

§ 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

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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.