

## § 24.6

meet the required elements of a *prima facie* case, *i.e.*, to give rise to an inference that the respondent knew that the employee engaged in protected activity, and that the protected activity was likely a reason for the personnel action. Normally the burden is satisfied, for example, if it is shown that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If these elements are not substantiated in the investigation, the investigation will cease.

(c)(1) Notwithstanding a finding that a complainant has made a *prima facie* showing required by this section with respect to complaints filed under the Energy Reorganization Act, an investigation of the complainant's complaint under that Act shall be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.

(2) Upon receipt of a complaint under the Energy Reorganization Act, the respondent shall be provided with a copy of the complaint (as supplemented by interviews of the complainant, if any) and advised that any evidence it may wish to submit to rebut the allegations in the complaint must be received within five business days from receipt of notification of the complaint. If the respondent fails to make a timely response or if the response does not demonstrate by clear and convincing evidence that the unfavorable action would have occurred absent the protected conduct, the investigation shall proceed. The investigation shall proceed whenever it is necessary or appropriate to confirm or verify the information provided by respondent.

(d) Whenever the Assistant Secretary dismisses a complaint pursuant to this section without completion of an investigation, the Assistant Secretary shall give notice of the dismissal, which shall contain a statement of reasons therefor, by certified mail to the complainant, the respondent, and their representatives. At the same time the Assistant Secretary shall file with the Chief Administrative Law Judge, U.S.

## 29 CFR Subtitle A (7-1-03 Edition)

Department of Labor, a copy of the complaint and a copy of the notice of dismissal. The notice of dismissal shall constitute a notice of determination within the meaning of §24.4(d), and any request for a hearing shall be filed and served in accordance with the provisions of §24.4(d) (2) and (3).

### §24.6 Hearings.

(a) *Notice of hearing.* The administrative law judge to whom the case is assigned shall, within seven calendar days following receipt of the request for hearing, notify the parties by certified mail, directed to the last known address of the parties, of a day, time and place for hearing. All parties shall be given at least five days notice of such hearing. However, because of the time constraints upon the Secretary by the above statutes, no requests for postponement shall be granted except for compelling reasons or with the consent of all parties.

(b) *Consolidated hearings.* When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his own or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one case may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

(c) *Place of hearing.* The hearing shall, where possible, be held at a place within 75 miles of the complainant's residence.

(d) *Right to counsel.* In all proceedings under this part, the parties shall have the right to be represented by counsel.

(e) *Procedures, evidence and record—(1) Evidence.* Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

(2) *Record of hearing.* All hearings shall be open to the public and shall be

mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits and other pertinent documents or records, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

(3) *Oral argument; briefs.* Any party, upon request, may be allowed a reasonable time for presentation of oral argument and to file a prehearing brief or other written statement of fact or law. A copy of any such prehearing brief or other written statement shall be filed with the Chief Administrative Law Judge or the administrative law judge assigned to the case before or during the proceeding at which evidence is submitted to the administrative law judge and shall be served upon each party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge and shall be due within the time prescribed by the administrative law judge.

(4) *Dismissal for cause.* (i) The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim:

(A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause; or

(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.

(ii) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include a recommended order dismissing the claim, defense or party.

(f)(1) At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or partici-

pate as *amicus curiae* at any time in the proceedings. This right to participate shall include, but is not limited to, the right to petition for review of a recommended decision of an administrative law judge, including a decision based on a settlement agreement between complainant and respondent, to dismiss a complaint or to issue an order encompassing the terms of the settlement.

(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, shall be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

(g)(1) A Federal agency which is interested in a proceeding may participate as *amicus curiae* at any time in the proceedings, at the agency's discretion.

(2) At the request of a Federal agency which is interested in a proceeding, copies of all pleadings in a case shall be served on the Federal agency, whether or not the agency is participating in the proceeding.

#### § 24.7 Recommended decision and order.

(a) Unless the parties jointly request or agree to an extension of time, the administrative law judge shall issue a recommended decision within 20 days after the termination of the proceeding at which evidence was submitted. The recommended decision shall contain appropriate findings, conclusions, and a recommended order and be served upon all parties to the proceeding.

(b) In cases under the Energy Reorganization Act, a determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The proceeding before the administrative law