DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1979

RIN 1218–AB99

Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations governing the employee protection (''whistleblower'') provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (''AIR21''), a Federal Aviation Administration reauthorization bill, enacted into law April 5, 2000. This rule establishes procedures and time frames for the handling of complaints under AIR21, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (''OSHA''), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (''ALJ'') for a hearing de novo, hearings by ALJs, appeal of ALJ decisions to the Administrative Review Board (acting on behalf of the Secretary) and judicial review of the Secretary's final decision.

On April 1, 2002, OSHA published an interim final rule (67 FR 15454) which provided for rules of procedure and time frames to implement Section 519 of AIR21. At that time the agency requested comments concerning the interim final rules, and in response several comments were received from interested parties. OSHA has reviewed the comments and now adopts this final rule which has been revised in part to address problems perceived by the agency and the commenters.

DATES: This final rule is effective on March 21, 2003.

FOR FURTHER INFORMATION CONTACT: John Spear, Director, Office of Investigative Assistance, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3603, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2199.

SUPPLEMENTARY INFORMATION:

I. Background

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (''AIR21''), Public Law 106–181, was enacted on April 5, 2000. Section 519 of the Act, codified at 49 U.S.C. 42121, provides protection to employees against retaliation by air carriers, their contractors and their subcontractors, because they provided information to the employer or the Federal Government relating to air carrier safety violations, or filed, testified, or assisted in a proceeding against the employer relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (''FAA'') or any other law relating to the safety of air carriers, or because they are about to take any of these actions. These rules establish procedures for the handling of complaints under AIR21.

II. Summary of Statutory Provisions

The AIR21 whistleblower provisions include procedures which allow a covered employee to file, within 90 days of the alleged discrimination, a complaint with the Secretary of Labor (''the Secretary'').[1] Upon receipt of the complaint, the Secretary must provide written notice to both the person named in the complaint who is alleged to have violated the Act (''the named person'') and the FAA of: The allegations contained in the complaint, the substance of the evidence submitted with the complaint, and the rights of the named person throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the named person an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation. However, the Secretary may conduct an investigation only if the complainant has made a prima facie showing that the alleged discriminatory behavior was a contributing factor in the unfavorable personnel action alleged in the complaint and the named person has not demonstrated, through clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior. This provision is similar to the 1992 amendments to the ERA, codified at 42 U.S.C. 5851.

After investigating a complaint, the Secretary shall issue a determination letter. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that discriminatory behavior has occurred, the Secretary must notify the named person of those findings along with a preliminary order which requires the named person to: Abate the violation, reinstate the complainant to his or her former position and provide make-whole relief and compensatory damages to the complainant, as well as costs and attorney's and expert fees reasonably incurred. The complainant and the named person then have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing on the record. The filing of objections under AIR21 shall stay any remedy in the preliminary order except for preliminary reinstatement. This provision for preliminary reinstatement after the investigation is similar to the employee protection provision of STAA, 49 U.S.C. 31105. If a hearing before an administrative law judge is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, AIR21 requires the hearing to be conducted ''expeditiously.'' The Secretary then has 120 days after the ''conclusion of a hearing'' in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, complainant and the named person may enter into a settlement agreement which terminates the proceeding. The Secretary shall assess against the named person, on the complainant's request, a sum equal to the total amount of all costs and expenses, including attorney's and expert witness fees, reasonably incurred by the complainant in bringing the complaint to the Secretary or in connection with participating in the proceeding which resulted in the order on behalf of the complainant. The Secretary also may award a prevailing employer an attorney's fee, not exceeding $1,000, if he or she finds that the complaint is or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation. Finally, AIR21 makes persons who violate these newly created whistleblower provisions subject to a

[1] Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA. Secretary's Order 5–2002 (67 FR 65008, October 22, 2002); Secretary's Order 1–2002 (67 FR 64272, October 17, 2002). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the Administrative Review Board. See Secretary's Order 1–2002.

civil penalty of up to $1,000. This provision is administered by the FAA.

III. Summary of Regulations and Rulemaking Proceedings

On April 1, 2002, the Occupational Safety and Health Administration published in the **Federal Register** an interim final rule promulgating rules which implemented Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106–181, 67 FR 15454—15461. In addition to promulgating the interim final rule, OSHA's notice included a request for public comment on the interim rules by May 31, 2002. On May 29, 2002, OSHA received a request from the Association of Flight Attendants requesting a 30-day extension of the comment period, and on June 13, 2002, OSHA published a notice in the **Federal Register** extending the comment period to June 30, 2002, 67 FR 40597.

In response, six organizations filed comments with the agency. Comments were received from the Association of Flight Attendants (AFA); the Air Line Pilots Association (ALPA); the Transportation Trades Department, AFL–CIO (TTD); the Air Transport Association (ATA); the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); and the National Whistleblower Legal Defense and Education Fund on behalf of the National Whistleblower Center (NWC). Senator Charles Grassley of Iowa also submitted comments.

OSHA has reviewed the comments and, in response, has developed a final rule which makes some changes in the interim final rule. Other changes urged by commenters were considered but rejected. OSHA addresses the comments in the discussion that follows. The comments and OSHA's response are discussed in the order of the provisions of the rule.

General Comments

OSHA received four comments of a general nature relating to the regulations. The AFL–CIO questioned whether the interim procedures related to filing of complaints, processing of investigations and conduct of administrative reviews satisfy the following four requirements which, in its opinion, are needed to meet the intent of Congress:

(1) Whistleblowers must have control of their legal cases through an Individual Right of Action;

(2) The investigating and prosecuting authority must not have discretionary authority that may be abused to undermine the legal interests of complainants;

(3) Loopholes that allow illegal employer conduct or circumscribe the protected acts of complainants must be eliminated; and

(4) Legal burdens of proof for whistleblowers must be realistic.

OSHA believes that, as a general matter, the interim rules provide for administrative and judicial review procedures and burdens of proof required by AIR21 and fully satisfy the spirit and intent of Congress to provide whistleblower protection to aviation workers, thus helping to increase the safety of the aviation industry and the traveling public.

The NWC suggested that OSHA posters be amended to inform employees of all the whistleblower laws administered by OSHA; or, in the alternative, OSHA should make posters regarding employee rights under all the whistleblower laws widely available free of charge to the regulated community and encourage employers to comply with the law and voluntarily post notice of the law. OSHA believes that posters and other means or informing employers and employees of their rights and responsibilities under the various whistleblower statutes are vital to achieving the goals of the statutes, although AIR21 does not authorize OSHA to require employers to post notice of the law. However, the FAA has developed and distributed posters and other informational materials to airport authorities, employers and employee groups around the country.

The ATA submitted three general comments regarding the nature of the relationship between OSHA and the FAA. The ATA suggested that the rules be modified to provide that (1) the FAA has complete and exclusive jurisdiction over air carrier safety issues, (2) when OSHA receives an AIR21 discrimination complaint, the FAA must first make a threshold determination as to whether the underlying safety issues raised by the complaint relate to a violation, and (3) throughout any investigation by OSHA, the FAA retains exclusive authority to determine any air carrier safety issues underlying or related to the discrimination complaint. With respect to the first and third comments, OSHA agrees that the FAA has authority over air carrier safety issues as defined by statute. OSHA does not agree, however, that AIR21 provides that it is the FAA's responsibility to first make a threshold determination as to whether the underlying safety issues raised by the complainant relates to an air carrier safety violation. That initial, threshold determination of whether the complainant engaged in activities protected by the law is common to all the various whistleblower statutes and is made by OSHA in the regular course of determining a prima facie showing that protected conduct was a contributing factor in the alleged unfavorable personnel action.

Section 1979.100 Purpose and Scope

This section describes the purpose of the regulations implementing AIR21 and provides an overview of the procedures covered by these new regulations. No comments were received relating to this section.

Section 1979.101 Definitions

In addition to the general definitions, the regulations include program-specific definitions of ''air carrier'' and ''contractor.'' The statutory definition of ''air carrier'' applicable to AIR21 is found at 49 U.S.C. 40102(a)(2), a general definitional provision applicable to air commerce and safety. The statutory definition of ''contractor'' is found in AIR21 at 49 U.S.C. 42121(e).

Four comments were received regarding the definitions contained in § 1979.101. The NWC proposed that the term ''air carrier'' include those carriers owned by foreign persons, stating that it would be inconsistent with safety and national security to exclude from protection whistleblowers who uncovered and disclosed problems related to air carriers which may happen to be owned or controlled by foreign corporations or persons. AIR21 is contained in Title 49, Subtitle VII, Part A, of the United States Code. While AIR21 contains a definition of ''contractor,'' it does not contain a definition of ''air carrier'' and so the general definitions applicable to Part A contained in Subpart 1 apply. The terms ''air carrier'' and ''foreign air carrier'' are separately defined by statute at 49 U.S.C. 40102(a)(2) (''air carrier'') and 49 U.S.C. 40102(a)(21) (''foreign air carrier''), and the general definition of air carrier is set forth in the AIR21 rule. OSHA has no authority to define the terms otherwise.

The NWC also stated that the definition of the term ''contractor'' should be further explained to ensure that the definition include all contractors which perform, directly or indirectly, any function whatsoever which may have safety implications, and that safety-sensitive functions specifically include security related activities. The NWC suggested that the definition of ''safety-sensitive'' should include persons who work for

contractors who are in a position to witness and or identify the misconduct of other employees or contractors as opposed to reporting only on the employee's own employer. OSHA agrees that ''safety-sensitive functions'' include security-related activities, but believes that the definition as written is adequate.

The AFA commented that the terms ''contractors, subcontractors, or agents or air carriers'' be added to the definition of ''person.'' The term ''person'' is included in the definitions because it is used variously in the statute to mean both organizations and individuals. The definition describes what type of legal entities may be included in the term ''person.''

Section 1979.102 Obligations and Prohibited Acts

This section describes the whistleblower activity which is protected under the Act and the type of conduct which is prohibited in response to any protected activity.

The NWC commented that § 1979.102(b) should explicitly include reports of security violations or reports of security weaknesses made to the employer or a law enforcement agency in the definition of protected activity. OSHA believes that the regulation appropriately sets forth the statutory definition of protected activity, which includes providing ''information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.'' Therefore, OSHA does not believe that the additional language requested is necessary.

The AFA suggested that the words ''actively or passively'' be added to § 1979.102(b) to clarify that all forms of discrimination, whether active or passive, are violations of the Act. The AFA also recommended that the words ''actual or constructive'' be added before the word ''knowledge'' in § 1979.102(b)(1) and (2) to prevent an employer from making a ''don't want to know'' plausible deniability argument to escape accountability for violating the Act. OSHA considers that extensive case law exists involving analogous language in other employee protection statutes. Therefore, OSHA anticipates that similar interpretations would be applied under AIR21.

The NWC recommended that § 1979.102(c) be further defined, in order to prevent a chilling effect on employee disclosures, by stating that the term ''deliberate'' does not apply to unintentional conduct. There is case law involving analogous provisions of other employee protection statutes defining the phrase ''deliberate violations'' for purposes of denying protection to an employee who causes a violation of applicable safety laws. *See, e.g., Fields* v. *United States Department of Labor Administrative Review Board,* 173 F.3d 811, 814 (11th Cir. 1999) (''petitioners moved knowingly and dangerously beyond their authority when, on their own, and fully aware that their employer would not approve, they conducted experiments inherently fraught with danger''). We anticipate that a similar construction of that term would be applied under AIR21.

Section 1979.103 Filing of Discrimination Complaint

This section explains the requirements for filing a discrimination complaint. Under AIR21, to be timely a complaint must be filed within 90 days of the alleged violation. Under *Delaware State College* v. *Ricks,* 449 U.S. 250, 258 (1980), this date is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. *Equal Employment Opportunity Commission* v. *United Parcel Service,* 249 F.3d 557, 561–62 (6th Cir. 2001). Under § 1979.103(a), complaints may be made by any person on the employee's behalf with the consent of the employee.

Section 1979.103(b) of the interim rule permitted complaints to be made both in writing and orally. The rule has been changed to require that complaints be made in writing, which shall include a full statement of the acts and omissions alleged to constitute the violation, in accordance with the procedures for filing whistleblower complaints under several other employee protection provisions for which the Secretary of Labor has delegated the responsibility for enforcement to OSHA. Complaints still do not need to be made in accordance with any particular form. However, because of difficulty encountered in the processing of oral complaints, OSHA has determined that the process for filing full complaints in writing codified at 29 CFR 24.3(c) should apply to whistleblower complaints filed under AIR21.

The AFA commented that § 1979.103(c) should be changed to include the Federal Aviation Administration as a place where complaints may be sent because the FAA website advised that whistleblower complaints may be filed with the FAA. Similarly, the NWC proposed that § 1979.103.(c), (d) and (e) should make clear that whistleblower complaints filed with other agencies should be deemed timely filed, particularly when the underlying safety concern was originally directed to the other agency. The NWC also commented that an internal whistleblower complaint to the employer should also act to toll the AIR21 statute of limitations. OSHA wants to make clear in the regulations that claims should preferably be filed with OSHA. However, as noted in OSHA's Whistleblower Investigations Manual (OSHA Instruction DIS 0–0.8), it is OSHA's policy, as supported by case law, that complaints timely filed by mistake with the FAA or other agency not having the authority to grant relief to the whistleblower may be considered timely filed with OSHA. The reference to filing with ''any Department of Labor officer or employee'' has been changed to ''any OSHA officer or employee'' to make the rule consistent with other whistleblower rules administered by OSHA.

The ATA commented that § 1979.103(e) should be deleted in its entirety because OSHA states no legal authority for the provision, individuals may intentionally file under one statute and not the other, and the section is vague because it does not make clear which statutory process OSHA will follow. The purpose of § 1979.103(e) is to make clear to the regulated community that OSHA reserves the right to investigate any whistleblower claim that properly falls under OSHA's purview. Section 11(c) of the Occupational Safety and Health Act (''OSH Act'') provides employment protection for employees who exercise certain rights under the OSH Act, principal among them being the right to file an occupational safety and health complaint with OSHA within 30 days of the alleged violation. Section 11(c), unlike STAA and ERA, does not provide for an administrative determination of the merits of a complaint by the Secretary; instead, the Secretary of Labor may seek to bring an action in Federal District Court to enforce the whistleblower protection provision of the OSH Act. Section 1979.103(e), which is comparable to a provision in the STAA regulations (see § 1978.102(e)), puts the community on notice that OSHA considers all complaints filed with it as potential complaints under Section 11(c) if it should turn out in the course of the investigation that the underlying

protected safety or health activity falls under OSHA's authority rather than that of the FAA. The final rule also clarifies that the requirements of Section 11(c) necessarily apply to complaints that OSHA treats as having been filed under the OSH Act, and that the requirements of AIR21 apply to complaints that OSHA treats as having been filed under AIR21.

Section 1979.104 Investigation

AIR21 contains a requirement similar to the requirement in the ERA that a complaint shall be dismissed if it fails to make a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Also included in this section is the AIR21 requirement that an investigation of the complaint will not be conducted if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct, notwithstanding the prima facie showing of the complainant. Under this section, the named person has the opportunity within 20 days of receipt of the complaint to meet with representatives of OSHA and present evidence in support of his or her position.

If, upon investigation, OSHA has reasonable cause to believe that the named person has violated the Act and therefore that preliminary relief for the complainant is warranted, OSHA again contacts the named person with notice of this determination and provides the substance of the relevant evidence upon which that determination is based, consistent with the requirements of confidentiality of informants. The named person is afforded the opportunity, within ten business days, to provide written evidence in response to the allegation of the violation, meet with the investigators, and present legal and factual arguments why preliminary relief is not warranted. This provision provides due process procedures in accordance with the Supreme Court decision under STAA in *Brock* v. *Roadway Express, Inc.,* 481 U.S. 252 (1987). In addition, we clarified that the ten-day time period refers to ten business days. This is consistent with the Federal Rules of Civil Procedure 6(a), which excludes from the computation of the period of time intermediate Saturdays, Sundays, and legal holidays, when the period of time prescribed or allowed is less than 11 days.

In a comment submitted by the AFA, it was suggested that § 1979.104(a) be revised to require the Assistant Secretary to notify both the named person and the complainant of the filing of the complaint and their rights under the Act. However, the statutory language only requires that the named person be notified in writing. As a matter of policy, OSHA does acknowledge receipt of the complaint in writing back to the complainant.

The ATA commented that § 1979.104.(b) should be modified to make clear that if OSHA initiates an investigation, but later concludes that the complainant has failed to establish a prima facie case or that the respondent has rebutted the prima facie case, the agency should terminate the investigation. This comment misapprehends OSHA's practice and the intent of the rule. If, at any point in the investigation, it becomes clear that a prima facie showing cannot be established or that the evidence otherwise reveals that the complaint lacks merit, OSHA will dismiss the complaint.

The TTD, NWC, AFA, and Senator Grassley all commented that § 1979.104(b)(1)(iv) and (b)(2) should be changed to more accurately reflect the language of the statute in describing the complainant's burden of proof. The commenters felt that the use of the word ''likely'' effectively changed the intent of the statutory language placing on the complainant the burden to demonstrate that the protected activity ''was a contributing factor in the unfavorable personnel action alleged in the complaint.'' OSHA agrees that the language of the interim rule could be construed to alter or otherwise inaccurately reflect the language of the statute, and has changed it by deleting the word ''likely.''

The AFA suggested that § 1979.104(c) be changed to require the Assistant Secretary to share documents submitted by the named person with the complainant and to allow the complainant to be present during the initial meeting with the named person, if requested. OSHA believes that, consistent with other whistleblower laws, the language of the statute is clear that the initial investigation by OSHA is to be conducted independently for the purpose of establishing the factual circumstances and facilitating an early resolution of the claim.

The ATA recommended that § 1979.104(c) be changed to lengthen the named person's response time from ten days to 30 days. ATA felt that ten days is not enough time to research and provide an appropriate response that is substantial enough to make the required demonstration by ''clear and convincing evidence.'' OSHA agrees that ten days may frequently be a very short time to effectively research and prepare a response. However, because the statute provides only 60 days for OSHA to complete the entire investigation and issue findings, OSHA believes that allowing half that time for submitting an initial response will impede its ability to complete the investigation in a timely manner. The final rule is changed to permit 20 days for submitting an initial response and a request for a meeting, which is also consistent with other whistleblower statutes having a 60-day investigation time frame.

The AFA suggested that § 1979.104(d) be modified to delete the words, ''other than the complainant'' from the last sentence to ensure confidentiality for all persons, including the complainant. This rule is intended to affirmatively provide for the protection of the identity of persons who come forward to OSHA to provide information or testimony relevant to OSHA's investigation of the whistleblower complaint. The phrase is not intended to limit or restrict in any way OSHA's ability to appropriately withhold information or documentation provided by the complainant which would ordinarily be exempt from disclosure under the provisions of the Freedom of Information Act.

The AFA also suggested that § 1979.104(e) be changed to require that when the Assistant Secretary concludes that reinstatement is warranted, the complainant, as well as the named person, be contacted to give notice of the substance of the evidence supporting the complainant's claim and an opportunity to be present in any subsequent meeting. The NWC recommended that § 1979.104(e) be deleted in its entirety because a second review of the respondent's position unnecessarily delays the investigation. As noted above, it is OSHA's position that OSHA's investigation is conducted independently prior to the administrative hearing phase of the process, in which all parties participate fully. The purpose of § 1979.104(e) is to ensure compliance with the Supreme Court's ruling in *Brock* v. *Roadway Express, Inc.,* 107 S. Ct. 1740 (1987), in which the court, on a constitutional challenge to the temporary reinstatement provision in the employee protection provisions of the Surface Transportation Assistance Act (now codified at 49 U.S.C. 31105), upheld the facial constitutionality of the statute and the procedures adopted by OSHA under the Due Process Clause of the Fifth Amendment, but ruled that the record

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 restatement 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.

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

Board, any relief ordered by the ALJ, except for a preliminary order of reinstatement, is inoperative while the matter is pending before the Board. This section now further provides that, when the Board accepts a petition for review, its review of factual determinations will be conducted under the substantial evidence standard. This standard also is applied to Board review of ALJ decisions under the whistleblower provision of STAA. 29 CFR 1978.109(b)(3).

The AFA recommended that § 1979.110(a) be changed to state that a petition for review must be filed with the ARB within ten days, rather than received by the Board within 15 days to allow either party sufficient time to file without being penalized by inconsistent postal delivery. OSHA agrees that, due to the vagaries of postal delivery, the date of filing as described in this section rather than the date of the Board's receipt of the petition should be used to determine whether a petition is timely, and that ten days is sufficient time to petition for review of an ALJ decision. Only business days shall be counted in the ten days allowed for filing a petition, consistent with the Federal Rules of Civil Procedure 6(a), and paragraph (a) of this section has been changed to clarify the change from ''15'' to ''ten'' days.

The AFA also recommended that § 1979.110(c) be changed to avoid undue delay by providing that the administrative law judge's decision becomes the final order of the Secretary after 120 days if the Administrative Review Board fails to act within the 120 days. OSHA agrees that the procedure for Board review of an ALJ decision should be modified to avoid delay and prejudice to the parties, and to facilitate the issuance of a final order of the Secretary as required by the Act. The modifications to the Board review procedure in paragraphs (a) and (b) of this section, *i.e.*, discretionary review by the Board, which shall accept as conclusive ALJ findings of fact that are supported by substantial evidence, address the concerns expressed by the AFA, and the recommended change to paragraph (c) of this section is not necessary.

Section 1979.111 Withdrawal of Complaints, Objections, and Findings; Settlement

This section provides for the procedures and time periods for withdrawal of complaints, the withdrawal of findings by the Assistant Secretary, and the withdrawal of objections to findings. It also provides for approval of settlements at the investigatory and judicial stages of the case.

The NWC commented that § 1979.111 should be modified to permit a complainant to freely withdraw his or her complaint without prejudice. OSHA believes that § 1979.111 does permit a complainant to freely withdraw his or her complaint without prejudice. The purpose of the Assistant Secretary's approval is to help ensure that the complainant's withdrawal is, indeed, made freely without threat of coercion or unlawful promise.

Section 1979.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the Administrative Review Board to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

Section 1979.113 Judicial Enforcement

This section describes the Secretary's power under the statute to obtain judicial enforcement of orders and the terms of a settlement agreement. It also provides for enforcement of orders of the Secretary by the person on whose behalf the order was issued.

Section 1979.114 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the Secretary may, upon application and notice to the parties, waive any rule as justice or the administration of the Act requires.

The NWC commented that § 1979.114 should be deleted in its entirety because it has no basis in the statutory language. OSHA believes that the regulation should remain to give the administrative law judges and the Administrative Review Board the flexibility to take actions in unusual situations that are not contemplated by the regulations.

IV. Paperwork Reduction Act

This rule contains a reporting requirement (§ 1979.103) which was previously reviewed and approved for use by the Office of Management and Budget (''OMB'') under 29 CFR 24.3 and assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

V. Administrative Procedure Act

This rule is a rule of agency procedure and practice within the meaning of Section 553 of the Administrative Procedure Act (''APA''), 5 U.S.C. 553(b)(A). Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments was not required for these regulations, which provide procedures for the handling of discrimination complaints. However, the Assistant Secretary sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

Furthermore, because this rule is procedural rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

VI. Executive Order 12866; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132.

The Department has concluded that this rule should be treated as a ''significant regulatory action'' within the meaning of Section 3(f)(4) of Executive Order 12866 because AIR21 is a new program and because of the importance to FAA's airline safety program that ''whistleblowers'' be protected from retaliation. E.O. 12866 requires a full economic impact analysis only for ''economically significant'' rules, which are defined in Section 3(f)(1) as rules that may ''have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.'' Because the rule is procedural in nature, it is not expected to have a significant economic impact; therefore no economic impact analysis has been prepared. For the same reason, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*). Furthermore, because this is a rule of agency procedure or practice, it is not a ''rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), and does not require Congressional review. Finally, this rule does not have ''federalism implications.'' The rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government'' and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of AIR21, in order to allow resolution of whistleblower complaints. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

Document Preparation: This document was prepared under the direction and control of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 1979

Administrative practice and procedure, Air carrier safety, Employment, Investigations, Reporting and recordkeeping requirements, Whistleblowing.

Signed at Washington, DC this 17th day of March, 2003.

John L. Henshaw,

Assistant Secretary for Occupational Safety and Health.

Accordingly, for the reasons set out in the preamble part 1979 of title 29 of the Code of Federal Regulations is revised to read as follows:

PART 1979—PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 519 OF THE WENDELL H. FORD AVIATION INVESTMENT AND REFORM ACT FOR THE 21ST CENTURY

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

Sec.

Subpart B—Litigation

Subpart C—Miscellaneous Provisions

Authority: 49 U.S.C. 42121; Secretary of Labor's Order 5–2002, 67 FR 65008 (October 22, 2002).

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

§ 1979.100 Purpose and scope.

(a) This part implements procedures under section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121 (''AIR21''), which provides for employee protection from discrimination by air carriers or contractors or subcontractors of air carriers because the employee has engaged in protected activity pertaining to a violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.

(b) This part establishes procedures pursuant to AIR21 for the expeditious handling of discrimination complaints made by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints under AIR21, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, and withdrawals and settlements.

§ 1979.101 Definitions.

Act or *AIR21* means section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106–181, April 5, 2000, 49 U.S.C. 42121.

Air carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

Complainant means the employee who filed a complaint under the Act or on whose behalf a complaint was filed.

Contractor means a company that performs safety-sensitive functions by contract for an air carrier.

Employee means an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

Named person means the person alleged to have violated the Act.

OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

Person means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons.

Secretary means the Secretary of Labor or persons to whom authority under the Act has been delegated.

§ 1979.102 Obligations and prohibited acts.

(a) No air carrier or contractor or subcontractor of an air carrier may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

(b) It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has:

(1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;

(2) Filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code, or under any other law of the United States;

(3) Testified or is about to testify in such a proceeding; or

(4) Assisted or participated or is about to assist or participate in such a proceeding.

(c) This part shall have no application to any employee of an air carrier, contractor, or subcontractor who, acting without direction from an air carrier, contractor, or subcontractor (or such person's agent) deliberately causes a violation of any requirement relating to air carrier safety under Subtitle VII Aviation Programs of Title 49 of the United States Code or any other law of the United States.

§ 1979.103 Filing of discrimination complaint.

(a) *Who may file.* An employee who believes that he or she has been discriminated against by an air carrier or contractor or subcontractor of an air carrier in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

(b) *Nature of filing.* No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.

(c) *Place of filing.* The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: *http://www.osha.gov.*

(d) *Time for filing.* Within 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.

(e) *Relationship to section 11(c) complaints.* A complaint filed under AIR21 that alleges facts which would constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), shall be deemed to be a complaint filed under both AIR21 and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would constitute a violation of AIR21 shall be deemed to be a complaint filed under both AIR21 and section 11(c). Normal procedures and timeliness requirements for investigations under the respective laws and regulations will be followed.

§ 1979.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants). The Assistant Secretary will also notify the named person of his or her rights under paragraphs (b) and (c) of this section and paragraph (e) of § 1979.110. A copy of the notice to the named person will also be provided to the Federal Aviation Administration.

(b) A complaint of alleged violation will be dismissed unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.

(1) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity or conduct;

(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an unfavorable personnel action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

(2) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant will be so advised and the investigation will not commence.

(c) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint will not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Within 20 days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating his or her position. Within the same 20 days the named person may request a meeting with the Assistant Secretary to present his or her position.

(d) If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the behavior protected by the Act, the Assistant Secretary will conduct an investigation. Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with 29 CFR part 70.

(e) Prior to the issuance of findings and a preliminary order as provided for in § 1979.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the named person has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the named person to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The named person shall be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of his or her position, and to present legal and factual arguments. The named person shall present this evidence within ten business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named

person can agree, if the interests of justice so require.

§ 1979.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), a preliminary order of reinstatement would not be appropriate. At the complainant's request the order shall also assess against the named person the complainant's costs and expenses (including attorney's and expert witness fees) reasonably incurred in connection with the filing of the complaint.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the administrative law judge, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

(c) The findings and the preliminary order shall be effective 30 days after receipt by the named person pursuant to paragraph (b) of this section, unless an objection and a request for a hearing has been filed as provided at § 1979.106. However, the portion of any preliminary order requiring reinstatement shall be effective immediately upon receipt of the findings and preliminary order.

Subpart B—Litigation

§ 1979.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to paragraph (b) of § 1979.105. The objection or request for attorney's fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b)(1) If a timely objection is filed, all provisions of the preliminary order shall be stayed, except for the portion requiring preliminary reinstatement. The portion of the preliminary order requiring reinstatement shall be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review.

§ 1979.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, of 29 CFR part 18.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted as hearings de novo, on the record. Administrative law judges shall have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the named person object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

§ 1979.108 Role of Federal agencies.

(a)(1) The complainant and the named person shall be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or may participate as amicus curiae at any time in the proceedings. This right to participate shall include, but is not limited to, the right to 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, to dismiss a complaint or to issue an order encompassing the terms of the settlement.

(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) The FAA may participate as amicus curiae at any time in the proceedings, at the FAA's discretion. At the request of the FAA, copies of all pleadings in a case must be sent to the FAA, whether or not the FAA is participating in the proceeding.

§ 1979.109 Decision and orders of the administrative law judge.

(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in

paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1979.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits.

(b) If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary shall be effective immediately upon receipt of the decision by the named person, and may not be stayed. All other portions of the judge's order shall be effective ten business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

§ 1979.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board (''the Board''), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. 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. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge shall become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.

(c) The final decision of the Board shall be issued within 120 days of the conclusion of the hearing, which shall be 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 with the administrative law judge in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, even if the Assistant Secretary is not a party.

(d) If the Board concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

(e) If the Board determines that the named person has not violated the law, an order shall be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding $1,000.

Subpart C—Miscellaneous Provisions

§ 1979.111 Withdrawal of complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether the withdrawal will be approved. The Assistant Secretary will notify the named person of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement shall be approved in accordance with paragraph (d) of this section.

(b) The Assistant Secretary may withdraw his or her findings or a preliminary order at any time before the expiration of the 30-day objection period described in § 1979.106, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or

order will begin a new 30-day objection period.

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved. If the objections are withdrawn because of settlement, the settlement shall be approved in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement shall be filed with the administrative law judge or the Board, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board, shall constitute the final order of the Secretary and may be enforced pursuant to § 1979.113.

§ 1979.112 Judicial review.

(a) Within 60 days after the issuance of a final order by the Board under § 1979.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.

(b) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

§ 1979.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§ 1979.114 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days notice to all parties and interveners, waive any rule or issue any orders that justice or the administration of the Act requires.

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