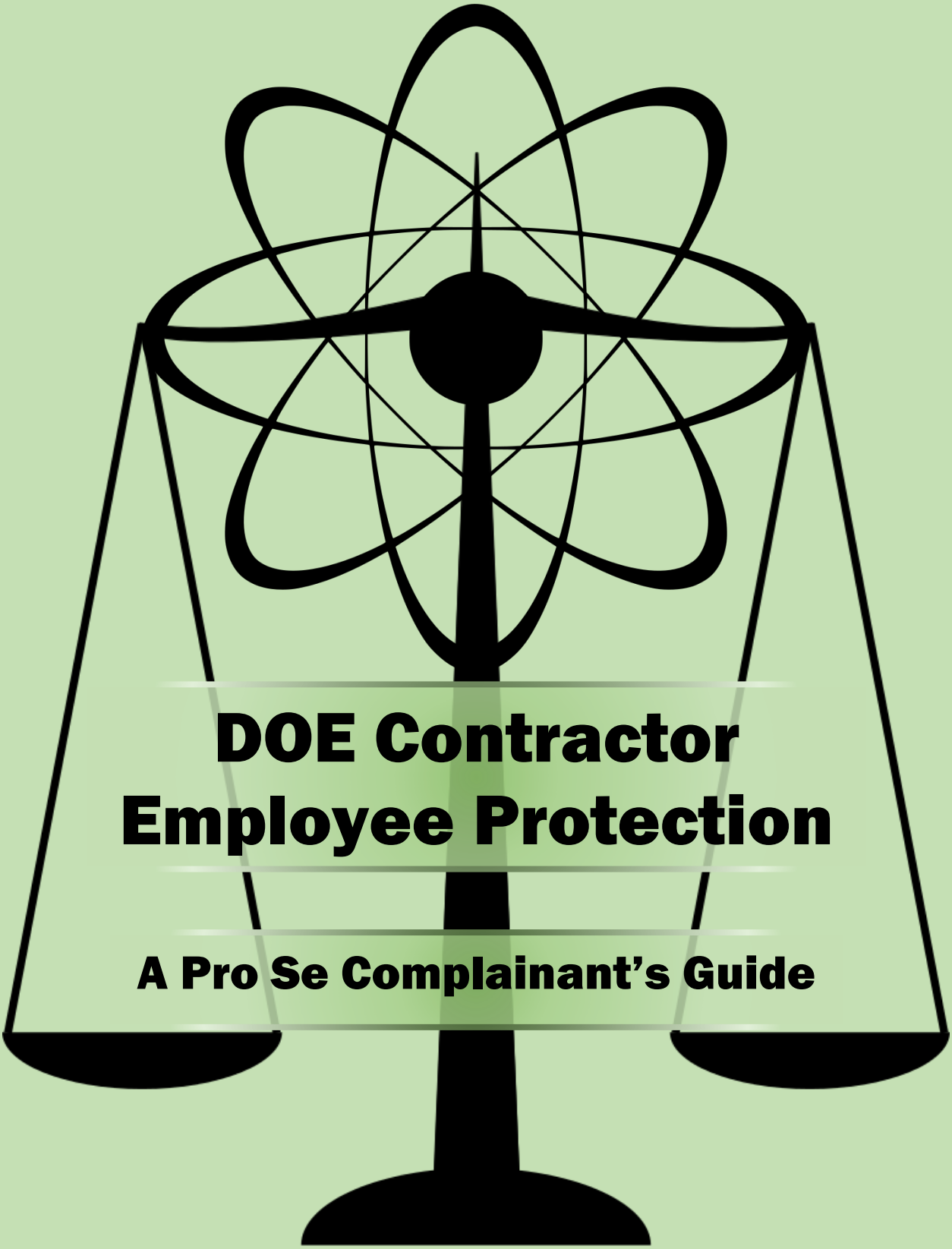

DOE Contractor Employee Protection

A Pro Se Complainant's Guide

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❖ How to use this Guidance

This Guidance is issued by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) and is intended to assist interested person(s) in navigating the legal procedures of 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. Some topics explain legal requirements and use mandatory language, such as "will", "must", or "required." Other topics discuss OHA procedure and how to present your case. These topics include language such as "should," "may," and "can." You are not required to follow these recommendations and, if you choose not to, OHA will still consider your case impartially.

❖ Part 708 Basics

Part 708 protects employees of DOE contractors and subcontractors from retaliation that occurs as a result of the employee making a protected disclosure. There are four questions that make up the substance of a 708 case.

First, the employee must prove that the answer to these questions is yes:

1. Was there a protected disclosure?
2. Was there an adverse personnel action?
3. Was the adverse personnel action taken in retaliation for the protected disclosure?

Even supposing the employee meets this burden of proof, the claim will not succeed if the employer can prove that the answer to this question is yes:

4. Would the employer have taken the adverse personnel action regardless of the protected disclosure?

◯ Protected Disclosures

◊ What disclosures are protected? (10 C.F.R. § 708.5)

There are several types of protected disclosures, including some that are actions, rather than words. The allegation in the disclosure does not actually have to be true, but the person disclosing it must reasonably believe it is true. The following is a list of the types of disclosures protected by Part 708:

1. Reports a substantial violation of a law, rule, or regulation;
    a. Minor violations, even minor violations of criminal statutes, are not "substantial." For example, a violation was not substantial when a contractor once had an employee work 16.25 hours in one day in violation of a state statute that capped daily work at 16 hours per day. (Case No. WBZ-17-0003). The violation may have been substantial if the time had been longer or the violation had occurred regularly.
    b. Internal policies (such as contractor policies or procedures) qualify as a "law, rule, or regulation" for purposes of Part 708 if the policy has language that is required by a law rule or regulation. For example, if a statute requires a contractor to have a company policy saying X, then a violation of the contractor's policy stating X may be a violation of law for purposes of Part 708. But if the contractor is not required to have a policy stating Y, a violation of Y is probably not a violation of law, rule, or regulation for Part 708.
2. Reports an abuse of authority, gross mismanagement, fraud, or gross waste of funds;
    a. Abuse of authority is an arbitrary exercise of power by an official or employee that negatively affects another person's rights, or that results in the official or employee

gaining an advantage for himself or to a preferred person(s). Part 708 is not intended to manage day to day decisions of DOE contractors, and mere unpleasant behavior by managers does not rise to the level of abuse of authority.

   b. Gross mismanagement is defined as more than simple wrongdoing or negligence. It does not include management decision that are debatable. There must be an element of blatancy.
   c. Fraud means knowingly misrepresenting the truth or concealing an important fact so that someone else will act against their own interests.
   d. Gross waste of funds is defined as more than a debatable expenditure that is significantly out of proportion to the benefit the government could reasonably expect to get.

3. Reports a substantial and specific danger to employees or to public health or safety;
   a. A substantial and specific danger is something that is likely to happen and likely to result in serious harm.
   b. Vague assertions of harm are not enough. Remote dangers (things that may or may not happen) are also not enough.
4. Participates in an administrative proceeding under Part 708 or a Congressional proceeding;
   a. Appearing as a witness or party in a Part 708 proceeding automatically qualifies as a protected disclosure. So does participating in a Congressional proceeding.
5. Refuses to participate in what they reasonably believe would constitute a violation of a federal health or safety law; or
6. Refuses to participate in something that they reasonably fear would cause serious injury to themselves or other employees or members of the public.

◊ To whom must disclosures be made in order to be protected? (10 C.F.R. § 708.5)

To qualify as a protected disclosure, the employee must have made the disclosure to:

1. A DOE Official;
2. A member of Congress;
3. Any other government official with the responsibility to oversee operations at a DOE site;
4. Their employer; or
5. Any higher tier contractor.

◊ Reasonableness

Reasonable belief or reasonable fear refers to what a reasonable person in a similar situation would believe or feel. The definition of "reasonable person" is far from settled. Some judges look at the available evidence and determine what they believe would be reasonable if they knew what the employee knew. Others may account for the employee's unique characteristics, such as work or personal history, and ask what a reasonable person with those characteristics would believe or feel. Unfortunately, there is no set answer to the question of what is reasonable. With that in mind, it is important for complainants to offer evidence and arguments to support why their belief was reasonable at the time they made a disclosure.

DOE regulations at 10 C.F.R. 708.6 offers some guidance as to reasonable fear requirements:

- 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
- 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.

◊ Refusal to participate (10 C.F.R. § 708.7)

When a protected disclosure is actually a protected activity—specifically, refusal to participate—there are extra steps that an employee must take for the refusal to be covered by Part 708. The employee, before refusing to participate, must ask the employer to correct the violation or remove the danger. If the employer does not do so, and the employee still refuses to participate, then by the 30th day after the refusal to participate, the employee must disclose the violation or dangerous situation to one of the people listed above. *See* 10 C.F.R. 708.7. Timing is very important, and if there is no evidence that one of these steps happened or that they did not happen in the correct order or timeframe, there may not be a protected disclosure.

○ Adverse Personnel Actions and Retaliation

Part 708 defines retaliation as "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."

That definition encompasses quite a bit, so let's break it out:

- The contractor (or subcontractor) takes the action against the person who made the protected disclosure.
    - Retaliating against someone's relatives, friends, or program does not necessarily count, unless doing so directly harms the person who made the protected disclosure.
- The action is an "adverse personnel action".
    - The regulation mentions several types of adverse personnel actions, but it is not exhaustive. Actions that don't end up resulting in disciplinary action may still be retaliatory. For instance, convening a disciplinary panel may be retaliatory, even if no discipline is actually given at the end.
    - Adverse personnel actions will negatively affect the terms and conditions of employment. This could mean rate of pay, rate of accrual of leave, requirements to use leave, geographic and environmental considerations, management and hierarchy decisions, equipment availability, and more.
- The action must be a result of the employee's protected disclosure.
    - This is often the most difficult part of a Part 708 claim to prove. Many employees who bring Part 708 complaints (known as **complainants**) truly believe that an act was in retaliation for their disclosure, but they struggle to prove it. Generally, two criteria must be met to prove that the action was taken in retaliation for the disclosure:
        - TIMING: To be retaliatory, the adverse personnel action must have happened within a reasonable timeframe after the protected disclosure. For instance, an adverse personnel action taken by a site superintendent is probably not related to a disclosure made to a team leader three hours earlier. An adverse personnel action taken three years after a disclosure is also unlikely to be related to the disclosure.
        - KNOWLEDGE: In addition to timing, the person or persons involved in ordering the adverse personnel action need to have known about the protected disclosure at the time they ordered the action. For example, if an employee was demoted nine months after making a protected disclosure, the employee would

need to show that the person who made the decision knew about the protected disclosure before making the decision. Sometimes this can be a complicated standard. If the person who *carried out* an adverse personnel action knew about a protected disclosure but the person who *made the decision* to take the action did not, the action was probably not retaliation. Complainants need to show a direct line between the protected disclosure and the decision to take the adverse personnel action.

○ Burdens and Standards of Proof (10 C.F.R. § 708.29)

A "burden of proof" describes who needs to prove what to succeed on their claim. The "standard of proof" is how convincing a party needs to be in order to satisfy their burden of proof. Complainants and contractors have different burdens and standards of proof under Part 708

◊ Complainants

Burden of Proof → Complainants must prove:

- They made a protected disclosure
    - To a covered person
    - That they reasonably believed at the time was true
- The Contractor took one or more retaliatory actions against the Complainant
- The alleged retaliation would not have occurred but for the alleged protected disclosure
    - Timing
    - Knowledge by the person who decided to take the alleged retaliatory action

Standard of Proof → Complainants must prove all of the above by a **preponderance of the evidence**. This means that it is more likely than not that what the Complainant is saying is true. If proof were a scale from 1 to 100, a preponderance of the evidence would be 51 or higher.

Common Evidence → The following types of evidence are commonly used to meet the Complainant's Burden of Proof:

- Emails or other writings that the Complainant used to make the disclosure
- Witness testimony
- Organizational Charts

◊ Contractors

Burden of Proof → If the Complainant meets their burden and standard of proof, the burden then shifts to the contractor to prove that it would have taken the same action (the alleged retaliation) even if Complainant had not made their protected disclosure.

Standard of Proof → The contractor must prove the above by **clear and convincing evidence**. This means that it is *substantially* more likely than not that what the contractor is saying is true. On the 1 to 100 proof scale, clear and convincing evidence would be more than 51, but less than 100.

Common Evidence → The following types of evidence are commonly used to meet the contractor's Burden of Proof:

- Emails or other writings
- Performance Evaluations
- Internal reports

◯ Cases Not Covered by Part 708 (10 C.F.R. § 708.4)

◊ EEO Cases

In Part 708 cases, the adverse personnel action is taken because the employee made a protected disclosure. If the employee believes that the adverse personnel action was taken exclusively because of his race, color, religion, sex, age, national origin, or other similar characteristic, then the case is not a Part 708 case.

◊ Knowing participation in misconduct

If the complaint involves misconduct and the employee, without direction from the employer, deliberately caused it, the case is not a Part 708 case. The same is true if the employee knowingly participated in the misconduct.

◊ Other cases based on the same set of facts (*see also* 10 C.F.R. § 708.16)

Many states and federal agencies have whistleblower protection programs that may be applicable to the situation that gave rise to your Part 708 complaint. If you choose to pursue a Part 708 complaint, you cannot also file a case somewhere else based on the same set of facts. There are exceptions to this, but very few. The most common exception is that Complainants may pursue EEO complaints based on the same set of facts because their burden of proof for the EEO complaint is different than that of the Part 708 Complaint. Generally, however, if you file somewhere else, your Part 708 complaint *will* be dismissed.

If you do file in another court and your case is dismissed for lack of jurisdiction, you may file a Part 708 complaint. Your time to file a Part 708 complaint (discussed later) stops running when you file in the other court and begins running again the day after your case with that court is dismissed for lack of jurisdiction.

◊ Release of restricted data

If, in the course of a protected disclosure or participation, the employee improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation, the case is not a Part 708 case.

❖ The Part 708 Process

◯ Alternative Dispute Resolution (ADR)

The ADR Office offers mediation services to attempt to resolve 10 CFR Part 708 complaints in a more informal manner. Our mediators serve as third party neutrals that provide a confidential and voluntary process in which the parties can work towards a mutually agreeable resolution. ADR can be used at any time prior to the Administrative Judge issuing an initial agency decision after a hearing. To request ADR or learn more about ADR services, any party may contact the ADR Office directly at ADROffice@hq.doe.gov or 202-2586-4002. You can find additional information on their website at www.energy.gov/adr.

◯ When to file a complaint (10 C.F.R. § 708.15)

Unlike some of the other whistleblower protection programs available to DOE employees and contractor employees, Part 708 has a relatively short window for filing complaints. Your complaint must be filed by the 90th day after you knew, or reasonably should have known, about the alleged act of retaliation. Note that if you allege three acts of retaliation and you file your complaint 89 days after you knew about the

last one, your complaint may be dismissed in part as it relates to the alleged acts of retaliation that happened more than 90 days before you filed your complaint.

Reasonable knowledge is often a common sense determination. Take, for example, an allegation of an act of retaliation because a disciplinary letter was placed in your file. If you received an email at the time saying a document was added to your file and available to be viewed, you reasonably should have known about the letter at that time because a reasonable person would likely check the file. The 90 days would likely begin to run from the date that you received the email (again, reasonable people check their email daily). If you did not check your email or did not look at the file for 30 days after receiving the email, you still would have only 90 days after the email was received to file your complaint because you should have been aware of the letter once you received the email.

If your employer has grievance or arbitration procedures for dispute resolution, you must complete those before you file your complaint. The 90-day clock stops running on the date that you file your grievance and resumes running on the day after the grievance-arbitration procedure ends OR 150 days after the grievance was filed if a final decision has not been issued.

○ Filing your complaint (10 C.F.R. § 708.11-14)

Most Part 708 cases begin when the employee meets with their ECP office. The ECP worker will either conduct an interview to get the necessary filing information or provide the employee with the information necessary to draft their own complaint.

The OHA has created a form employees can use to file a complaint (available for download here). The form is designed to assist employees in filing a complete complaint. However, complaints may be in any format and employees do not need to use the OHA's form. Employees who choose to use the form should be sure to email it to their ECP manager, not the OHA.

If an employee chooses not to use the form, they should keep in mind that Part 708 states that a complete complaint must include following:

1. Your name, email address, and date of the complaint
2. For each protected disclosure you claim, please include:
    a. The date you made the disclosure
    b. A description of what you said or wrote
    c. The person(s) to whom you made your disclosure
    d. The law, rule, or regulation (or other category covered by § 708.5) that was the subject of your disclosure
3. F or each alleged act of retaliation, please include:
    a. The protected disclosure you believe contributed to the alleged retaliation
    b. The date of the alleged retaliation
    c. A description of the alleged retaliation
    d. The person(s) involved in the alleged retaliation
4. Required Statements:
    a. A statement that you are not currently pursuing a remedy under State or other applicable law, as described in § 708.15
    b. A statement that all of the facts you included in your complaint are true and correct to the best of your knowledge and belief
    c. An affirmation that you have completed all applicable grievance or arbitration procedures using one of the following, as appropriate:

i. All available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted. The procedure was terminated on [DATE] for [list the reasons for termination].
ii. I 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. I filed the grievance on [DATE].
iii. My employer has established no grievance-arbitration procedures.

○ Responses (10 C.F.R. § 708.17)

By the 15th day after your complaint is filed, the ECP Director or Head of Field Element (for simplicity, ECP Director will include Head of Field Element, unless otherwise specified, for the rest of this document) will provide a copy of your complaint to the contractor. The contractor will then have 15 days to submit a response to your complaint. The ECP Director will provide you with a copy of the response and you will be able to reply to it.

○ Jurisdictional issues (10 C.F.R. § 708.18-20)

After receiving the responses from the employer and employee, the ECP will review the complaint for completeness and for jurisdiction. The ECP may accept the complaint for further processing or may dismiss the complaint for lack of jurisdiction or other good cause. Dismissals may be appealed. If the complaint goes on for further processing, ECP will duplicate the entire file (including exhibits and responses) and send it to the OHA.

◊ Dismissal for lack of jurisdiction (10 C.F.R. § 708.18)

The ECP Director can dismiss a complaint for lack of jurisdiction or other good cause for the following reasons:

1. Your complaint was filed after the 90th day after you knew or reasonably should have known about the alleged act of retaliation;
    a. This may seem fairly straight forward. However, “reasonably should have known” can sometimes be a grey area. “Reasonably should have known” means that a normal person in your circumstances would have known. Negligence, whether willful or unintentional, is not a good reason not to know about retaliation. For instance, if you are supposed to check your email daily but did not check it for two weeks and that caused you to not know about an act of retaliation until 10 days after it happened, your time to file would not be extended by 10 days. This is because a reasonable person would have seen the email on the day it was sent.
2. The facts you allege do not present issues that Part 708 addresses;
    a. Complainants often bring up EEO issues in their complaints. However, Part 708 does not address EEO issues. If no part of your complaint fits the criteria of Part 708, your case cannot continue.
3. You filed a complaint somewhere else based on the same set of facts as your Part 708 complaint;
    a. If you file a complaint with another whistleblower program (like the Department of Labor’s whistleblower protection program) or in a state or federal court AND you have to prove the same things for that complaint as for your 708 complaint, then your 708 complaint will be dismissed.

   b. An EEO complaint based on the same events as your 708 complaint will not trigger dismissal because you have to prove something different (discrimination) than you would for your 708 complaint.
4. Your complaint, as written, is frivolous or without merit;
   a. A claim is frivolous if there is no way to argue that it is true or correct. For example, a complaint might be frivolous if the complainant claimed that he reasonably believed he made a protected disclosure when he told his minor child about wrongdoing at work. There is no way to argue that the complainant's statement to his child constitutes a protected disclosure, and, therefore, the claim is frivolous.
   b. A claim lacks merit if it is misleading, false, irrelevant, or not based in fact. Examples include
      i. A complainant claims to have made a disclosure about a failure to follow the employee handbook (not a violation of a law, rule, or regulation);
      ii. A complainant claims he was fired in retaliation for making a protected disclosure, but does not give any details about the alleged protected disclosure.
5. The issues in your complaint have been resolved or otherwise decided by subsequent events; or
   a. Typically, this means that the case has been settled through some type of alternative dispute resolution.
6. Your employer made a formal offer to provide you with your requested remedy or a remedy that DOE considers equivalent to what you could have gotten if you succeeded in your Part 708 complaint.
   a. The OHA is limited in the kinds of relief it can provide to whistleblowers. If your employer offers to give you everything that the OHA could give you if you won your case, there is little point to continuing the proceeding and your case may be dismissed.

◊ Appealing jurisdictional dismissal (10 C.F.R. § 708.19)

If the ECP Director dismisses your complaint for any of these reasons, he or she will notify you of the decision via certified mail and will provide you with the reasons for the dismissal.

You can appeal the dismissal to the OHA Director. Your appeal must be received by the OHA by the 10th day after you received notice that the ECP Director dismissed your complaint. Your appeal must include:

1. A copy of the dismissal notice and
2. The reasons why you believe the complaint should not have been dismissed.

You must send your appeal and any accompanying documents to the ECP Director and any other parties, such as the contractor. You can do this, and file the appeal, by email. The OHA Director will issue a decision on your appeal by the 30th day after the OHA receives it. If the OHA Director grants your appeal, your complaint will proceed to the Investigation stage of the Part 708 Process.

It is helpful, but not required, to send a copy of your complaint with your appeal.

◊ Petition for Secretarial Review (10 C.F.R. § 708.20)

If the OHA Director denies your appeal, you can ask for a review by the Secretary of Energy by filing a Petition for Secretarial Review with the OHA within 30 days of receiving the denial of the appeal. In order to get Secretarial Review, your petition must demonstrate that extraordinary circumstances exist, such as the discovery of new evidence that was not available at the time of the decision. The Secretary

will review the case and, if he finds extraordinary circumstances, may order the OHA Director to revise the appeal decision, which may include an order requiring further processing of the complaint. If the Secretary does not find extraordinary circumstances, the appeal decision becomes the Final Agency Decision and your case is dismissed.

○ Investigation (10 C.F.R. § 708.22)

If your case is not dismissed for jurisdictional reasons, the ECP Director will forward the complaint to the OHA for investigation. The OHA Director will appoint an investigator, usually an attorney on the OHA staff. The investigator will contact you to set up an interview. He may ask you for witnesses that he should interview and he will likely ask you for any documentation you can provide supporting your claim. The investigator will also ask your employer for documents and a list of witnesses to interview. The purpose of the investigation is to narrow the issues so that the parties can focus on the most important ones.

After the interviews, the investigator will prepare draft statements for the interviewees to sign. The draft statements will summarize the content of the interview. If an interviewee does not agree with the content of the draft statement, he may edit it to reflect what he believes he said. If an interviewee fails to return a signed statement to the investigator, the investigator may use the draft statement (labelled as a draft) in writing the Report of Investigation.

◊ Dismissal before completion of the investigation (10 C.F.R. § 708.22(g)–(j))

On rare occasions, the initial investigation will reveal that the complaint has jurisdictional problems or that the complaint is meritless.

Example 1: An investigator may discover that, even though the complaint was filed 89 days after the employee actually knew about the alleged retaliation, the employee *should have known* a week earlier because of an email he neglected to open. This jurisdictional problem, discovered only after the investigation started, would be grounds for dismissal.

Example 2: During interviews, the complainant admits that he made his protected disclosure because he knew he would be terminated later that week and the employer confirms the timing of the intended termination. The complaint could be dismissed for lack merit because, as the termination would have happened even without the protected disclosure, both parties agree that no retaliation occurred. An investigator may discover that a complaint lacks merit only if both parties agree about the relevant facts.

If an investigator determines that dismissal at this stage is appropriate, he will request that the OHA Director appoint an Administrative Judge to decide whether the complaint should be dismissed. The investigator will refer the case to the Administrative Judge, along with a written statement outlining the factual and legal reasons why he believes the case should be dismissed. The Administrative Judge will consider all of the materials collected during the investigation, as well as the investigator's written statement.

If the Administrative Judge decides that dismissal is appropriate, he will issue an Initial Agency Decision (IAD) describing the factual and legal bases for dismissal with the investigator's written statement attached. This can be appealed using the process described in Part 708 for appealing IADs. If the Administrative Judge decides that dismissal is not appropriate, he will issue a written statement explaining why the complaint should not be dismissed. This cannot be appealed. If the complaint is not dismissed, the investigation will continue. A new investigator may be assigned.

◊ Report of Investigation

The investigator will usually issue a Report of Investigation (ROI) within 90 days of beginning the investigation. If the case is referred for dismissal, the time to issue the ROI is paused while the Administrative Judge considers the case. The clock resumes on the day after the Administrative Judge issues his decision not to dismiss the case.

The ROI will identify and evaluate the issues in the case. Particularly helpful for complainants who do not have an attorney, the ROI will identify the weakest part of the complaint. Most OHA investigators are experienced in Part 708 adjudication as well, and the analysis in the ROI can inform complainants about the kinds of evidence they should gather and the opposing arguments they may face.

○ Hearing

When the ROI is issued, the OHA Director will appoint an Administrative Judge (AJ) to hear the case. The AJ will send a letter to both parties with instructions for how to proceed. The letter will offer tentative dates for the hearing, which will usually last for up to three days. The letter will also advise the parties of which documents are included in the official record of the case; usually only the ROI and the documents to which it cites are in the hearing record at this point. The parties must resubmit any other documents from the Investigation that they wish to have in the record.

◊ Briefing

Typically, the AJ will ask both parties to submit a brief, which is a document that outlines the party's theory of the case. The parties will also have an opportunity to respond to each other's briefs. Keep these tips in mind as you write.

□ *Format*

- An effective brief will be legible. If possible, use a word processor, such as Microsoft Word or Google Docs, to write your brief. The AJ will typically read your brief on his computer.
- Make sure your font is easy to read. OHA suggests standard fonts like Times New Roman, Arial, and Helvetica. The font size should be big enough to read easily, but not too big. Font sizes 10 or 12 are usually easy to read.
- One inch margins are standard. Justified or left justified margins with single spacing make for easy reading too.

□ *Organization*

- An effective brief will be organized so that it flows in a logical order, giving the reader all the information necessary to understand the sections that follow. Typically, a brief will contain a **background section** state the facts of the case, followed by a **law section** that describes the **applicable laws**, followed by an **analysis section** that applies the laws to the facts of the case.
- Background section: This is where you state the facts of the case. Think about your whole argument before you start, then pull out what facts are relevant to winning your case. Try not to include facts that don't help prove your points.

Some people write this section last—or go back after they've written the other sections—to fill in any details necessary to understand the rest of the brief, or delete unnecessary details.

- Law section: This section should describe the laws that you believe are applicable to your case. An effective law section will not contain an argument, but rather a neutral description of the laws that are relevant. Citations to the law are extremely helpful.

Many people find it helpful in this section to describe other cases where the law they're citing applied to facts similar to their own. These descriptions help demonstrate to the AJ how a law works in practice.

- Analysis section: This is where you write your argument. The analysis should show how the law you described applies to the facts you described and why. This is also where you may counter the points made by the other party.

□ *Content*

- Typically, the AJ will impose a page limit on the briefs. While many complainants use their brief to air grievances and protest treatment they felt was out of line, the most successful ones focus on the relevant facts and how the law applies to them.
- The OHA has been hearing Part 708 cases for over 20 years. It can be very helpful to a Complainant to read Part 708 and the cases the OHA has decided in the past. The OHA will always work to decide similar cases in similar ways. Therefore, if a past case has facts similar to yours, pay close attention to how the OHA decided that case and why. Decisions from the last several years are available on the OHA website at https://www.energy.gov/oha/listings/whistleblower-cases. Older cases are available at https://www.energy.gov/sites/prod/files/Whistleblower_Cases_Archive.pdf.
- Remember to provide supporting evidence. Try to avoid conclusory statements. These are statements that are not supported by evidence. On its own, the following statement is conclusory: "My boss must have known that I told DOE about the violation." However, with supporting evidence, it is no longer conclusory: "My boss must have known that I told DOE about the violation because she was on the call with me."
  Many successful complainants attach exhibits to their brief. These include documents supporting the facts in their brief, such as emails, memos, pictures, phone records, reports, employee handbooks, and voicemails (to name a few). See the next section for tips on submitting exhibits. **DO NOT EVER DISCLOSE CLASSIFIED INFORMATION.**

THE AJ MAY INCLUDE AN ORDER TO SHOW CAUSE IN THE INITIAL LETTER AND REQUEST BRIEFING ON THAT ISSUE. WHEN WRITING THIS BRIEF, MAKE SURE YOU PAY ATTENTION TO THE REASON THE AJ MADE THE ORDER AND THE QUESTIONS HE WOULD LIKE ANSWERED IN THE BRIEF. IF YOUR BRIEF DOES NOT ADDRESS THE CONCERNS IN AN ORDER TO SHOW CAUSE, YOUR CASE MAY BE DISMISSED.

◊ Exhibits

Every exhibit submitted to the OHA is added to the case file and given a label. Employee exhibits are named with letters (Exhibit A) and contractor exhibits are named with numbers (Exhibit 1). The following method is preferred for submissions to the OHA. Exhibits will not be rejected if differently labeled, however, they may be more difficult for the AJ to find and review.

- Separate each exhibit into a separate document.
- Label each document according to the specified naming convention (*i.e.* Exhibit A, Exhibit B, Exhibit C, etc.).
- When emailing exhibits for submission, include in your subject line your case number and which documents you are sending. Example: WBM-00-0000 Complainant's Exhibits A-J.

If possible, please avoid combining several different documents into a single exhibit.

◊ Dismissal

During the hearing stage, but before the actual hearing date, the employer may submit a motion to dismiss and either party may submit a motion for summary judgment. The AJ may also dismiss the case or grant summary judgment without a motion if he finds it appropriate to do so.

□ *Motion to Dismiss*

A motion to dismiss may be filed by an employer if the employer believes that the case does not meet the jurisdictional requirements of Part 708. Typically, the motion will be filed with a brief in support of the employer's argument. The Complainant will be given an opportunity to respond to the brief. Sometimes, there are several rounds of responses if the AJ believes that it is necessary.

Just as with briefs responding to an Order to Show Cause, it is important that a brief responding to a motion to dismiss addresses the issues and facts raised in the employer's motion.

□ *Summary Judgment*

A motion for summary judgment is appropriate when there is no genuine dispute about material facts. A material fact is one that is essential to the case. Look at the following example:

> A motion for summary judgment is filed in a case about whether an employer terminated the complainant because the complainant reported a radiation worker's intentional falsification of a radiation survey.

In this case, the material facts would include (1) whether, when, and to whom the complainant made the disclosure; (2) whether, when, and for what reason the employer terminated the complainant; and whether intentional falsification of a radiation survey falls into one of the § 708.5 categories. Note that whether the falsification happened or was intentional is NOT a material fact. If all the parties agree on the material facts of the case, then the AJ does not need to hold a hearing to determine the facts. He can apply the law to the facts as agreed and issue a decision without holding a hearing. This is called summary judgment.

The arguments the parties make in briefings on summary judgment are (1) whether a fact is "material" (*i.e.* essential) to the case; and (2) whether the parties actually disagree about the facts. It is important to address both points in the brief.

◊ Discovery

If a complaint is not dismissed or the case is not decided on summary judgment, the AJ will usually order discovery for the parties sometime after the initial letter is sent. This is how the parties obtain evidence from each other. The parties may request relevant documents from each other, send each other written questions (known as **interrogatories**) to be answered in writing under oath, and request depositions. The AJ will establish deadlines for requests and production. If a party misses a production deadline, the other party may ask the AJ to subpoena the documents from the other party.

Discovery is not meant to uncover new wrongdoing. Rather, it is each party's chance to get evidence to support the claims made in the complaint, response, and briefs.

◊ Witnesses

The AJ will give you a deadline by which you must submit a list of witnesses. There is a sample witness list in the Appendix. Many complainants find it helpful to select witnesses who directly witnessed the events in question or who have direct knowledge of the rules, regulations, or laws at issue. If a witness is crucial to your case but is unwilling to testify or fears reprisal from their employer, the AJ can issue a subpoena compelling the witness to testify at the hearing. Part 708 protects witnesses who are employed by DOE contractors or subcontractors from retaliation for their participation in your Part 708 case. Hearing witnesses testify under oath.

◊ The Hearing

Hearings may be held in person or over video teleconference (VTC). The AJ will begin with an opening statement explaining the purpose and rules of the hearing. After the opening statement, the parties will call their witnesses. The AJ will administer an oath to every witness, and each witness will give his or her testimony subject to penalties for perjury. The AJ's main job is to determine what the facts are by assessing the credibility of witnesses and reviewing the documents. Once the AJ has determined the facts, he will apply the law to those facts to reach a decision on the complaint.

The complainant will call his witnesses first. He will examine his witnesses by asking questions. When he is finished, the contractor will have an opportunity to cross-examine the witness. The AJ may also ask questions. Once all of the complainant's witnesses have been questioned, the contractor will call its witnesses. The contractor will examine each witness and the complainant will have an opportunity to cross-examine them. The AJ may also ask questions.

Once every witness has been questioned, the AJ will close the proceeding. A transcript of the hearing will be prepared and the AJ will issue a decision.

□ *Questioning Witnesses*

Questioning witnesses can be difficult. The goal is to get the witness to provide answers that support your claims. The AJ will be judging the witnesses' credibility in addition to listening to their testimony. Here are some tips to help you make the most of your questioning.

- Ask relevant questions. As with the briefing, many complainants use their questioning to air grievances and protest their treatment by their employer. However, the most successful complainants use their questioning to draw out facts that support their claims.
- Focus on the facts. It is difficult to use questions to hurt a witness's credibility. It is often a better use of time to get more facts that support your claims than to try and prove that a witness is lying or biased.
- Plan ahead. Know your witnesses and what they will say. Reviewing the other party's witness list can help you determine what you need to know from each of

their witnesses. Making lists of questions in advance can keep you focused, even if the witness says something unexpected.

The person questioning the witness is not allowed to testify during the questioning. To avoid this, it helps to make sure what you're saying is in the form of a question.

□ *Using Exhibits*

Parties may wish to reference exhibits while questioning witnesses. It can be helpful to have multiple copies of the exhibit you will reference so that you can provide it to the AJ and other party as well as the witness. When referring to an exhibit, it is helpful to call it by its label (Exhibit A) rather than the title of the actual document.

□ *Closing the Record*

After the hearing, the AJ will set a date on which the case's record will close. After that date, no new submissions or evidence will be accepted. This allows parties to submit various post-hearing documents—such as evidence supporting hearing testimony or written closing arguments—that have been requested by the AJ.

◯ Initial Agency Decision (10 C.F.R. § 708.30–31)

The AJ will issue the DOE's Initial Agency Decision (IAD) within 60 days after the record closes or he receives the transcript of the hearing, whichever is later. If the case is dismissed or denied before a hearing, that decision would also be an IAD. The IAD will set out the AJ's findings of fact and legal conclusions and either grant, deny, or dismiss the complaint. If the IAD grants the complaint, it may order a specific remedy or it may call for another hearing or further briefing to help determine the remedy.

◊ Remedies (10 C.F.R. § 708.36)

The remedies available under Part 708 include:

- Reinstatement;
- Transfer preference;
- Back pay;
- Reimbursement of reasonable costs of the 708 proceeding; and
- Other similar remedies that will stop the violation and provide the Complainant with relief.

Part 708 does not permit the AJ to order compensation for things like pain, suffering, embarrassment, or reputational damage. Reimbursement for the Complainant's costs during the 708 proceeding can only be ordered if the IAD grants the complaint. It is helpful to include in the complaint the specific remedy sought.

◯ Appealing an Initial Agency Decision (10 C.F.R § 708.32–34)

Any party can file an appeal of the IAD. Typically, a losing party files an appeal. However, if the Complainant wins, they may still appeal the remedy if they believe the ordered remedy is not correct.

By the 15th day after receiving the IAD, the appealing party (the Appellant) must file a Notice of Appeal with the OHA and send it to the other parties. This notice should request that the OHA Director review the IAD. By the 15th day after the Notice of Appeal is filed, the Appellant must file a Statement of Issues for the OHA Director to review. This Statement should include all the issues that the Appellant wants the Director to consider. This should usually focus on errors in the way the AJ applied the law in the IAD. Because the AJ is the fact finder, the OHA Director only overturns a factual determination if there is clear error.

The Statement of Issues is not a place for the Appellant to reiterate their version of the facts, nor is it a place to raise new arguments. New arguments are generally not allowed on appeal. New evidence is typically not allowed either, unless extraordinary circumstances exist, such as the evidence not being available until after the IAD issued. The Statement of Issues is a great place to discuss how the AJ applied the law to the facts that they found. A proper Statement of Issues should always describe why the Appellant believes the IAD is wrong and should support that argument with evidence and citations to other similar cases.

○ Petition for Secretarial Review (10 C.F.R § 708.32)

Any party may submit a Petition for Secretarial review of an appeal of an IAD to the OHA within 30 days of receiving the appeal decision and then file a Statement of Issues within the following 15 days. Both the Petition and Statement must be sent to the other parties as well. The Statement should demonstrate that extraordinary circumstances exist, such as the discovery of new evidence that was not available at the time of the hearing. The Secretary will review the case and, if he finds extraordinary circumstances, may order the OHA Director to revise the appeal decision, which may include an order requiring further processing of the complaint. If the Secretary does not find extraordinary circumstances, the appeal decision becomes the Final Agency Decision.

Decisions on Petitions for Secretarial Review may take several months.

APPENDIX

APPENDIX A

❖ Sample Complaint

PART 708 COMPLAINT FORM INSTRUCTIONS

These forms are provided for the benefit of potential complainants to help you understand the filing requirements of a Part 708 Complaint. **These forms are optional—you are not required to use these forms.** Please read these instructions carefully before completing the forms.

"Disclosure" Section Instructions

A protected disclosure is the statement you made that you believe led to retaliation against you. According to 10 C.F.R. § 708.5, to be protected, your disclosure must have revealed:

(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.

Your "disclosure" may also take the form of protected conduct if you:

(1) Participated in a Congressional proceeding or Part 708 proceeding; or
(2) Refused to participate in an activity, policy, or practice if you believed participation would:
    (a) Constitute a violation of a federal health or safety law; or
    (b) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

In the "Disclosure" section below, report only ONE protected disclosure per page. If you have more than one protected disclosure to report, click the red "Additional Disclosures" button in the bottom right-hand corner of the page; complete a separate page for EACH protected disclosure you believe you made.

If you need more space to describe a protected disclosure than is available in the provided box, you may attach a separate statement to your submission email. Please label the statement clearly so that the reader can identify which protected disclosure it relates to.

"Retaliation" Section Instructions

In the "Retaliation" section below, report only ONE alleged act of retaliation per page. If you have more than one alleged act of retaliation to report, click the red "Additional Retaliation" button in the bottom right-hand corner of the page; complete a separate page for EACH alleged act of retaliation that you believe was committed against you. (Acts of retaliation may be related. The separation into different pages is merely to assist with processing the complaint.)

If you need more space to describe an alleged act of retaliation than is available in the provided box, you may attach a separate statement to your submission email. Please label the statement clearly so that the reader can identify which alleged act of retaliation it relates to.

"Required Statements" Section Instructions

Complete the "Required Statements" section below. Check both of the square boxes (provided that they are true), select one of the statements regarding grievance-arbitration procedures, and sign the form. If you submit an incomplete form, your complaint may be dismissed.

Please note that it is unlawful to knowingly submit false statements on this form. For more information, click here (18 U.S.C. § 1001).

Submission Instructions

Before submitting your form, check each page carefully to ensure that the information in it is correct, as some information may have pre-populated from previous pages. To submit your form, click the "Submit" button on the bottom right-hand corner of the "Required Statements" section. This will bring up an email draft which must be addressed to your ECP Director or Head of Field Element (as applicable). Please attach any additional statements or documents to the email.

PART 708: YOUR DISCLOSURE

PLEASE COMPLETE A SEPARATE PAGE FOR EACH ALLEGED DISCLOSURE YOU MADE.

Sally Smith | Sally.Smith@sample.sample | Today's Date: 05/31/2019

Date of Disclosure: 4/2/19 | Disclosure No.: 1

Please identify the person(s) to whom you made your disclosure.

My boss, Marcus Manager

Please describe your disclosure covered under 10 C.F.R. § 708.5. Include what you said and how the recipient responded. If you need more room, attach an additional statement to your submission email.

On April 2, 2019, I told Marcus Manager that I saw Andy Adams, a security guard for the site, let an unbadged person into a restricted area. Marcus spent the next 10 minutes grilling me about why I was watching other employees and told me to focus on my work. I asked him if he was going to do anything about the security breach. He said he would handle it and told me to I should get back to work so I wouldn't fall behind on my assignments.

Please identify the law, rule, or regulation (or other category covered by § 708.5) the violation of which was the subject of your disclosure.

Security breach

Click to report additional disclosures.

PART 708: ALLEGED RETALIATION AGAINST YOU

PLEASE COMPLETE A SEPARATE PAGE FOR EACH ACT OF RETALIATION.

Sally Smith | Sally.Smith@sample.sample | Today's Date: 05/31/2019

Date of Retaliation: 4/16/19 | Act of Retaliation No.: 1

End Date of Retaliation (if applicable): | Related to Disclosure No(s).: 1

Please describe the alleged act of retaliation, including what happened, who made the decision for the act to happen, whether there were any witnesses and who, and how the act relates to the protected disclosure. If you need more room, attach an additional statement to your submission email.

On April 16, 2019, Marcus told me to come into his office. When I got there, he issued me a write-up for insubordination and unsatisfactory performance. He told me it was because I had been away from my desk during work hours, which is ridiculous. I saw Adam because the door to the restricted area is on the way to the bathroom. I told Marcus I didn't want to sign the write-up because it wasn't fair, but he said I'd get in more trouble if I didn't sign it. I signed the write up that day.

Click to report additional retaliation.

REQUIRED STATEMENTS FORM

Sally Smith | Sally.Smith@sample.sample | Today's Date: 05/31/2019

Check the following boxes to certify that both statements are true:

☑ I am not currently pursuing, nor have I previously pursued, a remedy under State or other applicable law. (Does not include EEOC complaints)

☑ All of the facts that I have included in this complaint are true and correct to the best of my knowledge and belief.

Select one of the following:

○ All available opportuinites for resolution through an applicable grievance-arbitration procedure have been exhausted.

Date grievance-arbitration procedures terminated:

Please describe the reasons for termination of the grievance-arbitration.

○ I 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.

Date grievance filed:

◉ My employer has established no grievance-arbitration procedures.

○ My employer has established a grievance-arbitration procedure, but I have not utilized it.

Please describe the reasons you did not utilize the grievance-arbitration procedure. Please note that, absent extenuating circumstances, your complaint may be dismissed if your employer has a grievance-arbitration procedure and you have not utilized it.

/s/ Sally Smith

Signature

Submit

APPENDIX B

❖ Sample Complainant Witness List

1. Marcus Manager: Marcus should know that I made the protected disclosure and that he wrote me up.
    a. Phone: XXX-XXX-XXXX
    b. Email: XXXXXXX@XXXXX.com
2. Andy Adams: Andy is Marcus's neighbor and they go to each other's houses all the time. This is why Marcus was mad at me.
    a. Phone: XXX-XXX-XXXX
    b. Email: XXXXXXX@XXXXX.com
3. Gary Gribble: Gary's cubicle is right next to mine. After I told Marcus about seeing Andy let someone into the restricted area, I told Gary how Marcus treated me. He can also verify that the door to the restricted area is on the way to the restrooms.
    a. Phone: XXX-XXX-XXXX
    b. Email: XXXXXXX@XXXXX.com
4. Vivian Varga: Vivian works in security and should be able to look at the security camera footage from the day to show that what I saw actually happened.
    a. Phone: XXX-XXX-XXXX
    b. Email: XXXXXXX@XXXXX.com
5. Francis Faber: Francis works in HR and can vouch that I have never had problems with insubordination or performance.
    a. Phone: XXX-XXX-XXXX
    b. Email: XXXXXXX@XXXXX.com