

Section 1979.107 Hearings

This section adopts the rules of practice of the Office of Administrative Law Judges at 29 CFR Part 18, Subpart A. In order to assist in obtaining full development of the facts in whistleblower proceedings, formal rules of evidence do not apply. The section specifically provides for consolidation of hearings if both the complainant and the named person object to the findings and order of the Assistant Secretary.

The ALPA commented that a new subsection should be added to § 1979.107 setting forth the standard of proof to be used by the administrative law judges at hearing. OSHA believes that the statute clearly sets forth the criteria for determination by the Secretary, and additional clarification is not necessary.

Section 1979.108 Role of Federal Agencies

The ERA and STAA regulations provide two different models for agency participation in administrative proceedings. Under STAA, OSHA ordinarily prosecutes cases where a complaint has been found to be meritorious. Under ERA and the other environmental whistleblower statutes, on the other hand, OSHA does not ordinarily appear as a party in the proceeding. The Department has found that in most environmental whistleblower cases, parties have been ably represented and the public interest has not required the Department's participation. Therefore this provision utilizes the approach of the ERA regulation at 29 CFR 24.6(f)(1). The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an administrative law judge; petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the Administrative Review Board proceeding. Although we anticipate that ordinarily the Assistant Secretary will not participate in AIR21 proceedings, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests

of justice might require participation by the Assistant Secretary. The FAA, at that agency's discretion, also may participate as amicus curiae at any time in the proceedings. The Department believes it is unlikely that its preliminary decision not to ordinarily prosecute meritorious AIR21 cases will discourage employees from making complaints about air carrier safety.

Four comments were received regarding § 1979.108(a)(1). The TTD and the AFA commented that the regulation should explicitly provide that the Assistant Secretary shall act only in the interests of the complainant at any hearings. The ALPA commented that the Assistant Secretary should always act as prosecutor at any hearing before the ALJ or review by the Board. The AFA commented that the Assistant Secretary should act as prosecutor only at the request of the complainant. And the ATA supported the section as written and commented that the Assistant Secretary should limit participation to those few cases that present issues of such particular legal significance to the agency as to warrant participation. In consideration of all the comments received it is OSHA's determination to leave the language of this rule as written. The Assistant Secretary may participate as a party or may participate as amicus curiae as he or she may deem necessary or appropriate.

Section 1979.109 Decision of the Administrative Law Judge

This section sets forth the content of the decision and order of the administrative law judge, and includes the statutory standard for finding a violation. The section further provides that the Assistant Secretary's determination to dismiss the complaint without an investigation or complete an investigation pursuant to § 1979.104 is not subject to review. Paragraph (a) of this section has been clarified to state expressly that the Assistant Secretary's determinations on whether to proceed with an investigation and to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears the case on the merits, and may not remand the matter to the Assistant Secretary to conduct an investigation or make further factual findings. Paragraph (c) of this section has been changed to make the ALJ decision effective ten business days after the date on which it was issued, unless a timely petition for review has been filed with the Administrative Review Board, to conform with the change in § 1979.110(a), which provides ten

business days instead of "15 days" from the date of the ALJ decision for the filing of a petition for review.

The AFA commented that § 1979.109(b) should be changed to require the administrative law judge to provide the complainant with any evidence of the named person's attorney's fees and to formally advise the complainant that the decision to award fees may be appealed. OSHA does not believe this language is necessary because the right of either party to appeal the administrative law judges' decisions is explained in the subsequent section, to wit, § 1979.110.

The NWC commented that § 1979.109(c) should be modified to reflect that the administrative law judges do not have statutory authority to lift the Assistant Secretary's preliminary order of reinstatement. OSHA does not believe that the proposed change can be supported by the language of the statute.

Section 1979.110 Decision of the Administrative Review Board

The decision of the ALJ is the final decision of the Secretary if no timely petition for review is filed with the Administrative Review Board. Upon the issuance of the ALJ's decision, the parties may petition the Board for review of that decision. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. Paragraph (a) of this section has been modified to facilitate the review process by stating expressly that the parties must specifically identify the findings and conclusions to which they take exception in the petition, or the exceptions are deemed waived by the parties.

Paragraphs (a) and (b) also have been modified to provide that appeals to the Board are not a matter of right, but rather petitions for review are accepted at the discretion of the Board. The Board has 30 days to decide whether to grant the petition for review. If the Board does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If the Board grants the petition, the Act requires the Board to issue a decision not later than 120 days after the date of the conclusion of the hearing before the ALJ. The conclusion of the hearing is deemed to be the conclusion of all proceedings before the administrative law judge—i.e., ten business days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed in the interim. If a timely petition for review is filed with the