

letter accompanying the findings and order advises the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. 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.

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, as under AIR21, 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 Sarbanes-Oxley. 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. 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).

#### *Section 1980.106 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; if the filing of objections is made in person, by hand-delivery or other means, the date of receipt is considered the date of the filing. The filing of objections is also considered a request for a hearing before an ALJ.

#### *Section 1980.107 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/or order of the Assistant Secretary. In order for hearings to be conducted as expeditiously as possible, and particularly in light of the unique provision in Sarbanes-Oxley allowing complainants to seek a *de novo* hearing in Federal court if the Secretary has not issued a final decision within 180 days of the filing of the complaint, this section provides that the ALJ has broad authority to limit discovery. For example, an ALJ may limit the number of interrogatories, requests for production of documents, or depositions allowed. An ALJ also may exercise discretion to limit discovery unless the complainant agrees to delay filing a complaint in Federal court for some definite period of time beyond the 180-day point. If a complainant seeks excessive or burdensome discovery or fails to adhere to an agreement to delay filing a complaint in Federal court, a district court considering a request for *de novo* review might conclude that such conduct resulted in delay due to the claimant's bad faith.

#### *Section 1980.108 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 OSHA's participation. The Department believes this is even more likely to be the situation in cases involving allegations of corporate fraud. Therefore, as in the AIR21 regulations,

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 Sarbanes-Oxley 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 Securities and Exchange Commission ("SEC"), at that agency's discretion, also may participate as *amicus curiae* at any time in the proceedings. OSHA believes it is unlikely that its preliminary decision ordinarily not to prosecute meritorious Sarbanes-Oxley cases will discourage employees from making complaints about corporate fraud.

The Department seeks comment regarding its preliminary decision that the Assistant Secretary should not ordinarily participate in Sarbanes-Oxley proceedings, but should participate in appropriate cases, or whether instead the Department should follow the STAA model under which it ordinarily participates where a complaint is found to have merit. The Department will consider these comments, as well as its experience under this program in the interim, in issuance of the final rule.

#### *Section 1980.109 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 as to whether to dismiss the complaint without an investigation or conduct an investigation pursuant to § 1980.104 is not subject to review by the ALJ, who hears the case on the merits.