

failed to show that OSHA investigators had informed Roadway of the substance of the evidence to support reinstatement of the discharged employee.

*Section 1979.105 Issuance of Findings and Preliminary Orders*

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue a finding regarding whether or not the complaint has merit. If the finding is that the complaint has merit, the Assistant Secretary will order appropriate preliminary relief. The letter accompanying the findings and order advises the parties of their right to file objections to the findings of the Assistant Secretary. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final findings and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed. The language of § 1979.105(c) has been changed to explain this process without repeating the discussion in § 1979.106(b).

The AFA commented that § 1979.105(a) should be modified to require the awarding of attorney's fees to the complainant and to provide only to the complainant a written summary of the relevant facts obtained when a complaint is dismissed. OSHA believes that it is obligated under the law to provide written findings to both parties regardless of the outcome of the investigation. OSHA agrees that the statutory language requires the Secretary to award reasonable attorney's fees, and the language of the regulation has been changed accordingly.

The ATA commented that § 1979.105(a) should be modified to make clear that OSHA should not order preliminary reinstatement of an employee involved in air carrier operations if the individual poses a safety risk to employees or passengers. The ATA felt that it was possible in certain situations that OSHA might reasonably conclude that a complainant should be reinstated, but that the complainant's return to work could pose a safety hazard to other employees or the public. AIR21 only permits issuance of a preliminary order granting reinstatement if there is reasonable cause to believe that a violation has occurred. Section 1979.104(e) provides opportunities for the named person to present evidence to OSHA that the complainant would have been

discharged even in the absence of his or her protected activity. Where the named party establishes that the complainant would have been discharged even absent the protected activity, there would be no reasonable cause to believe that a violation has occurred. Therefore, a preliminary reinstatement order would not be issued.

Furthermore, a preliminary order of reinstatement would not be an appropriate remedy where, for example, the named party establishes that the complainant is, or has become, a security risk based upon information obtained after the complainant's discharge in violation of AIR21's employee protection provision. See *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360–62 (1995), in which the Supreme Court recognized that reinstatement would not be an appropriate remedy for discrimination under the Age Discrimination in Employment Act where, based upon after-acquired evidence, the employer would have terminated the employee upon lawful grounds. The final regulation explicitly so provides. Moreover, because section 1979.105(a) provides that the Assistant Secretary's preliminary order will require reinstatement, along with the other make-whole remedies, "where appropriate," we believe that the regulations provide safeguards that address ATA's legitimate security-risk concerns. Finally, in appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. Such "economic reinstatement" frequently is employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977. See, e.g., *Secretary of Labor on behalf of York v. BR&D Enters., Inc.*, 23 FMSHRC 697, 2001 WL 1806020 \*\*1 (June 26, 2001).

The AFA suggested that § 1979.105(b) should be changed to require the named person to produce proof of attorney's fees and to provide the evidence directly to the complainant in cases where OSHA finds that a complaint is frivolous or brought in bad faith. The NWC commented that such sanctions against the complainant should not be available during the investigation phase. In consideration of the comments presented and OSHA's own re-evaluation of the statutory language, OSHA has deleted the paragraph delegating to OSHA responsibility for assessing attorney's fees up to \$1,000 during the investigation phase for complaints frivolously filed or filed in bad faith (§ 1979.105(b)). The remaining

paragraphs of this section have been renumbered. The named person may seek attorney's fees for complaints filed frivolously or in bad faith in the administrative law judge proceeding as provided in § 1979.106(a). Such attorney's fees may be sought for fees incurred during the investigation of a frivolous complaint, even where the Assistant Secretary finds no merit to the complaint and the complainant does not file any objection to the determination. See § 1979.105(b) and § 1979.109(b). The named person also may seek attorney's fees as provided in § 1979.110(a), in a petition for review by the Board. See § 1979.110(e).

*Section 1979.106 Objections to the Findings and the Preliminary Order*

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or e-mail communication is considered the date of the filing. The filing of objections is also considered a request for a hearing before an ALJ. The language of § 1979.106(b) has been changed to explain the effect of the timely filing of objections on the preliminary order without repeating the discussion in § 1979.105(c).

The NWC commented that in § 1979.106(a) the requirement that a party needs to file "objections" at the time a request for hearing is filed should be deleted. The basis for the comment was that other whistleblower regulations do not require it and that unnecessary litigation may result over the adequacy of the objections rather than the merits of the case. OSHA has considered this concern and believes that the rules as drafted are correct and consistent with the language of the statute. It is not expected that a party's list of objections needs to be exhaustive at the time of the initial request for hearing. A named person may seek attorney's fees for the filing of a frivolous complaint or a complaint filed in bad faith when filing any objections and a request for a hearing.

The NWC also felt that § 1979.106(b)(1) should require that all of the remedies of a preliminary order be immediately effective, rather than just the reinstatement portion, when the employee prevails at the investigative stage. OSHA believes that such an interpretation is clearly inconsistent with the statutory language which states that objections shall not operate to stay any reinstatement remedy contained in the preliminary order.