

U.S. Department of Energy

OFFICE OF HEARINGS & APPEALS

ANNUAL REPORT FY 2023



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Director's Message



I am pleased to report on the fiscal year (FY) 2023 operations of the Office of Hearings and Appeals (OHA). OHA's mission is to provide adjudicatory and dispute resolution services to the U.S. Department of Energy (DOE). 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 a variety of programs. In FY 2023, 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. OHA staff continued to conduct remote hearings in all our cases. Our office has integrated Microsoft OneDrive, SharePoint, and Teams into its workflow, streamlining our processes and providing greater capabilities for collaboration with other offices.

OHA continued to promptly process cases in FY 2023. For example, we issued Personnel Security decisions, on average, just 10 days after receiving the hearing transcript. Also, while federal law allows 20 days to process Freedom of Information Act appeals, OHA adjudicated these appeals within an average of just 13 days, down from 17 days in FY 2022.

The number and diversity of cases received and processed by OHA, which rose dramatically in FY 2022, continued to increase in FY 2023. In FY 2023, OHA received 144 Personnel Security cases. The Alternative Dispute Resolution (ADR) Office, housed within OHA, had 158 total cases, over twice as many as in FY 2022. The ADR Office added an ADR specialist to its roster, expanding our training capacity and allowing us to service more organizations and improve the working environment across the DOE complex.

As we begin FY 2024, 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,

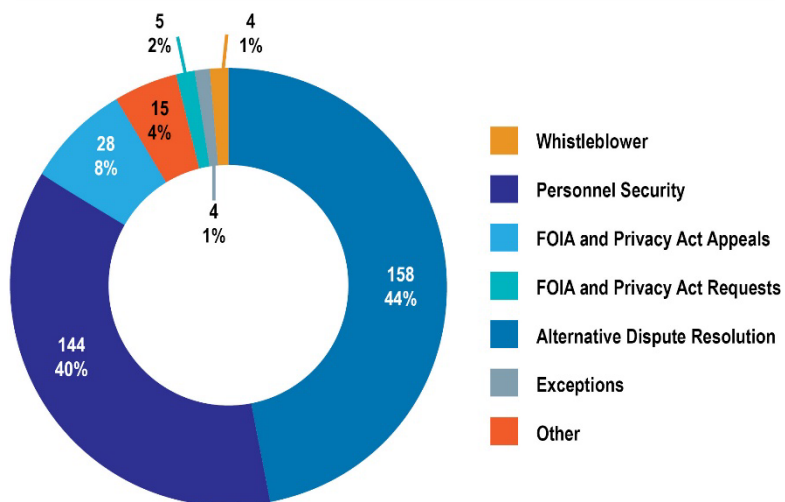
Poli A. Marmolejos
Director and Chief Administrative Judge
Office of Hearings and Appeals

Adjudicatory and Dispute Resolution Services

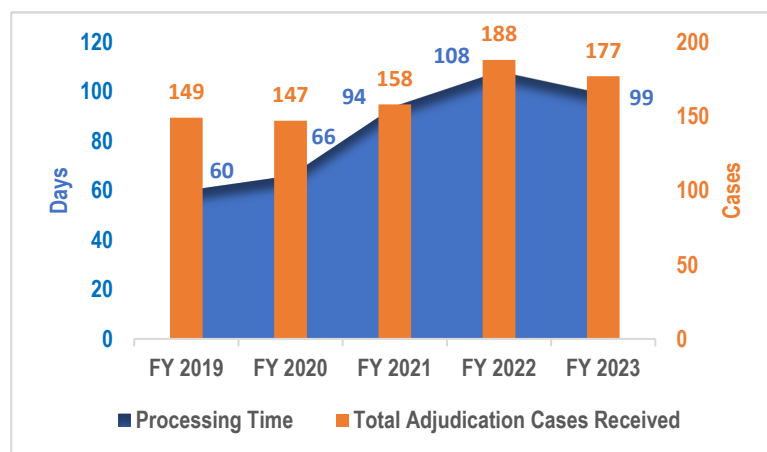
The Office of Hearings and Appeals (OHA) is the U.S. Department of Energy's (DOE's) central administrative adjudicative forum for conducting hearings and issuing Departmental decisions with respect to adjudicative proceedings delegated to OHA by the Secretary. Over the years, OHA has adjudicated appeals from a variety of DOE determinations, including those related to the Department's Alternative Fuel Transportation Program; crude oil refund proceedings; 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 fiscal year (FY) 2023, OHA continued to conduct adjudications for multiple programs, which principally include:

- Personnel Security (10 C.F.R. Part 710): conducting hearings and issuing decisions regarding individuals' eligibility to obtain or hold a security clearance
- Human Reliability Program (10 C.F.R. Part 712): conducting hearings and issuing decisions regarding individuals' eligibility to occupy positions that afford access to certain material, nuclear devices, or facilities
- Freedom of Information Act (FOIA) (10 C.F.R. Part 1004): adjudicating appeals filed by FOIA requesters dissatisfied with DOE's determinations with regard to their FOIA requests
- Contractor Employee Whistleblower Protection (10 C.F.R. Part 708): investigating complaints, conducting hearings, and issuing decisions regarding whistleblower complaints filed by contractor employees who allegedly suffered reprisal as a result of engaging in protected conduct, such as making a disclosure regarding public health and safety matters
- Requests for Adjustment Relief (42 U.S.C. § 7194): ruling upon applications for exceptions or similar relief from DOE regulations or final orders; for example, requests for an exception from complying with DOE's energy efficiency regulations, based on allegations of serious hardship, gross inequity, or unfair distribution of burdens
- Energy Efficiency Standards Enforcement (42 U.S.C. § 6303): conducting hearings and issuing decisions regarding enforcement of energy efficiency standards
- Special Projects: conducting fact-findings with regard to sensitive matters already in dispute and providing adjudication services for unique disputes within the Department.

OHA Cases Received FY 2023



Total Adjudication Cases and Processing Times



In many of the cases that OHA handles, OHA's decision is the Final Agency Decision. Procedures to be followed in OHA's cases vary depending on the type of case and can be found on OHA's website at <http://energy.gov/oha>, under "Services." In addition to its adjudicatory role, OHA also houses DOE's Alternative Dispute Resolution (ADR) Office, which provides all DOE components and contractors with support and resources for preventing and resolving workplace disputes. The ADR Office's activities include a mediation program; a quarterly newsletter; a range of trainings, including Open Enrollment Workshops, custom trainings, and a Supervisor Forum; 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 case 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 2023, OHA handled a total of 353 cases, of which 177 were adjudication cases.

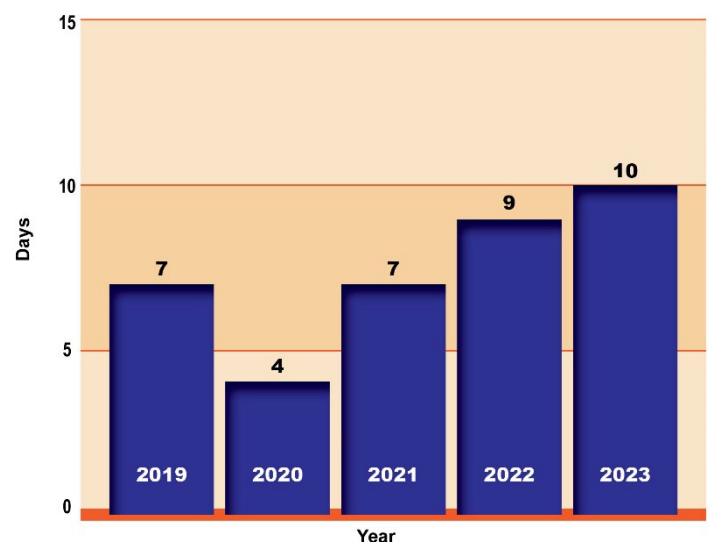
Personnel Security and Human Reliability Program

In FY 2023, OHA received 144 and adjudicated 141 Personnel Security cases (nearly 80% of the total cases adjudicated by OHA).¹ Each of these cases concerned a federal or contractor employee's eligibility for a DOE security clearance. Similarly, OHA also adjudicates cases concerning federal and contractor employees' 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 in 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 security clearances). The OHA Administrative Judge assigned to each case conducts a hearing, analyzes the evidence, and renders a decision, which may be appealed within DOE.

Personnel Security cases are decided using the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*.

Personnel Security hearings (PSHs) involve various types of conduct or personal problems that raise doubt about an individual's judgment, trustworthiness, or reliability as defined in the National Security Adjudicative Guidelines. Evidence and testimony typically given in these hearings include expert medical opinions, medical test results, tax filings, budgets and financial records, and prior signed agreements between the individual and their employer to abstain from problematic conduct. Some cases involve multiple security concerns. For example, a case may involve a concern about excessive alcohol use and a concern about unfiled taxes. As in FY 2019, FY 2020, FY 2021, and FY 2022, Alcohol Consumption (Guideline G) was the largest category of security concerns adjudicated by OHA in FY 2023.

PSH Time to Decision After Transcript



¹ Some cases received prior to FY 2023 were adjudicated in FY 2023.

Adjudicative Guidelines

A: Allegiance to the United States

F: Financial Considerations

K: Handling Protected Information

B: Foreign Influence

G: Alcohol Consumption

L: Outside Activities

C: Foreign Preference

H: Drug Involvement and Substance Misuse

M: Use of Information Technology

D: Sexual Behavior

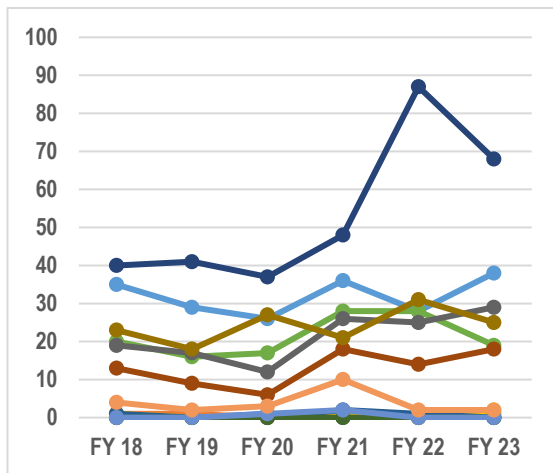
I: Psychological Conditions

Bond Amendment
(Illegal Substance Use and Addiction)

E: Personal Conduct

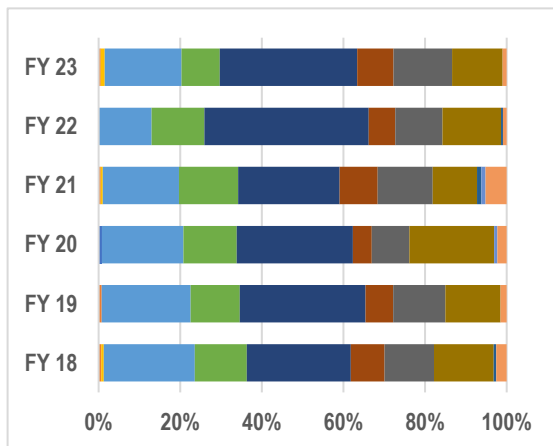
J: Criminal Conduct

PSH Cases by Type



	FY 18	FY 19	FY 20	FY 21	FY 22	FY 23
Guideline A	0	0	1	0	0	0
Guideline B	1	1	0	1	0	1
Guideline C	0	0	0	0	0	0
Guideline D	1	0	0	1	0	2
Guideline E	35	29	26	36	28	38
Guideline F	20	16	17	28	28	19
Guideline G	40	41	37	48	87	68
Guideline H	13	9	6	18	14	18
Guideline I	19	17	12	26	25	29
Guideline J	23	18	27	21	31	25
Guideline K	1	0	0	2	1	0
Guideline L	0	0	0	0	0	0
Guideline M	0	0	1	2	0	0
Bond Amendment	4	2	3	10	2	2

PSH Case Types by Percentage



OHA serves all DOE sites for Personnel Security adjudications, but the bulk of the cases come from the national laboratories in New Mexico, California, and Tennessee.

Freedom of Information and Privacy Acts

OHA considers appeals of agency determinations under the Freedom of Information Act (FOIA) and the Privacy Act. The FOIA was enacted to ensure that government is as transparent as possible. DOE's governing regulations for the FOIA and the Privacy Act are set forth in 10 C.F.R. Parts 1004 and 1008, respectively. Most of the appeals arise under the FOIA, though OHA did receive one Privacy Act appeal in FY 2023. These appeals arise from determinations across the DOE complex and involve diverse subject matter areas. OHA facilitates communication between the requester and the agency, in some cases leading to the resolution of the issues without the need for issuing an appeal decision. OHA's FOIA processing times are consistently some of the fastest in the federal government. In FY 2023, OHA's time to decision for FOIA appeals was the lowest of any cabinet agency, as it has been for four out of the last five years.

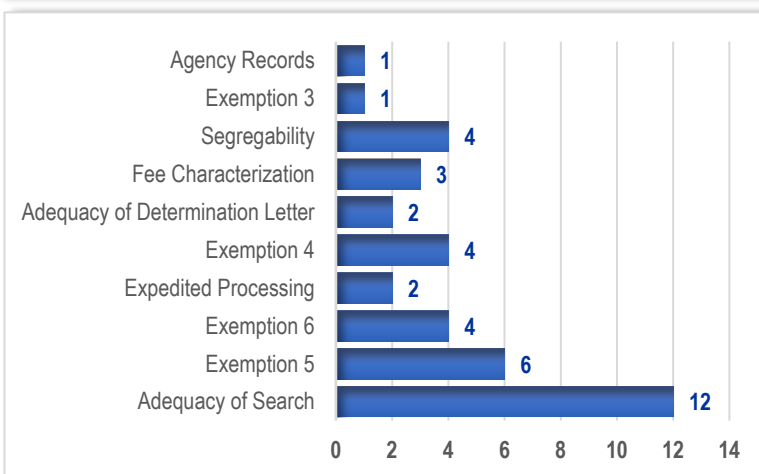
Appeals involved a broad range of issues, from whether the agency performed an adequate search for the requested records to analyzing whether information was properly withheld under one of FOIA's nine exemptions from public disclosure.

The charts on this page present information about non-classified FOIA appeals. Classified FOIA appeals are processed separately.

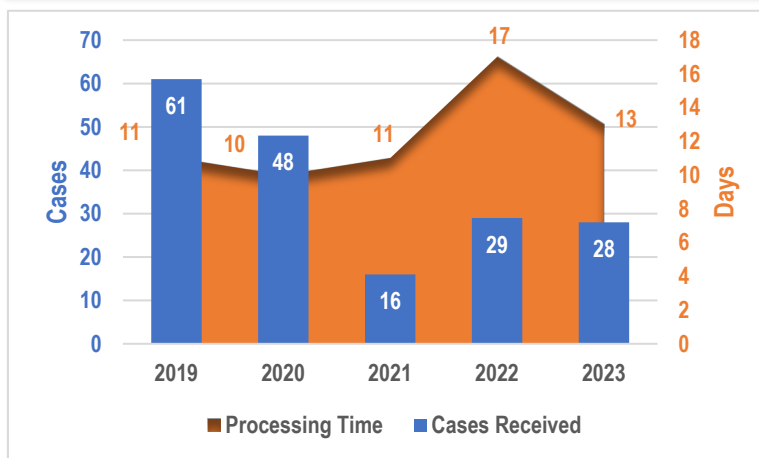
PSH Case Locations

NNSA Headquarters	1	NRLFO ID	3
NNSA Amarillo	11	NRLFO Lynchburg	3
NNSA Kansas City	11	NRLFO Pittsburgh	2
NNSA LANL	29	NRLFO SC	1
NNSA LLNL	5	NRLFO Schenectady	5
NNSA NV	2	NRLFO TN	1
NNSA NM	3	Oak Ridge Office	2
NNSA Sandia	14	Oak Ridge WA PNNL	1
NNSA Y-12	7	OST Albuquerque	1
Headquarters	1	OST Oak Ridge	1
Idaho Operations Office	3	Richland Operations Office	2
Los Alamos Field Office	1	Oak Ridge/Paducah	11

Issues Raised in FOIA Appeals in FY 2023



FOIA Cases Received and Processing Time



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 in 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). In FY 2023, four employees had a Part 708 whistleblower case before OHA.

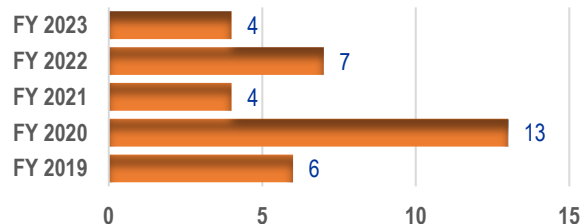
The main issue in Part 708 cases is generally whether an employee engaged in a protected activity—such as reporting safety hazards—and, if so, whether the contractor would have taken the adverse personnel action against the employee in the absence of that protected activity. When a case is referred to OHA, an OHA Investigator conducts interviews, examines documentary evidence, and issues a report. Following the issuance of the report, the case is then assigned to an OHA Administrative Judge who 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.

Each stage of OHA's processing of a whistleblower complaint is designated as a different type of case in OHA's case management system. This is done in part due to the amount of work involved in each stage and in part to ensure that no attorney works on multiple stages of the same case. The Whistleblower Cases by Type chart shows how many of each case stage OHA opened in FY 2023.

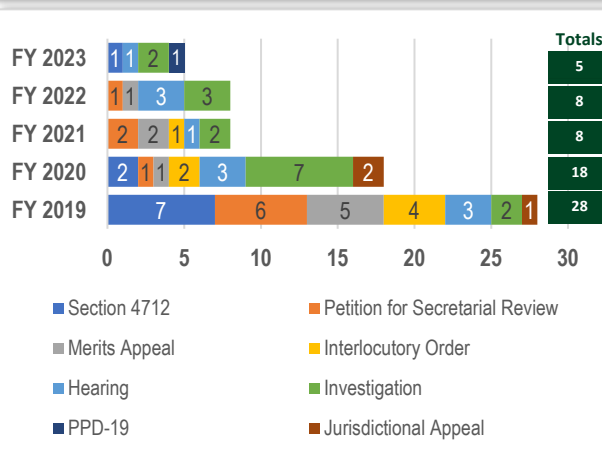
In FY 2023, OHA processed DOE's first Presidential Policy Directive-19 (PPD-19) whistleblower case. PPD-19 prohibits any officer or employee of an executive branch agency from taking, failing to take, or threatening to take "any action affecting an employee's [e]ligibility for [a]ccess to [c]lassified [i]nformation as a reprisal for a [p]rotected [d]isclosure." Protected disclosures must be regarding a violation of federal law, rule, or regulation or regarding mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. PPD-19 complaints are initially filed with DOE's Office of the Inspector General (OIG) and a report of investigation is sent to OHA for a final determination.

OHA also processed a whistleblower complaint brought under 41 U.S.C. § 4712, Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information. Protected disclosures for these cases are the same as those in PPD-19 cases with the added requirement that the violation of law, rule, or regulation; mismanagement; abuse of authority; or gross waste of funds must be related to federal funds or contracts, except for disclosures about a danger to public health or safety. These complaints are also filed initially with OIG before a report of investigation is sent to OHA for a final determination.

Total Part 708 Whistleblowers



Whistleblower Cases by Type

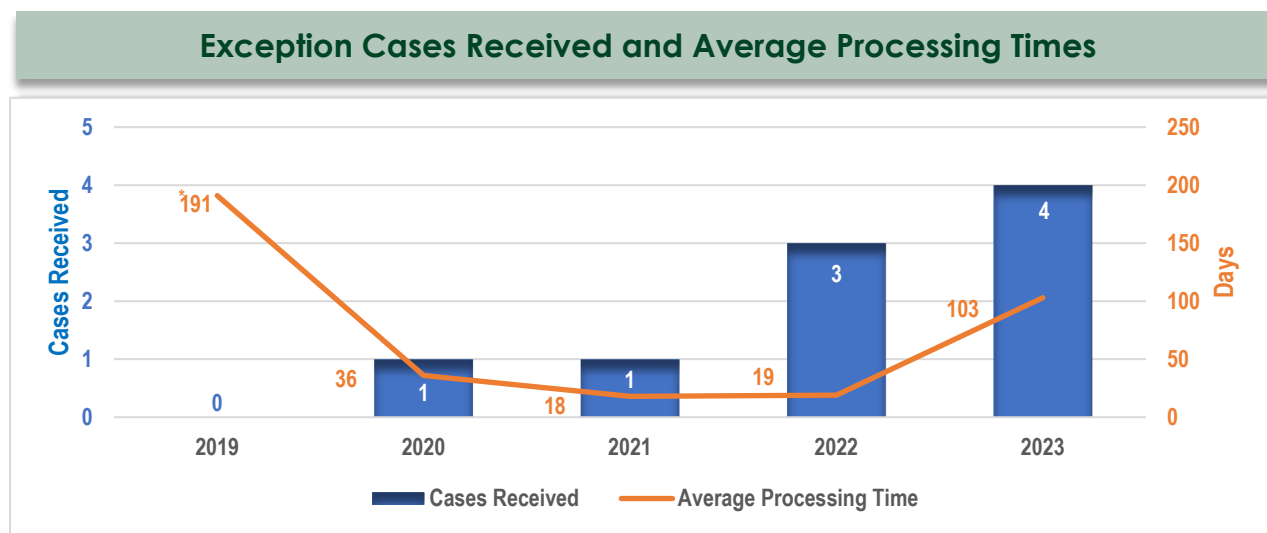


Energy Efficiency Enforcement Program

OHA participates in the enforcement of DOE's Energy Efficiency Standards in two ways. OHA considers petitions for adjustments, including interpretations, modifications, rescissions of, exceptions to, or exemptions from DOE rules, regulations, or orders. This is one of OHA's longest running programs. Applications for exception are the most common type of adjustment case OHA receives. Exception relief 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.

OHA also conducts hearings for entities that have received a Notice of Proposed Penalty for violations of the energy efficiency standards pursuant to the Energy Policy and Conservation Act, 42 U.S.C. § 6291 et seq. The program requires Administrative Procedure Act-style adjudication before an Administrative Law Judge (ALJ), who determines whether a civil penalty is warranted and, if so, an appropriate amount. OHA received its first enforcement hearing cases in FY 2023 and issued six decisions in that year, recommending penalties totaling over \$5 million.

The received exception cases 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 typically receives more than the average number of applications seeking exceptions from the requirements of those regulations. OHA expects to see an increase in exceptions cases in FY 2024 as regulations promulgated during the last several years begin taking effect.



*Case closed from previous year; no new cases opened in FY 2019.

Alternative Dispute Resolution

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

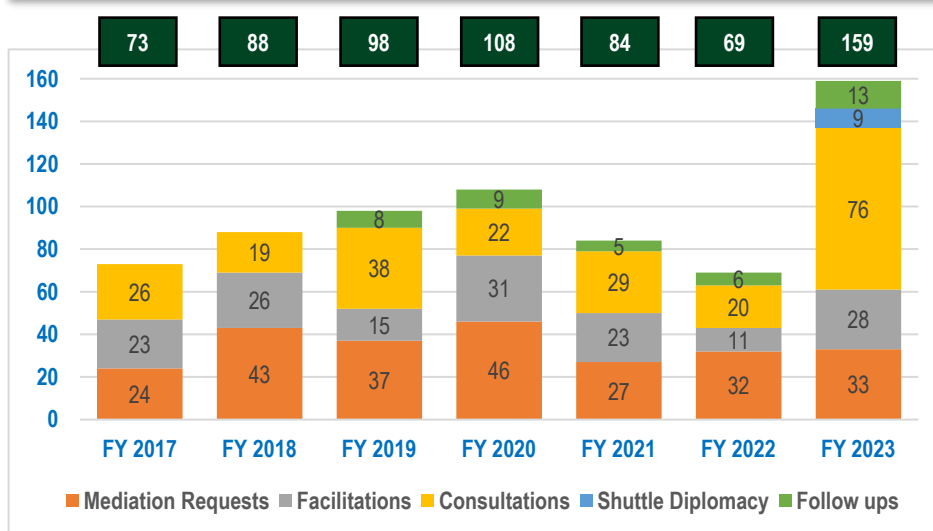
The ADR Office provides mediation, facilitation, consultation, and training services to DOE federal and contractor employees at all levels of the DOE complex to help manage conflict and resolve disputes at the earliest possible stages and, hopefully, prevent the need for litigation. In FY 2023, as in years past, the ADR Office continued to support sister agencies by providing neutral services to other federal agencies as part of the Federal Shared Neutrals Program.

The ADR Office provided training and outreach to nearly 4,500 attendees across 42 DOE components in FY 2023, amounting to over 126 training hours. As a result of these trainings, individuals learned to establish conflict-healthy workplaces; learned the skills they need to address and resolve conflict early; learned to embrace differing views, diverse backgrounds and perspectives; and, ultimately, catalyzed innovation, growth and progress in their organizations.

The ADR Office's case-related referrals more than doubled in FY 2023 as a result of its customized training and outreach activities.



ADR Cases Received



FY 2023 ADR Office Training and Outreach



Other Areas of OHA Jurisdiction

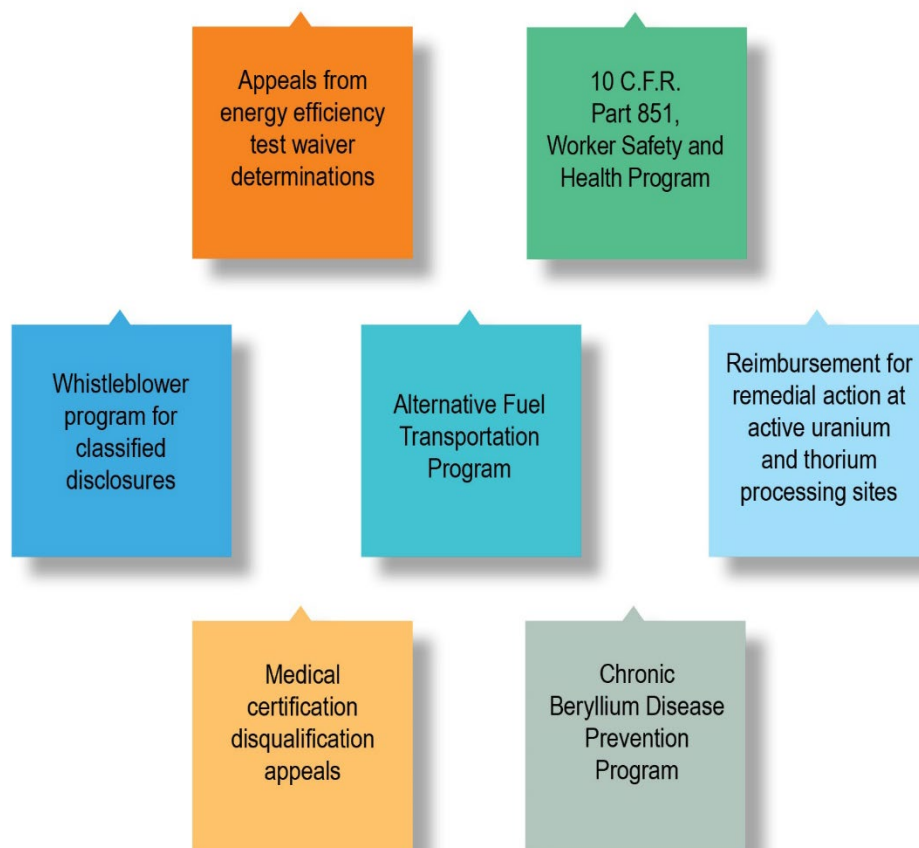
Hydroelectric Production Incentives Program

Under Sections 242, 245, and 247 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 incentive program. Applicants may file appeals with OHA to challenge determinations regarding eligibility or 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.

Additional Areas of OHA Jurisdiction



OHA Initiatives and Improvements

FY 2023 presented many opportunities for growth and innovation at OHA. From technology to internal procedures to continuing education, staff maintained OHA's longstanding commitment to continuous improvement. The following list describes some of OHA's FY 2023 initiatives and improvements.

- OHA coordinated and completed the move of OHA office space from 950 L'Enfant Plaza to our new location in the Forrestal Building, resulting in a savings of over \$535,000 in annual rent.
- OHA organized several trainings for employees across the DOE complex, including a four-day ALJ training conducted by judges with the National Judicial College; two FOIA trainings conducted by Department of Justice attorneys; and a week-long mediation training led by trainers from the Federal Mediation and Conciliation Service, which provided a 40-hour mediation certification.
- OHA entered into an agreement with the Small Business Administration (SBA) to process and issue decisions in SBA debt case appeals. We received numerous cases, which our two ALJs began processing.
- OHA worked with the Office of the Chief Financial Officer on its revision of DOE Order 533.1, regarding collection of debts from DOE employees, which will provide a new role for our office concerning hearings on the validity of debts and appeals of debt waiver decisions.
- The ADR Office created a new training and outreach program, the monthly Supervisor Forum. This forum has helped to open the lines of communication, virtually connecting supervisors across the DOE complex, allowing them to explore topics related to creating a conflict-healthy culture and to be thought partners in issues and challenges they may be facing. Since its inception in FY 2023, the monthly Supervisor Forum has reached nearly 300 supervisors across the DOE complex.
- The ADR Office provided twice monthly Open Enrollment Workshops serving over 1,400 employees and covering over 54 hours throughout FY 2023. The topics of these workshops included Bystander/Upstander Intervention, Difficult Conversations, and 5 Pillars of an Engaged Workplace. The ADR Office's quarterly Lunchtime Series reached over 2,000 individuals throughout the DOE and federal government, covering topics such as Rehumanizing Workplaces, Power Disparities, and Strengthening Social Connection and Collaboration.
- During FY 2023, the ADR Office issued four "ADR Review" newsletters, providing information regarding our services, upcoming events, related articles, and announcements. Articles included Trivialization in the Workplace, De-Escalation, and Effective Apologies.
- In addition to its traditional services, in FY 2023, the ADR Office debuted its use of the Listening Circle as a tool for group work. Specifically, one team member facilitated an in-person discussion for a program office challenged with complicated communication issues. The feedback was overwhelmingly positive and propelled the client organization forward in its desire for change.
- OHA remains a fully paperless office. OHA's docket and information technology teams also developed new procedures for electronically transmitting large files securely to and from non-DOE entities. While paper submissions are still accepted to ensure continued equal access to OHA services, electronic submissions are strongly encouraged.
- OHA had 100% participation in the Federal Employee Viewpoint Survey, scoring 97% in Global Satisfaction, 98% in Employee Engagement, and 100% in Performance Confidence. Every participant responded that they would recommend OHA as a great place to work.

Resources & Contact

Extensive information about the Office of Hearings and Appeals is available on our website at <http://energy.gov/OHA>.

The website includes information about OHA's jurisdiction, including application regulations, OHA Decisions, and an FAQ section.



*Click
or
scan*

For general information,
or to give us feedback
on any aspect of our operations,
please email OHA at
OHA.filings@hq.doe.gov.

