difficulty performing actions such as employee reassignments or downsizing. Industry officials say that complying with NRC regulations has been complicated by Labor's enlargement of protected activity. For an example of an activity that Labor has deemed "protected," industry officials cited a ruling that allows employees to withhold their safety concerns from management and instead report safety concerns directly to the media or to NRC rather than going through the plant's management.

[2]We interviewed individuals in a variety of occupations—managers and lawyers primarily—however, in this report we use the terms "official" and "officials," unless otherwise noted.

Abuse of the whistleblower protection system, officials claim, takes the form of employees' (1) making discrimination allegations, some of which are completely frivolous, and using their "protected" status to insulate themselves from personnel actions, such as negative performance evaluations or reassignments, or (2) threatening to file discrimination allegations to avoid or delay layoffs, negotiate buyouts, or receive other financial settlements. However, while they are concerned about the burdensome and costly processes that result from such abuse, neither the industry officials we interviewed nor NEI had information on the extent of such abuse or believe that such data could be collected. Moreover, NEI officials questioned whether it is possible to collect such data.

Industry officials' suggestions to improve whistleblower protection emphasized holding in abeyance NRC action to investigate or engage in enforcement action based on whistleblower claims until Labor has completed its investigations and issued a final ruling. In addition, industry officials suggest setting time limits for NRC and Labor actions and final decisions, penalizing employees who pursue frivolous allegations beyond the initial stages, and using alternative dispute resolution (ADR) options when the allegations do not appear to involve significant safety issues. Industry officials also say that NRC and Labor should clearly define "protected activities" in the public record. However, as a result of their perceptions about the processes and Labor's rulings, as well as their view that little is likely to change in their favor, the industry officials say they have become increasingly inclined to avoid the federal system and settle complaints before the issues are made known outside the plant or to settle the cases early in the federal whistleblower protection processes.

Officials from NRC and Labor, however, did not agree with these industry comments and viewed their agencies as acting appropriately and within their authority. NRC and Labor officials also said that the whistleblower protection system ensures that employees feel free to raise safety concerns to both management and NRC and promotes a work environment that is crucial for maintaining safety in the nuclear industry. Neither agency accepted the assertion by some industry officials that the whistleblower protection system is plagued by abuse.

Background

In 1977, NRC took the position that, even in the absence of explicit statutory authority, (1) it had general authority under AEA to investigate alleged discrimination against employees for raising safety concerns and (2) it had authority to take enforcement action when discrimination

allegations were substantiated. NRC also took the position, however, that it lacked authority to provide individuals with personal remedy for the discrimination. In 1978, the Congress passed section 210 (now section 211) of the ERA, which granted such authority to the Department of Labor.[3] In 1982, NRC issued regulations consistent with section 210 that prohibited licensees and their contractors from discriminating against employees for raising concerns. In that year, NRC also entered into a memorandum of understanding with Labor on the complementary responsibilities of the two agencies. Since then, NRC and Labor have shared responsibility for investigating discrimination allegations.

In 1992 and 1993, in response to complaints by employees who claimed they were not being protected from discrimination, NRC initiated reviews of the employee protection system. In a January 1994 report, an NRC review team concluded that the existing NRC and Labor processes, as then implemented, did not sufficiently protect employees who had alleged discrimination. The team recommended a series of improvements to the protection system. Our recent report summarizes the current status of actions taken on these recommendations. Industry officials, however, do not believe that NRC produced evidence of a problem with the industry safety culture and expressed frustration that what they see as a few isolated cases drives NRC to greater regulatory action.

Recent Developments

Other events have also affected the nuclear power industry. The Energy Policy Act of 1992 included provisions to allow competition at the wholesale level in electricity generation. Since this law was enacted, actions for the economic deregulation of retail power markets have also taken place. Structural changes and economic uncertainties driven by regulatory and market forces have also affected the nuclear industry. The number of nuclear power units operating or under construction has decreased. Employment in the industry has declined.

Because of these changes to the business environment, NRC has raised as an issue the possibility of the erosion of nuclear safety throughout the industry. Pressures for nuclear plants to become low-cost energy producers and the potentially limited resources available for plant improvements have been identified as reasons for concern about possible reductions in nuclear safety. NRC has made known its concern about failure by industry management to identify or resolve problems that management may incorrectly view as having little safety significance.

[3]The legislative history for section 210 also confirmed NRC's authority under the AEA.

Because NRC relies on licensees and their employees to identify and resolve workplace safety concerns, it believes that licensees must maintain an environment in which the employees are encouraged to freely raise these concerns without fear of reprisal. Consequently, the issue of whistleblowers and their protection has become increasingly important.

Industry officials are aware of concerns about upcoming restructuring and deregulation of the electric utility industry but stated that they will not affect licensees' ability to address safety concerns. Industry representatives are concerned, however, that if additional downsizings and other industry reorganizations occur, an increase in discrimination complaints is likely to follow. Consequently, the federal processes associated with an increase in cases will divert finite management resources and thus may create additional pressure in a competitive environment.

In our March 1997 report on nuclear safety concerns, we reviewed the joint NRC-Labor process for action on allegations of discrimination. Our report concluded that NRC and Labor have acted on some NRC and Office of Inspector General (OIG) recommendations to enhance their management of nuclear employee discrimination cases and that the resulting changes should improve monitoring of the process, increase NRC involvement, and augment licensees' responsiveness to employee concerns. However, we also concluded that other recommendations that could be made that would further improve the system had not been implemented and that better coordination and commitment from both NRC and Labor would be required to do so. We recommended that Labor establish and attempt to meet realistic time periods for investigating complaints. We recommended that NRC improve its monitoring of the allegation process and its coordination with Labor. Finally, we recommended that NRC implement methods to obtain information on the environment for reporting safety issues in nuclear plants.

System for Protecting Employees Involves Two Agencies

Although the management of a nuclear power plant charged with discrimination faces two agencies investigating the same allegation, the agencies have different purposes for their investigations. While Labor supports plant safety indirectly by providing personal remedies to industry employees who have been discriminated against for raising safety allegations, NRC has direct responsibility for ensuring that nuclear plants operate safely.

In 1982, when the whistleblower protection system was in its early stages, NRC and Labor entered into a memorandum of understanding in which they agreed to carry out their responsibilities independently but to cooperate and exchange timely information in areas of mutual interest. 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 initially formulated to implement the memorandum also specified that NRC would not normally initiate an investigation of a complaint if Labor was already investigating it or had completed an investigation and found no violations. If Labor found a violation, NRC would consider Labor's actions before deciding what enforcement action, if any, to take.

Prior to October 1993, NRC had investigated relatively few discrimination complaints and usually waited for the Labor Secretary's final decision, which generally took longer than an NRC investigation. 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 better focused resources on high-priority discrimination cases. Currently, 55 percent of NRC's Office of Investigations (OI) workload consists of investigating whistleblower discrimination allegations. However, in 96 of the 106 discrimination cases closed by OI in fiscal year 1996, no discrimination was found.

NRC's Response to a Discrimination Allegation

When NRC staff receive a discrimination allegation, they conduct a review to determine (1) whether the allegation has safety implications and (2) the level in the organization of the alleged discriminator. However, NRC staff generally do not inform plant management of the specific nature of their concerns. NRC staff also assess the priority of the discrimination allegation. If NRC determines, on the basis of an OI investigation, that a violation occurred, or if an adjudicatory determination of discrimination is received from Labor, NRC's Office of Enforcement assesses the case in accordance with its enforcement policy, which defines four levels of severity, and advises on the appropriate sanction, if any.

If Labor ultimately finds that the employer has unlawfully discriminated against an employee, it may, under the ERA, order the employer to make restitution. Restitution can include reinstating employees to their former position and providing back pay and possibly other compensation. If NRC

finds unlawful discrimination, based on either an investigation by Labor or an NRC investigation, NRC may (1) serve upon the company a notice of violation that identifies one or more violations of a legally binding requirement, (2) fine the licensee, or (3) have the company's license to operate a nuclear plant suspended, modified, or revoked. Industry officials pointed out that in lodging a confidential discrimination complaint, the employee making the allegation incurs neither expense nor risk. If neither agency finds discrimination or finds that the complaint was entirely frivolous, the person making the allegation suffers no financial loss or other adverse consequences.

One factor NRC uses to determine severity is whether a hostile work environment existed; another is the organizational position of the offender identified in the whistleblower case. Discrimination violations by senior corporate management are level I and are punishable by fines of up to $110,000 per day. Violations by a first-line supervisor are level III and carry lower fines. Civil actions, as well as criminal referrals to the Department of Justice for prosecution of individual managers, are possible.

Labor's Actions to Protect Whistleblowers

Labor's actions to investigate whistleblower complaints made by nuclear industry employees are much like those it takes to protect employees in industries covered by other whistleblower legislation.[4] Labor's role in ERA discrimination cases consists of (1) an investigation by the Occupational Safety and Health Administration (OSHA);[5] (2) a hearing before an ALJ if the OSHA determination is appealed; (3) a review of the recommended decision by the ARB, which issues the Secretary of Labor's final decision;[6] and (4) a review of the settlement, if there is one. Settlements are often made to minimize the cost and time of continuing a case for both the employee and licensee and may occur at any point.

[4]Along with the Energy Reorganization Act, 42 U.S.C. section 5821, other laws containing whistleblower protections include Clean Air Act, 42 U.S.C. 7622; Comprehensive Environmental Response—Compensation and Liability Act of 1980, 42 U.S.C. 9610; Federal Water Pollution Control Act, 33 U.S.C. 1367 and 1369; Safe Drinking Water Act, 42 U.S.C. 300j9; Solid Waste Disposal Act, 4 U.S.C. 6971; Surface Transportation Assistance Act, 49 U.S.C. 31105; Surface Transportation Assistance Act of 1982, 49 U.S.C. app. 2305; and Toxic Substances Control Act, 15 U.S.C. 2622.

[5]Until February 1997, this responsibility was assigned to Labor's Wage and Hour Division. It was transferred to OSHA as part of an exchange of responsibilities to better use program expertise and resources.

[6]Until early 1996, ALJ recommended decisions were reviewed by the Office of Administrative Appeals, and the final decision was signed by the Secretary. Since then, the final decision has been signed for the Secretary by the Chair of the ARB.

Neither Labor's ARB nor the ALJs view nuclear whistleblower cases or issues as being unique or having special circumstances. According to Labor's chief judge, the Office of Administrative Law Judges (OALJ) generally treats all whistleblower cases similarly. He also emphasized that nuclear and environmental cases are governed by the same procedural regulations. In addition, in making decisions for nuclear industry whistleblower cases, ALJs rely on precedents established in whistleblower cases decided under other laws that regulate other industries. However, in considering ERA whistleblower cases, ALJs generally do not consult with NRC staff.

All ALJ decisions in whistleblower cases are rendered in the form of recommendations, which must be reviewed by the Secretary of Labor or designee (since 1996, the ARB). There is a statutory 90-day limit from when a complaint is filed until Labor renders its decision.[7] The ARB has worked to clear up a backlog of cases and told us that it attempts to provide a timely decision in all cases. Either party dissatisfied with the ARB's decision may appeal the final Labor ruling to the appropriate federal circuit court of appeals within 60 days.

Managers' Concerns With Federal Processes That Protect Whistleblowers

Industry officials expressed varied opinions about whether both NRC and Labor should continue to be involved in protection and what role each agency should play. The perspectives expressed about the processes, case outcomes, and potential for abuse appeared to depend largely on whether the licensee had recent experience in dealing with whistleblowers and the processes. Generally, officials without recent experience in whistleblower cases expressed few concerns and showed a reluctance to make comments. None of the industry officials we interviewed who had recent contact with the federal processes was satisfied with them as they are being currently carried out. The officials said they believed too much time is allowed to elapse before reaching a final determination on cases. They were also concerned about redundant and overlapping investigations, intrusion into management processes, contradictory messages from NRC, NRC's interpretation and use of industry data, and the effect of whistleblower complaints on NRC's perception of a utility's overall nuclear operations and safety environment.

Industry officials we interviewed pointed out that before either NRC or Labor becomes involved in the formal federal processes, several in-plant

[7] In our March 1997 report, we note that this statutory limit is rarely met and is considered to be unreasonable by officials at NRC and Labor.

options are available for employees to report safety concerns. Among these options are the front-line manager, middle managers, and upper management, as well as employee concerns programs, personnel offices, and anonymous reporting mechanisms, including hotlines and suggestion boxes. Officials told us that these mechanisms are used to resolve thousands of concerns industrywide each year and that the cases litigated represent a minute fraction of the total number of concerns raised within the industry.

In addition, officials told us that concerned employees who are not comfortable with these reporting alternatives are urged to report directly to NRC. NRC, however, generally prefers that employees inform their management of safety issues directly. Nevertheless, the NRC's expectation that employees will normally raise safety concerns to their employer does not mean that employees cannot come directly to NRC. NRC policy encourages employees to come forward to NRC at any time they believe NRC officials should be aware of their concerns.

Industry Opinions Varied Widely on NRC and Labor Roles

Industry managers and legal representatives expressed widely varying opinions about whether two federal agencies should continue to be involved in the whistleblower protection processes with overlapping responsibilities and which agency should have full responsibility. Some officials said they believe that Labor staff cannot make adequate decisions about the nuclear whistleblowers because they do not understand the safety context and technical environment of the nuclear industry. They criticized Labor staff for not actively consulting during their investigations with NRC resident inspectors or other staff to better understand technical issues and the regulatory context of nuclear plant operations.

Industry officials also told us that Labor staff do not fully appreciate the safety implications that the Secretary's rulings may have on nuclear power operations. Some argued that the Secretary's rulings about public policy protections of whistleblowers have moved beyond Labor's area of expertise (employees' restitution) and have affected technical areas. Some officials said that it would be easier for technically trained engineers to learn about employment law than for Labor staff to understand the highly technical, scientific, and closely regulated environment of a nuclear power generating facility.

Other industry officials, however, fully acknowledge Labor's expertise in human resource and labor law issues. They see whistleblower protection

as being fundamentally about individual disputes and personal remedies and correctly within Labor's purview. Labor's processes of adjudication before the ALJ, with the opportunity for discovery and cross-examination, are especially viewed as positive attributes of the system. Industry officials contrasted Labor's adjudication process with their perceptions of the closed NRC system under which investigations are conducted. They also voiced strong concerns about what they describe as a hostile and accusatory law enforcement attitude that NRC OI investigators often exhibit.

Industry legal representatives raised concerns about the threat of "criminality" that NRC brings into the discrimination investigation process. Some industry attorneys contended that NRC's basis for threatening criminal prosecution related to these cases relies on an expansive interpretation of NRC's authority under the AEA.[8] Industry attorneys also believe that because NRC's investigations can result in a civil penalty and possibly a criminal referral, NRC should interpret its discrimination regulation more narrowly than Labor interprets section 211, an employment discrimination statute, which provides only civil penalties. Thus, they believe that NRC unfairly bases potential criminal action on the outcome of a civil proceeding.

Industry officials also told us that NRC has attempted to expand its activity into Labor's area of responsibility by proposing a personal remedy such as a holding period (whereby an action against an employee who alleges discrimination would be held in abeyance until the complaint has been fully investigated) in its discussion of possible regulatory changes. These legal representatives are concerned as well that NRC attempted to overstep its authority by attempting to tell nuclear management how it should behave in developing and maintaining a safety-conscious environment.

Specific Concerns With Processes

Industry officials commented about the specific problems they encountered with the current federal processes, as well as the use of the processes in general. Specific issues of concern were that the processes take too long, are redundant, interfere with management actions, and are often used to resolve issues unrelated to safety. Officials are also concerned about NRC's possibly inappropriate use of allegation data and heightened enforcement posture. Several of these issues have been raised in prior NRC studies, and steps have been taken or are being considered to

[8]In its comments, NRC noted that the Department of Justice agrees with NRC's interpretation of its authority. We did not verify this assertion attributed to Justice.

respond to them. In our March 1997 report, we reviewed actions NRC and Labor took in response to various review teams' suggestions. We made several recommendations on actions that NRC and Labor could take to improve the processes, timeliness, quality of information, and overall knowledge of the work environment. Industry officials in general, however, did not believe that the changes recently made or proposed would improve the processes much. They said that most of the changes do not take into account the industry point of view.

Processes Believed to Take Too Long

Managers in the nuclear power industry recently involved with the federal processes to protect whistleblowers complained about the extensive time needed to complete investigations at each step. They also complained about the significant amounts of managers' effort and company resources expended in defending themselves through the multiple processes. As we previously reported, according to our analysis of cases from October 1, 1993, to June 30, 1996, the average time needed to reach a determination at the first stage of the process (a Labor Wage and Hour or OSHA investigation) was 4 months, and few cases met the 30-day completion time included in the law.[9] During that same period, the average time required from the first assignment of a case to an ALJ, until a final ruling was rendered by the Secretary, took about 2.5 years.

NRC and Labor agreed that reducing the time to resolve nuclear whistleblower cases would be good for all, and the average times have been reduced somewhat. In discussing the recommendation mentioned in our earlier report concerning limiting the time period of a case to a total of 480 days (and limiting the Secretary of Labor to 90 days to issue a final decision), the chair of the ARB repeated his concern that a 90-day timeliness standard was unrealistic because it would severely affect the parties' ability to file all the necessary legal briefs. He said that meeting this standard would cause Labor to severely restrict the parties' ability to properly respond to the issues presented. Labor's chief administrative law judge commented that while OALJ is not opposed to realistic time standards, his experience was that few complainants or employers were prepared for early hearing dates and that requests for continuances were the rule rather than the exception. NRC staff said that they are continuing to discuss timeliness issues with Labor.

Processes Described as Redundant

The existing federal process involves several steps with actions by multiple agencies, which industry sees as redundant. By regulation, OSHA must complete an initial investigation within 30 days; however, the time is

[9]GAO/HEHS-97-51, Mar. 31, 1997, pp. 17-18.

almost always extended through a waiver requested by the complainant or the licensee. In addition, NRC may conduct a technical review dealing with the safety issues raised and a full-scale OI investigation, which may review the same whistleblower allegation received by OSHA. If either party disagrees with the OSHA decision, it may appeal to Labor's OALJ within 5 calendar days. An appeal sets aside the results of the investigation and initiates a new investigation at the ALJ level.

Industry officials told us that they are in favor of bringing allegations to a close and desire early settlement of the issues. However, in instances in which settlement is not reached, industry sees multiple investigations by different organizations that do not share information as inherently inefficient and as consuming licensee management resources unnecessarily. In addition, industry officials stated that when an appeal to the ALJ is requested by either party, the current practice of discarding the OSHA investigation results is wasteful and adds considerable time to resolving allegations. Even when OSHA investigations and OALJ adjudications do not find discrimination, the Secretary of Labor, through the ARB, may determine that it did occur, causing NRC staff to review the case. Finally, even if a case is settled before a decision by the ARB, NRC's OI may initiate its own investigation.

NRC and Labor officials said they understand the frustration that industry feels because of multiple investigations. The chair of the ARB suggested that a review of the first stage of the process may be in order to determine whether the OSHA investigation phase led to settlements of cases. NRC staff said that they believed the initial investigations resulted in a large number of settlements. (Our analysis of cases investigated while Labor's Wage and Hour staff were responsible for the initial investigation (before February 3, 1997) showed a settlement rate of about 16 percent of cases.) NRC staff added that doing away with the initial Labor investigations would increase NRC's workload. NRC currently uses an OSHA finding of discrimination as a starting point for NRC's dialogue with a licensee over corrective action and also considers the evidence gathered by OSHA during the course of OI's investigation.

Processes Said to Interfere With Effective Management

Many of the managers we interviewed said that the whistleblower protection process interfered with their ability to perform management functions related to those making allegations and their other staff in a timely manner. Managers told us how they were forced to delay decisions on normal supervisory actions because of the consultation necessary in a whistleblower case. Some managers who have been involved with the

processes referred to the consultations as excessive and gave examples of how they were advised to confer with higher levels of management, human resources or personnel units, and the plant's or the parent utility's legal staff before taking supervisory action. Managers complained that in some situations the extra consultations necessary have created a window of vulnerability in which the plant could be exposed to more potential problems from employees whose fitness for duty might be questioned than would have been the case previously, when swift action without consultation was the norm.

Most of the industry managers we talked to believed few of the discrimination allegations were legitimate. However, because of fear for their careers, and because the Department of Justice can hold them criminally accountable for actions deemed to be discriminatory, nuclear industry managers said that they must take all the allegations seriously and respond to them accordingly. Higher-level managers said that the delays associated with processing allegations that do not warrant investigation particularly demoralize managers who come from a command and control environment. They said such delays also decrease plant efficiency and extend the time needed to resolve employees' concerns.

Industry officials also cited examples of how managers become frustrated in dealing with individuals making allegations who have an adversarial relationship with management and how other workers perceive that the whistleblower receives special treatment. Managers at one licensee told us of how one very public person bringing an allegation in a maintenance job was assigned to a favorable "desk job" to guard against further charges of retaliation and that coworkers were unhappy that he was receiving this opportunity and they were not.

Industry officials also told us of how managers were sometimes puzzled about how to behave because of the lack of feedback from NRC's OI on its investigation activities. Several licensees commented about OI staff not communicating to the target of a harassment and intimidation allegation when review of the case found insufficient evidence to support the discrimination allegation. This failure to notify left the accused managers in a state of anxiety for lengthy periods, sometimes for years. Officials told us this failure to communicate is especially worrisome because managers could not be sure whether their past actions were appropriate or not. Managers were also concerned because the OI investigators made

reference to possible criminal, in addition to civil, charges with possible referrals to Justice for prosecution.

Industry officials also said the stigma of being accused in a whistleblower case severely harms the reputation of individual managers and the company. Managers and legal representatives said they were also concerned about the negative publicity created by NRC's issuance of a press release with a notice of violation in these cases. Further, industry officials claim that the damage to an accused individual manager's reputation cannot be undone even if the notice of violation is rescinded.

NRC staff acknowledged that the time to complete investigations could be rather lengthy. They also agreed that they did not ordinarily provide closure letters to each individual investigated. They stated, however, that letters signaling the closure of an investigation are always sent to the licensee, with the expectation that licensee management will inform all concerned employees that the case had been closed. Furthermore, they also told us that while they do have the authority to refer cases to Justice for consideration of criminal prosecution, such prosecution has occurred only once.

Industry Officials Believe That They Get Contradictory Messages From NRC

Industry officials we interviewed said that NRC often gives contradictory messages in its actions and guidance relative to handling whistleblower allegations. Officials said NRC often acts on a finding of discrimination by Labor, even when that finding contradicts the results of NRC's own preliminary investigations by on-site teams. Managers also said that, on occasion, NRC enforcement actions have ignored actions previously taken by the plant management to correct conditions that led to the safety allegations and subsequent discrimination allegations. As a consequence, officials said that managers feel second-guessed, new managers may be penalized for improper actions taken by prior managers, and the public may perceive that problems that have been corrected still exist. Industry officials would like to see NRC publicly acknowledge actions that managers have taken to resolve issues and to see NRC take these corrective actions into account when making enforcement announcements to the media.

Nuclear officials also told us that NRC encourages upper management participation in whistleblower-related situations, but when upper-level management becomes involved in resolving a case, the plant risks increased NRC sanctions if discrimination is found. Under NRC's enforcement procedures, the level of the decisionmaker is considered in

determining the severity of the enforcement action. Therefore, upper-level managers who become involved in these cases to protect lower managers and ensure that whistleblower situations receive the high-level management attention that NRC encourages make themselves and the plant vulnerable to more severe penalties than if they had not become involved.

NEI commented on what it characterized as the extremeness of NRC's enforcement approach by comparing NRC's enforcement policy provisions relating to discrimination with other enforcement provisions relating to reactor operations. Industry representatives pointed out that in the context of reactor operations, a Level I civil penalty applies if a radiological release occurs (as at Three Mile Island). They said they thought it is unreasonable to treat a discrimination finding against a senior member of licensee management with as severe a penalty as would be given with a radiological release.

Although NRC officials disagreed that they automatically act on Labor's decision even if it contradicts their own findings, they did acknowledge that, in almost every case, NRC has adopted the final position of Labor when initiating its enforcement actions. NRC staff said that they review each of Labor's decisions but that without any compelling reason, they do not independently examine the evidence supporting Labor's findings. NRC officials note that while NRC can base its enforcement decisions on Labor's rulings, it is not required to do so. NRC staff gave examples of two cases in which they have refrained from taking action, despite an ALJ or ARB finding of discrimination.

NRC staff also said that confusion about NRC processes could contribute to impressions that NRC actions are contradictory. The OI Director explained that preliminary technical reviews of issues related to discrimination allegations are often handled by resident inspectors or NRC regional staff who focus primarily on the safety issues associated with an allegation, not on the alleged discriminatory conduct of the managers. Investigations of the discrimination allegation by OI investigative staff can result in conclusions about allegations different from those conducted during the preliminary technical review. Also, the Director of the Office of Enforcement acknowledged that long periods of time often passed and that managers changed between original discrimination incidents and enforcement actions. However, he said improper conduct by the company may be dealt with through enforcement actions, even though NRC

acknowledged that new managers were in place and changes had been made.[10]

Managers Question Data NRC Uses

Managers expressed concern about the allegation data that NRC collects, uses, and publishes to indicate the safety conditions at specific nuclear plants. They believe that the data on safety allegations can be taken out of context and are open to a variety of interpretations. For example, data showing a large number of issues and allegations outstanding could indicate problems at a plant or with its management culture. Conversely, the same data could be interpreted to show that employees feel free to raise safety concerns, and this is precisely the environment that NRC wants to encourage. Industry officials expressed particular concern about NRC's February 27, 1997, Federal Register notice, "Safety Conscious Work Environment."[11] The NRC notice requested comments on a proposal that would use changes in the rate or number of allegations as possible evidence of an emerging adverse trend concerning safety consciousness at a facility. Industry representatives were highly critical of having the allegation data used in this way.

In addition, officials told us that management-reported instances of safety concerns are combined with allegations made by employees and contractors in the data that NRC collects and publishes. For these reasons, industry managers said that they believe that NRC needs to do additional work in its allegation data collection and analyses and that they are wary of data-driven enforcement targeting until such a review has been completed.

NRC officials responded that numbers of allegations alone do not drive the start of NRC investigations or enforcement actions and that NRC's policy was not to use management-reported incidents against them. The Director of the Office of Enforcement said that NRC's goal was not to take action against licensees but to create a safety-conscious environment. However, NRC acknowledged that in the past it has combined management reports of safety concerns with employee concerns, a practice that it plans to change. NRC's agency allegation adviser acknowledged that NRC could do more to explain to industry how the data would (and would not be) used. NRC officials said that this explanation might be included as part of a planned Federal Register notice.

[10]The Director of the Office of Enforcement added that if new management acted promptly to settle the matter, this would likely be reflected in the enforcement action, if any.

[11]60 Fed. Reg. 8790 (1997).

NRC's Regulatory Power Affects Officials' Views on Whistleblower Protection System

Industry officials' concerns about the whistleblower protection process are heightened by NRC's regulatory power over licensees regarding the total operation of nuclear plants. Industry officials said that they believe that NRC may take enforcement action against any licensee when Labor finds discrimination, regardless of the circumstances and even when technical safety issues are not at stake. They believe also that a series of whistleblower complaints, regardless of their merit or outcome, may be interpreted as indicating a pattern of problems that will lead NRC to investigate a licensee's overall activities. Even when no wrongdoing is found, the investigations consume management resources, disrupt plant operations, and may generate concern on the part of both consumers and shareholders, to the point of threatening the continued viability of the plant. As a result, managers and legal representatives said that by resolving the cases informally, they attempt to avoid entering the federal whistleblower protection system.

Some industry officials said that NRC in recent years has become unjustifiably aggressive in pursuing allegations, even those that may be questionable. Some expressed concern that NRC has proposed that licensees may be subject to regulatory action if employees merely perceive that discrimination occurred. Industry legal representatives believe that the recent increased concern over whistleblower allegations is a disproportionate response to the relatively few high-profile cases that have received media attention. These officials also noted that what industry saw as proposed NRC regulations on a safety-conscious workplace are vague and incapable of being effectively implemented or objectively enforced.

NEI officials were also highly critical of NRC's proposal to impose a holding period whereby employees who allege discrimination would be guaranteed full pay and benefits until the complaint has been fully investigated. Under current procedures, this could last at least until an ALJ has heard the case and issued a recommended decision. Industry officials said this policy might provide an inducement for some employees to file an allegation to protect themselves against legitimate economically related personnel actions. These concerns are heightened by industry officials' expectations that economic pressures stemming from deregulation will lead to additional personnel actions such as job-shifting and downsizing and that the environment that has led to numerous cases in which adverse actions were based on economic reasons will continue for some time.

Secretary of Labor Rulings Cause Industry Concern

Industry representatives expressed concern about a number of rulings the Secretary of Labor and the ARB have made on whistleblower cases in the past several years, especially what they characterize as significant reversals by the Secretary and the ARB of several ALJ-recommended decisions that favored the industry. They see these rulings, which reversed the ALJs', as having broadened the employee protection system, widened the definition of "protected activities," and interfered with management's ability to efficiently run nuclear power plants.

Secretary Reversed ALJ Recommendations

Nuclear industry legal representatives told us that they monitor Labor's final rulings in whistleblower cases very closely. They find that the percentage of Secretary of Labor or ARB reversals of ALJ-recommended decisions is very high, especially where the ALJ decisions had favored the industry rather than the whistleblower. The chair of Labor's ARB told us that he does not ordinarily "score" its decisions or tabulate data on how cases were decided. In order to be able to assess the accuracy of industry's characterizations of the Secretary's reversal decisions, we asked Labor to review its decisions and categorize them.

Appendix III summarizes the Secretary's rulings from January 1994 through March 1997. According to Labor's analysis and our review, over this period the ALJ's recommendation was in favor of the licensee 44 times and in favor of the employee 7 times. On review, the Secretary affirmed ALJ recommendations 39 times, reversed the ALJ in an employee's favor 11 times, and reversed the ALJ in a licensee's favor 1 time. The bulk of the decisions came in 1995 when Labor issued a number of final decisions for cases that had been pending for some period of time.

In discussing rulings made in 1995, Labor and industry used different totals.[12] Industry representatives initially maintained that in 1995, in the 38 cases in which the ALJ made a recommended decision to the Secretary on the merits of a case, the Secretary affirmed the ALJ decisions 19 times and reversed the ALJ decisions 19 times (a 50-percent reversal rate). Labor's tabulation of the 1995 data shows that in that year the Secretary affirmed ALJ recommendations 17 times, reversed the ALJ in the employee's favor 6 times, and reversed the ALJ in the licensee's favor 1 time. In their comments on the draft report, NEI staff reviewed their 1995 data and identified 42 decisions in which the Secretary addressed substantive

[12]Both Labor and NEI officials stressed that they were not counting reversals made for procedural reasons (for example, whether or not the case was filed on time) or other nonsubstantive reasons. The discrepancy in the total number of cases counted for 1995 may be caused to some extent by how cases were classified as substantive or nonsubstantive.

recommended decisions, affirming decisions 28 times and rejecting recommended decisions 14 times (a 33-percent reversal rate).

Industry attorneys alleged that the percentage of reversals in favor of the employee was higher in nuclear whistleblower cases than in whistleblower cases in other industries or in other federal agency appellate processes. We did not, however, obtain the data necessary to confirm that statement. In addition, Labor calculated that a total of 95 settlements were approved and 5 settlements were rejected over the period January 1994 to March 1997.

Industry Has Appealed Few of the Labor Secretary's Reversals

Either party may appeal an unfavorable decision to the court. Industry legal representatives whom we interviewed stated they had appealed few of the Secretary's decisions. In most cases, they did not view such appeals to be a reliable avenue for relief from adverse decisions because federal agency decisions are given great deference by the courts. They told us that their clients generally make a business decision to either accept the Secretary's decision or settle the case.

NRC and Labor officials confirmed that the number of cases appealed is small. However, they reiterated to us that industry has the right to appeal the rulings and that appeal processes are readily available. Neither the industry nor the agencies keep a count of ERA whistleblower cases that have been appealed. However, in their comments on the report, OALJ officials said that they endeavor to track the ultimate disposition of cases. For ERA cases from fiscal year 1990 to the present, OALJ reported that 20 cases had been appealed to federal courts but did not indicate how many of the appeals were initiated by the complainant and how many were initiated by the respondent employer.

Officials Question Basis for Some Secretarial Reversals of ALJ Decisions

Some industry attorneys alleged that several secretarial reversals of ALJ decisions occurred because of determinations of witness credibility. These counsels argued that proper judgments of witnesses' credibility can be made only by personally seeing and hearing the witnesses, not solely by reviewing the written record. Industry attorneys said that they believe the ALJs are in a better position to determine the credibility of the witnesses because, unlike the Secretary, they observed the demeanor of the witnesses and participated directly in the proceedings. The OALJ staff we interviewed agreed with this position. They also believe that the written record of the case alone does not provide the ARB with a true sense of what

took place during the proceedings. Our review of the Secretary's decisions did not identify any cases in which Labor's documentation showed witness credibility to be the primary reason for a reversal. However, ALJs and industry attorneys suggested that credibility issues may have influenced the Secretary's reasoning for several reversals.

The Chair of the ARB acknowledged that the issue of credibility of evidence had been discussed in the past and that some ALJs had raised the same issues about being present during the proceedings with him. He recalled one case of a disagreement over expert witness testimony but did not remember any other cases in which the credibility of witnesses was the primary determinant in an ARB decision to reverse a recommended ALJ decision.

Officials Say Labor's Rulings Have Broadened Employee Protections

Some industry officials believe that several of the Secretary of Labor's decisions reversing ALJ recommendations have expanded the definition of protected activities beyond what was intended in section 211 of the ERA, with the result that the industry's ability to manage and comply with NRC safety regulations has been curtailed. We have delineated some specific cases in which the Secretary of Labor reversed ALJs' recommended decisions and in which industry officials have viewed the reversals as significant because they believe these rulings have considerably broadened the definition of "protected activities." (See app. IV for more extensive details on these cases.)

- Robainas v. Florida Power and Light. In this case, the Secretary reversed the ALJ and found discrimination when an employee was ordered to take a psychological fitness-for-duty examination and was terminated for refusing to do so. Industry managers said that they are concerned over the effect that ruling has on their ability to meet NRC requirements to safely manage their workforce without being subjected to section 211 liability. The industry believes that a more complete appreciation of NRC's fitness-for-duty regulation would have led the Secretary to understand that a referral, by itself, created no adverse consequences for the employee.
- Hobby v. Georgia Power. In this case, the Secretary reversed the ALJ and held that the employee's raising concerns about a lack of cooperation between himself and a senior nuclear officer was "tantamount to" protected activity. The Secretary ruled that management feared the consequences of a memorandum raising concerns about the reporting structure of nuclear operations and concluded that the complainant's position was eliminated to silence complaints about the company's

reporting structure. Officials said the ruling created a chilling effect on managers' supervisory behavior and ability to pursue legitimate downsizing.

- Mosbaugh v. Georgia Power. In this case, the Secretary reversed the ALJ and permitted the long-term and surreptitious taping of fellow workers, NRC representatives, and management conversations in the plant, considering this taping to be a legitimately protected activity. Managers said the ruling has had the effect of reducing open and frank discussion about technical and safety issues and limiting informal resolution of issues between managers and staff.
- Saporito v. Florida Power and Light. In this case, the Secretary's decision gave an individual making an allegation the right to refuse to disclose safety concerns to the licensee and instead go directly to NRC with a safety allegation without first informing plant management.[13] The Secretary also found it permissible that the individual not go to the licensee even after he identified the safety concern to NRC. Licensees believe this severely infringes on their ability to protect public health and safety if they are denied potentially important operational information. Managers and industry attorneys view this as contrary to the entire intent of the section 211 process, which is geared to enhance the safety environment of nuclear facilities. Attorneys also see it as being contrary to the experiences of other regulated industries, where whistleblower protections begin after all internal mechanisms to resolve a dispute have been unsuccessfully attempted.

  In response to this ruling, NRC's chairman wrote to Labor stating its policy that an NRC contact by a person bringing an allegation should be viewed as a last resort. The letter emphasized that licensees are primarily responsible for maintaining nuclear safety at their facilities and that the licensees have a right to expect that their employees will use internal mechanisms to inform them of safety matters. In a subsequent policy statement, NRC made clear its expectation that while employees will normally raise safety concerns to their employers, it does not mean that they cannot come directly to NRC, and in fact they should come to NRC whenever they believe the NRC should be aware of their concerns.

- Finally, in Biddy v. Alyeska Pipeline, industry legal representatives expressed concern about a ruling the Secretary made under the Toxic Substances Control Act (15 U.S.C. 2622). This decision concerned parties providing the Secretary with details of all settlements of claims arising

[13]In comments on the draft report, NRC asserted that this perception is incorrect; see app. VI for NRC's comments.

from the same factual circumstances forming the basis of the federal claim. Industry representatives see the requirements of meeting this decision as possibly revealing information about licensees' business decisions to employees and their attorneys, who might then use it to gain unfair advantage in future proceedings. They said that this might be a disincentive to settle cases.

ARB officials strongly disagreed that their decisions had broadened the protections beyond what the ERA statute had intended. They said that Labor rulings had not, in fact, expanded the list of activities that could properly be classified as protected but, rather, the ALJs had simply drawn upon legal precedents involving whistleblower cases under other similarly worded statutes.

ARB officials also said that they understand the difference in the relationship between the nuclear industry and its regulator compared with other industries but that that relationship does not and cannot have any bearing on how Labor treats allegations of discrimination. ARB staff acknowledged, however, that they were not familiar with all NRC's enforcement targeting approaches or potential enforcement actions that NRC might take after an allegation has been raised and investigated by Labor. The Chair of the ARB said that he plans to become more familiar with these actions in order to better understand the nuclear industry's reactions to Labor's rulings.

Industry officials also commented on the protected activities listed under ERA and how they believe the Secretary of Labor has gone beyond the activities cited in the statute or in regulations to broaden whistleblower protections. In one instance, officials said Labor's broadening of protections has made certain occupations—for example, security guards or quality assurance positions—themselves a "protected" activity. In these officials' views, simply by being in one of the specific positions that Labor has interpreted as having to do with safety, an individual would be covered by whistleblower protections. Under this reasoning, any changes to working conditions management makes or personnel actions that management takes that adversely affect employees in these occupations may be considered to be harassment or intimidation. No specific action related to reporting a safety problem or issue need occur for an employee to be protected through the whistleblower processes.

The Chair of the ARB conceded that employees in certain job classifications may engage in protected activity simply by doing their jobs. However, he

noted that not only does a specific protected act have to be found but also the employee must prove that the adverse action was taken by the licensee because of that protected act in order to support a ruling of discrimination.

Abuse of the System Alleged but Not Documented

Many of the nuclear power officials we interviewed said that the federal whistleblower protection system is plagued by abuse but that only a relatively few individuals are responsible for such abuse. Industry members varied in their descriptions of abuse, but we generally understood them to mean that someone was using the system in ways that were not intended, such as to gain a financial or other benefit that was not part of protecting employees' rights to raise safety concerns. However, the industry did not define abuse uniformly and did not compile data to indicate either its character or extent.

We could not obtain data to adequately quantify or characterize abuse for individual plants or from the NEI on the industry as a whole. Industry representatives told us that it is unlikely that data on abuse of the system would ever be collected. They said that each case is unique and licensees make individual determinations and business decisions to resolve them. Likewise, data on settlements at all levels are not systematically collected and maintained by industry, Labor, or NRC. Industry representatives told us that in recent years licensees have been more prone to settle whistleblower cases than they had been in the past and that they are more likely to settle cases within the plant or at least early in the process than they are to wait until the latter stages of the formal federal processes.

Federal Processes Are Believed to Be Used to Resolve Nonsafety Issues

Officials told us that many of the whistleblower complaints have been about concerns other than safety issues. They emphasized, however, that industry's concern with the fairness and efficiency of the current process does not reflect any disagreement with the policy underlying the federal whistleblower protection system. Officials state that they believe that employees play an important role in raising safety concerns and fully support the need to encourage employees to identify safety concerns and the existence of a mechanism to respond to instances in which employees are discriminated against for raising such concerns. However, officials said they believe that some whistleblowers use protected status to insulate themselves from normal management personnel actions, such as negative performance evaluations, reassignments, or layoffs. Some officials said that employees use the process to obtain leverage in dealing with

managers to obtain buyouts, settlements, or early retirements. Some told us the process is used as a forum to resolve various human resources or personnel disagreements that should be resolved by other means. In one example, a licensee told us that an individual was filing an allegation because of what he saw as an unfair distribution of funds between management and labor in a profit-sharing plan. Some officials have also alleged that employees go from employer to employer and raise frivolous allegations purely to seek financial settlements.

NRC recognizes that some potential exists for individuals to "use the system." However, NRC officials do not accept the argument that a person who engages in protected activity is immune from discipline, discharge, or other action. NRC and Labor officials told us that they believe that properly documented cases of nondiscriminatory adverse actions taken by the employer can be reviewed in the current protection system and the employer can be found to have acted without discrimination.

Industry Sees Different Characterizations of Whistleblowers

While the federal processes protect employees who go outside the plant to NRC, Labor, or the public to raise safety concerns as "whistleblowers," many industry officials do not view all whistleblowers alike. Some managers and attorneys informally classified whistleblowers—employees and contractors—into four categories. NRC and Labor officials did not directly comment on these characterizations.

1. True believers—employees generally perceived to be competent and loyal who have raised what they see to be a serious safety issue and who are not satisfied that management has responded adequately to the issue or believe management has resolved it incorrectly or incompletely. These employees are willing to risk their careers to ensure that the issue or professional disagreement is dealt with properly and completely.

2. Employees with personal or personality problems—employees in conflict with one or more members of management over issues that are related to safety but that also involve personality clashes or reflect personality problems on the part of the employee. Managers said that the whistleblowers in this category have somewhat traditional supervisor/employee conflict issues often related more to "personality" issues than to the safety issue cited or have problems dealing with people. Employees in this group bring their issue to the whistleblower process because they know that it will receive attention by high-level management at the facility and by outside parties—namely, NRC and Labor. Industry

officials said employees in this group often use other venues, including equal employment opportunity complaints, state courts, or grievances filed with a union, in attempting to resolve their issues while they pursue whistleblower allegations.

3. "Insurance policy" writers—employees viewed by managers as filing a safety issue as a placeholder to insulate them against adverse management decisions, as, for example, an unfavorable performance review, premature separation, or downsizing. Officials view employees in this group as using whistleblower protection to shelter them from economic and business decisions that may minimize or threaten their employment at a facility. Managers cited instances in which contractors brought in for plant refueling operations have employed the allegation process, or the threat of its use, as a way to extend their employment for the maximum duration. Other examples cited included persons who fear downsizing decisions contemplated by a nuclear facility and who raise an allegation as a way of possibly protecting themselves from layoffs.

4. "Entrepreneurs"—employees who use the federal processes or the threat of filing a complaint as a way to hold the company hostage and achieve some monetary settlement in exchange for dropping, or not filing, a harassment or discrimination charge. According to the officials, these employees may file multiple claims against the same facility or several employers, or look to negotiate some other benefit, such as an early retirement, buyout, or other payoff as a way to pressure their employer.

Although different officials offered variations on the number and size of whistleblower categories, most industry officials believed that the number of true safety issues raised by whistleblowers was small. However, industry officials stated that despite the fact that they believed that most of the safety issues raised by whistleblowers did not reflect major safety issues, the industry recognized that each concern must be treated as though it, in fact, did represent such a safety issue. Industry representatives we spoke to saw the last three categories of whistleblowers as being responsible for the majority of the whistleblower allegation activity.

Industry officials told us that experience led them to expect discrimination complaints to increase during periods of uncertainty, job reassignments, and particularly downsizings. Officials stated that historically, during transition periods, such as moving from the construction phase to starting full operation or during refueling and maintenance shutdowns, significant

numbers of safety allegations and whistleblower allegations occurred. They predicted these cyclical allegations would continue. Some officials also said that as the industry continues to respond to economic pressures of deregulation and competition, and with the possible closing down of some nuclear plants when their original licenses expire, the number of safety concerns and whistleblower complaints probably would increase.

NRC and Labor officials were aware of the various characterizations of whistleblowers, but officials at both agencies said that a whistleblower's reason for raising an allegation was irrelevant to them. NRC said that its policy is that the motive of a person making an allegation does not alter the validity of the allegation and should not change the way in which NRC or a licensee follows up on a concern. Labor officials and ALJs said that the motivation of the nuclear whistleblower did not have, and should not have, any effect on deliberations over the allegations made.

In responding to industry's observation that many safety issues raised in the protection process were relatively minor, NRC officials acknowledged that most allegations were not "show stoppers." However, they noted that if they failed to deal with the minor issues, they would be discouraging the raising of larger issues. NRC officials also expressed concern that employees who feel inhibited about raising concerns may take more indirect methods of raising concerns, thus delaying resolution of the issue and requiring additional licensee and NRC resources.

Industry Suggestions for Improving the Whistleblower Protection System

Industry officials made a number of suggestions to improve the federal whistleblower protection system. Although they raised many issues about the current processes, none advocated major structural changes. Most of the managers and the legal representatives we interviewed said they were willing to work within the present system if they had to and viewed these processes as a cost of doing business. Generally, they said that the most negative aspects of the whistleblower protection processes arose when failure to resolve issues internally led to media attention and active NRC intervention. Some managers and legal representatives suggested that NRC should return to its previous policy of withholding taking action on a section 211 claim (other than to ensure that the underlying safety issue raised is evaluated and addressed) until the Labor process has been completed. The industry officials did not suggest that NRC be relieved of any of its responsibility for protecting public safety and health but expressed the view that restricting NRC's actions related to a

discrimination claim until the completion of Labor's activities would not affect its obligations.

Suggestions for improvement included limiting the time for actions and decisions at all levels of NRC and Labor and employing sanctions against employees who pursue frivolous allegations beyond the initial stages. They also suggested that NRC clearly define what constitutes "protected activities" in a nuclear power plant. Industry officials suggested as well that both NRC and Labor should encourage the use of companies' internal management processes to resolve whistleblower discrimination allegations quickly.

Officials object to NRC's proposed policy of using the number of settlements as an indicator of the level of safety consciousness at a plant or NRC's perceived assumption that a plant management's settling cases indicates that a pattern of harassment and intimidation may exist at its facility. Finally, the officials said that NRC and Labor should eliminate any real or perceived obstacles to settling cases.

Industry officials support Labor's making available more ADR options, particularly when the whistleblower allegations do not involve significant safety issues. Appendix V contains information on a pilot program that Labor is considering for the use of ADR in whistleblower cases. Labor currently offers settlement judges for the adjudication of whistleblower claims, but this option is not often used.[14] Industry representatives did not express any reservations about using settlement judges to resolve these complaints. They said that the process simply is not well known across the industry and that few have had experience with it.

NRC is strongly supportive of Labor's employing ADR in cases brought under section 211 of ERA. In an April 15, 1997, letter to Labor, NRC stated that it believes that ADR will decrease reliance on formal adjudication and that ADR will serve the interests of the parties in obtaining prompt resolution of their claims as well as the interests of the federal government in conserving resources.

Agency Comments and Our Evaluation

NRC provided written comments on the draft report. In those comments, NRC's Executive Director for Operations disagreed with several of the positions taken by industry and discussed in our report. NRC also stated

[14]From July 1996 to July 1997, 10 ERA cases were referred to settlement judges. Nine of the cases were settled with the help of a settlement judge; one case was still pending while this report was being drafted.

that its current regulations and policies support the goals of protecting workers from discrimination and maintaining plant safety. NRC staff also provided technical comments that clarified certain NRC policies and positions discussed in the draft report. We have revised our report in several places to incorporate comments made both formally and informally. NRC's comments appear in appendix VI.

We did not receive comments from the Secretary of Labor on our draft report. The Chair of the ARB and Labor's Chief Administrative Law Judge did, however, provide comments that updated and clarified a number of technical issues raised in the report. Generally, neither ARB nor OALJ took issue with most of the industry positions raised in the report. The Chair of ARB declined to comment on the merits of specific decisions but encouraged any party who believes a final decision by ARB is contrary to law or unsupported by fact to exercise his or her right to appeal that decision. In his comments on the report, Labor's Chief Judge pointed out that while nuclear and environmental whistleblower cases are governed by the same procedural regulations and that legal precedents apply to both types of cases, administrative law judges are keenly aware that ERA whistleblower cases arise in a factual context that is distinct from environmental whistleblower cases. Given their formal and technical comments, we have modified portions of the report and included references to their comments in several places. ARB comments appear in appendix VII. OALJ comments appear in appendix VIII.

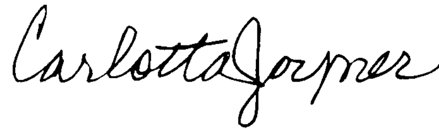
NEI provided technical comments and clarifications to its positions on several issues. Many of these have also been incorporated in the report. NEI was also interested in ensuring that it communicated its concern that discussions about the problems with the whistleblower protection processes should not overshadow the successful safety culture that has been achieved in the nuclear power industry today. NEI was also concerned about the role of NRC in whistleblower processes and what it viewed as an imbalance between NRC's regulatory emphasis on whistleblower protection and the amount of benefit to the industry. NEI did not provide written comments for publication.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 7 days after its issue date. At that time, we will send copies to the Secretary of Labor, the Chairman of NRC, and interested congressional committees. We will also

make copies available to industry licensees and NEI and to others upon request.

If you have questions about this report, please call me on (202) 512-7014. Major contributors to this report are listed in appendix IX.

Sincerely yours,



Carlotta C. Joyner
Director, Education and
Employment Issues

Contents

Letter		1
Appendix I Scope and Methodology		36
Appendix II Industry Sites Represented by Officials We Interviewed		38
Appendix III Secretary of Labor and ARB Decisions, January 1994-March 1997		39
Appendix IV Department of Labor Whistleblower Rulings That Concern Nuclear Industry Management		40
Appendix V Department of Labor Pilot Processes for ADR Use		42
	Labor's Alternative Dispute Resolution Pilot Program to Include ERA Cases	42
	Labor Offers Use of Settlement Judges in Current Cases	43

Appendix VI Comments From the Nuclear Regulatory Commission and Our Evaluation		44
	GAO Comments	47
Appendix VII Comments From the Administrative Review Board, Department of Labor		48
Appendix VIII Comments From the Office of Administrative Law Judges, Department of Labor		49
Appendix IX GAO Contacts and Staff Acknowledgments		51
Table	Table III.1: Secretary of Labor and ARB Rulings on ERA Cases Decided on the Merits, January 1994-March 1997	39

Abbreviations

ADR	alternative dispute resolution
AEA	Atomic Energy Act
ALJ	administrative law judge
ARB	Administrative Review Board
ERA	Energy Reorganization Act
NEI	Nuclear Energy Institute
NRC	Nuclear Regulatory Commission
OALJ	Office of Administrative Law Judges
OI	Office of Investigations
OIG	Office of Inspector General
OSHA	Occupational Safety and Health Administration

Scope and Methodology

To understand the processes and the legal protection afforded nuclear power industry employees who claim they have been discriminated against for raising safety concerns, we reviewed the whistleblower protection provisions of the 1974 Energy Reorganization Act (ERA) as amended, the Energy Policy Act, and the Atomic Energy Act of 1954. We also examined the legislative histories of these laws. We examined federal regulations relating to the Department of Labor's handling of employee complaints under ERA and the Nuclear Regulatory Commission's (NRC) protection of nuclear power employees from discrimination. We also examined the relevant sections of NRC's and Labor's procedure manuals and management directives.

To determine the effect of Labor's rulings on industry's ability to manage its workforce, we reviewed ERA cases from January 1979 to March 1997. Because of industry concerns with recent rulings from the Secretary of Labor and Labor's Administrative Review Board (ARB), we reviewed rulings from January 1994 to March 1997 and asked Labor to provide summary tables of those rulings. We discussed the rulings, provisions of these laws, and various regulations with NRC officials and with officials in Labor's ARB and Office of Administrative Law Judges (OALJ).

In addition, we discussed with knowledgeable industry representatives the protection of nuclear employees who have raised safety concerns and potential for abuse of the whistleblower protection system. To obtain the perspective of licensees, we visited representatives of 15 electrical utility companies that account for 52 of the nation's 110 civilian nuclear generating units. We interviewed managers who had dealt with discrimination complaints involving both NRC and Labor and with attorneys who have represented employees and licensees in whistleblower cases. We also met with officials of the Nuclear Energy Institute (NEI), a nuclear power industry association whose members include the top officials of utility companies operating nuclear plants, and we spoke with other industry legal representatives and industry groups.

Since we were focused on the industry's perspective on federal processes and rulings, we did not attempt to determine the merits of particular cases other than to review the potential effect of specific rulings on industry safety. We did not meet with individuals who made allegations to discuss their treatment or their particular case histories. We did not attempt to establish the appropriateness of NRC's response to particular rulings or their allocation of resources for whistleblower protection activities.

We performed our work between September 1996 and June 1997 in accordance with generally accepted government auditing standards.

Industry Sites Represented by Officials We Interviewed

Arizona Public Service Co.
Baltimore Gas and Electric Co.
Commonwealth Edison Co.
Detroit Edison Co.
Florida Power and Light Co.
Georgia Power Co.
Houston Lighting and Power Co.
Northeast Nuclear Energy Co.
Pennsylvania Power and Light Co.
Southern California Edison
Southern Nuclear Operating Co.
Tennessee Valley Authority
Texas Utilities Electric Co.
Virginia Electric and Power Co.
Yankee Industries

Secretary of Labor and ARB Decisions, January 1994-March 1997

Whistleblower cases are initially investigated by Labor's Occupational Safety and Health Administration (OSHA) field staff. If either party to the complaint does not agree with OSHA's decision, the case may be appealed to Labor's OALJ and the appeal is heard by an administrative law judge (ALJ). The ALJ makes a recommended decision to the Secretary of Labor. The Secretary may accept, reject, or modify the recommended decision. Since April 17, 1996, Labor's ARB has acted for the Secretary in issuing final decisions on questions of law and fact arising in review or on appeal of whistleblower cases.

Industry representatives expressed concern about the number of nuclear whistleblower cases in which the Secretary or the ARB had reversed the decision of the ALJ. Table III.1 shows Labor's compilation of Secretary of Labor/ARB rulings in ERA whistleblower cases for January 1994 through March 1997.

Table III.1: Secretary of Labor and ARB Rulings on ERA Cases Decided on the Merits, January 1994-March 1997

Secretary's/ARB's decision in ERA cases[a]	1994	1995	1996	1997 (Jan-Mar.)	Total
ALJ recommendation affirmed	12	17	8	2	**39**
ALJ recommendation reversed in employee's favor	2	6	3	0	**11**
ALJ recommendation reversed in licensee's favor	0	1	0	0	**1**
Total	14	24	11	2	**51[b]**

[a]The ARB does not maintain an audit trail of individual cases at each level of review.

[b]Of the 51 cases, at the ALJ level the licensee won 44 and the employee won 7.

Source: Department of Labor, ARB.

Department of Labor Whistleblower Rulings That Concern Nuclear Industry Management

Case and summary of issue	Discrimination alleged	Labor disposition	Management response to ruling	Effect management perceives
Robainas v. Florida Power and Light				
Whether a utility company's order to have one employee undergo psychological fitness-for-duty evaluation qualifies as discrimination under ERA.	Harassment, false performance evaluations, illegal fitness-for-duty evaluation, and unlawful discharge.	ALJ recommended that complaint be dismissed because of failure to meet burden of proof. Secretary reversed and ordered reinstatement with back pay with interest, costs, expenses, and attorney's fees. Remanded to ALJ for proceedings to determine complete remedy.	Managers may delay or refuse to order a psychological examination.	Potentially unstable staff may be left in positions in which they could endanger plant safety.
Hobby v. Georgia Power				
Whether employee's purely internal memorandum raising concerns that company's reporting structure may not be in compliance with its NRC license or regulations constitutes protected activity under ERA.	Company eliminated job of the person making allegation, required him to turn in his employee badge and gate opener to executive garage, limited his access within the building, and gave him a lesser office.	ALJ recommended dismissal of entire complaint. Secretary remanded case to ALJ to determine complete remedy.	Managers may delay or refuse to take adverse actions against employees.	Staff may refuse to obey justifiable management orders. Other staff may be required to carry out these orders.
Saporito v. Florida Power and Light				
Whether employees may refuse to discuss their safety concerns with management and go directly to NRC.	Employer disciplined, harassed, and discharged employee.	ALJ recommended denying complaint. Secretary remanded case to ALJ to determine whether discharge for "unprotected" activities was supportable by the record given the mixed motives.	Management's efforts to ensure safety are delayed because employees' right to refuse to bring safety concerns to management leaves management uninformed.	Plant may not be as safe while an outside party verifies existence of a safety problem and informs plant management.
Mosbaugh v. Georgia Power				
Whether surreptitious electronic recording, by person making an allegation, of conversations that supported complaints to NRC constituted protected activity under the ERA.	Employer downgraded performance evaluation, removed company car, and suspended and later discharged employee.	ALJ recommended dismissal of complaint. Secretary rejected ALJ's recommendation and found that discharge violated ERA. Ordered reinstatement with back pay.	Managers believe free and open exchange of information is inhibited. Trust necessary to maintaining plant safety is eroded because employees' right to secretly tape conversations causes managers and staff to hold back, thereby reducing open communication.	Constrained communication and a potentially less safe plant during the time the taping goes on and the time when NRC informs the management of the plant of its concern.

(continued)

Case and summary of issue	Discrimination alleged	Labor disposition	Management response to ruling	Effect management perceives
Biddy v. Alyeska Pipeline				
ARB requires parties requesting approval of settlements to provide settlement documentation for any other claims arising from the same factual circumstances forming basis of federal claim or certification that no other settlement agreements were entered into by the parties.	Although not an ERA issue, this whistleblower decision is being applied to ERA cases and concerns industry. Case was brought under Toxic Substances Control Act, Federal Water Pollution Control Act, Clean Air Act, and Solid Waste Disposal Act.	ALJ recommended decision requiring that information on all parties' settlements related to the same facts be submitted to Labor in order for federal settlement to be approved.	Managers and legal representatives fear that (1) employees who wish to "hold up" the company for money and (2) competitors who might profit from proprietary information will gain unfair advantage if they can readily see details of case settlements.	Managers may be less likely to use the settlement approach—and company is thus deprived of a legitimate tool of negotiations that could ease conflict and save time and money.

Department of Labor Pilot Processes for ADR Use

Labor's Alternative Dispute Resolution Pilot Program to Include ERA Cases

On February 12, 1997, Labor published a proposed rule in the Federal Register (vol. 62, no. 29, pp. 6689-95) entitled "Expanded Use of Alternative Dispute Resolution in Programs Administered by the Department of Labor." This proposal requested public comments on the use of ADR in a proposed pilot project test of voluntary mediation or arbitration in six categories of cases that OALJ adjudicates. One category included environmental whistleblower cases under employee protection provisions of the 1974 ERA, which covers whistleblowers in the nuclear industry.

Labor plans to proceed with a pilot test to help determine whether private, voluntary mediation or arbitration can (1) resolve disputes more quickly and more efficiently than conventional litigation, (2) produce resolutions that satisfy the parties and Labor, and (3) use the enforcement and litigation resources of Labor more effectively. The primary potential benefits of using ADR are lower litigation costs to both parties and, for government agencies, the ability to resolve more cases with the same resources.

Labor's proposed pilot test will be limited to six types of cases, selected because they present promising opportunities for the effective use of voluntary ADR: (1) discrimination cases involving environmental whistleblower cases under the employee-protection provisions of ERA and six other environmental safety and health statutes, (2) cases under section 11(c) of the Occupational Safety and Health Act (29 U.S.C. 660(c)), (3) cases under the Family and Medical Leave Act of 1993 (29 U.S.C. 2601 et seq.), (4) cases under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.), (5) compliance review cases under Executive Order 11246, and (6) complaint investigation cases under the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. 4212). The results of the proposed pilot test will guide Labor in future ADR initiatives, including the possible expansion of voluntary mediation or arbitration to other types of cases.

During the 1990s, Labor has received an annual average of about 90 environmental whistleblower complaints. The Department's OALJ conducts about 80 hearings each year in this type of case, resulting in 30 to 40 final ARB decisions. In the past, there have been significant delays in the administrative adjudication process. Most recently, cases have been adjudicated or resolved more promptly.

Under the proposed pilot test, after an employee's complaint has been investigated, Labor would determine whether the case is suitable for ADR.

If ADR is appropriate, Labor would offer the employer and the employee the option of mediation, arbitration, or both, conducted either by a settlement judge in OALJ or by a private mediator or arbitrator. Labor would not be a party to or participate in any mediation or arbitration.

Under the proposal, the ARB would not be bound by any resolution reached by the parties but would review the results of mediation or arbitration. If appropriate, using the same standard now applied in the ARB's review of other environmental whistleblower settlements between employees and employers, the parties' mediated settlement or the arbitrator's decision would be included in a final ARB order. Labor would revise or supplement its existing regulations for environmental whistleblower cases (29 C.F.R. part 24), as necessary, to incorporate these procedures.

Labor Offers Use of Settlement Judges in Current Cases

Labor currently offers the use of settlement judges to resolve whistleblower cases in a less time-consuming and costly manner than a full ALJ appeal process. In these cases, specially selected ALJs hear evidence from both parties and attempt to help them reach a settlement. If settlement attempts are unsatisfactory to either party for any reason, the case goes back to the formal OALJ process for a full hearing. Labor's procedures for the use of the settlement judge process have been available for several years, but relatively few cases have been adjudicated this way.

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

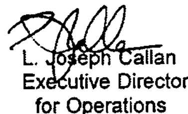
August 6, 1997

Ms. 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 POWER SAFETY: Industry Concerns With Federal Whistleblower Protection System. Our comments on the report are enclosed. While we believe the industry should have an opportunity to express its views on this topic, we have a general concern that the industry did not provide specific examples to support their perceptions, as noted in several places in the report. History has shown the need to protect workers from discrimination and for licensees to establish and maintain a safety conscious work environment that encourages workers to raise and seek the resolution of safety concerns. We believe the NRC regulations and policies support these goals and aid in maintaining plant safety.

Sincerely,



L. Joseph Callan
Executive Director
for Operations

Enclosure:
As stated

COMMENTS ON DRAFT GAO REPORT "NUCLEAR POWER SAFETY: INDUSTRY CONCERNS WITH FEDERAL WHISTLEBLOWER PROTECTION SYSTEM," GAO/HEHS-97-162.

Now on p. 3.
See comments 1 and 2.

1. On Page 6, the report provides the following industry perception, "As examples of activities that Labor has made "protected," industry officials cite rulings that allow employees to withhold their safety concerns from management...."

   The industry perception of the findings by Labor is incorrect. We know of only one ruling by Labor (Saporito v. FPL) that might support such a position. In that case the Secretary of Labor (SOL) issued an order clarifying that an employee does not have an "absolute right" to withhold safety concerns from management. Rather, the issue may be fact dependent. The SOL reemphasized that coming to the NRC with such a concern is a protected activity. However, DOL has not completed action on this case at this time. The SOL remanded the case to the Administrative Law Judge (ALJ) for reconsideration of the facts in view of the SOL's decision.

Now on p. 7.
See comment 3.

2. On Page 12, second paragraph, the discussion of the number of discrimination cases investigated and substantiated by NRC's Office of Investigations may mislead the reader attempting to determine the percentage of discrimination cases that are substantiated. Of the 106 discrimination cases closed by OI in FY 1996, 85 were investigated to a full conclusion based on the merits of the case. Discrimination was substantiated in 10 of these cases and was not substantiated in 75 of these cases. The other 21 discrimination cases were closed for various administrative reasons.

Now on p. 7.
See comment 1.

3. On page 13, first sentence, the report states, "When the NRC staff receive a discrimination allegation they usually conduct a review ..."

   The use of "usually" is misleading and should be deleted. Each discrimination allegation is reviewed by the staff for safety implications and to determine the level of the alleged discriminator.

Now on p. 9.
See comment 1.

4. On Page 14, the report states that there is no legally required time limit on the DOL Administrative Review Board to make a final decision. Section 211 of the Energy Reorganization Act imposes a 90 day limit for completing the whole DOL review, i.e. from the time the complaint is received to the issuance of the ARB decision. While the time limit is far too short to complete this process and, for the most part, is not met, there is a legally mandated time limit. Because the time limit is unreasonable, NRC and DOL are jointly drafting legislation that would set reasonable time limits, as discussed in this report.

Now on p 11.
See comment 4.

5. On Page 17, first paragraph, the report states, "Some legal representatives contend that NRC's basis for threatening criminal prosecution related to these cases relies on an expansive interpretation of NRC's authority under the AEA."

   The NRC believes it is important to note that the Department of Justice agrees with NRC's interpretation of its authority under the AEA.

2

Now on p. 15.
See comment 1.

6. On Page 23, the first paragraph refers to statements made by "Officials ..." and the second paragraph refers to statements made by "Nuclear officials ...." We believe it would be clearer if both paragraphs attributed the statements to "Industry officials ...."

Now on pp. 16-17.
See comments 5 and 6.

7. On Page 25, the last sentence of the first paragraph does not properly characterize the comments by the Director of the Office of Enforcement. We recommend the sentence be revised to read, "However, he said improper conduct by the company may need to be sanctioned, even though NRC acknowledged that new managers were in place and changes had been made because the new management continued the positions of the previous management thereby continuing the potential chilling effect."

Now on p. 18.
See comment 1.

8. On Page 27, the third sentence discusses industry perceptions of "proposed NRC regulations" on a safety-conscious work environment. The industry clearly mis-interpreted the *Federal Register Notice* (62 FR 8785), "Request for Comments, Safety-Conscious Work Environment," issued by the NRC on February 26, 1997. The notice provided an opportunity for the industry and the public to provide comments very early in the NRC's process of evaluating methods of measuring and improving the work environment. The notice clearly stated it was a request for comment, not a notice of proposed rulemaking or an advanced notice of proposed rulemaking.

Now on p. 24.
See comment 7.

9. On page 34, second paragraph, the report states that industry officials perceive that because of unspecified decisions by Labor, certain occupations are in themselves protected activities. On Page 35, the report states that the Chairman of Labor's ARB agrees that the work performed by certain occupational groups are inherently protected activities. However, we believe that the following sentence attributed to the Chairman of Labor's ARB should be emphasized more strongly. An employee engaged in a protected activity is only protected if the basis for an adverse action is the protected activity. Therefore, if the employer can show that they would have taken the same action notwithstanding the protected activity, the adverse action is not discriminatory and the employer will prevail.

Now on p. 40.
See comment 1.

10. On Page 52, in discussing Saporito v. Florida Power and Light, the statement in the third column, "Secretary found alleged act of retaliatory discipline and harassment not causally related to protected activity" appears incorrect. The Secretary did not find discrimination. Rather, the Secretary remanded the case to the Administrative Law Judge to determine whether the discharge for the "unprotected" activities was supportable by the record given the mixed motives in this case. Consequently, we suggest that GAO review the summary of this case as stated in Appendix IV.

The following are GAO's comments on the Nuclear Regulatory Commission's letter dated August 6, 1997.

GAO Comments

1. Wording revised.

2. See footnote 13.

3. Comment not incorporated. In the 21 cases closed for administrative reasons, discrimination was not substantiated.

4. See footnote 8.

5. Comment not fully incorporated.

6. See footnote 10.

7. Comment not incorporated. The ARB Chair clarified remarks attributed to him concerning occupational groups and adverse actions.

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

July 29, 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:

The Administrative Review Board (ARB), United States Department of Labor, has received and reviewed the General Accounting Office's Draft Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Commerce, House of Representatives, concerning *Nuclear Power Safety: Industry Concerns With Federal Whistleblower Protection System*. According to the report the industry is concerned with the substance of a number of final decisions issued by the ARB.

The ARB considers it inappropriate to comment upon the merits of our decisions. The decisions of the ARB speak for themselves. We do note that under the environmental whistleblower statutes and the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. §5851 (1988 and Supp. IV 1992), each party has the right to appeal a final decision of the ARB to the appropriate United States Court of Appeals. Of the five cases specifically complained about by the industry, Appendix IV, one was not subject to an appeal because it involved the approval of a settlement, two are pending before Administrative Law Judges on remand, and two were settled by the licensees without availing themselves of the opportunity to appeal the decision. We encourage any party that believes a final decision of the ARB is contrary to law, or unsupported by fact, to exercise its right to appeal that decision. We note that in the past four years only one final whistleblower decision of the Department of Labor has been reversed by a Court of Appeals and that was not an ERA case.

Thank you for the opportunity to respond to the Draft Report. If we may be of any further assistance in this project, please contact me at the above address (Room N1651) or by telephone at (202) 219-9039.

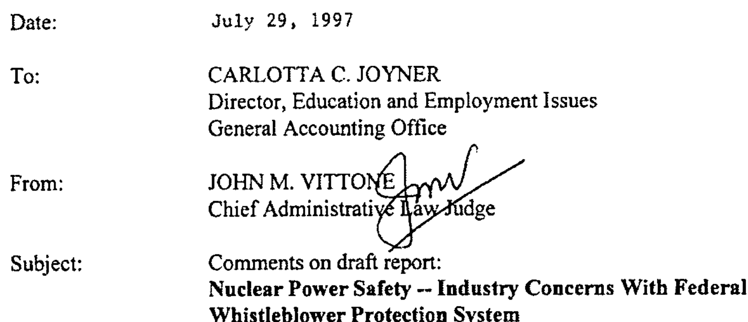
Sincerely,

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: July 29, 1997

To: CARLOTTA C. JOYNER
Director, Education and Employment Issues
General Accounting Office

From: JOHN M. VITTONE
Chief Administrative Law Judge

Subject: Comments on draft report:
Nuclear Power Safety -- Industry Concerns With Federal Whistleblower Protection System

Thank you for the opportunity to comment on GAO's draft report on industry's perspective of nuclear whistleblower protection proceedings. Most of my comments are solely informational.

Now on p. 19.

I. Page 14. Treatment of nuclear whistleblower cases

The draft report refers to a statement by me that the Office of Administrative Law Judges generally treats all whistleblower cases similarly. I would like to emphasize that nuclear and environmental whistleblower cases are governed by the same procedural regulations (29 C.F.R. Part 18), and that the legal precedents in nuclear and environmental cases are generally applicable to both types of cases. Nonetheless, administrative law judges are keenly aware that ERA whistleblower cases arise in a factual context that is distinct from environmental whistleblower cases.

Now on pp. 12 and 28.

II. Pages 18 and 41 Imposition of time standards

The draft report mentions industry concern over the amount of time needed to complete DOL's process. While OALJ is not opposed to realistic time standards, this Office's experience with the whistleblower hearing process is that few litigants -- including complainants *and* respondent-employers -- are prepared for early hearing dates, and that requests for continuances are the rule rather than the exception. It is generally the parties' schedules, and not the administrative law judge's, that dictate the length of time from docketing to hearing.

Now on p. 13.

III. Page 20. Settlement rates

The draft report mentions that the settlement rate is approximately 16% before OSHA. As a point of information, recent experience has been that the settlement rate is much higher before OALJ. As of July 28, 1997, for ERA cases with a docket number of FY95 or FY96, the settlement rate is 46%. Specifically, for cases with those docket numbers, 27 dispositions were

the result of a recommended decision on the merits, withdrawal of the complaint or procedural dismissal (e.g., untimely filing of complaint), while 23 dispositions resulted from settlements.

IV. Page 30 Appeals

Now on p. 20.

The draft report mentions that neither industry nor the agencies keep a count of ERA whistleblower case that have been appealed. OALJ endeavors to track the ultimate disposition of whistleblower cases and logs this information on caselists on its Internet site. For ERA cases with a FY90 or higher docket number, OALJ's records indicate that 20 cases were appealed to the federal courts.

V. Page 42 Settlement Judges

Now on p. 28.

The draft report mentions that industry is not well acquainted with OALJ's settlement judge process. OALJ has endeavored to monitor its settlement judge process to determine its effectiveness. To date, the results have been encouraging. Settlement judges proceedings which conclude in settlement save the parties considerably in time and expense, and may result in savings for the Department when lengthy hearings could be expected.[1] Where the cases do not settle, settlement judges report that the proceedings had helped to focus the issues for hearing. Settlement judges also report that the intentions of the parties appeared to play a significant role in the settlement judge proceedings. Recently, OALJ has trained additional administrative law judges in mediation techniques and has placed information about the settlement judge process on the Internet and prehearing orders.

For ERA whistleblower cases in particular, ten cases were referred to settlement judges from July 1996 to present. Nine of the cases settled with the help of a settlement judge, while the other case is still pending.

cc: Larry Horinko
Edward C. Shepherd

[1]Settlement judges responding to a survey at the end of 1996 on all settlement judge proceedings for the second half of that year reported that judicial time spent on settlement varied from as little as six hours to as much as sixty hours. Most settlement proceedings required judicial time in the range of 15 to 30 hours.

-2-

GAO Contacts and Staff Acknowledgments

GAO Contacts

Larry Horinko, Assistant Director, (202) 512-7001
George Erhart, Senior Economist, (202) 512-7026

Staff Acknowledgments

In addition, the following individuals made important contributions to this report: Edward C. Shepherd and Richard Kelley gathered and analyzed essential information and drafted sections of the report. Jonathan Barker of the Office of General Counsel assisted in gathering information and provided legal assistance, and Philip Olson provided technical advice concerning NRC activities.

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