



OFFICE OF HEARINGS AND APPEALS ANNUAL REPORT FY2021





Office of Hearings and Appeals

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DIRECTOR'S MESSAGE

I am pleased to report on the FY 2021 operations of the Office of Hearings and Appeals (OHA). OHA's mission is to provide adjudicatory and dispute resolution services to the Department of Energy. OHA's work directly supports DOE's strategic goal to "[p]osition the Department of Energy to meet the challenges of the 21st century and the nation's Manhattan Project and Cold War legacy responsibilities by employing effective management and refining operational and support capabilities to pursue departmental missions." OHA supports this goal by issuing timely and appropriate decisions. In FY 2021, as in past years, OHA provided independent, timely, and thorough analysis and review on a wide variety of issues, helping maintain the quality of DOE's decision-making. The year 2021 was especially challenging, in light of COVID-19. As a result of the pandemic, OHA transitioned to a fully remote workforce in March 2020. In FY 2021, OHA was able to coordinate with other offices to offer fully remote hearings for all its cases. The office has also embraced new technology such as SharePoint and Microsoft Teams to collaborate internally and with other DOE components.

Despite the difficulties created by the pandemic, OHA continued to process cases promptly. For example, we issued Personnel Security decisions, on average, in just 7 days after receiving the hearing transcript. This is less than half the time to decision in 2017. Also in FY 2021, the Department of Justice reports showed that OHA's average FOIA Appeal processing time of 14 days was the fastest of all Cabinet Agencies.

This year, OHA added two new Administrative Judges to its roster. This increased capacity came just as OHA began working on the backlog of Personnel Security cases that had built up during the first year of the Covid-19 pandemic. All of our Administrative Judges worked to complete each case in a timely manner and we were able to successfully process the entire backlog within a few months.

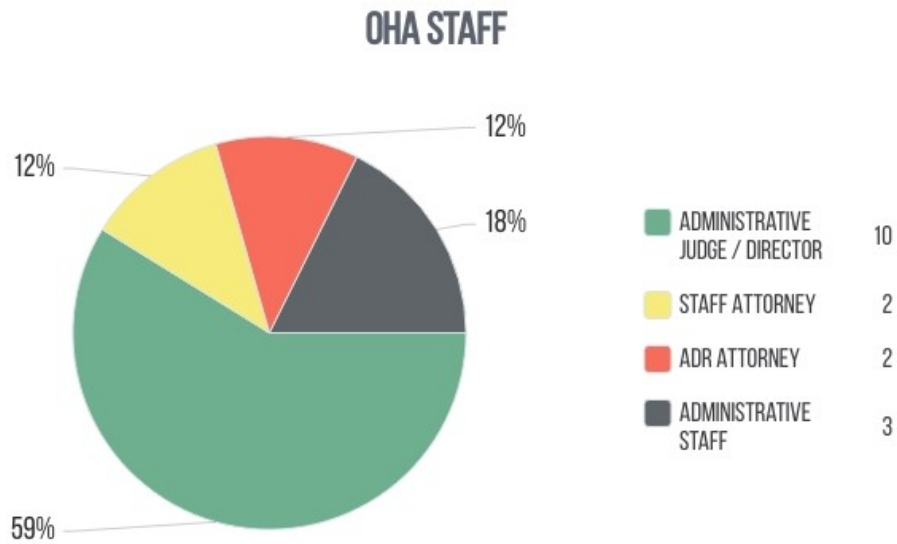
As we begin FY 2022, we are committed to continued improvement, and to meeting all Departmental needs for our services. Going forward, we will continue to review our operations to identify opportunities for increased efficiency and productivity while maintaining our commitment to excellence.

We hope that this report is informative. If you have any comments or suggestions for future improvements, please contact our office by email at OHA.Filings@hq.doe.gov, or by phone at (202) 287-1566.

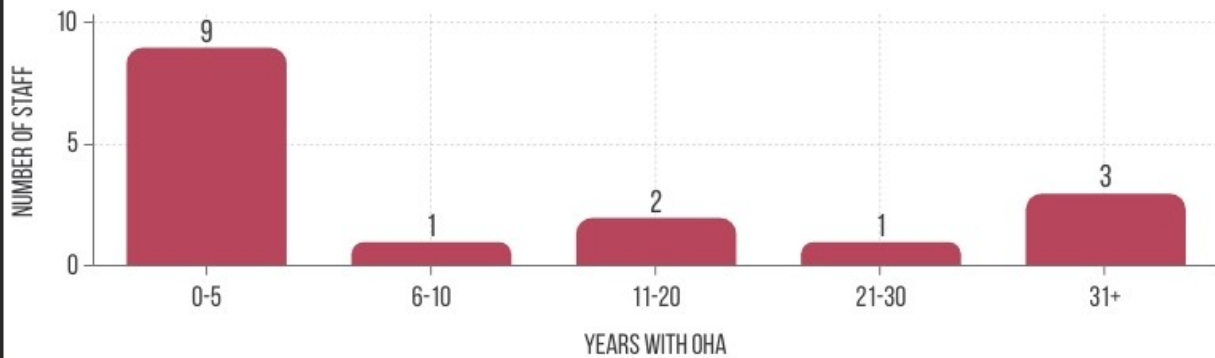
*Sincerely,
Poli A. Marmolejos*

OHA AT A GLANCE – FY 2021

Organizational Makeup

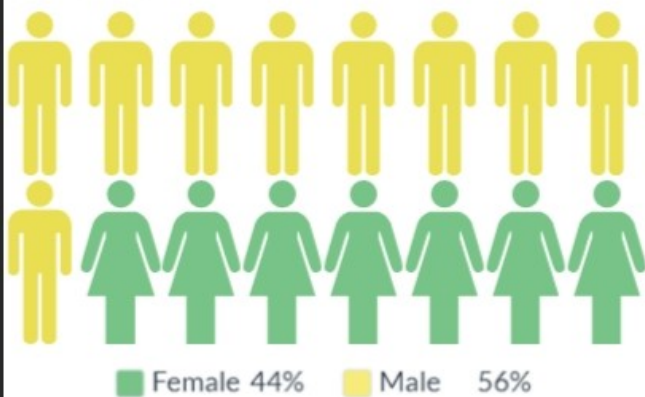


OHA Years In Service



Gender Diversity

ALL OHA STAFF



ADMINISTRATIVE JUDGES



STAFF/ADR ATTORNEYS

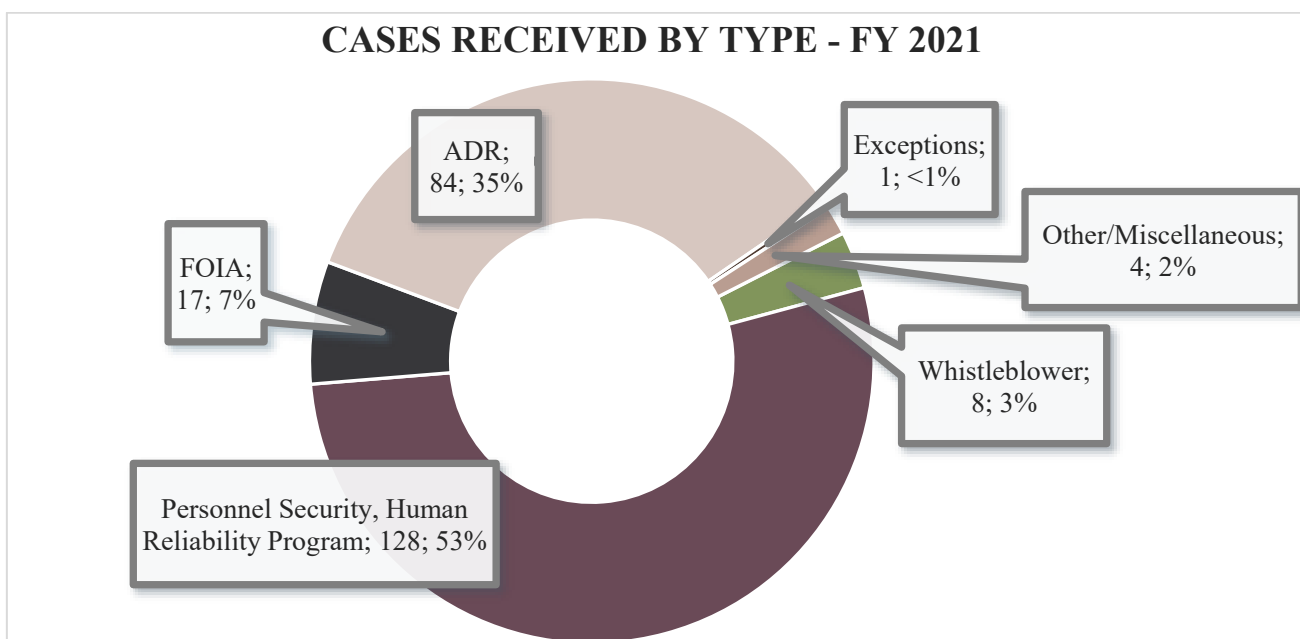


ADJUDICATORY AND DISPUTE RESOLUTION SERVICES

The Office of Hearings and Appeals is the central administrative adjudicative forum for the Department of Energy. The Secretary of Energy has delegated to the OHA Director authority to act in many different areas. The OHA Director's decision typically serves as the Final Agency Decision for DOE. Over the years, OHA has adjudicated appeals from a variety of DOE determinations, including those related to the Department's Alternative Fuel Transportation Program; physician panel reviews of DOE worker occupational illness claims; payment-equal-to-taxes claims under the Nuclear Waste Policy Act of 1982; and equity interests in various energy production sites. In FY 2021, OHA continued to conduct adjudications for multiple programs, with the bulk of cases comprised of personnel security and whistleblower proceedings, FOIA and Privacy Act appeals, and requests for exceptions from energy efficiency regulations and energy information reporting requirements. OHA's procedures vary depending on the type of case involved, and can be found on its website at <http://energy.gov/oha>, under "Services."

In addition, OHA's Alternative Dispute Resolution Office promotes the understanding and use of Alternative Dispute Resolution (ADR) throughout the Department. Activities include a mediation program; a semiannual newsletter; a range of trainings; support for inter-agency ADR activities; and a series of regularly-held lunchtime trainings.

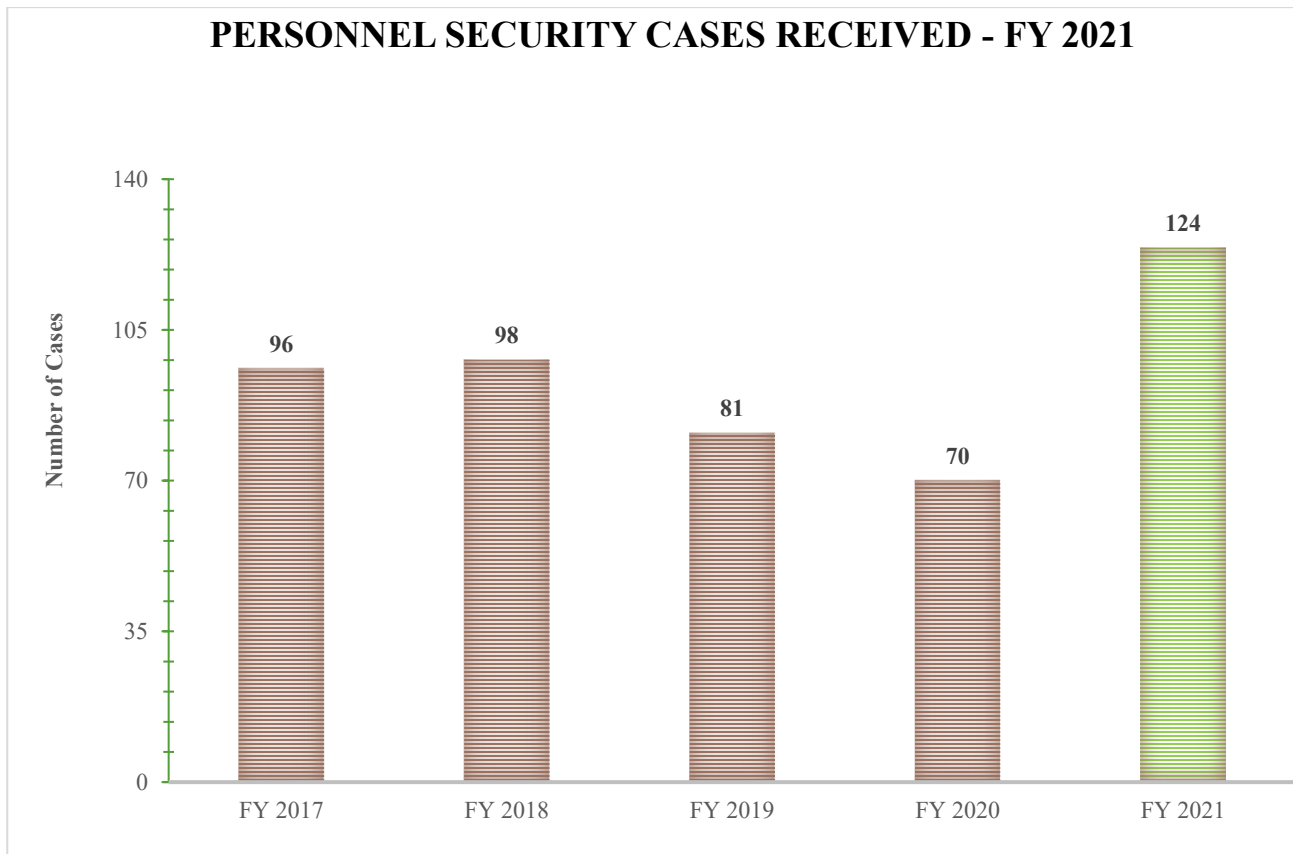
Ultimately, OHA's mission involves more than resolving disputes, whether through adjudication or by ADR. The decisions issued by OHA reflect the balancing of important and varied interests, including those of the public, the Department, industry groups, and individual litigants. In FY 2021, OHA received a total of 242 cases, of which 158 were adjudication cases. The following chart shows the volume of cases received, by type along with each type of case's percentage of OHA's total case load.



Personnel Security and Human Reliability

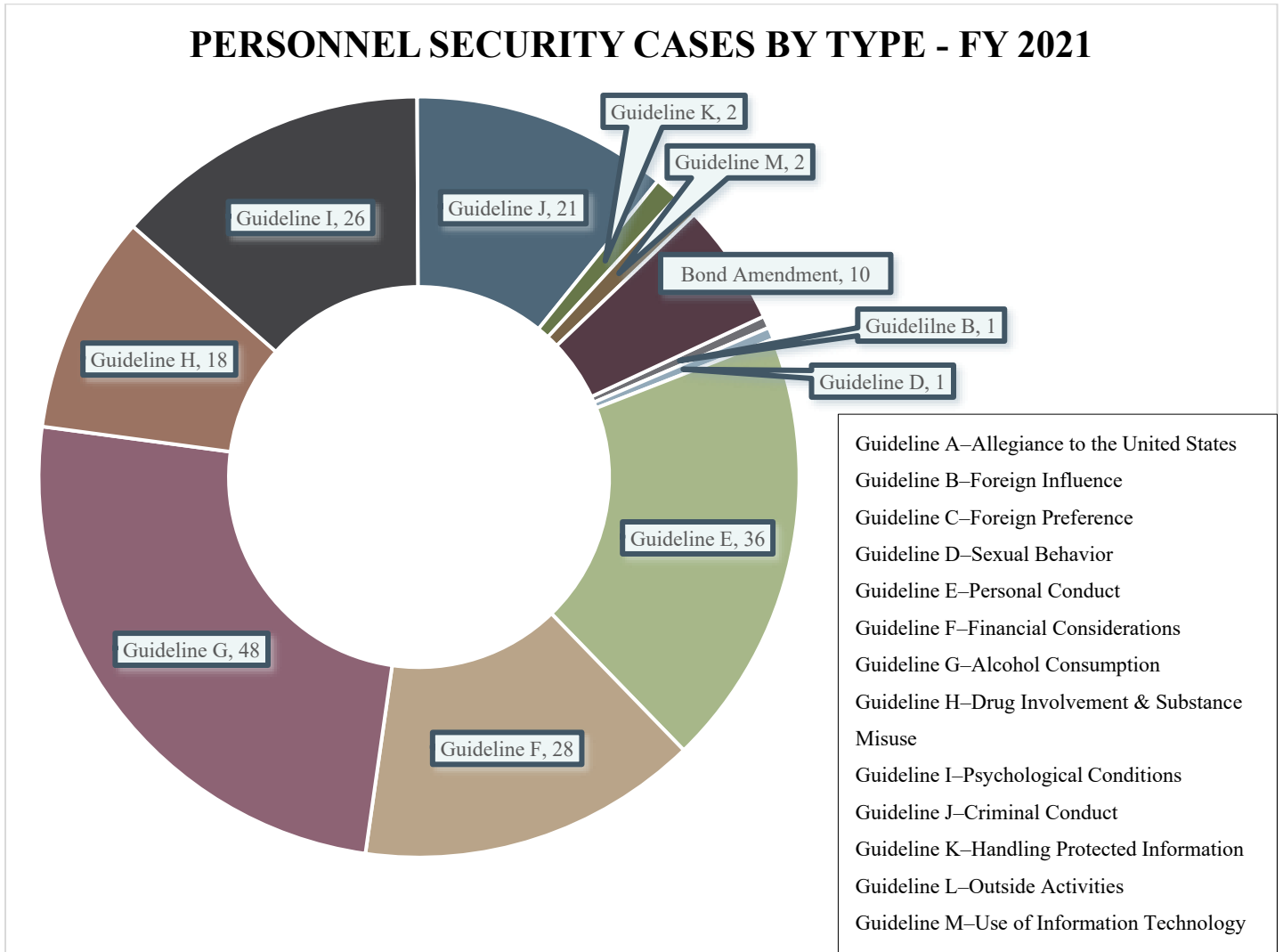
In FY 2021, 128 cases (over 80% of the cases required to be adjudicated by OHA) concerned a federal or contractor employee's eligibility for a DOE security clearance or eligibility for the Human Reliability Program (HRP), a security and safety reliability program for individuals who may have access to certain material, nuclear devices, or facilities. The governing regulations for the various programs are set forth at 10 C.F.R. Part 710 (DOE security clearances), 10 C.F.R. Part 712 (DOE HRP), and 10 C.F.R. Part 10 (Nuclear Regulatory Commission (NRC) security clearances). The OHA Administrative Judge assigned to each case conducts a hearing, analyzes the evidence, and renders a decision which may be appealed to an Appeals Panel within DOE. Personnel Security cases are decided using the National Security Adjudicative Guidelines.

The following chart shows the number of personnel security cases, including NRC and HRP cases, received during each of the past five years.



Personnel security hearings typically involve concerns about excessive alcohol use, substance abuse, psychological conditions, financial irresponsibility, or conduct raising doubt about an individual's judgment, honesty, and reliability, among other issues. Evidence and testimony may include expert medical opinions, medical test results, tax filings, budgets and financial records, and signed agreements between the Individual and their employer to abstain from concerning conduct.

The chart below shows the number of cases in which various types of security concerns were raised. Some cases involve multiple concerns. For example, a case may involve a concern about excessive alcohol use and a psychological condition. As in FY 2019 and FY 2020, Alcohol Consumption (Guideline G) was the largest category of adjudicated security concerns in FY 2021.

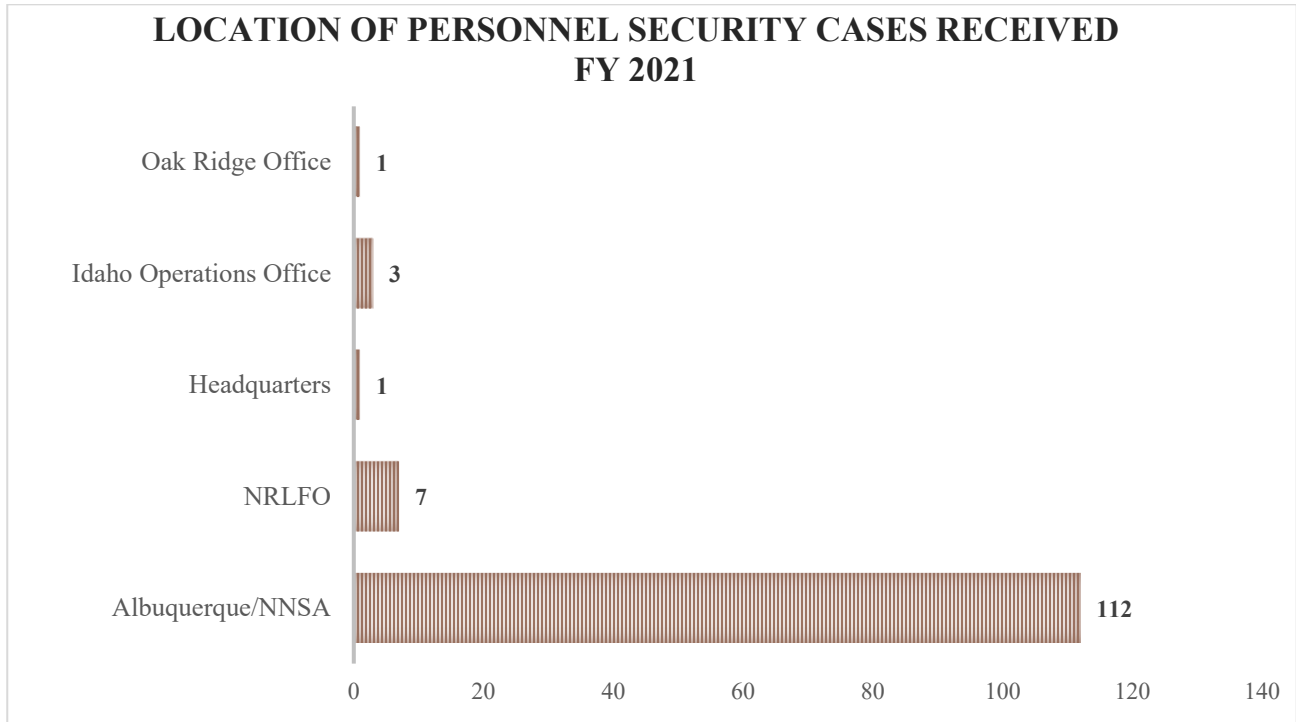


OHA strives to provide quality adjudications as quickly as possible. In FY 2021, OHA’s time to decision after receiving a transcript of a Personnel Security hearing was just 7 days. Only 14 Personnel Security decisions were appealed to DOE’s Appeals Panel in FY 2021, and of those, only 3 were reversed.

While regulations allow OHA 30 days to issue a decision after receipt of a Personnel Security hearing transcript, in FY 2021 OHA averaged 7 days to issuance.

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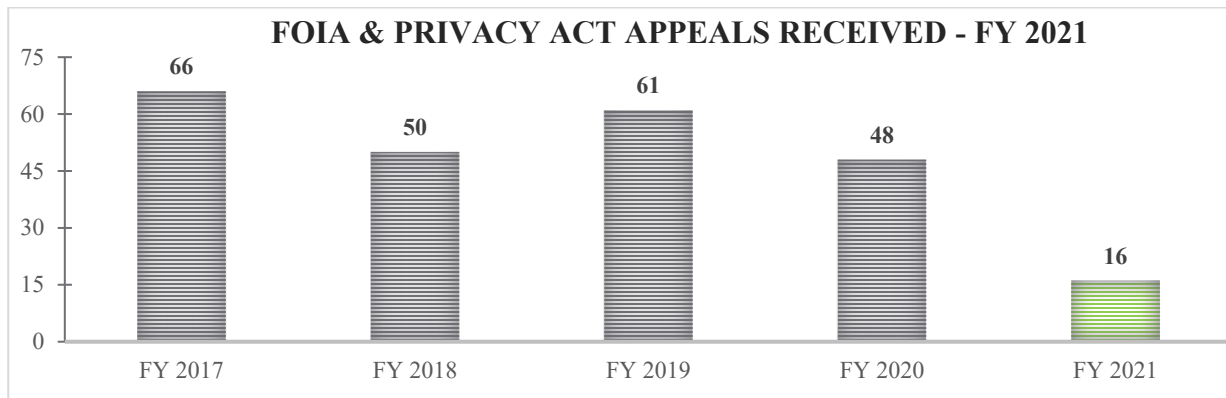
OHA serves all DOE sites for Personnel Security adjudications, but the vast majority of cases come from the national laboratories in New Mexico, California, and Kansas City. The chart below shows a breakdown of where Personnel Security cases originated in FY 2021.



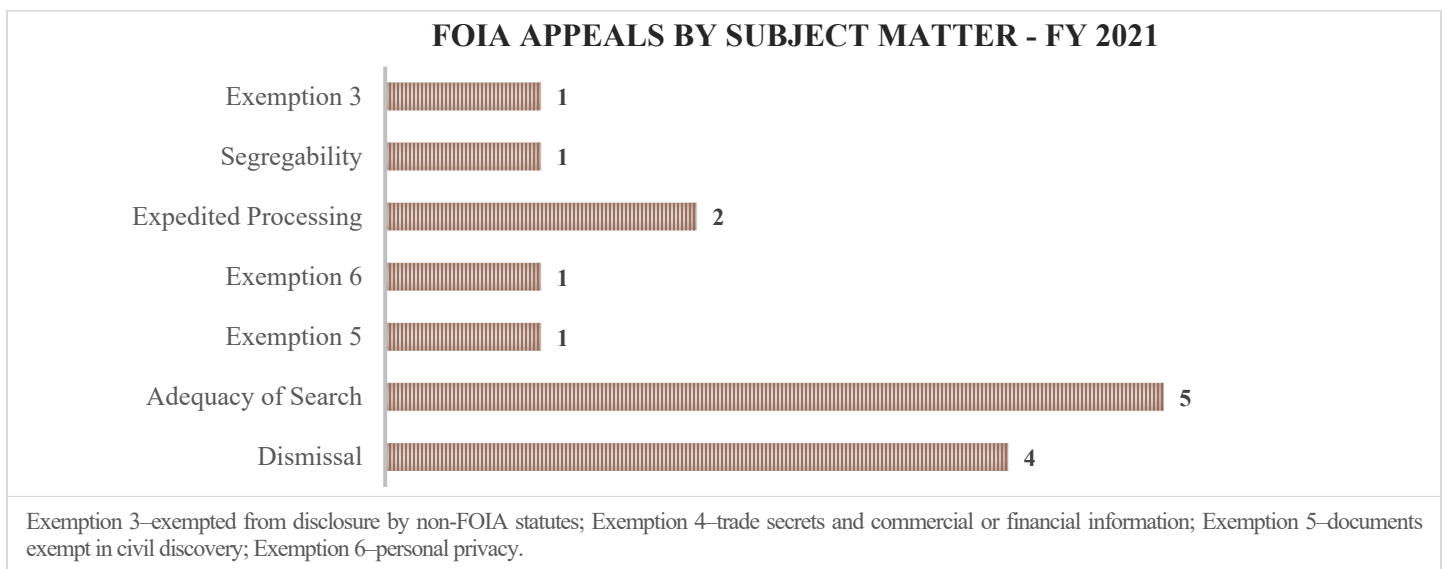
Freedom of Information and Privacy Acts

OHA considers appeals of agency determinations under the Freedom of Information Act (FOIA) and the Privacy Act. The governing regulations are set forth at 10 C.F.R. Parts 1004 and 1008, respectively. These appeals arise from determinations across the DOE complex and involve diverse subject matter areas. OHA facilitates communication between the requester and the agency, which in some cases permits the resolution of the issues without adjudication.

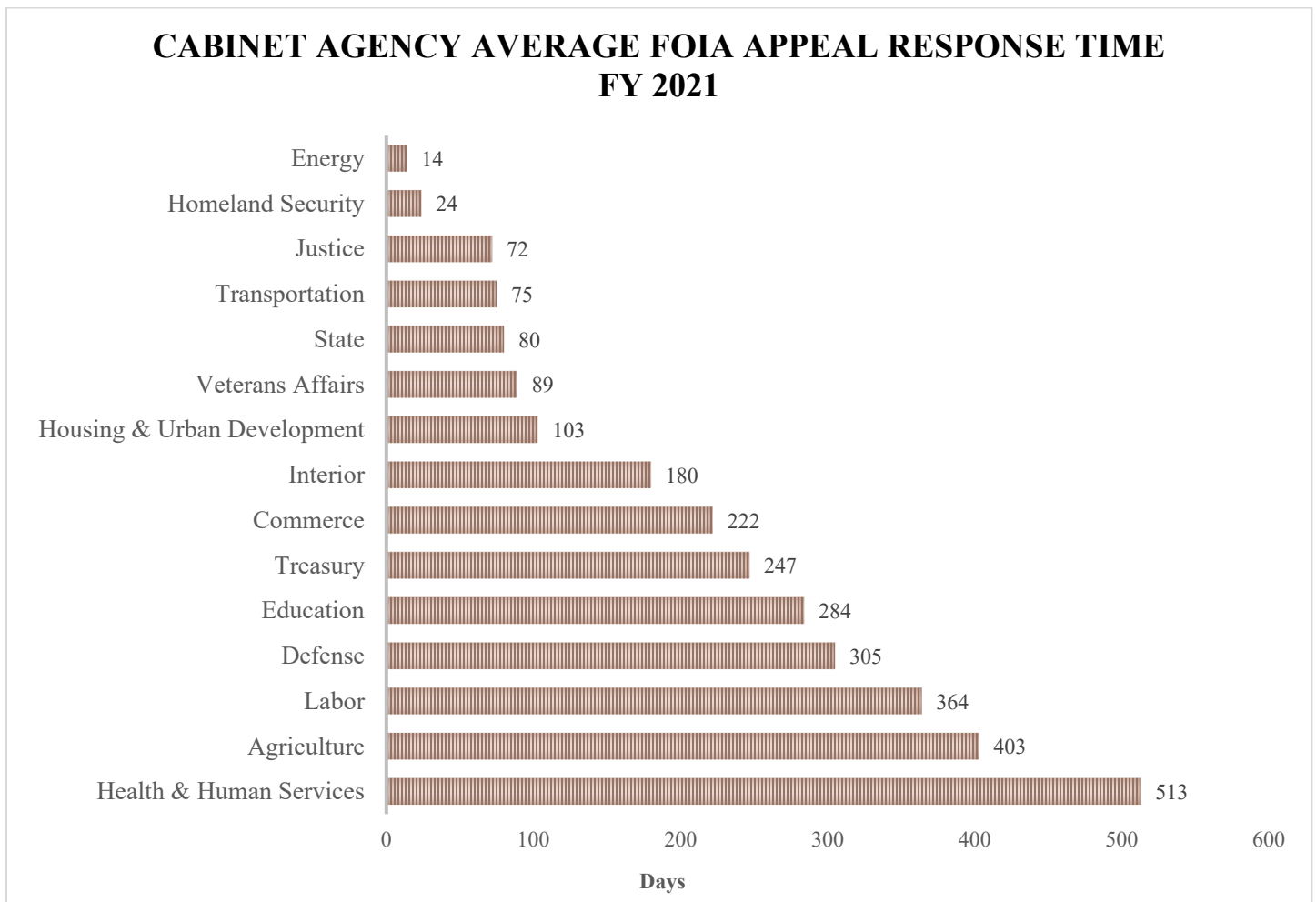
In FY 2021, OHA received 16 FOIA and Privacy Act Appeals. The following chart shows the number of cases received for each of the past five fiscal years. The number of such appeals dropped in FY 2021; the reason for this drop is unclear.



Appeals involved a broad range of issues, from whether the agency performed an adequate search for the requested records to analyzing whether information is “confidential” under Exemption 4 (exemption from public disclosure for commercial information) after a recent landmark Supreme Court ruling. The following chart shows the issues involved in FY 2021 FOIA Appeals.



The following chart shows that OHA had the fastest average response time for FOIA Appeals of any Cabinet Agency for FY 2021. This has been the case every year since FY 2017, when OHA began tracking these data. Additionally, none of OHA's FOIA decisions were overturned by Federal Courts in FY 2021.

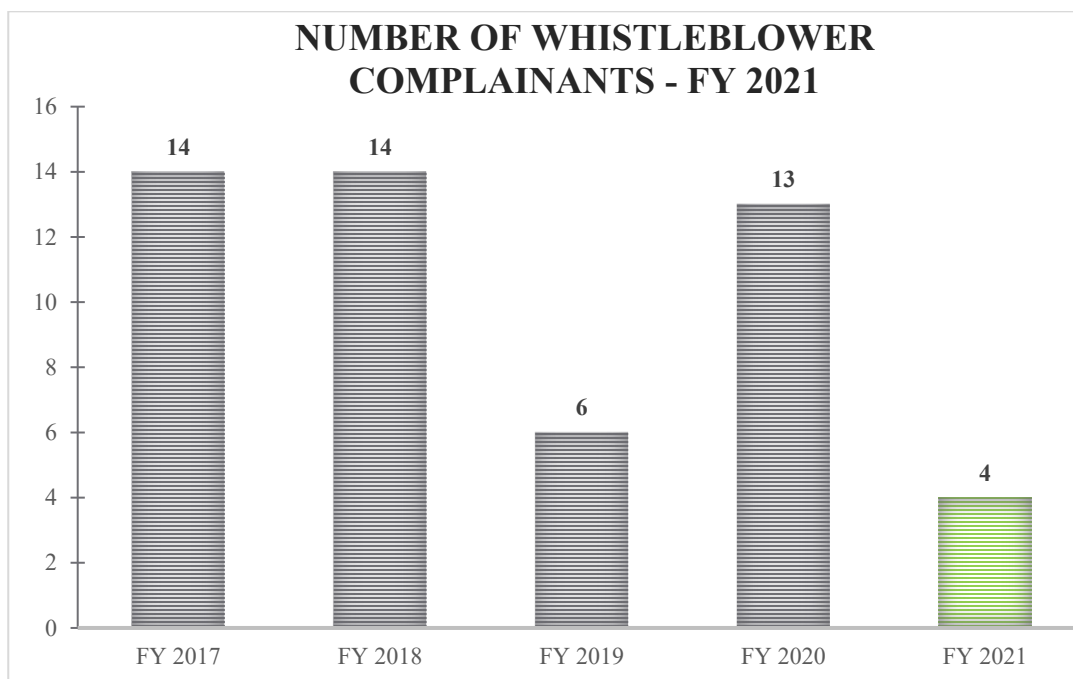


Whistleblower: Part 708 DOE Contractor Employee Protection Program

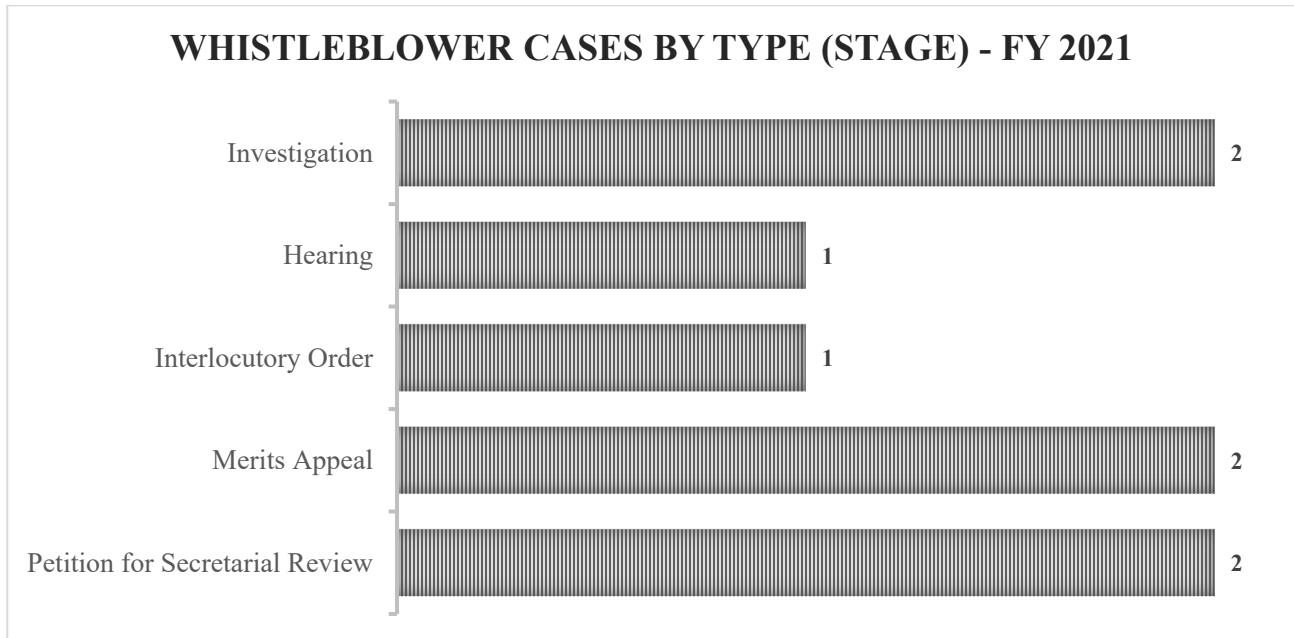
OHA investigates complaints, conducts hearings, and considers appeals under DOE’s Contractor Employee Protection Program. The program provides an avenue of relief for DOE contractor employees who suffer reprisal as a result of making protected disclosures or engaging in other types of protected activity. The governing regulations are set forth at 10 C.F.R. Part 708. OHA’s website contains a “Whistleblower Q&A” page, available at <https://www.energy.gov/oha/whistleblower-qas>, to assist DOE field personnel and contractor employees in understanding the process for considering Part 708 complaints. A finding of reprisal for certain types of disclosures may result in civil penalties pursuant to DOE enforcement programs under the Price-Anderson Act and the DOE Worker Safety and Health Rule (10 C.F.R. Part 851).

The main issue in these cases is generally whether an employee engaged in a protected activity—such as reporting safety hazards—and, if so, whether the contractor would have taken the adverse personnel action against the employee in the absence of that protected activity. An OHA Investigator conducts interviews, examines documentary evidence, and issues a report. Following the issuance of the report, an OHA Administrative Judge is assigned to the case. The Administrative Judge rules on pre-hearing motions, conducts a hearing, and issues an initial agency decision, which may be appealed to the OHA Director. The OHA Director also decides appeals from dismissals of complaints.

The chart below shows the number of individuals who have filed a Part 708 complaint or had a complaint referred to OHA under 41 U.S.C. § 4712 (Enhancement of Contractor Protection From Reprisal For Disclosure of Certain Information), for each of the past five fiscal years. In FY 2021, all whistleblower cases before OHA were Part 708 cases. As with FOIA and PA appeals, the number of whistleblower complaints dropped in FY 2021; the reason for this drop is unclear. The chart below shows the number of individuals who filed whistleblower complaints over the last five years.



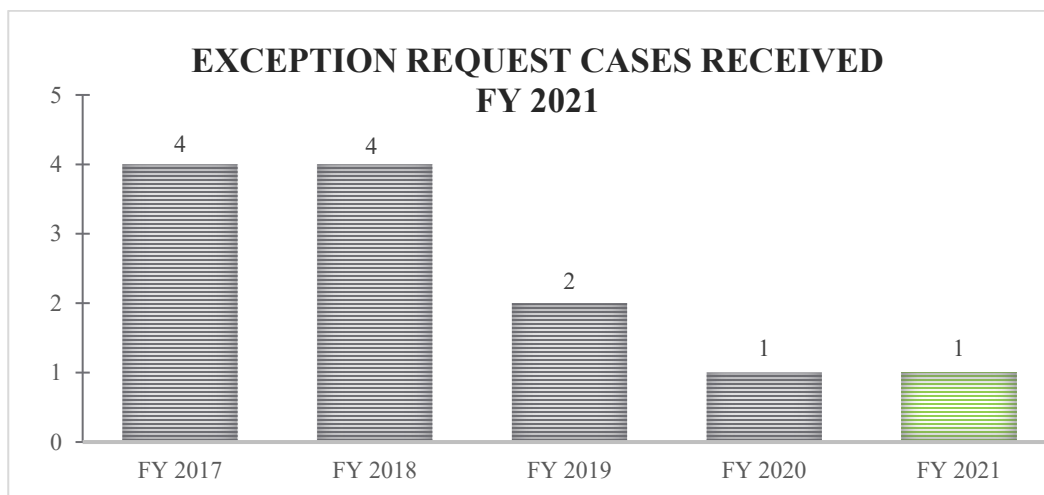
The chart below shows the different stages of the whistleblower cases processed by OHA in FY 2021. Because each case may enter more than one stage of the process, the total number of cases shown exceeds the total number of individuals who filed whistleblower complaints.



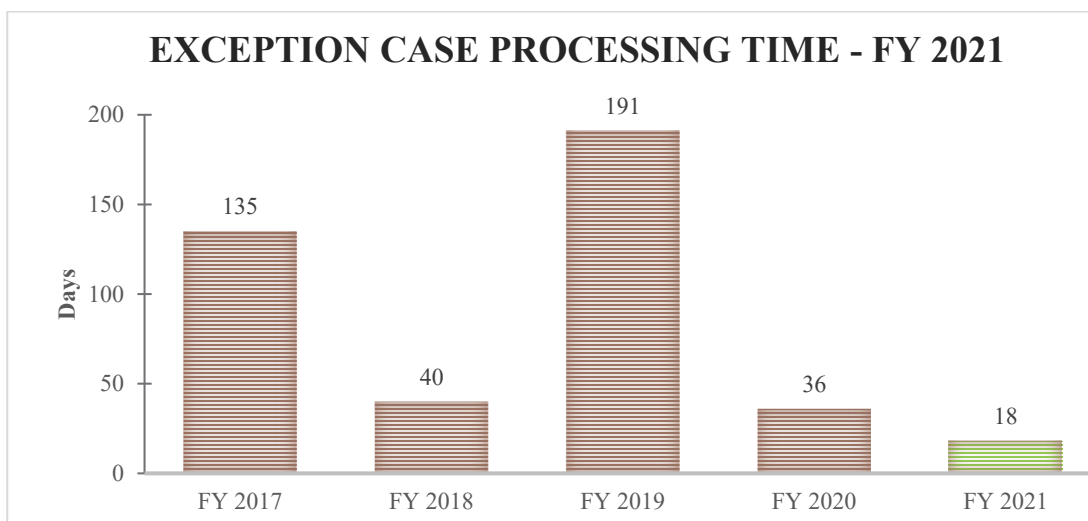
Exceptions and Special Redress

OHA considers petitions for special redress, as well as requests for exception (*i.e.*, relief) from certain DOE regulations and orders. An exception is granted where the application of a regulation, rule, or order would constitute a gross inequity, serious hardship, or unfair distribution of regulatory burdens. OHA may grant an exception, for example, if applying a rule to a specific firm would be inconsistent with the overall purpose of a program or would impose a burden on the firm that would be grossly disproportionate to the burden imposed on other firms. The nature of relief granted varies depending on the DOE regulations at issue, the hardship faced by the firm, and other circumstances.

Exception cases received are shown in the chart below. The enactment of new regulations impacts the types of Exception cases received in any given year. For example, when new product efficiency regulations are promulgated or about to take effect, OHA receives more applications for exceptions from manufacturing and testing requirements. As more new regulations take effect in the coming months, OHA expects to see an increase in applications for exception.



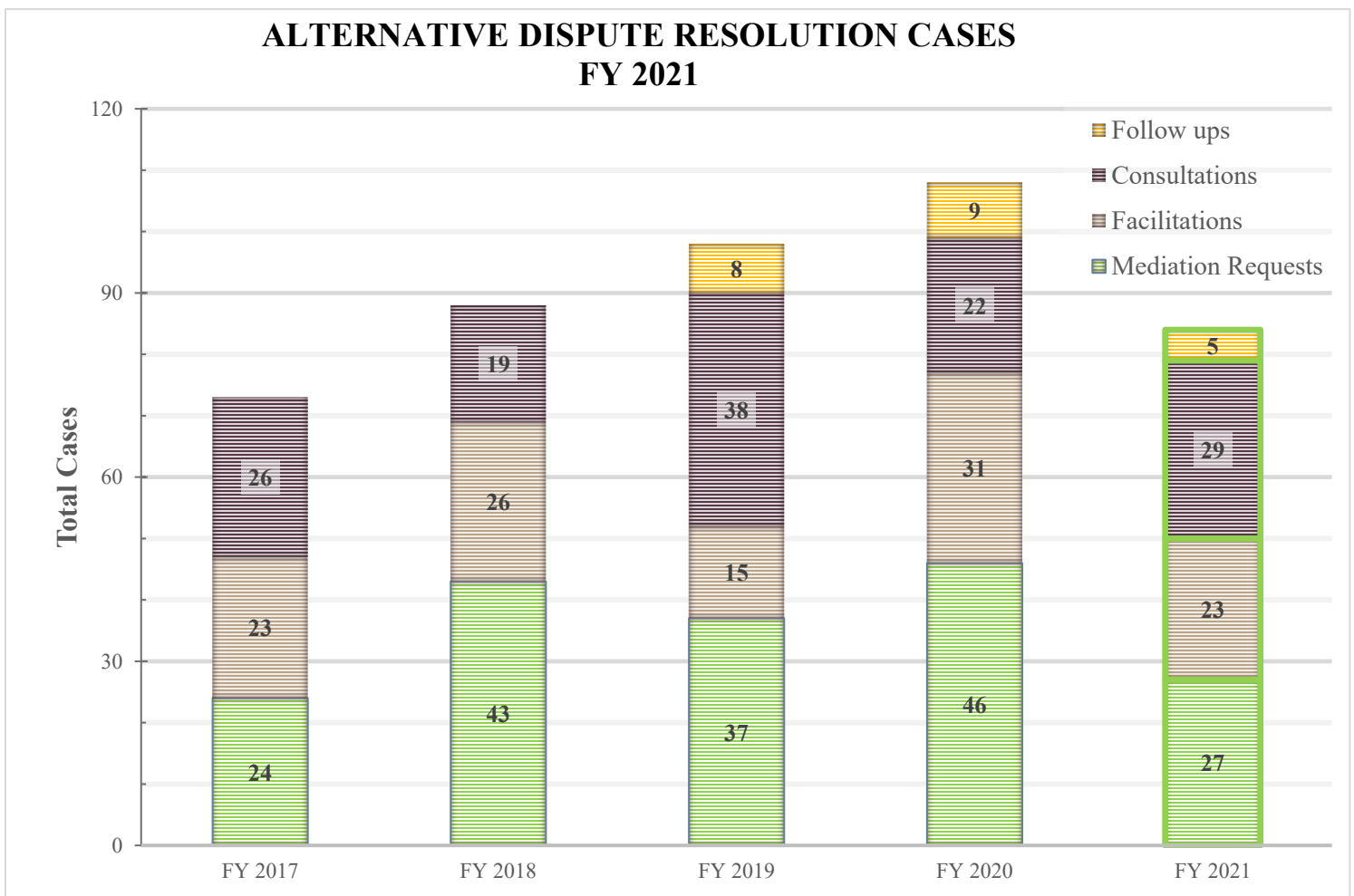
As shown in the following chart, exception case processing time hit a historic low in FY 2021.



Alternative Dispute Resolution

OHA's Alternative Dispute Resolution Office (ADRO) serves as a resource to all DOE employees and DOE contractors for conflict management and dispute resolution purposes, with an emphasis on workplace conflicts. ADRO is tasked with several responsibilities, including managing DOE's Alternative Dispute Resolution (ADR) Program, providing third-party neutrals and conflict management training services, and promoting the use of ADR generally throughout DOE.

ADRO provides mediation, facilitation, consultation, and training services to DOE federal and contractor employees at all levels of the DOE complex to help manage conflict and resolve disputes at the earliest possible stages without resorting to litigation. In addition, as in years past, ADRO continued to support sister agencies by providing neutral services to four other federal agencies as part of the federal Shared Neutrals Program.



ADRO FY 2021 Year In Review

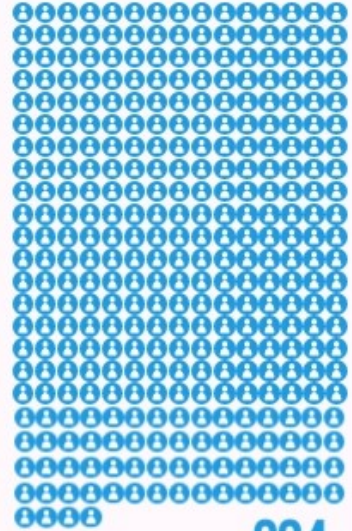
EVENTS AND ATTENDANCE

868
ATTENDEES

3 LUNCHTIME
SERIES



VIRTUAL TRAININGS
14



334
ATTENDEES

POPULAR ADRO SERVICES & OFFERINGS



ADR LUNCHTIME SERIES



EXECUTIVE ESSENTIALS/ SUPERVISORY ESSENTIALS BRIEFINGS



ADR REVIEW
(ADRO NEWSLETTER)



FEDERAL MEDIATION & CONCILIATION
SERVICE TRAINING (INTERNAL)

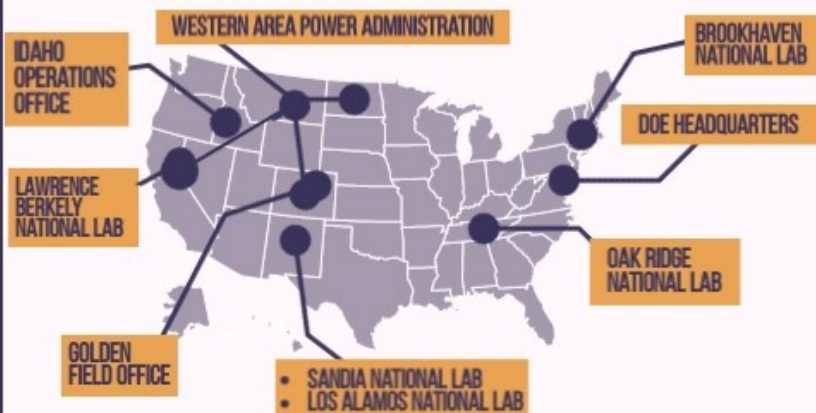


NEW EMPLOYEE ORIENTATION



TRAINING AND OUTREACH

MORE THAN
10 SITES SERVED ACROSS THE DOE
COMPLEX AND THE NATION, INCLUDING...



3 NEW ISSUES OF THE
ADR REVIEW NEWSLETTER



Other Areas of OHA Jurisdiction

Hydroelectric Production Incentives Program

Under Section 242 of the Energy Policy Act of 2005, the Secretary of Energy is directed to make incentive payments to the owner or operator of a qualified hydroelectric facility based on the number of kilowatt hours of hydroelectric energy generated by the facility during the incentive period. Any qualified owner or operator of a hydroelectric facility that added hydropower to non-powered dams or conduits between 2005 and 2027 (provided that the original dam or conduit was built prior to 2005) is eligible to apply to DOE for payment under the Section 242 incentive program. Applicants may file appeals with OHA to challenge eligibility determinations or determinations regarding the amount of an incentive payment.







Fact-Finding Reviews and Special Projects

At the request of DOE management officials, OHA may conduct independent fact-finding reviews or other special projects to fulfill a departmental need. These reviews may involve a specific allegation, a general review of the workplace environment, or an adjudication for which no appropriate process currently exists. As part of its review, OHA may conduct interviews, collect relevant documents, and/or prepare a written report that is delivered to the management official.

Medical Certification Disqualification

Under the Medical, Physical Readiness, Training, and Access Authorization Standards for Protective Force Personnel program, 10 C.F.R. Part 1046, a Security Police Officer who receives a medical certification disqualification may seek a final review by OHA, pursuant to 10 C.F.R. § 1046.15(d).

ADDITIONAL AREAS OF OHA JURISDICTION*

-  **APPEALS FROM ENERGY EFFICIENCY TEST WAIVER DETERMINATIONS**
-  **WHISTLEBLOWER PROGRAM FOR CLASSIFIED DISCLOSURES**
-  **ALTERNATIVE FUEL TRANSPORTATION PROGRAM**
-  **10 C.F.R. PART 851 WORKER SAFETY AND HEALTH PROGRAM**
-  **REIMBURSEMENT FOR REMEDIAL ACTION AT ACTIVE URANIUM AND THORIUM PROCESSING SITES**
-  **CHRONIC BERYLLIUM DISEASE PREVENTION PROGRAM**

***LIST IS NON-INCLUSIVE**

OHA INITIATIVES AND IMPROVEMENTS

FY 2021 presented many opportunities for growth and innovation at OHA despite the challenges of the COVID-19 pandemic. From technology to internal procedures to continuing education, staff maintained OHA's long-standing commitment to continuous improvement. The following list describes just some of OHA's FY 2021 initiatives and improvements.



OHA remained a virtually paperless office in FY 2021. While paper submissions are still accepted to ensure continued equal access to OHA services, electronic submissions are strongly encouraged.



OHA transitioned to fully remote hearings in 2021. Since 2009, OHA conducted most hearing via video teleconferences from its L'Enfant Plaza offices. This year, staff were trained on the technology to hold hearings from their remote locations and OHA's IT Point of Contact worked with OHA staff and other DOE sites to ensure that hearings remained secure.



OHA's IT Point of Contact created a report within OHA's legal filing system so that Administrative Judges could track their calendars and case statuses with the click of a button.



OHA hosted several internal trainings. Staff attended a three-day training on mediations and a DOJ FOIA and Privacy Act refresher training. At its weekly all-hands meeting, OHA hosted speakers from the DOE Appeals Panel, the National Background Investigations Bureau, and DOE's Reasonable Accommodations office.



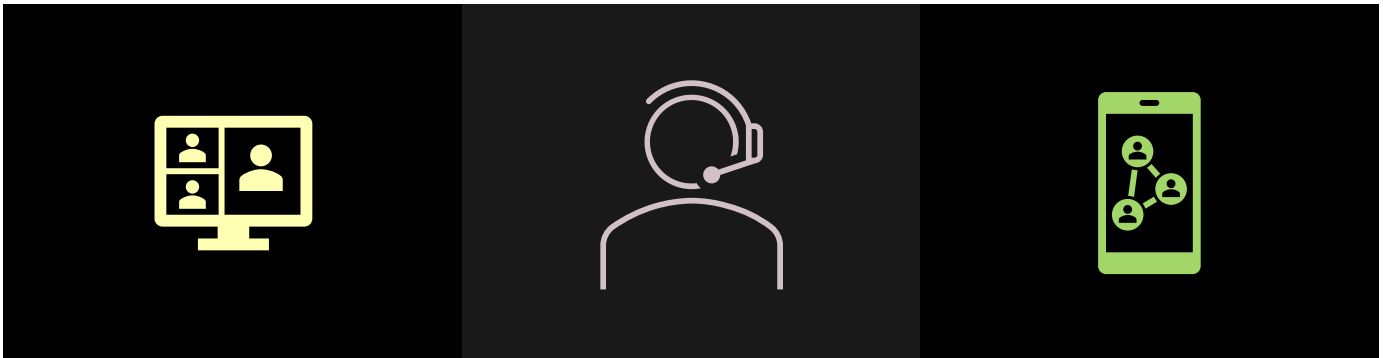
OHA remains committed to continuous improvement. In FY 2021, OHA conducted a review of its employee motivation and engagement, change management, process improvement opportunities, and customer experience.



OHA continued to develop its staff individually in FY 2021. Several staff members completed leadership trainings. Two Administrative Judges completed DOE's Emerging Leaders Program. Many staff members utilized OHA's Westlaw subscription to attend on-demand continuing legal education training. OHA also continued its virtual staff community-building activities, conducting lunchtime "picture lunches" with photos submitted by staff, and brief talent showcases.

MANAGING OUR MISSION & EMPOWERING OUR STAFF

OHA continued full-time telework for all staff in FY 2021 in response to the COVID-19 pandemic. Utilizing Webex videoconferencing, DOE-enabled mobile devices, and cloud-based collaboration programs like SharePoint and Teams, OHA was able to conduct 100% of its duties remotely.



Managing the OHA Mission during the Pandemic

When DOE first transitioned to full-time telework status, all Personnel Security cases before OHA were paused indefinitely. Typically, pre-COVID-19, the OHA Administrative Judge and an OHA staff attorney would appear from a specified video teleconferencing (VTC) room in OHA's offices at 950 L'Enfant Plaza in Washington, while the DOE attorney and the subject Individual and a court reporter would appear from a DOE site or court reporter's office in the city in which the subject Individual worked. With social distancing guidelines in place, this setup would no longer work. In 2021, OHA worked through the entire backlog of Personnel Security cases, conducting hearings via Webex, DOE's preferred video call application. Each participant appeared from a private location of his or her choosing. OHA conducts all its pre-hearing conferences via Webex in order to give the parties a chance to test and gain experience with the program before the hearing date.

OHA has also begun conducting mediations and facilitations via Webex. OHA staff use breakout rooms in the Webex application, as well as cell phones, to conduct one-on-one communications with parties, as appropriate in these proceedings. Overall, OHA's ability to harness existing DOE resources to perform its duties remotely is the most significant factor in its successful utilization of full-time telework.

Empowering Our Staff

In addition to technological efforts, OHA's efforts to maintain its tightknit community have greatly bolstered its success in transitioning to full-time telework. OHA leadership routinely checks in personally with staff via phone and Microsoft Teams and encourages use of DOE's support resources. The strong relationships in OHA have helped staff continue to work together, utilizing individual strengths to continue delivering high-quality results to the public, internal DOE stakeholders, and other government entities.

GENERAL INFORMATION

RESOURCES AND CONTACT

EXTENSIVE INFORMATION ABOUT THE OFFICE OF HEARINGS AND APPEALS (OHA) IS AVAILABLE ON OUR WEBSITE AT [HTTP://ENERGY.GOV/OHA](http://energy.gov/oha). THE WEBSITE INCLUDES INFORMATION ABOUT OHA'S JURISDICTION, INCLUDING APPLICABLE REGULATIONS, FREQUENTLY ASKED QUESTIONS, AND OHA DECISIONS.



FOR GENERAL INFORMATION, OR TO GIVE US FEEDBACK ON ANY ASPECT OF OUR OPERATIONS, PLEASE EMAIL US AT [OHA.FILINGS@HQ.DOE.GOV](mailto:oha.filings@hq.doe.gov).

