

Department of Energy

§ 708.29

attempt to resolve the complaint through mediation or other informal means at any time before issuance of an initial agency decision on the complaint.

§ 708.28 What procedures govern a hearing conducted by the Office of Hearings and Appeals?

(a) In all hearings under this part:

(1) The parties have the right to be represented by a person of their choosing or to proceed without representation. The parties are responsible for producing witnesses in their behalf, including requesting the issuance of subpoenas, if necessary;

(2) Testimony of witnesses is given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 1621, dealing with the criminal penalties associated with false statements and perjury;

(3) Witnesses are subject to cross-examination;

(4) Formal rules of evidence do not apply, but OHA may use the Federal Rules of Evidence as a guide; and

(5) A court reporter will make a transcript of the hearing.

(b) The Hearing Officer has all powers necessary to regulate the conduct of proceedings:

(1) The Hearing Officer may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint;

(2) The Hearing Officer may permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection and other purposes; and requests for admission;

(3) The Hearing Officer may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence;

(4) The Hearing Officer may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission

of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the hearing; direct that written motions, documents, or briefs be filed with respect to issues raised during the course of the hearing; ask questions of witnesses; direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential); and otherwise regulate the conduct of the hearing;

(5) The Hearing Officer may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer, or, without good cause, to attend a hearing;

(6) The Hearing Officer, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Hearing Officer.

(7) The parties are entitled to make oral closing arguments, but post-hearing submissions are only permitted by direction of the Hearing Officer.

(8) Parties allowed to file written submissions must serve copies upon the other parties within the time prescribed by the Hearing Officer.

(9) The Hearing Officer is prohibited, beginning with his or her appointment and until a final agency decision is issued, from initiating or otherwise engaging in *ex parte* (private) discussions with any party on the merits of the complaint.

§ 708.29 What must the parties to a complaint prove?

The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence