

## Department of Energy

## Pt. 708

test records and chromatographic tracings, shall be retained by the laboratory in such a manner as to allow retrieval of all information pertaining to the individual urine specimens for a minimum period of five years after completion of testing of any given specimen, or longer if so instructed by DOE or by the contractor. In addition, a frozen sample of all positive urine specimens shall be retained by the laboratory for at least six months, or longer if so instructed by DOE.

(d) The contractor shall maintain as part of its medical records copies of specimen chain of custody forms.

(e) The specimen chain of custody form will contain the following information:

- (1) Date of collection;
- (2) Tested person's name;
- (3) Tested employee/applicant's social security number or other identification number unique to the individual;
- (4) Specimen number;
- (5) Type of test (random, applicant, occurrence, reasonable suspicion, follow-up, or other);
- (6) Temperature range of specimen;
- (7) Remarks regarding unusual behavior or conditions;
- (8) Collector's signature; and
- (9) Certification signature of specimen provider certifying that specimen identified is in fact the specimen the individual provided.

### §707.17 Permissible actions in the event of contractor noncompliance.

Actions available to DOE in the event of contractor noncompliance with the provisions of this part or otherwise performing in a manner inconsistent with its approved program include, but are not limited to, suspension or debarment, contract termination, or reduction in fee in accordance with the contract terms.

## 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?

## § 708.1

- 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 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?
- 708.40 Are contractors required to inform their employees about this program?
- 708.41 Will DOE ever refer a complaint filed under this part to another agency for investigation and a decision?
- 708.42 May the deadlines established by this part be extended by any DOE official?
- § 708.43 Does this rule impose an affirmative duty on DOE contractors not to retaliate?

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.

SOURCE: 64 FR 12870, Mar. 15, 1999, unless otherwise noted.

### 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 Congress-

## 10 CFR Ch. III (1–1–12 Edition)

sional 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

## Department of Energy

## § 708.5

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 believe reveals—

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

## § 708.6

(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.

[57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

### § 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 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.

[57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

### § 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

## 10 CFR Ch. III (1–1–12 Edition)

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

## Department of Energy

## § 708.15

(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

## § 708.16

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)(3).

[57 FR 7541, Mar. 3, 1992, as amended at 65 FR 6319, Feb. 9, 2000]

### **§ 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

## 10 CFR Ch. III (1–1–12 Edition)

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.

## Department of Energy

## § 708.21

### § 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 delegate) 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

### **§ 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

## 10 CFR Ch. III (1–1–12 Edition)

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

## Department of Energy

## § 708.29

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

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

(a) In all hearings under this part:

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

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

(3) Witnesses are subject to cross-examination;

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

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

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

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

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

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

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

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

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

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

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

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

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

### § 708.29 What must the parties to a complaint prove?

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

### § 708.30

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.

### 10 CFR Ch. III (1–1–12 Edition)

#### **§ 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

## Department of Energy

## § 708.38

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 delegatee) 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

## § 708.39

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).

### **§ 708.40 Are contractors required to inform their employees about this program?**

Yes. Contractors who are covered by this part must inform their employees about these regulations by posting notices in conspicuous places at the work site. These notices must include the name and address of the DOE office where you can file a complaint under this part.

[64 FR 37397, July 12, 1999]

### **§ 708.41 Will DOE ever refer a complaint filed under this part to another agency for investigation and a decision?**

Notwithstanding the provisions of this part, the Secretary of Energy retains the right to request that a complaint filed under this part be accepted by another Federal agency for investigation and factual determinations.

[64 FR 37397, July 12, 1999]

## 10 CFR Ch. III (1–1–12 Edition)

### **§ 708.42 May the deadlines established by this part be extended by any DOE official?**

Yes. The Secretary of Energy (or the Secretary's designee) may approve the extension of any deadline established by this part, and the OHA Director may approve the extension of any deadline under § 708.22 through § 708.34 of this subpart (relating to the investigation, hearing, and OHA appeal process).

[64 FR 37397, July 12, 1999]

### **§ 708.43 Does this rule impose an affirmative duty on DOE contractors not to retaliate?**

Yes. DOE contractors may not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in §§ 708.5(a)–(c).

[65 FR 6319, Feb. 9, 2000; 65 FR 9201, Feb. 24, 2000]

## **PART 709—COUNTERINTELLIGENCE EVALUATION PROGRAM**

### **Subpart A—General Provisions**

Sec.

- 709.1 Purpose.
- 709.2 Definitions.
- 709.3 Covered persons subject to a CI evaluation and polygraph.
- 709.4 Notification of a CI evaluation.
- 709.5 Waiver of polygraph examination requirements.

### **Subpart B—CI Evaluation Protocols and Protection of National Security**

- 709.10 Scope of a counterintelligence evaluation.
- 709.11 Topics within the scope of a polygraph examination.
- 709.12 Defining polygraph examination questions.
- 709.13 Implications of refusal to take a polygraph examination.
- 709.14 Consequences of a refusal to complete a CI evaluation including a polygraph examination.
- 709.15 Processing counterintelligence evaluation results.
- 709.16 Application of Counterintelligence Evaluation Review Boards in reaching conclusions regarding CI evaluations.
- 709.17 Final disposition of CI evaluation findings and recommendations.