DEPARTMENT OF ENERGY

10 CFR Part 708

48 CFR Parts 913, 922, and 970

RIN 1901–AA78

Criteria and Procedures for DOE Contractor Employee Protection Program; Department of Energy Acquisition Regulations

AGENCY: Department of Energy.

ACTION: Interim final rule and opportunity for public comment.

SUMMARY: This document provides the text of a revised regulation governing the Department of Energy's (DOE) contractor employee protection program. The program provides procedures to protect employees of DOE contractors who believe they have suffered retaliation for disclosing information concerning danger to health or safety, substantial violations of law, or gross mismanagement; for participating in Congressional proceedings; or for refusing to participate in dangerous activities. This rulemaking also makes conforming changes to procurement regulations to address the expanded scope of the Department's whistleblower protection program.

DATES: It is effective April 14, 1999. Interested persons may submit comments by May 14, 1999.

ADDRESSES: Comments may be mailed to Roger Klurfeld, Assistant Director, or Thomas O. Mann, Deputy Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0107, telephone number 202–426–1449, FAX 202–426–1415, e-mail: roger.klurfeld@hq.doe.gov, thomas.mann@hq.doe.gov.

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SUPPLEMENTARY INFORMATION:

I. Introduction and Background

In exercising its proprietary responsibilities for the control and management of its nuclear weapon maintenance and environmental cleanup sites, research and development laboratories, test sites, and other Government-owned or -leased facilities, the DOE must take steps to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste, and abuse. To this end, the Secretary of Energy has taken vigorous action to assure that all such DOE facilities are well-managed and efficient, while at the same time operated in a manner that does not expose the workers or the public to needless risks or threats to health and safety. The DOE is endeavoring to involve both Federal and contractor employees in a partnership to aggressively identify problems and seek their resolution. In that regard, employees of DOE contractors are encouraged to come forward with information that they reasonably and in good faith believe evidences unsafe, unlawful, fraudulent, or wasteful practices. Employees providing such information are entitled to protection from consequent retaliation by their employers with respect to compensation, and the terms, conditions, or privileges of employment.

The original rule was published in the **Federal Register** on March 3, 1992 (57 FR 7533). In order to assure workplace conditions at DOE facilities that are harmonious with safety and good management, the rule was intended to improve the procedures for resolving complaints of retaliation by establishing procedures for independent fact-finding and hearing before a Hearing Officer at the affected DOE field installation, followed by an opportunity for review by the Secretary or his designee. These procedures were made available to those contractor employees who alleged health and safety violations, but were not covered by the Department of Labor regulations in 29 CFR part 24. In addition, contractor employees who alleged employment retaliation resulting from the disclosure of information relating to waste, fraud, or mismanagement, or from the participation in proceedings conducted before Congress or pursuant to the rule, or from the refusal to engage in illegal or dangerous activities, could also utilize the procedures regardless of whether they are covered by the health and safety protection procedures of the Department of Labor. This rule was not intended to cover complaints of retaliation stemming from or relating to other types of discrimination by contractors, such as discrimination based on race, color, religion, sex, age, national origin, or other similar basis.

After the rule had been in effect for more than four years, the Department took steps to obtain the views of interested parties on its operation. A Notice of Inquiry was published on October 25, 1996 (61 FR 55230), in which DOE invited members of the public, particularly those persons with experience under the DOE contractor employee protection program (e.g., contractors, complainants and attorneys), to recommend regulatory changes that might help to streamline the process and make it more responsive to the needs of both complainants and contractors. Comments were received from 28 individuals or organizations in response to the Department of Energy's Notice of Inquiry.

The procedures set forth in Part 708 are designed specifically to deal with allegations of retaliation against contractor employees and to provide relief where appropriate. Retaliation against contractor employees may also lead to the imposition of penalties under the Price Anderson Amendments Act of 1988 (Pub. L. 100–49, August 20, 1988), implemented by DOE under 10 CFR part 820 (Part 820). Pursuant to Part 820, to the extent an act of retaliation by a DOE contractor results from an employee's involvement in matters of nuclear safety in connection with a DOE nuclear activity, the retaliation could constitute a violation of a DOE Nuclear Safety Requirement. The retaliation could therefore be subject to the investigatory and adjudicatory procedures of both part 820 and part 708, and could warrant relief to the employee under Part 708 and the imposition of civil penalties on the DOE contractor under part 820. A full discussion of the relationship between this part and 10 CFR part 820 and the procedures that are followed in situations where an alleged act of retaliation falls under both this part and part 820 can be found in **Federal Register** Volume 57, No. 95, Friday, May 15, 1992, at 20796–98.

After considering the comments received in response to the Notice of Inquiry, DOE published a Notice of Proposed Rulemaking (NOPR) in the **Federal Register** on January 5, 1998 (63 FR 733), which suggested substantial revisions to Part 708. DOE received a number of comments on those proposed revisions. In response to the comments on the NOPR, DOE has made extensive procedural changes to part 708. To give the public further opportunity to comment, this regulation is being issued as an interim final rule, effective 30 days after the date of publication in the **Federal Register**. The public will have 60 days after the date of publication to submit comments on the interim final rule.

II. Summary of Changes

Since publishing the NOPR, DOE has rewritten Part 708 in ''plain language'' style, consistent with the ''Memorandum on Plain Language in Government Writing'' which the President issued on June 1, 1998. We have broken down the regulatory sections into more discrete units that are easier to understand. The section titles are in the form of questions to help guide a reader through the procedures in the rule. In addition, we have rearranged the order of some sections. As a result, the section numbers in this interim final rule do not correspond to their precursors in either the original rule or the NOPR.

DOE has modified the employee coverage in §§ 708.2 and 708.3 by eliminating the requirement that to be eligible for protection under this rule, complainants must be employed by contractors performing work on sites that DOE owns or leases. The new language instead covers employees of contractors performing work directly related to activities at DOE-owned or -leased sites, even if the contractor is located, or the work is performed, off-site. An example is an employee involved in the preparation of environmental impact statements related to programs and activities on DOE-owned and -leased sites. Accordingly, we have deleted the definition of ''work performed on-site,'' previously found in § 708.4. We are making conforming changes to the Department of Energy Acquisition Regulations (DEAR) provisions regarding coverage. In addition, DOE has deleted the provision, found in the original 1992 version of § 708.2(a), that the underlying procurement contract contain a clause requiring compliance with all applicable safety and health regulations. This provision is no longer necessary since DOE contracts now require compliance with Part 708 when specifically applicable.

In order to avoid duplicate review of allegations of whistleblower retaliation under various Federal statutes and regulations, the interim final rule in § 708.4 excludes from coverage employee complaints that are submitted for review under Department of Labor regulations found at 29 CFR part 24, ''Procedures for the Handling of Discrimination Under Federal Employee Protection Statutes.'' These would include complaints submitted by DOE contractor employees under section 211(a) of the Energy Reorganization Act of 1974 (42 U.S.C. 5851(a)). That Act added protection for employees of ''a contractor or subcontractor of the Department of Energy that is indemnified by the Department of Energy under section 170d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order 12344.''

Section 6006 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) (section 6006) afforded additional protections to contractor employees against retaliation for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract). Section 6006 assigns responsibilities to Inspectors General (including the Inspector General for the Department of Energy) to implement these protections. Section 708.4 excludes from coverage employee complaints that are submitted for review to the DOE Office of Inspector General pursuant to section 6006. The regulation implementing section 6006 is found at 48 CFR part 3, Subpart 3.9, ''Whistleblower Protections for Contractor Employees.''

The Office of Contractor Employee Protection, and the position of Director of the Office of Contractor Employee Protection, no longer exist within DOE. We have removed references to the ''Office of Contractor Employee Protection'' and the ''Director of the Office of Contractor Employee Protection'' from the interim final rule. DOE has reassigned the functions previously assigned to the Director of the Office of Contractor Employee Protection to other officials.

Under § 708.17(a) of the interim final rule, the Director of the Office of Employee Concerns or the ''Head of Field Element'' (i.e., the manager of the local DOE office) can dismiss a complaint for lack of jurisdiction or other good cause. An employee may appeal a dismissal at this initial stage to the Director of the Office of Hearings and Appeals (OHA) under § 708.18(a). In addition, the OHA Director will consider appeals of Hearing Officer decisions. The OHA Director's appeal decision, either on jurisdiction or on the merits of an individual case, will be the final agency action, except when a ''petition for Secretarial review'' is filed under § 708.19 (jurisdiction) or § 708.35 (appeal on the merits). The Secretary will reverse or revise a decision by the OHA Director only under extraordinary circumstances.

DOE has amended the language now contained in §§ 708.5(a)(1) and 708.5(a)(3) to afford protection for disclosures of ''substantial'' violations of laws, rules or regulations and ''gross'' mismanagement, instead of ''violations of laws, rules or regulations'' and ''mismanagement.''

Section 708.5(a) of the interim final rule expands coverage of disclosures to include those made to other government officials, such as those from other Federal or state agencies who have responsibility for oversight of activities on DOE-owned or -leased sites.

Section 708.5(a) of the interim final rule further defines the nature of the disclosure, requiring that the employee's disclosure involves information he or she ''reasonably and in good faith believes'' is true. The previous rule in § 708.5(a)(1) only required that the complainant ''in good faith believes'' the information he or she disclosed. The ''reasonableness'' criterion is consistent with the Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (1989) (codified at scattered sections of 5 U.S.C.), and many state statutes which afford protection to both public and private sector employees against retaliation for whistleblowing activities.

The standard adopted in §§ 708.5 through 708.7 is analogous to that adopted for the rights of employees to stop work in the face of health and safety concerns in the Department of Labor regulations under the Occupational Safety and Health Act (the OSH Act). Thus, 29 CFR 1977.12(b)(2) provides that an employee who, ''with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition,'' is protected against discrimination based on that conduct where ''the employee's apprehension of death or injury [is] of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury * * *'' and where there is insufficient time or opportunity either to seek effective redress from the employer or to notify the Occupational Safety and Health Administration of the danger. See Section 11(c) of the OSH Act.

Similarly, under Part 708 an employee's refusal to participate in an activity, policy, or practice is protected where ''[a] reasonable person, under the circumstances that confronted the employee, would in good faith conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice * * *.'' Section 708.6(a). Moreover, under § 708.7 the employee must have asked the contractor to

correct the problem, and the contractor must have refused to do so. In addition, for the refusal to participate to constitute a protected refusal under Part 708, the employee must have notified a DOE official, a Member of Congress, or a government official with responsibility over such matters within thirty days after the refusal to participate.

We further recognize that employees who stop work may be considered to have engaged in an unprotected work stoppage for which the employer is free to take action under the Labor Management Relations Act (LMRA) unless they do so ''in good faith because of abnormally dangerous conditions * * *'' See LMRA, Section 502. We did not receive any comments suggesting that there has been a conflict with Section 502 of the LMRA. However, we would be interested in any comments directed to actual concerns in this regard.

Section 708.14 of the interim final rule increases the time limit for filing a complaint from 60 to 90 days. The time limit for filing a complaint will still be tolled while a complainant is seeking remedial action through internal contractor procedures. DOE still requires the exhaustion of internal grievance procedures, but the interim final rule permits individuals to file a complaint under Part 708 if they have not received a response on a grievance relating to the complaint within 150 days of filing of the grievance. The program will no longer permit an employee to bypass an internal grievance procedure on the grounds that it is ''ineffectual,'' and we have deleted the provision formerly found in § 708.6(c)(2) from the corresponding provision, § 708.13, of the interim final rule. The reason for this change is to encourage the use of internal grievance procedures to resolve allegations of retaliation at the earliest stage possible.

Under § 708.15(a), as long as the complainant is pursuing final and binding grievance-arbitration processes, a complaint under this regulation will be dismissed for lack of jurisdiction. After exhausting such procedures, an individual is free to file a complaint under Part 708 to resolve any remaining issues under § 708.5. Such a complaint may be dismissed for good cause, however, as provided in § 708.17 (for example, if the issues in the complaint have been substantially resolved or the employer has made a formal offer to provide a remedy that DOE considers to be equivalent to what would be provided as a remedy under this regulation). This approach respects the labor-management relationship that applies to many DOE contractor employees, and is consistent with the deference given to final and binding arbitration decisions issued under collective bargaining agreements.

Section 708.16(a) provides that within 15 days of receiving a complaint, the EC Director or the Head of Field Element will give the respondent contractor a copy of the complaint and advise the contractor that it has ten business days after receipt of the complaint to submit comments to the appropriate DOE office. Section 708.16(b) has been added to require that notice and an opportunity for comment also be provided to labor organizations on complaints filed by employees they represent.

Under § 708.18, the OHA Director is responsible for deciding initial appeals of dismissals of complaints on jurisdictional grounds. Under § 708.8(c) of the original rule, the Deputy Secretary, as the delegee of the Secretary, routinely made these decisions. In practice, however, that system has proved to be inefficient, and DOE believes the OHA Director will be better able to process jurisdictional appeals on an expedited basis. The OHA Director's decision on a jurisdictional appeal is the final agency decision unless a party files a petition for Secretarial review within 30 days under § 708.19. The Secretary will reverse or revise a decision by the OHA Director only under extraordinary circumstances.

Section 708.21 encourages informal resolution of complaints, and language has been added to recommend the use of mediation to settle disputes. We have deleted the provision in § 708.8(b) of the original rule that ''the Head of the Field Element or designee shall enter into a settlement agreement which terminates the complaint.'' That provision is unnecessary, since the only parties to a settlement under part 708 would be the contractor and its employee.

If the parties cannot resolve a complaint by informal means such as mediation, a complainant has two options for referral to the OHA under § 708.21: a hearing without an investigation, or an investigation followed by a hearing. This departs from the procedure under the previous rule, which provided that all complaints that were accepted and that had not been resolved informally were investigated before the parties had the right to request a hearing.

If a complainant requests an investigation followed by a hearing, the OHA Director will appoint an investigator under § 708.22. The OHA investigator will investigate the complaint under § 708.22, and issue a report of investigation under § 708.23 within 60 days. The OHA Director may extend the deadline for completion of an investigation only once by up to 30 days under § 708.23(a).

If the OHA convenes a hearing, under § 708.26(a) it will take place within 90 days after receipt of the complaint, or issuance of the report of investigation, whichever is later. This represents a change from § 708.9(b) in the original rule, which required the hearing to take place within 60 days. As a practical matter, the 60 day deadline did not always give the parties sufficient preparation time, and it routinely had to be extended. Under § 708.24, the parties can agree to cancel a hearing, in which case the Hearing Officer will issue the initial agency decision based on the existing record.

The hearing procedures are contained in §§ 708.25 through 708.28. DOE has added language in §§ 708.28(b)(1) and 708.28(b)(2) authorizing the Hearing Officer, at the request of a party, to provide for reasonable discovery by the parties. Discovery is a process used to enable a party to learn about the other party's evidence before a hearing takes place. Discovery eliminates the element of surprise from a hearing, and it can facilitate the settlement of disputes. It can take the form of ''oral depositions,'' where a representative of one party asks questions of a witness for the other party. The deposition is recorded and transcribed by a court reporter. Discovery can also take the form of written ''interrogatories,'' where one party gives written questions to a witness for the other party, who answers them in writing. Additionally, one party may make a ''request for production of documents'' of the other party. A party may also request permission to enter and inspect the property and facilities of the other party. Finally, ''requests for admissions'' is another form of written discovery by which one party asks the other party to admit certain facts.

The burdens of proof for the complainant and for the contractor are set out in a separate section, § 708.29, for emphasis. An employee can also argue that the claimed legitimate reason for taking action against the employee was a pretext for retaliation. The Hearing Officer will issue an initial agency decision under § 708.30 (if a hearing is held) or § 708.31 (if no hearing is held). The legal standard in § 708.29 applies to all cases, whether or not a hearing is held. The interim final rule extends the time for issuing the initial agency decision from 30 to 60 days after the cancellation of the hearing, receipt of the transcript, or

receipt of the post-hearing submissions, whichever occurs later.

Appeals of cases will now go to the OHA Director for his review rather than directly to the Secretary or his designee. Any party may appeal an initial agency decision from an OHA Hearing Officer to the OHA Director under § 708.32, and procedures for considering an appeal are set out in § 708.33. Under § 708.34, the OHA Director will be responsible for issuing the decision on an appeal within 60 days after he closes the record. A party aggrieved by a Hearing Officer decision has not exhausted its administrative remedies until it files an appeal with the OHA Director and the OHA Director issues a decision granting or denying the appeal. The OHA Director's decision on an appeal is the final agency decision unless a party files a petition for Secretarial review within 30 days under § 708.35. The Secretary will reverse or revise a decision by the OHA Director only under extraordinary circumstances. The types of relief that DOE may order now appear in § 708.36.

The right to petition for Secretarial review has been retained to emphasize DOE's strong, ongoing commitment to whistleblower protection. DOE anticipates that petitions for Secretarial review will be relatively rare under this interim final rule, and that the appeal decisions issued by the OHA Director, either on jurisdiction or on the merits of an individual case, will be the final agency action in most cases. This is consistent with the Department of Labor's procedures. In 1996, the Department of Labor amended its whistleblower procedures to eliminate final appellate review by the Secretary, and created an Administrative Appeals Board analogous to the OHA Director responsible for handling them. 61 FR 19978. The Department of Labor's new system was set up to cure inefficiencies and reduce delays in issuing final agency decisions. DOE has decided to transfer appeals from the Secretary to the OHA Director with the same goals in mind. These changes from the process described in the NOPR will expedite the final resolution of whistleblower complaints by DOE.

The extant OHA management structure ensures that the different functions for which OHA will now be responsible under part 708 will be performed by different staff members. The OHA has used a similar separation of functions in other programs for over 25 years, and it has worked successfully to ensure the fair and equitable treatment of initial and appellate submissions by independent decision-makers.

We have added a new section (§ 708.8) to the interim final rule to explicitly state that the revised procedures shall apply in any complaint proceeding pending at the informal resolution stage, the investigative stage or the hearing stage on the effective date of this rule. Appeals currently pending before the Secretary's designee, the Deputy Secretary, will be decided by the Deputy Secretary (rather than be transferred to the OHA Director). It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. See, e.g., *Landgraf* v. *USI Film Products*, 511 U.S. 244, 275 (1994); *Lindh* v. *Murphy*, 117 S.Ct. 2059, 2063–64 (1997); *Natural Resources Defense Council, Inc.* v. *NRC*, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing *Pacific Molasses Co.* v. *FTC*, 356 F.2d 386 (5th Cir. 1966)). DOE will apply the revised procedures to pending cases consistent with the case law.

Finally, this rulemaking also makes conforming changes to the Department of Energy Acquisition Regulations (DEAR) required by expansion of the scope of the whistleblower protection program to cover work done on behalf of DOE directly related to activities at DOE-owned or -leased sites.

III. Summary and Discussion of Public Comments Received Pursuant to the January 5, 1998 Notice of Proposed Rulemaking

DOE received comments from three individuals, two contractors and one public interest group in response to the Department of Energy's Notice of Proposed Rulemaking (NOPR), published in the **Federal Register** on January 5, 1998.

Comment: One commenter recommended that disclosures should have some factual basis, and not just be evaluated on whether they were made in good faith. The commenter also recommended that the complainant be required to provide evidence that the action taken against the employee was retaliatory, including a showing that the disclosure ''would likely provoke censure'' by the contractor.

Response: We believe that the change to the rule in § 708.5(a) accomplishes the first objective of the commenter. Section 708.5(a) now requires that the employee's disclosure involve information he or she ''reasonably and in good faith believes'' is true. This ''reasonableness'' criterion is consistent with the federal Whistleblower Protection Act of 1989, many state statutes, and administrative and judicial decisions.

Section 708.29 of the interim final rule requires that the complainant show, by a preponderance of the evidence, that there was a protected disclosure that was a contributing factor in the alleged retaliation against the complainant. This usually entails proving that the person taking the retaliation had actual or imputed knowledge of the protected activity. A reasonable inference can be drawn from the circumstances that the protected activity was a consideration in taking the alleged retaliation. We therefore believe the interim final rule includes the second element sought by the commenter. Alternatively, the employee can demonstrate that the contractor's asserted legitimate reason was a pretext for retaliation for the protected conduct.

Comment: One commenter suggested that the DOE pay for the legal costs of indigent whistleblowers and provide counsel for such whistleblowers during a mediation phase or when the whistleblower has to deal face to face with contractors who are represented by counsel.

Response: The procedures established under this rule are intended to be informal and designed to facilitate prompt resolution. Providing attorneys would undermine that objective. Moreover, DOE has no evidence that unavailability of legal counsel has impeded whistleblowers in pursuing their complaints. Legal services may be available through local bar associations, from public interest groups that represent whistleblowers or from attorneys who represent clients in these types of cases on a contingent fee basis. Finally, complainants who prevail may receive attorney fees and costs as part of the remedy provided, and settlement agreements between the parties may also include attorney fees for a complainant. These mechanisms should ensure that counsel can be obtained where warranted by the complexity of the issues.

Comment: A commenter requested that the rule include additional information regarding the definition of off-site subcontractors that are covered by the rule. The commenter raised a question about the possible coverage of employees of outside law firms that handle a contractor's litigation or engineering firms that design on-site facilities.

Response: We do not believe that a more precise definition is possible that would avoid questions such as those the commenter raised. In the NOPR, and the language being adopted today in § 708.2, ''contractor'' is defined as

a seller of goods or services who is a party to

(1) A management and operating contract or other type of contract with DOE to perform work directly related to DOE-owned or -leased facilities, or

(2) A subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or -leased facilities.

Further, § 708.2 of the rule defines ''employee'' as

a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart.

It is conceivable that the employees the commenter cited as examples could be the targets of retaliation by a contractor for activities protected by part 708. As described by the commenter, the work being performed may directly relate to activities on DOE sites. There have been decisions under part 708 in which DOE found contractors in violation of this part for pressuring subcontractors to take actions against employees who have engaged in protected activities. Analysis of similar allegations would have to consider jurisdictional issues including the nature of the relationship among the DOE contractor, the complainant and the complainant's employer, the nature of the protected activity by the complainant, and the status of the complainant as an ''employee'' under this part.

Comment: The commenter also questioned the provision allowing a complainant to bypass the investigative phase and submit the complaint directly to the Office of Hearings and Appeals. The commenter stated it was particularly concerned that this process would not afford an employer the opportunity to avoid cases involving ''trivial'' matters; it would not allow an employer to provide evidence that a complaint does not warrant a hearing; and there would be cost savings by requiring an investigation, thereby reducing the number of trivial matters receiving administrative review. The commenter has also recommended that DOE provide employers with the entire complaint, and not merely ''a statement of the issues raised in the complaint'' as proposed in § 708.6.

Response: Under § 708.9(a) of the original rule, either party had a right to request a hearing after the issuance of a report of investigation. The interim final rule changes this procedure in two ways. First, under § 708.21(a) an investigation will no longer be required, but will only occur if requested by the complainant. Second, under § 708.24, all parties can agree to cancel a hearing.

The interim final rule provides, in § 708.16(a), that upon receipt of a complaint, DOE will give the contractor a copy of the complaint and advise the firm that it may submit information to rebut the allegations in the complaint within ten days after receiving the complaint. This process is similar to that followed by the Department of Labor, in 29 CFR part 24, for processing whistleblower complaints filed under the Energy Reorganization Act. We believe this process provides a more equitable opportunity for all parties to address the issues that have been raised.

The interim final rule also contains the requirement that disclosures be made ''reasonably and in good faith.'' The new language in § 708.5(a) includes protections for disclosures of ''substantial'' violations of laws, rule or regulations and ''gross'' mismanagement. These more stringent criteria will also avoid cases involving what the commenter referred to as ''trivial'' matters.

The interim final rule requires complainants to use established grievance-arbitration procedures before filing a Part 708 complaint. To the extent that employers have internal mechanisms to deal with issues raised by employees, they will have a full opportunity to learn the nature of the allegations, to respond to those allegations, and to resolve the dispute internally before the filing of a complaint under Part 708. The interim final rule also stresses the availability of informal resolution, including mediation. This process has proven highly successful for clarifying issues raised in a complaint to facilitate the resolution of disputes by the parties themselves. We hope that parties will make maximum use of this phase of part 708.

Comment: The commenter also recommended that DOE dismiss a case if the Deputy Inspector General for Inspections makes a determination not to pursue an investigation of the complaint.

Response: In the interim final rule, we have changed the provision in the NOPR that drew this comment. The OHA is now responsible for all steps in processing a complaint, once DOE accepts jurisdiction, except when a party requests Secretarial review. Under § 708.21 of the interim final rule, the complainant alone will have the option to forego an investigation, and proceed directly to the hearing stage. We therefore decline to adopt the commenter's suggestion.

Comment: A commenter indicated agreement with several of the proposed changes, including the change in the time limit for filing a complaint; the right of a complainant to request a hearing 240 days after referral of a complaint to the Deputy Inspector General for Inspections; the ability of the Hearing Officer to provide for reasonable discovery; the issuance of a decision within 60 days of the close of a hearing; and the inclusion of off-site employees in the definition of employees covered by the rule. The commenter also recommended that DOE should make jurisdictional decisions within 30 to 45 days of the filing of a complaint, and grant punitive and emotional damages as additional remedies to successful complainants.

Response: Section 708.17(a) of the interim final rule provides 15 days as the period for resolving jurisdictional issues. Such decisions may require the Head of Field Element or the Director of the Office of Employee Concerns to obtain additional information from a complainant or a contractor, and the 15-day time period is a target, rather than an absolute requirement. In any event, DOE will expedite determinations of jurisdiction as much as possible. The streamlined OHA process under the interim final rule will obviate any need for the proposed right to request a hearing after a complaint has been pending before the DOE for 240 days.

With respect to the request for punitive or emotional damages, this issue was also raised by another commenter. That commenter pointed out that ''other statutory schemes,'' including 29 CFR part 24, which the Department of Labor administers, provide compensatory damages beyond the restitutionary remedies afforded under this part. We consider this issue below.

Comment: A commenter recommended the elimination of the provision of the proposed rule that would preclude an employee from filing under part 708 if the complaint could be filed under other statutory mechanisms, including under 29 CFR part 24 or 48 CFR part 3, Subpart 3.9. The commenter noted that the amendments to the Energy Reorganization Act of 1992, codified at 42 U.S.C. 5851(h), state:

> This section may not be construed to expand, diminish, or otherwise affect any rights otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

Response: The interim final rule provides that an employee is not prohibited from filing a complaint under this part merely because relief could have been sought under 29 CFR part 24 or 48 CFR part 3, Subpart 3.9. The interim final rule, in section 708.15(a), does continue the policy contained in the original rule that DOE will dismiss a complaint under this part if the complainant, with respect to the same facts, is pursuing a remedy available under State or other applicable law.

We take note of the language in the amendments to the Energy Reorganization Act of 1992 cited by the commenter, and conclude that the statutory language, enacted after the publication and effective date of the original part 708, should be given effect by not precluding the use of this part by employees who can file under 29 CFR part 24. This part provides an alternative to 29 CFR part 24 for DOE contractor employees to seek redress for retaliation. However, as discussed below, section 708.15(a) of the interim final rule is generally intended to avoid consideration on the merits of cases that were first filed in another forum.

The Inspector General, under 48 CFR part 3, Subpart 3.9, is required to conduct an initial inquiry of a complaint. However, the Inspector General may determine that the complaint is frivolous or for other reasons does not merit further investigation. Therefore, although an employee may file a complaint under that rule, the employee's complaint may not be fully investigated. As such, 48 CFR part 3, Subpart 3.9 would not constitute an avenue for redress for an employee if the complaint is not investigated fully and it should not preclude the subsequent filing of a complaint under part 708 if the Inspector General, after conducting an initial inquiry, declines to take further action on the matter.

With a choice of remedies available, DOE wishes to avoid the situation where an employee could simultaneously pursue the same whistleblower complaint in more than one forum. Under section 708.4(c) of the interim final rule, an employee who elects to pursue a remedy under 29 CFR part 24 (Department of Labor), or 48 CFR part 3, Subpart 3.9 (Inspector General), is generally precluded from later using Part 708. However, section 708.15(a) recognizes two equitable exceptions to this general rule: (1) when the prior complaint under 29 CFR part 24 is dismissed for lack of jurisdiction by the Department of Labor or (2) when the Inspector General, after conducting an initial inquiry, declines to take further action on the matter under 48 CFR part 3, Subpart 3.9. In either instance, the employee is no longer barred from filing a complaint under part 708.

Comment: The commenter also recommended that Hearing Officers not only be given ''the authority to provide for reasonable discovery,'' but be required to provide discovery. The commenter cites one case processed under this part in which there was a dispute over the extent of discovery made available.

Response: We do not believe that requiring discovery is consistent with the necessary authority of a Hearing Officer. To require discovery would eliminate the exercise of discretion as to its necessity. We recognize that some cases will require reasonable discovery in order to develop key factual issues presented in the complaint. This may be particularly true in those cases in which the complainant has exercised the option under § 708.21(a)(1) to proceed directly to the hearing stage without an investigation. Nevertheless, we believe that the Hearing Officer must determine the necessity and appropriate scope of discovery on a case-by-case basis, as has been the practice to date. As provided in § 708.28(b)(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. The citation of a single instance in which there was a disagreement over the granting of a motion for discovery does not, in our opinion, warrant the change recommended. (The dispute was resolved in that case, and the Hearing Officer eventually granted the discovery request.)

Comment: The commenter also recommended that the definition of retaliation should also include the abuse of the security clearance process against an employee, and permit DOE to investigate and remedy alleged personnel security abuses under part 708. The commenter stated that the regulations governing the eligibility for security clearances (10 CFR part 710) do not include remedies for adverse consequences employees may suffer because of the misuse of the clearance process beyond the eligibility determination itself.

Response: The definition of retaliation in this part includes ''intimidation, threats, restraint, coercion or similar action taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) in retaliation for the employee's disclosure of information, participation in proceedings, or refusal to participate in activities * * *.'' It is possible that retaliation as so defined could include actions by the contractor that cause the questioning, suspension, or termination of a security clearance.

The commenter is correct that the regulations governing the eligibility for security clearances at part 710 do not include remedies for adverse consequences employees may suffer because of the misuse of the clearance process beyond the eligibility determination itself. With respect to the eligibility determination, § 710.4 clearly states that the procedures shall not be used for an improper purpose, including any attempt to coerce, restrain, threaten, intimidate or retaliate against individuals for exercising their rights under statute, regulation, or DOE directive. In addition, Part 710 provides considerable due process protections for any individual that is the subject of an access eligibility determination.

Because the Department relies solely on part 710 in determining eligibility for security clearances and part 710 includes protections designed to guard against abuse of that process, there is no review available under part 708 procedures for the ultimate determination on eligibility for a clearance. Thus, if DOE sustains a negative security determination made under part 710, there is no remedy under part 708 even if the security clearance review was initiated as part of an act of retaliation. With respect to consequences beyond the eligibility determination, part 708 may apply.

Comment: This commenter, and one other commenter, recommended that we expand the available remedies to include compensatory damages, including damages for mental anguish, pain and suffering, and emotional distress resulting from a contractor's wrongful actions.

Response: The restitutionary remedies authorized under § 708.36 are intended to correct unwarranted employment actions. The goal of this regulation is simply to restore employees to the position they would have occupied but for the retaliation. Part 708 exists to provide an alternative to filing a lawsuit in which a broad range of compensatory relief may be available, but it is not intended to suspend that option or duplicate the remedies that may be available in litigation. Before choosing a forum for seeking redress of an unwarranted employment action,

contractor employees should compare part 708 with other available remedies.

Comment: The commenter also recommended that part 708 cover DOE employees. In support of the recommendation, the commenter questioned the effectiveness of protections under the Whistleblower Protection Act of 1989 and also cited the case of *Jenkins* v. *U.S. Environmental Protection Agency,* 92–CAA–06, May 18, 1988, a case in which a Federal employee was granted protection against retaliation for protected whistleblowing under the Clean Air Act.

Response: Dissatisfaction with the provisions of the Whistleblower Protection Act of 1989 or its implementation is a matter for legislative consideration; it is not an issue within the scope of this rulemaking. Department of Labor procedures under 29 CFR part 24 provide an additional statutory forum for Federal employees who seek whistleblower protection. We do not believe that these statutory protections for Federal employees need to be supplemented by an additional DOE regulatory process.

Comment: One series of comments expressed various concerns about the interrelationship between the draft revision of part 708 and the scheme of labor-management relations contemplated by the Labor Management Relations Act (LMRA), e.g.,

- That the proposed rule would provide a mechanism for bypassing the collectively bargained grievance-arbitration process and the labor organizations which are the exclusive representatives of the employees in the bargaining unit for the purposes of collective bargaining with the contractors by allowing the Department and the employers to deal directly with employees under part 708 regarding terms and conditions of their employment in violation of the LMRA, and
- That the proposed rule would obviate the need to pursue disputes related to such matters before the National Labor Relations Board or the Federal district courts under sections 301 and 302 of the LMRA.

Thus, the commenter stated, ''the current proposed regulation could act to exclude the legal representative of duly established union agents from any reprisal claim, and would diminish the contractual right for employers and unions to work together to negotiate a fair and reasonable settlement of disputes in the workplace* * * .''

Response: We have carefully reviewed the issues raised by the commenter. The original version of part 708 that has been in effect since April 2, 1992, does not exclude bargaining unit members, including those covered by collective bargaining agreements, from coverage and we believe that determination to be clearly correct. DOE has unique responsibilities under the Atomic Energy Act to ensure the safety of its operations. Allowing members of bargaining units employed by DOE contractors to bring to DOE's attention in part 708 proceedings instances of retaliation for raising safety and similar issues may provide DOE information vital to its capacity to carry out its responsibilities, notwithstanding that such complaints may also relate to terms and conditions of employment which are mandatory subjects for collective bargaining.

Nonetheless, in light of the comments, DOE has added a provision to this interim final rule, new § 708.4(e), to specifically exclude from the coverage of part 708 complaints based on terms and conditions of employment within the meaning of the National Labor Relations Act if the complaint does not involve conduct protected under § 708.5. In addition, DOE addresses the commenters' concern about the potential for bypassing a complainant's collective bargaining representative by including a new provision, § 708.16(b), requiring notice of a complaint and a comment opportunity for any union representing a complainant who is part of a bargaining unit for collective bargaining purposes. Before filing a complaint under part 708, the employee is also required by § 708.12(d) of the interim final rule to exhaust all applicable grievance-arbitration procedures that have been established by agreement of the parties. After exhausting such procedures, the represented employee is free to file a complaint under part 708 to resolve any issues related to alleged retaliation for conduct protected under § 708.5. Such a complaint may be dismissed for good cause, however, as provided in § 708.17 if, for example, the issues in the complaint have been substantially resolved or the employer has made a formal offer to provide a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation.

We believe that this regulation, as modified, better reflects the original regulatory intent of providing procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for covered disclosure of information; participation in Congressional proceedings; or for refusal to participate in dangerous activities while not interfering in matters reserved to the exclusive province of the National Labor Relations Board and the federal district courts in cases brought pursuant to sections 301 and 302 of the LMRA.

We are particularly interested in comments addressing the impact of these changes.

Comment: The commenter also recommended that, in light of the Supreme Court having granted certiorari in *Wright* v. *Universal Maritime Serv. Corp.,* DOE withdraw the draft rule until such time as the Supreme Court issues its ruling. In *Wright,* the Court of Appeals for the Fourth Circuit held that the provisions of a collective bargaining agreement, including binding arbitration, are enforceable prior to the employee seeking statutorily provided rights.

Response: Since the submission of this comment, the Supreme Court has issued its decision in *Wright. See* __U.S.__ (No. 97–889, Nov. 16, 1998). In addition to reviewing that decision, we have further clarified the procedures established in part 708 to require exhaustion of contractual grievance-arbitration procedures. As modified, we believe that we have adequately resolved the concerns expressed by the commenter.

IV. Implementation and Enforcement

None of the comments received addressed the implementation and enforcement measures formerly contained in § 708.12(b), which now appear in § 708.38. However, this is an issue that has received comment in relation to litigation of whistleblower matters. Most complainants with actions reaching the implementation stage at § 708.38 have received the awards ordered by the Department without incident or problem, although a small percentage of cases have encountered difficulties. In situations where difficulties have arisen, the DOE has successfully worked with, and is continuing to work with, the complainant and relevant contractor to achieve a resolution. The DOE has found that each of these situations is unique and no single approach or solution can be used. For this reason, DOE has determined that no single approach to ensuring implementation of an ordered remedy is appropriate for promulgation in a rulemaking.

Furthermore, the streamlined process presented in this rulemaking will avoid problems that arose due to lengthy processing time. Thus, DOE will continue to use its existing measures as described in § 708.38.

The DOE did consider two alternative mechanisms for enforcement of its

decisions. The Department considered providing for assignment of contract funds by a contractor for the benefit of a successful complainant, and it considered providing for a third party beneficiary right in its contracts to successful complainants. The Department seeks comment on the mechanisms it considered, suggestions as to other mechanisms it might consider, and on its decision to maintain its current approach.

V. Public Hearing Determination

The Department concluded that the proposed rule would not involve a substantial issue of fact or law and that the proposed rule would not have a substantial impact on the nation's economy or a large number of individuals or businesses. No public comments were received requesting public hearings and none of the comments received indicated the need for such hearings. Therefore, pursuant to Public Law 95–91, the DOE Organization Act, and the Administrative Procedure Act (5 U.S.C. 553), the Department did not hold a public hearing on the rule.

VI. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be ''a significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the interim final rule meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This rule has been reviewed under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, which requires preparation of an initial regulatory flexibility analysis for any rule that is likely to have a significant economic impact on substantial numbers of small entities. The contracts and employees to which this rulemaking apply are for the most part covered by the original DOE Contractor Employee Protection Program, which prohibited discrimination against employees who engage in protected activities relating to the disclosure of certain types of information or for refusing to engage in unsafe or illegal practices. Most of the changes are procedural in nature aimed at streamlining the process, and the nature of available remedies has not changed. The emphasis on the use of early resolution through Alternative Dispute Resolution, primarily mediation, may in fact lessen adverse economic impacts. Similarly, where violations are found, the expected shortening of the processing time for complaints may result in remedies (e.g., back pay) that are less costly to contractors than under the original rule. Accordingly, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

No additional information or record keeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule deals only with administrative procedures regarding retaliation protection for employees of DOE contractors and subcontractors, and therefore, is covered under the Categorical Exclusion in paragraph A6 to Subpart D, 10 CFR Part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. Review Under Executive Order 12612

Executive Order 12612 (52 FR 41685, October 30, 1987) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This rule will only affect employee-contractor relations with respect to the operation of the DOE Contractor Employee Protection Program. States that contract with DOE will be subject to this rule. However, DOE has determined that this rule will not have a substantial direct impact on the institutional interests or traditional functions of the States.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each federal agency to prepare a written assessment of the effects of any federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in any one year. The Act also requires a federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity to timely input to potentially affected small governments

before establishing any requirements that might significantly or uniquely affect small governments. The rule published today does not contain any federal mandate, so these requirements do not apply.

H. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of the interim final rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

10 CFR Part 708

Administrative practice and procedure, Energy, Fraud, Government contracts, Occupational Safety and Health, Whistleblowing.

48 CFR Parts 913, 922 and 970

Government procurement.

Issued in Washington, on March 3, 1999.

George B. Breznay,

Director, Office of Hearings and Appeals.

Richard H. Hopf,

Director, Office of Procurement and Assistance Management.

For the reasons set forth in the preamble, Chapter III of title 10 and Chapter 9 of title 48 of the Code of Federal Regulations are amended as set forth below:

1. 10 CFR Part 708 is revised to read as follows:

PART 708—DOE CONTRACTOR EMPLOYEE PROTECTION PROGRAM

Subpart A—General Provisions

Sec.
708.1 What is the purpose of this part?
708.2 What are the definitions of terms used in this part?
708.3 What employee complaints are covered?
708.4 What employee complaints are not covered?
708.5 What employee conduct is protected from retaliation by an employer?
708.6 What constitutes ''a reasonable fear of serious injury?''
708.7 What must an employee do before filing a complaint based on retaliation for refusal to participate?
708.8 Does this part apply to pending cases?
708.9 When is a complaint or other document considered to be ''filed'' under this part?

Subpart B—Employee Complaint Resolution Process

708.10 Where does an employee file a complaint?
708.11 Will an employee's identity be kept confidential if the employee so requests?
708.12 What information must an employee include in a complaint?
708.13 What must an employee do to show that all grievance-arbitration procedures have been exhausted?
708.14 How much time does an employee have to file a complaint?
708.15 What happens if an employee files a complaint under this part and also pursues a remedy under State or other law?
708.16 Will a contractor or a labor organization that represents an employee be notified of an employee's complaint and be given an opportunity to respond with information?
708.17 When may DOE dismiss a complaint for lack of jurisdiction or other good cause?
708.18 How can an employee appeal dismissal of a complaint for lack of jurisdiction or other good cause?
708.19 How can a party obtain review by the Secretary of Energy of a decision on appeal of a dismissal?
708.20 Will DOE encourage the parties to resolve the complaint informally?

Subpart C—Investigation, Hearing and Decision Process

708.21 What are the employee's options if the complaint cannot be resolved informally?
708.22 What process does the Office of Hearings and Appeals use to conduct an investigation of the complaint?
708.23 How does the Office of Hearings and Appeals issue a report of investigation?
708.24 Will there always be a hearing after a report of investigation is issued?
708.25 Who will conduct the hearing?
708.26 When and where will the hearing be held?
708.27 May the Hearing Officer recommend mediation to the parties?
708.28 What procedures govern a hearing conducted by the Office of Hearings and Appeals?
708.29 What must the parties to a complaint prove?
708.30 What process does the Hearing Officer follow to issue an initial agency decision?
708.31 If no hearing is conducted, what is the process for issuing an initial agency decision?
708.32 Can a dissatisfied party appeal an initial agency decision?
708.33 What is the procedure for an appeal?
708.34 What is the process for issuing an appeal decision?
708.35 How can a party obtain review by the Secretary of Energy of an appeal decision?
708.36 What remedies for retaliation may be ordered in initial and final agency decisions?
708.37 Will an employee whose complaint is denied by a final agency decision be reimbursed for costs and expenses incurred in pursuing the complaint?
708.38 How is a final agency decision implemented?
708.39 Is a decision and order implemented under this part considered a claim by the government against a contractor or a decision by the contracting officer under sections 6 and 7 of the Contract Disputes Act?

Authority: 42 U.S.C. 2201(b), 2201(c), 2201(i), and 2201(p); 42 U.S.C. 5814 and 5815; 42 U.S.C. 7251, 7254, 7255, and 7256; and 5 U.S.C. Appendix 3.

Subpart A—General Provisions

§ 708.1 What is the purpose of this part?

This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.

§ 708.2 What are the definitions of terms used in this part?

For purposes of this part:

Contractor means a seller of goods or services who is a party to:

(1) A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities, or

(2) A subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or -leased facilities.

Day means a calendar day.

Discovery means a process used to enable the parties to learn about each other's evidence before a hearing takes place, including oral depositions, written interrogatories, requests for admissions, inspection of property and requests for production of documents.

DOE Official means any officer or employee of DOE whose duties include program management or the investigation or enforcement of any law, rule, or regulation relating to Government contractors or the subject matter of a contract.

EC Director means the Director of the Office of Employee Concerns at DOE Headquarters, or any official to whom the Director delegates his or her functions under this part.

Employee means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in § 708.5 of this subpart.

Field element means a DOE field-based office that is responsible for the management, coordination, and

administration of operations at a DOE facility.

Head of Field Element means the manager or head of a DOE operations office or field office, or any official to whom those individuals delegate their functions under this part.

Hearing Officer means an individual appointed by the OHA Director to conduct a hearing on a complaint filed under this part.

Management and operating contract means an agreement under which DOE contracts for the operation, maintenance, or support of a Government-owned or -leased research, development, special production, or testing establishment that is wholly or principally devoted to one or more of the programs of DOE.

Mediation means an informal, confidential process in which a neutral third person assists the parties in reaching a mutually acceptable resolution of their dispute; the neutral third person does not render a decision.

OHA Director means the Director of the Office of Hearings and Appeals, or any official to whom the Director delegates his or her functions under this part.

Party means an employee, contractor, or other party named in a proceeding under this part.

Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

You means the employee who files a complaint under this part, or the complainant.

§ 708.3 What employee complaints are covered?

This part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation, or refusal described in § 708.5.

§ 708.4 What employee complaints are not covered?

If you are an employee of a contractor, you may not file a complaint against your employer under this part if:

(a) The complaint is based on race, color, religion, sex, age, national origin, or other similar basis; or

(b) The complaint involves misconduct that you, acting without direction from your employer, deliberately caused, or in which you knowingly participated; or

(c) Except as provided in § 708.15(a), the complaint is based on the same facts for which you have chosen to pursue a remedy available under:

(1) Department of Labor regulations at 29 CFR part 24, ''Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes;''

(2) Federal Acquisition Regulations, 48 CFR part 3, ''Federal Acquisition Regulation; Whistleblower Protection for Contractor Employees (Ethics);'' or

(3) State or other applicable law, including final and binding grievance-arbitration, as described in § 708.15 of subpart B; or

(d) The complaint is based on the same facts in which you, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation. This part does not override any provision or requirement of any regulation pertaining to Restricted Data, national security information, or any other classified or sensitive information; or

(e) The complaint deals with ''terms and conditions of employment'' within the meaning of the National Labor Relations Act, except as provided in § 708.5.

§ 708.5 What employee conduct is protected from retaliation by an employer?

If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably and in good faith believe reveals—

(1) A substantial violation of a law, rule, or regulation;

(2) A substantial and specific danger to employees or to public health or safety; or

(3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would—

(1) Constitute a violation of a federal health or safety law; or

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

§ 708.6 What constitutes ''a reasonable fear of serious injury?''

Participation in an activity, policy, or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if:

(a) A reasonable person, under the circumstances that confronted the employee, would in good faith conclude there is a substantial risk of a serious accident, injury, or impairment of health or safety resulting from participation in the activity, policy, or practice; or

(b) An employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice.

§ 708.7 What must an employee do before filing a complaint based on retaliation for refusal to participate?

You may file a complaint for retaliation for refusing to participate in an activity, policy, or practice only if:

(a) Before refusing to participate in the activity, policy, or practice, you asked your employer to correct the violation or remove the danger, and your employer refused to take such action; and

(b) By the 30th day after you refused to participate, you reported the violation or dangerous activity, policy, or practice to a DOE official, a member of Congress, another government official with responsibility for the oversight of the conduct of operations at the DOE site, your employer, or any higher tier contractor, and stated your reasons for refusing to participate.

§ 708.8 Does this part apply to pending cases?

The procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part.

§ 708.9 When is a complaint or other document considered to be ''filed'' under this part?

Under this part, a complaint or other document is considered ''filed'' on the date it is mailed or on the date it is personally delivered to the specified official or office.

Subpart B—Employee Complaint Resolution Process

§ 708.10 Where does an employee file a complaint?

(a) If you were employed by a contractor whose contract is handled by a contracting officer located in DOE Headquarters when the alleged retaliation occurred, you must file two copies of your written complaint with the EC Director.

(b) If you were employed by a contractor at a DOE field facility or site when the alleged retaliation occurred, you must file two copies of your written complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract.

§ 708.11 Will an employee's identity be kept confidential if the employee so requests?

No. The identity of an employee who files a complaint under this part appears on the complaint. A copy of the complaint is provided to the contractor and it becomes a public document.

§ 708.12 What information must an employee include in a complaint?

Your complaint does not need to be in any specific form but must be signed by you and contain the following:

(a) A statement specifically describing

(1) The alleged retaliation taken against you and

(2) The disclosure, participation, or refusal that you believe gave rise to the retaliation;

(b) A statement that you are not currently pursuing a remedy under State or other applicable law, as described in § 708.15 of this subpart;

(c) A statement that all of the facts that you have included in your complaint are true and correct to the best of your knowledge and belief; and

(d) An affirmation, as described in § 708.13 of this subpart, that you have exhausted (completed) all applicable grievance or arbitration procedures.

§ 708.13 What must an employee do to show that all grievance-arbitration procedures have been exhausted?

(a) To show that you have exhausted all applicable grievance-arbitration procedures, you must:

(1) State that all available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted, and provide the date on which the grievance-arbitration procedure was terminated and the reasons for termination; or

(2) State that you filed a grievance under applicable grievance-arbitration procedures, but more than 150 days have passed and a final decision on it has not been issued, and provide the date that you filed your grievance; or

(3) State that your employer has established no grievance-arbitration procedures.

(b) If you do not provide the information specified in § 708.13(a), your complaint may be dismissed for lack of jurisdiction as provided in § 708.17 of this subpart.

§ 708.14 How much time does an employee have to file a complaint?

(a) You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation.

(b) The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure. The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of:

(1) The day after such dispute resolution efforts end; or

(2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued.

(c) The period for filing a complaint does not include time spent resolving jurisdictional issues related to a complaint you file under State or other applicable law. The time period for filing stops running on the date the complaint under State or other applicable law is filed and begins to run again the day after a final decision on the jurisdictional issues is issued.

(d) If you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing.

§ 708.15 What happens if an employee files a complaint under this part and also pursues a remedy under State or other law?

(a) You may not file a complaint under this part if, with respect to the same facts, you choose to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless:

(1) Your complaint under State or other applicable law is dismissed for lack of jurisdiction;

(2) Your complaint was filed under 48 CFR part 3, Subpart 3.9 and the Inspector General, after conducting an initial inquiry, determines not to pursue it; or

(3) You have exhausted grievance-arbitration procedures pursuant to § 708.13, and issues related to alleged retaliation for conduct protected under § 708.5 remain.

(b) Pursuing a remedy other than final and binding grievance-arbitration procedures does not prevent you from filing a complaint under this part.

(c) You are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts in a proceeding established or mandated by State or other applicable law, whether you file such complaint before, concurrently with, or after you file a complaint under this part.

(d) If you file a complaint under State or other applicable law after filing a complaint under this part, your complaint under this regulation will be dismissed under § 708.17(c)(2).

§ 708.16 Will a contractor or a labor organization that represents an employee be notified of an employee's complaint and be given an opportunity to respond with information?

(a) By the 15th day after receiving your complaint, the Head of Field Element or EC Director (as applicable) will provide your employer a copy of your complaint. Your employer has 10 days from receipt of your complaint to submit any comments it wishes to make regarding the allegations in the complaint.

(b) If you are part of a bargaining unit represented for purposes of collective bargaining by a labor organization, the Head of Field Element or EC Director (as applicable) will provide your representative a copy of your complaint by the 15th day after receiving it. The labor organization will be advised that it has 10 days from the receipt of your complaint to submit any comments it wishes to make regarding the allegations in the complaint.

§ 708.17 When may DOE dismiss a complaint for lack of jurisdiction or other good cause?

(a) The Head of Field Element or EC Director (as applicable) may dismiss your complaint for lack of jurisdiction or for other good cause after receiving your complaint, either on his or her own initiative or at the request of a party named in your complaint. Such decisions are generally issued by the 15th day after the receipt of your employer's comments.

(b) The Head of Field Element or EC Director (as applicable) will notify you by certified mail, return receipt requested, if your complaint is dismissed for lack of jurisdiction or other good cause, and give you specific

reasons for the dismissal, and will notify other parties of the dismissal.

(c) Dismissal for lack of jurisdiction or other good cause is appropriate if:

(1) Your complaint is untimely; or

(2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this part; or

(3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part; or

(4) Your complaint is frivolous or without merit on its face; or

(5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or

(6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this part.

§ 708.18 How can an employee appeal dismissal of a complaint for lack of jurisdiction or other good cause?

(a) If your complaint is dismissed by the Head of Field Element or EC Director, the administrative process is terminated unless you appeal the dismissal to the OHA Director by the 10th day after you receive the notice of dismissal as evidenced by a receipt for delivery of certified mail.

(b) If you appeal a dismissal to the OHA Director, you must send copies of your appeal to the Head of Field Element or EC Director (as applicable) and all parties. Your appeal must include a copy of the notice of dismissal, and state the reasons why you think the dismissal was erroneous.

(c) The OHA Director will issue a decision on your appeal and notify the parties of the decision by the 30th day after it is received.

(d) The OHA Director's decision, either upholding the dismissal by the Head of Field Element or EC Director or ordering further processing of your complaint, is the final decision on your appeal, unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision.

§ 708.19 How can a party obtain review by the Secretary of Energy of a decision on appeal of a dismissal?

(a) By the 30th day after receiving a decision on an appeal under § 708.18 from the OHA Director, any party may file a petition for Secretarial review of a dismissal with the Office of Hearings and Appeals.

(b) By the 15th day after filing the petition for Secretarial review, a party must file a statement setting forth the arguments in support of its position. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) After a petition for Secretarial review is filed, the Secretary (or his or her delegee) will issue the final agency decision on jurisdiction over the complaint. The Secretary will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. In the event he or she determines that a revision in the appeal decision is appropriate, the Secretary will direct the OHA Director to issue an order either upholding the dismissal by the Head of Field Element or EC Director or ordering further processing of your complaint.

§ 708.20 Will DOE encourage the parties to resolve the complaint informally?

(a) Yes. The Head of Field Element or EC Director (as applicable) may recommend that the parties attempt to resolve the complaint informally, for example, through mediation.

(b) The period for attempting informal resolution of the complaint may not exceed 30 days from the date you filed your complaint, unless the parties agree to extend the time.

(c) The 30-day period permitted for informal resolution of the complaint stops running when a request to dismiss your complaint on jurisdictional grounds is filed with the Head of Field Element or EC Director, and begins to run again on the date the OHA Director returns the complaint to the Head of Field Element or EC Director for further processing.

(d) If the parties resolve the complaint informally, the Head of Field Element or EC Director (as applicable) must be given a copy of the settlement agreement or a written statement from you withdrawing the complaint.

Subpart C—Investigation, Hearing and Decision Process

§ 708.21 What are the employee's options if the complaint cannot be resolved informally?

(a) If the attempt at informal resolution is not successful, the Head of Field Element or EC Director (as applicable) will notify you in writing that you have the following options:

(1) Request that your complaint be referred to the Office of Hearings and Appeals for a hearing without an investigation; or

(2) Request that your complaint be referred to the Office of Hearings and Appeals for an investigation followed by a hearing.

(b) You must notify the Head of Field Element or EC Director (as applicable), in writing, by the 20th day after receiving notice of your options, whether you request referral of your complaint to the Office of Hearings and Appeals for a hearing without an investigation, or an investigation followed by a hearing.

(c) If the Head of Field Element or EC Director does not receive your response to the notice of options by the 20th day after your receipt of that notice, DOE will consider your complaint withdrawn.

(d) If you timely request referral to the Office of Hearings and Appeals, the Head of Field Element or EC Director (as applicable) will forward your complaint to the OHA Director by the 5th day after receipt of your request.

(e) The Head of the Field Element or EC Director (as applicable) will notify all parties that the complaint has been referred to the Office of Hearings and Appeals, and state whether you have requested a hearing without an investigation or requested an investigation followed by a hearing.

§ 708.22 What process does the Office of Hearings and Appeals use to conduct an investigation of the complaint?

(a) If you request a hearing without an investigation, the OHA Director will not initiate an investigation even if another party requests one.

(b) If you request an investigation followed by a hearing, the OHA Director will appoint a person from the Office of Hearings and Appeals to conduct the investigation. The investigator may not participate or advise in the initial or final agency decision on your complaint.

(c) The investigator will determine the appropriate scope of investigation based on the circumstances of the complaint. The investigator may enter and inspect places and records; make copies of records; interview persons alleged to have been involved in retaliation and other employees of the charged contractor who may have relevant information; take sworn statements; and require the production of any documents or other evidence.

(d) A contractor must cooperate fully with the investigator by making employees and all pertinent evidence available upon request.

(e) A person being interviewed in an investigation has the right to be represented by a person of his or her choosing.

(f) Parties to the complaint are not entitled to be present at interviews conducted by an investigator.

(g) If a person other than the complainant requests that his or her identity be kept confidential, the investigator may grant confidentiality, but must advise such person that confidentiality means that the Office of Hearings and Appeals will not identify the person as a source of information to anyone outside the Office of Hearings and Appeals, except as required by statute or other law, or as determined by the OHA Director to be unavoidable.

§ 708.23 How does the Office of Hearings and Appeals issue a report of investigation?

(a) The investigator will complete the investigation and issue a report of investigation by the 60th day after the complaint is received by the Office of Hearings and Appeals, unless the OHA Director, for good cause, extends the investigation for no more than 30 days.

(b) The investigator will provide copies of the report of investigation to the parties. The investigation will not be reopened after the report of investigation is issued.

(c) If the parties informally resolve the complaint (e.g., through mediation) after an investigation is started, you must notify the OHA Director in writing of your decision to withdraw the complaint.

§ 708.24 Will there always be a hearing after a report of investigation is issued?

(a) No. An employee may withdraw a hearing request after the report of investigation is issued. However, the hearing may be canceled only if all parties agree that they do not want a hearing.

(b) If the hearing is canceled, the Hearing Officer will issue an initial agency decision pursuant to § 708.31 of this subpart.

§ 708.25 Who will conduct the hearing?

(a) The OHA Director will appoint a Hearing Officer from the Office of Hearings and Appeals to conduct a hearing.

(b) The Hearing Officer may not be subject to the supervision or direction of the investigator.

§ 708.26 When and where will the hearing be held?

(a) The Hearing Officer will schedule a hearing to be held by the 90th day after receipt of the complaint, or issuance of the report of investigation, whichever is later. Any extension of the hearing date must be approved by the OHA Director.

(b) The Hearing Officer will schedule the hearing for a location near the site where the alleged retaliation occurred or your place of employment, or at another location that is appropriate considering the circumstances of a particular case.

§ 708.27 May the Hearing Officer recommend mediation to the parties?

The Hearing Officer may recommend, but may not require, that the parties 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 that it would have taken the same action without the employee's disclosure, participation, or refusal.

§ 708.30 What process does the Hearing Officer follow to issue an initial agency decision?

(a) The Hearing Officer will issue an initial agency decision on your

complaint by the 60th day after the later of:

(1) The date the Hearing Officer approves the parties' agreement to cancel the hearing;

(2) The date the Hearing Officer receives the transcript of the hearing; or

(3) The date the Hearing Officer receives post-hearing submissions permitted under § 708.28(b)(7) of this subpart.

(b) The Hearing Officer will serve the initial agency decision on all parties.

(c) An initial agency decision issued by the Hearing Officer will contain appropriate findings, conclusions, an order, and the factual basis for each finding, whether or not a hearing has been held on the complaint. In making such findings, the Hearing Officer may rely upon, but is not bound by, the report of investigation.

(d) If the Hearing Officer determines that an act of retaliation has occurred, the initial agency decision will include an order for any form of relief permitted under § 708.36.

(e) If the Hearing Officer determines that an act of retaliation has not occurred, the initial agency decision will state that the complaint is denied.

§ 708.31 If no hearing is conducted, what is the process for issuing an initial agency decision?

(a) If no party wants a hearing after the issuance of a report of investigation, the Hearing Officer will issue an initial agency decision by the 60th day after the hearing is canceled pursuant to § 708.24. The standards in § 708.30, governing the issuance of an initial agency decision, apply whether or not a hearing has been held on the complaint.

(b) The Hearing Officer will serve the initial agency decision on all parties.

§ 708.32 Can a dissatisfied party appeal an initial agency decision?

(a) Yes. By the 15th day after receiving an initial agency decision from the Hearing Officer, any party may file a notice of appeal with the OHA Director requesting review of the initial agency decision.

(b) A party who appeals an initial agency decision (the appellant) must serve a copy of the notice of appeal on all other parties.

(c) A party who receives an initial agency decision by a Hearing Officer has not exhausted its administrative remedies until an appeal has been filed with the OHA Director and a decision granting or denying the appeal has been issued.

§ 708.33 What is the procedure for an appeal?

(a) By the 15th day after filing a notice of appeal under § 708.32, the appellant must file a statement identifying the issues that it wishes the OHA Director to review. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(b) In considering the appeal, the OHA Director:

(1) May initiate an investigation of any statement contained in the request for review and utilize any relevant facts obtained by such investigation in conducting the review of the initial agency decision;

(2) May solicit and accept submissions from any party that are relevant to the review. The OHA Director may establish appropriate times to allow for such submissions;

(3) May consider any other source of information that will advance the evaluation, provided that all parties are given an opportunity to respond to all third person submissions; and

(4) Will close the record on appeal after receiving the last submission permitted under this section.

§ 708.34 What is the process for issuing an appeal decision?

(a) If there is no appeal of an initial agency decision, and the time for filing an appeal has passed, the initial agency decision becomes the final agency decision.

(b) If there is an appeal of an initial agency decision, the OHA Director will issue an appeal decision based on the record of proceedings by the 60th day after the record is closed.

(1) An appeal decision issued by the OHA Director will contain appropriate findings, conclusions, an order, and the factual basis for each finding, whether or not a hearing has been held on the complaint. In making such findings, the OHA Director may rely upon, but is not bound by, the report of investigation and the initial agency decision.

(2) If the OHA Director determines that an act of retaliation has occurred, the appeal decision will include an order for any form of relief permitted under § 708.36.

(3) If the OHA Director determines that the contractor charged has not committed an act of retaliation, the appeal decision will deny the complaint.

(c) The OHA Director will send an appeal decision to all parties and to the Head of Field Element or EC Director having jurisdiction over the contract under which you were employed when the alleged retaliation occurred.

(d) The appeal decision issued by the OHA Director is the final agency decision unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision.

§ 708.35 How can a party obtain review by the Secretary of Energy of an appeal decision?

(a) By the 30th day after receiving an appeal decision from the OHA Director, any party may file a petition for Secretarial review with the Office of Hearings and Appeals.

(b) By the 15th day after filing a petition for Secretarial review, the petitioner must file a statement identifying the issues that it wishes the Secretary to consider. A copy of the statement must be served on the other parties, who may file a response by the 20th day after receipt of the statement. Any response must also be served on the other parties.

(c) All submissions permitted under this section must be filed with the Office of Hearings and Appeals.

(d) After a petition for Secretarial review is filed, the Secretary (or his or her delegee) will issue the final agency decision on the complaint. The Secretary will reverse or revise an appeal decision by the OHA Director only under extraordinary circumstances. In the event the Secretary determines that a revision in the appeal decision is appropriate, the Secretary will direct the OHA Director to issue a revised decision which is the final agency action on the complaint.

§ 708.36 What remedies for retaliation may be ordered in initial and final agency decisions?

(a) *General remedies.* If the initial or final agency decision determines that an act of retaliation has occurred, it may order:

(1) Reinstatement;

(2) Transfer preference;

(3) Back pay;

(4) Reimbursement of your reasonable costs and expenses, including attorney and expert-witness fees reasonably incurred to prepare for and participate in proceedings leading to the initial or final agency decision; or

(5) Such other remedies as are deemed necessary to abate the violation and provide you with relief.

(b) *Interim relief.* If an initial agency decision contains a determination that an act of retaliation occurred, the decision may order the contractor to provide you with appropriate interim relief (including reinstatement) pending the outcome of any request for review of the decision by the OHA Director. Such interim relief will not include payment of any money.

§ 708.37 Will an employee whose complaint is denied by a final agency decision be reimbursed for costs and expenses incurred in pursuing the complaint?

No. If your complaint is denied by a final agency decision, you may not be reimbursed for the costs and expenses you incurred in pursuing the complaint.

§ 708.38 How is a final agency decision implemented?

(a) The Head of Field Element having jurisdiction over the contract under which you were employed when the alleged retaliation occurred, or EC Director, will implement a final agency decision by forwarding the decision and order to the contractor, or subcontractor, involved.

(b) A contractor's failure or refusal to comply with a final agency decision and order under this regulation may result in a contracting officer's decision to disallow certain costs or terminate the contract for default. In the event of a contracting officer's decision to disallow costs or terminate a contract for default, the contractor may file a claim under the disputes procedures of the contract.

§ 708.39 Is a decision and order implemented under this regulation considered a claim by the government against a contractor or a decision by the contracting officer under sections 6 and 7 of the Contract Disputes Act?

No. A final agency decision and order issued pursuant to this regulation is not considered a claim by the government against a contractor or ''a decision by the contracting officer'' under sections 6 and 7 of the Contract Disputes Act (41 U.S.C. 605 and 606).

Title 48

PART 913—SIMPLIFIED ACQUISITION PROCEDURES

2–3. The authority citation for Parts 913 and 922 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

§ 913.507 [Removed]

4. Remove section 913.507.

PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

5. Section 922.7101 is revised to read as follows:

§ 922.7101 Clause.

The contracting officer shall insert the clause at 970.5204–59, Whistleblower Protection for Contractor Employees, in contracts other than management and operating contracts that involve work to be done on behalf of DOE directly related to activities at DOE-owned or -leased sites.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

6. The authority citation for part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Public Law 95–91 (42 U.S.C. 7254).

7. In section 970.2274–1, remove the last sentence of introductory paragraph (a), and remove paragraphs (a)(1) through (a)(3); revise paragraphs (b) and (c) as set forth below, and revise the reference in paragraph (d) to ''10 CFR 708.12(b)'' to read ''Part 708''.

§ 970.2274–1 General.

* * * * *

(b) Contractors found to have retaliated against an employee in reprisal for such disclosure, participation or refusal are required to provide relief in accordance with decisions issued under 10 CFR part 708.

(c) Part 708 is applicable to employees of contractors, and subcontractors, performing work on behalf of DOE directly related to DOE-owned or -leased facilities.

* * * * *

8. Section 970.5204–59 is revised to read as follows:

§ 970.5204–59 Whistleblower protection for contractor employees.

As prescribed in 970.2274–2, insert the following clause in management and operating contracts. As prescribed in 922.7101, insert the following clause in contracts that are not management and operating contracts involving work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

Whistleblower Protection for Contractor Employees (APR 1999)

(a) The contractor shall comply with the requirements of ''DOE Contractor Employee Protection Program'' at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

(b) The contractor shall insert or have inserted the substance of this clause, including this paragraph (b), in subcontracts at all tiers, for subcontracts involving work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

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