

U.S. DEPARTMENT OF ENERGY

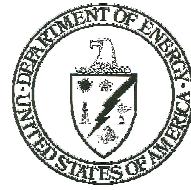


# OFFICE OF HEARINGS & APPEALS

FY 2012  
ANNUAL REPORT

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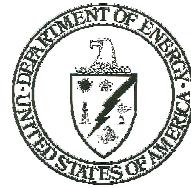
FY 2012  
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## MESSAGE FROM THE DIRECTOR...



I am pleased to report on the FY 2012 operations of the Office of Hearings and Appeals (OHA).

OHA's mission is to conduct fair and efficient hearings, and to issue decisions of the Department of Energy (DOE) with respect to any adjudicative proceedings which the Secretary may delegate. OHA's jurisdiction is broad and varied. It has included matters affecting the oil industry, consumers, appliance manufacturers, nuclear licensees, governmental entities, the public in general, and DOE and DOE contractor employees. Each area of jurisdiction supports one or more of DOE's Strategic Themes.

Here are highlights for the past year:

**Personnel security hearings.** Under DOE's personnel security program, OHA conducts administrative hearings concerning individuals' eligibility for access to classified information or special nuclear material. By the end of FY 2012, our average time for issuing a decision after the receipt of the hearing transcript stood at 24 days, its lowest level in any of the last ten years, over 36 percent below our average over the last five years, and over 57 percent below our average for FY 2003-2012. For the fourth year in a row, we had no cases older than 180 days in our end-of-year inventory.

**Whistleblower cases.** Under the DOE Contractor Employee Protection Program, OHA conducts investigations and hearings, and considers appeals concerning whistleblower claims filed by DOE contractor employees. We continued processing these cases in a timely fashion in FY 2012. Average processing time was 31 percent below the average for the last ten years and 12 percent below our average for fiscal years 2008 through 2012, and no case in our end-of-year inventory was older than 180 days. Also in FY 2012, our office considered three whistleblower complaints filed under the American Recovery and Reinvestment Act of 2009.

**Freedom of Information Act (FOIA) and Privacy Act Appeals.** OHA considers appeals of agency denials of requests for information under the FOIA and Privacy Act and issues final agency decisions. In FY 2012, though receiving a higher-than-average number of appeals, our FOIA and Privacy Act average case-processing time was 16 days, a figure below our most recent five-year average and less than half that of our average from FY 2002 through 2011.

**Exceptions and Special Redress.** OHA considers petitions for special redress, as well as requests for relief from certain regulatory requirements. In FY 2012, OHA granted exception relief from DOE lighting efficiency standards to producers of energy efficient fluorescent lamps, due to recent policies adopted by the government of China that significantly limited the availability of rare earth elements used in the production of the lamps. In the exceptions area, average case-processing time remained at historically low levels.

**Alternative Dispute Resolution.** OHA's Office of Conflict Resolution and Prevention (OCPR) serves as a resource to all DOE components and contractors to explore efficient and cost-effective means of preventing conflicts and resolving disputes, without the formalities or excessive costs of litigation. OCPR directs the DOE Headquarters Mediation Program, which processed 37 cases in FY 2012.

Over the last five years, OHA has reduced its average case-processing time by over 60%, while maintaining the professionalism, fairness, due process, and quality of decision-making that has always been a hallmark of our office. Throughout this report, we have highlighted examples of decisions issued by OHA during FY 2012.

In FY 2012, we continued using information technology to more efficiently provide the services we offer. Over 78 percent of the hearings we held in FY 2012 were conducted via video teleconferencing, compared to 54 percent in FY 2011, further reducing OHA's carbon footprint, achieving significant cost savings to the taxpayer in both the time and expense associated with travel, and providing greater flexibility in scheduling hearings, trainings, and other events.

We have saved even more resources by converting our paper record archives to electronic format, and avoiding, where possible, the creation of paper records. Essential to this effort has been the work of our Program Support Specialist Janet Gibson, who in FY 2012 received the Secretary's Appreciation Award for her invaluable support of this initiative (see page 18). Janet has eliminated over 1,210 cubic feet of paper records, which resulted in OHA being able to release 3,775 square feet of office space to DOE's Office of Management.

As we begin FY 2013, we are committed to continued improvement and to meeting any new Departmental needs for adjudicative services. To achieve improvements and be well positioned to accept new responsibilities, we continue to comprehensively review our operations to identify opportunities for increased efficiency and productivity.

We hope that this report is informative. If you have any comments or suggestions for future improvements, please contact Steve Goering at [steven.goering@hq.doe.gov](mailto:steven.goering@hq.doe.gov) or 202-287-1541.

Sincerely,

Poli A. Marmolejos

## INTRODUCTION

The Office of Hearings and Appeals is the central adjudicative forum for the Department of Energy. The Secretary of Energy has delegated to the OHA Director the authority to act for him in many different areas. The OHA Director's decision typically serves as final agency action.

During its over 30-year history, OHA has had broad-ranging subject matter jurisdiction. Originally OHA's primary function was to consider exceptions and other petitions related to the economic oil regulations, as well as Freedom of Information Act (FOIA) and Privacy Act appeals. From that point onward, OHA's jurisdiction has evolved to meet the needs of DOE's programs.

Over the years, OHA has heard appeals from a variety of DOE determinations, including those related to the Department's Alternative Fuel Transportation Program, physician panel reviews of DOE worker occupational illness claims, payment-equal-to-taxes claims under the Nuclear Waste Policy Act of 1982, civil penalties imposed for violations of DOE's worker safety and health rule, and the equity interests in production from Elk Hills Oil Field, formerly Naval Petroleum Reserve No. 1.

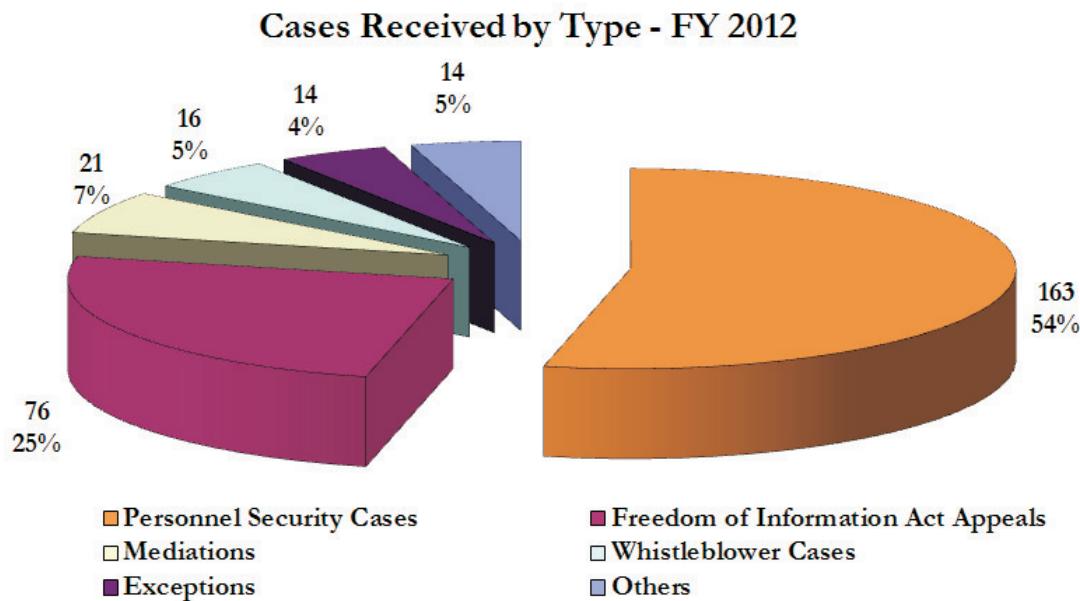
In FY 2012, OHA continued to conduct personnel security and whistleblower proceedings, consider FOIA and Privacy Act Appeals, rule on requests for exceptions from energy efficiency regulations, and promote the understanding and facilitate the use of Alternative Dispute Resolution (ADR) throughout the Department.

The procedures that OHA uses vary, depending on the type of case involved. OHA procedures are flexible and easily adaptable to new situations, allowing OHA to minimize "start-up" times and to produce high-quality work in new areas. OHA's general procedures and those used for specific proceedings can be found on our web site at <http://energy.gov/oha> under "Services."

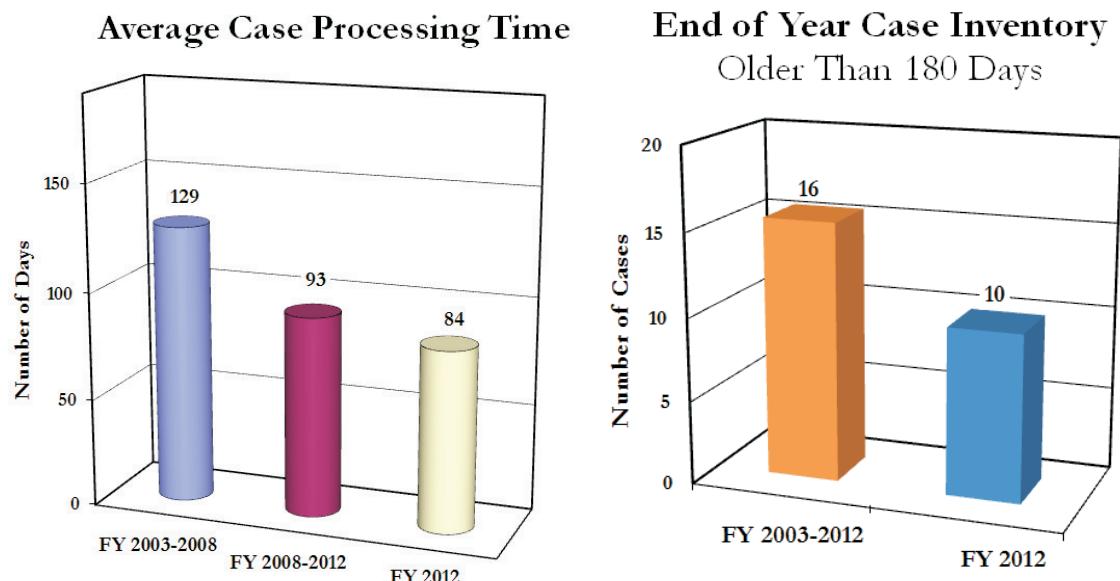
In the end, OHA's work involves more than resolving disputes. It also serves to inform affected parties and the public about the Department's programs. The decisions reflect the balancing of important and varied interests, including those of the public, the Department, state and local governments, and individual litigants.

## OVERVIEW OF OHA WORKLOAD

In FY 2012, OHA received a total of 304 cases. The majority of these consisted of personnel security hearings, followed by FOIA and Privacy Act appeals, mediations, whistleblower cases (investigations, hearings, and appeals), exception applications, and others. The following chart shows the volume of cases, by type (full data at Appendix, Table 1).



In FY 2012, OHA closed a total of 307 cases. The chart on the left below shows the average case-processing time for cases closed in FY 2012, and over the last five and ten fiscal years (full data at Appendix, Table 2). Our average case-processing time was nearly 10 percent below our most recent five-year averages and 35 percent less than our 10-year average. Over the last five years, we have reduced average case-processing time by over 60 percent. In addition, our inventory of older cases remains far below our average over the last ten years (full data at Appendix, Table 3). We attribute these results to a continued emphasis on timeliness.



## I. AREAS OF JURISDICTION

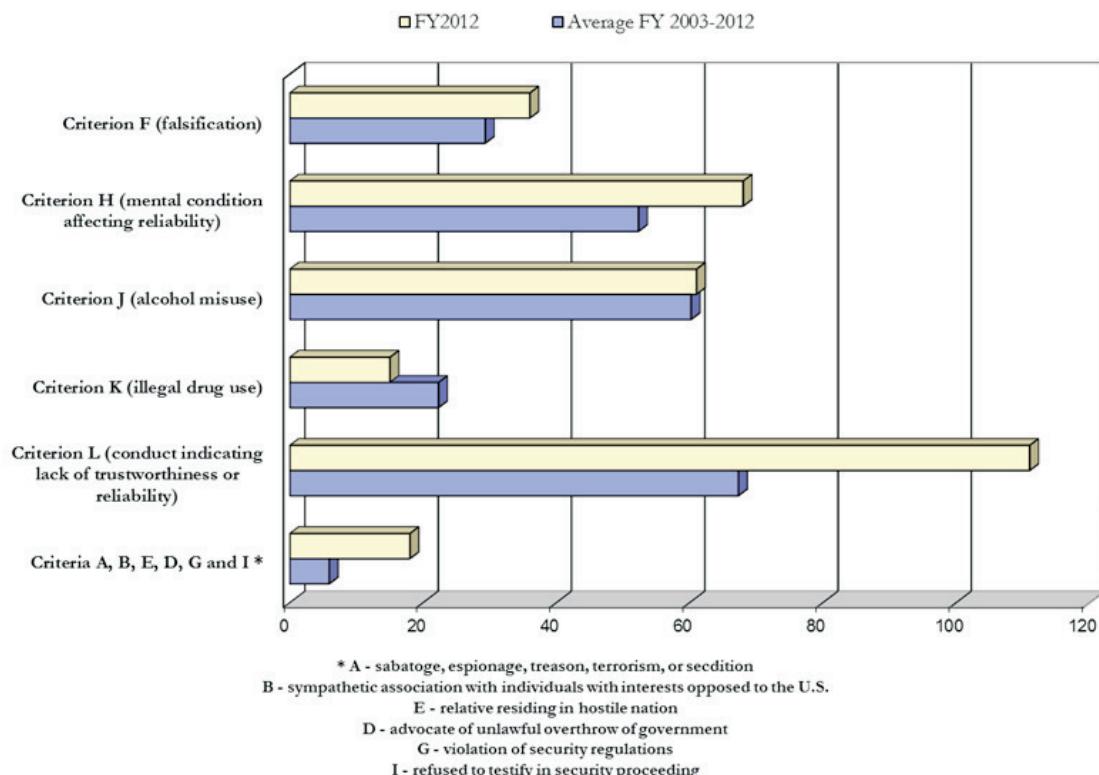
### A. PERSONNEL SECURITY

In FY 2012, 163 or 54 percent of cases received by OHA concerned a federal or contractor employee's eligibility for a DOE security clearance. OHA also conducts hearings involving eligibility for the human reliability program, a security and safety reliability program for individuals who may have access to certain material, nuclear devices, or facilities. The governing regulations are set forth at 10 C.F.R. Parts 710 and 712, respectively. OHA's web site contains a "Frequently Asked Questions" page to assist individuals in understanding the personnel security hearing process.

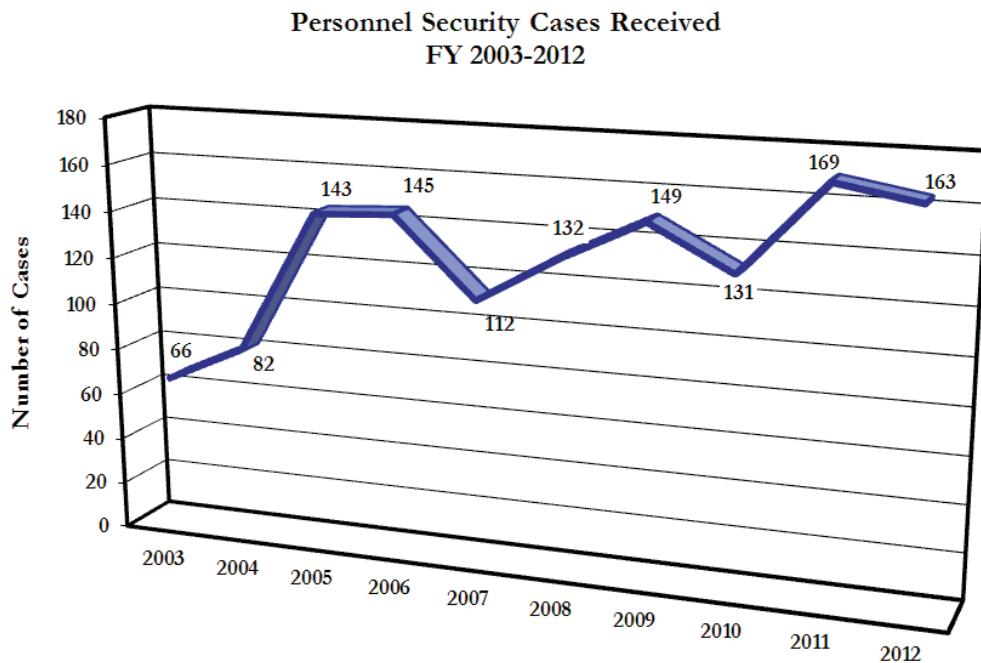
Personnel security hearings typically involve concerns about excessive alcohol use, substance abuse, mental illness, financial irresponsibility, or conduct raising doubt about an individual's honesty and reliability. Evidence and testimony may include expert medical opinion. The OHA Hearing Officer assigned to the case analyzes the evidence and renders a decision, which may be appealed to an Appeal Panel within the DOE.

The following chart (full data at Appendix, Table 4) shows the number of cases in which various types of concerns - also referred to as criteria - were raised. Some cases involve multiple criteria. For example, a case may involve a concern about excessive alcohol use (Criterion J) and related or different concerns about honesty and trustworthiness (Criterion L). As the chart shows, consistent with the relatively high volume of cases received in FY 2012 (see page 6), there was a greater than average number of cases falling under each criterion, with the notable exception of cases involving concerns raised by the use of illegal drugs.

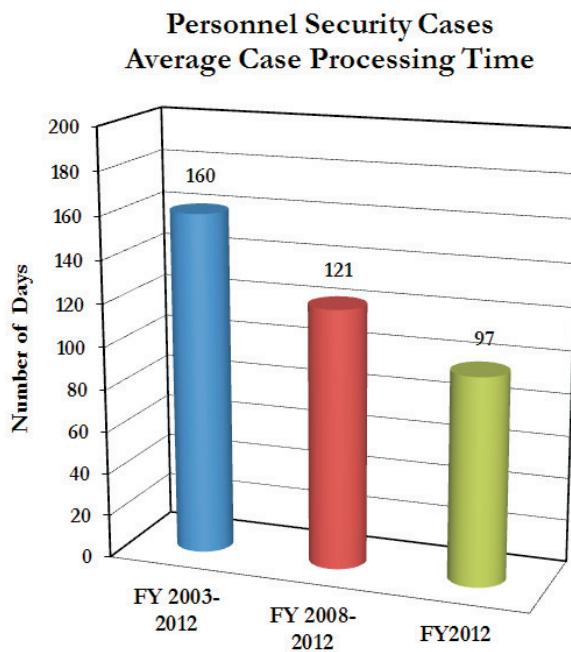
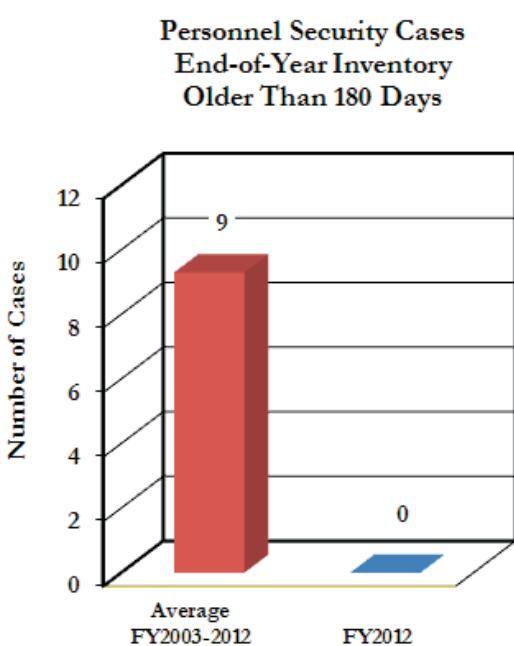
**Criteria Invoked in Personnel Security Cases**



The following chart (full data at Appendix, Table 5) shows the number of personnel security cases received during each of the last ten years. OHA received 163 personnel security cases in FY 2012, an historically high number, and nearly as many as received in FY 2011.



Despite the volume of such cases received in FY 2012, we continued to process personnel security cases in a more timely manner. Average case processing time fell to its lowest level in any of the last ten years, over 36 percent below our average over the last five years, and over 57 percent below our average for FY 2003-2012. At the end of the year, as has been the case since FY 2009, we had no cases in our inventory older than 180 days (full data for charts below can be found at Appendix, Tables 6 and 7). Data for FY 2012 reveals that in 87 (71.9%) of the total cases decided by OHA, the Hearing Officer determined that the individual should not be provided a security clearance.



## PERSONNEL SECURITY CASE DECISION SUMMARY

### Case No. PSH-11-0032 - Personnel Security Hearing

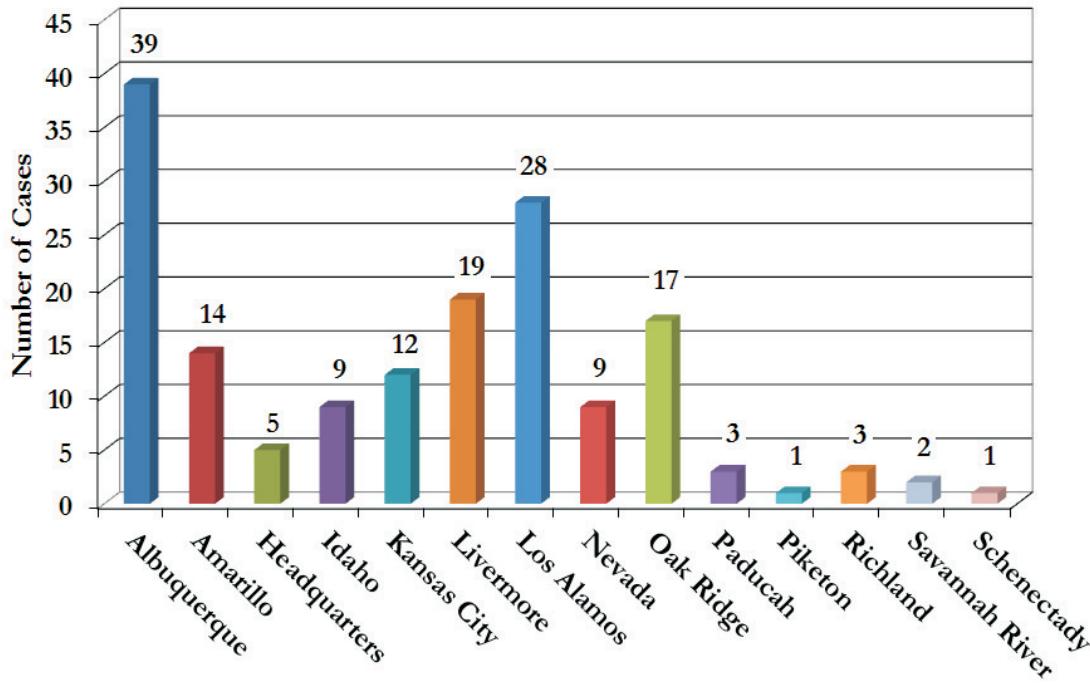
On April 24, 2012, an OHA Hearing Officer issued a Decision in which he determined that the DOE should not restore an individual's access authorization. A DOE Local Security Office (LSO) suspended the individual's security clearance and referred him to administrative review under 10 CFR Part 710. As a basis for the referral, the LSO cited the fact that the individual filed Chapter 13 Bankruptcy Petitions in April 1999, July 2002, February 2006, and October 2010, and that he failed to report his 2002, 2006, and 2010 bankruptcy filings within the time period required by relevant DOE directives.

The Hearing Officer found, though the individual had taken genuine steps toward better managing his finances, he had not yet established a sustained pattern of financial responsibility. Regarding the individual's failure to timely report his bankruptcy filings, the Hearing Officer found it unlikely that the individual will run afoul of the relevant reporting requirements in the future, but noted that, after filing for bankruptcy in 1999 and three times thereafter, the individual never specifically noticed the requirements pertaining to the reporting of bankruptcy filings, despite the fact that these requirements were presented to him yearly in security refresher briefings. The Hearing Officer concluded that the individual's repeated failure to take seriously the need to familiarize himself with basic requirements raises larger questions about his judgment going forward, given that this pattern of behavior continued over a period of more than 10 years, and only ended recently.

*The full text of this decision can be found at <http://energy.gov/sites/prod/files/oba/Security/PSH-11-0032.pdf>.*

### Location of Personnel Security Cases Received in FY 2012

(full data at Appendix, Table 8)



In the area of personnel security, OHA also serves its DOE customers by regularly taking part in the training of those involved in the Administrative Review process. On June 7, 2012, two OHA Hearing Officers participated, via video teleconference from DOE Headquarters, in a question and answer session with students at the National Training Center's course entitled "Administrative Review Hearing Procedures" being conducted in Albuquerque, New Mexico. The course is a mandatory component of the certification required for personnel security professionals in the Department-wide personnel security program. The Hearing Officers answered questions from the students regarding various aspects of the Administrative Review hearing process, including the role played by personnel security specialists, who are sometimes called upon to testify regarding particular national security concerns.

## B. WHISTLEBLOWER

In FY 2012, OHA's whistleblower jurisdiction encompassed cases filed under DOE's Contractor Employee Protection Program (10 C.F.R. Part 708) as well as those brought under the whistleblower provisions of Section 1553 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act).

### *Contractor Employee Protection Program*

OHA investigates complaints, conducts hearings, and considers appeals under DOE's Contractor Employee Protection Program. The program provides an avenue of relief for DOE contractor employees who suffer reprisal as the result of making protected disclosures or engaging in other types of protected activity. The governing regulations are set forth at 10 C.F.R. Part 708. OHA's web site (<http://energy.gov/oha>) contains two "Frequently Asked Questions" pages to assist DOE field personnel and contractor employees in understanding the process for considering contractor employee reprisal complaints.

The main issues in these cases are whether an employee engaged in protected activity and, if so, whether the contractor would have taken an adverse action against the employee in the absence of the employee's involvement in that activity. During the investigation, an OHA Investigator conducts interviews, examines documentary evidence, and issues a report. Following the issuance of the Report of Investigation, an OHA Hearing Officer is assigned to the case. The Hearing Officer rules on pre-hearing motions, conducts a hearing, and issues an initial agency decision, which may be appealed to the OHA Director. The OHA Director also hears appeals from dismissals of complaints. His decisions in both types of appeals serve to increase understanding of the program's purpose and implementation. A finding of reprisal for certain types of disclosures may result in civil penalties pursuant to the DOE enforcement programs under the Price-Anderson Act and the DOE Worker Safety and Health Rule (10 C.F.R. Part 851).

The DOE Contractor Employee Protection Program is part of a larger DOE program - the DOE Employee Concerns Program (ECP). The latter is managed by the Office of Civil Rights, an office within the DOE's Office of Economic Impact and Diversity. As an adjunct to its involvement in the Employee Concerns Program, OHA is active in related Departmental initiatives.

During the first part of FY 2012, the OHA Director and Janet Freimuth, Chief, Employee Protection and Exceptions, led the Department's efforts to establish an Office of the Ombudsman. The Secretary directed this effort in late 2011, and the Office was launched in March 2012. OHA continued to provide support during the next several months, including efforts to create an organizational overview of the various processes through which employees can raise and resolve concerns. The Office of the Ombudsman has proved to be enormously valuable to the Department, and OHA takes pride in its contribution to the Office's creation.

Also during FY 2012, OHA supported an ongoing dialogue among Departmental organizations concerning the processes for employees to raise concerns. OHA renewed regularly held meetings attended by Departmental organizations interested in employee-related issues, and OHA continued a close interface with the Employee Concerns Program and the Office of Health, Safety, and Security as issues arose. These activities are well aligned with the Department's efforts to achieve greater collaboration among DOE offices.

#### *Recovery Act*

The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, is an economic stimulus package enacted by the 111th Congress, and signed by the President into law on February 17, 2009. The Act established a \$787 billion economic recovery package, which provided for federal tax incentives and domestic spending in various infrastructure projects, including the energy sector.

Section 1553 of the Recovery Act provides whistleblower protections to all employees of non-federal employers that receive funding under the Act. More specifically, Section 1553(a) provides that an employer receiving funds under the Act may not retaliate against an employee for disclosing information relating to gross mismanagement, waste, public health or safety dangers, abuses of authority, or

### WHISTLEBLOWER CASE DECISION SUMMARY

#### **Case No. WBR-12-0003 - Complainant v. Chippewa Tribal Industries**

On August 28, 2012, OHA issued an Order in which it determined, on behalf of the DOE, that a Complaint of Reprisal (Complaint) filed by a complainant under Section 1553 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), against her former employer, Chippewa Tribal Industries (CTI), should be denied. The complainant alleged that she made protected disclosures to DOE and CTI and, as a result, experienced various retaliations including termination from her position.

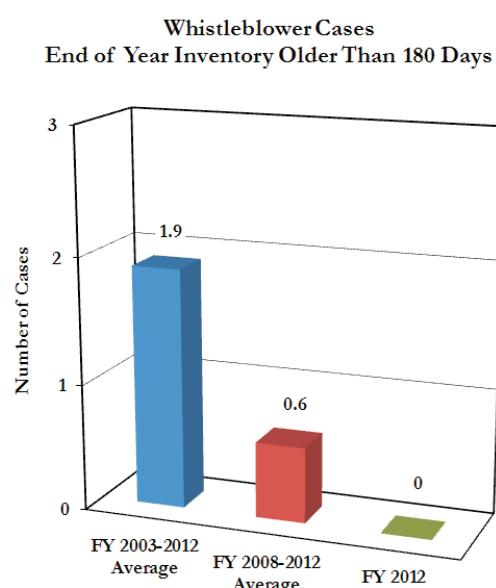
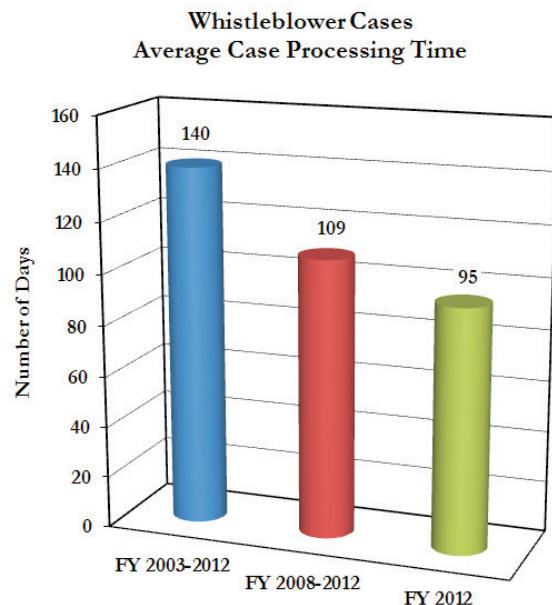
The Mountain Turtle Band of Chippewa Indians (Tribe), the owner of CTI, was awarded a Recovery Act Energy Efficiency and Conservation Block Grant (EECBG or grant) on November 16, 2009. The complainant alleged that her disclosure of waste relating to a grant program manager receiving a full salary with grant funds, despite the fact that the complainant was performing approximately 50 percent of the grant manager's duties, and her disclosure that the grant manager was requesting an increase in salary, were contributing factors resulting in the complainant's March 30, 2011, one-day suspension and her termination on April 4, 2011.

Upon reviewing the August 3, 2012 Office of Inspector General's Report regarding the Complaint, OHA found that none of the alleged disclosures made by the complainant was protected under the Recovery Act. Specifically, one of the disclosures, an email to a DOE EECBG Project Officer, was found to be too vague as to whether the complainant was seeking to complain about a waste of funds or was complaining about a technical issue regarding grant administration. With regard to the other disclosures, that the grant program manager was receiving a full salary for herself despite not working full-time on the grant, and that she had requested a salary increase, allegedly made during various meetings with Tribe and CTI officials, the Department found that there was insufficient evidence to establish that the complainant had, in fact, made the alleged disclosures. Consequently, the complainant was not entitled to any relief under the Recovery Act.

violations of laws concerning Recovery Act funds. If the employee's claim is meritorious, the agency may issue an order remedying the proven reprisal.

An employee who claims that he or she has been subjected to reprisal prohibited under Section 1553 of the Act must file a complaint with the Inspector General of the federal agency that authorized the release of stimulus funding to the non-federal employer alleged by the employee to have engaged in such prohibited retaliatory conduct. Section 1553(b)(1) provides that the IG will investigate the complaint unless the IG determines that the complaint is frivolous, does not relate to covered funds, or another federal or state judicial or administrative proceeding has previously been invoked to resolve such complaint. Section 1553(b)(2)(A) requires the IG to issue a report of its findings not later than 180 days after receiving a Section 1553 complaint. Not later than 30 days after receiving the IG's report, the head of the federal agency must issue an order granting or denying relief in whole or in part. ARRA § 1553(c)(2). Pursuant to a delegation of authority from the Secretary, OHA acts as "head of the agency" for purposes of issuing any order pursuant to Section 1553(c)(2) of the Recovery Act "whistleblower" provisions.

OHA received 16 whistleblower cases in FY 2012 and, as with our other areas of jurisdiction, we continued to focus on timeliness in the processing of these cases. We are pleased with the results of those efforts in the past year. Average case-processing time in FY 2012 was over 31 percent below our average over the last ten years and 12 percent below our average for fiscal years 2008 through 2012. In addition, no case in our end-of-year inventory was older than 180 days.

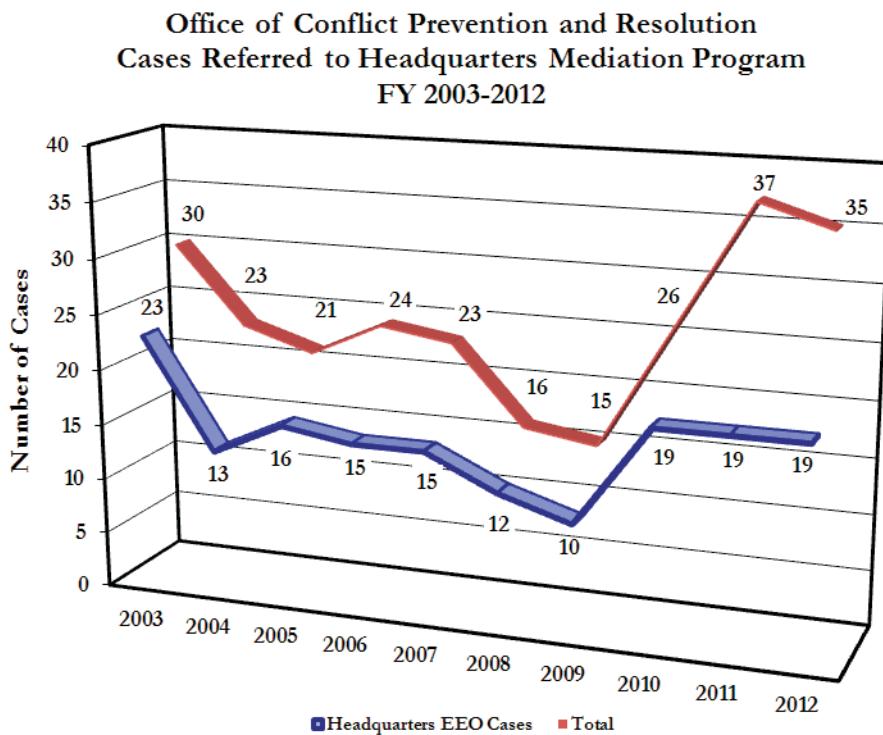


## C. ALTERNATIVE DISPUTE RESOLUTION

OHA's Office of Conflict Prevention and Resolution serves as a resource to all DOE components and contractors to explore efficient and cost-effective means of preventing conflicts and resolving disputes, without the formalities and costs of litigation.

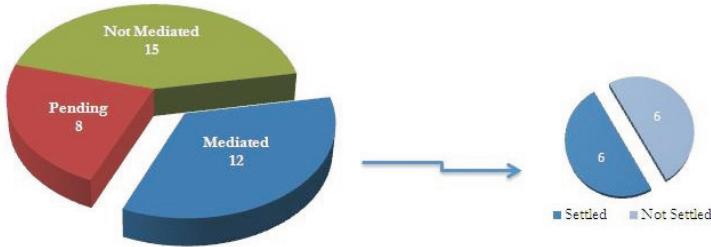
OCPR was created as a result of the Administrative Dispute Resolution Act of 1996 (ADRA), with the mandate to increase the understanding and use of alternative dispute resolution (ADR) within the Department. While ADRA focuses on issues already in controversy, OCPR's mandate was expanded to encourage the identification and prevention of potential conflicts throughout the DOE complex. ADR includes a variety of dispute resolution processes (including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, use of ombuds, or any combination thereof) that assist people in avoiding more polarizing (and, potentially, more costly) forums such as litigation. Mediation is the ADR method that is most often utilized at DOE.

OCPR directs the DOE Headquarters Mediation Program. During FY 2012, the OCPR staff and OHA staff attorney mediators conducted two-thirds of the mediations referred to OCPR. The Headquarters Mediation Program processed 37 cases in FY 2012. Historically, the majority of the cases referred to the program have been equal employment opportunity cases (most frequently referred from DOE's Office of Civil Rights).



Mediations were conducted in 12 of the 37 cases referred to OCPR in FY 2012, and a settlement rate of 50% was achieved in those cases, as shown in the following chart. Fifteen cases were not mediated, typically because one party did not wish to proceed to mediation or because the matter was resolved prior to mediation. Eight cases remained pending at the end of FY 2012.

Office of Conflict Prevention and Resolution  
Disposition of Cases Referred to the Headquarters Mediation Program  
FY 2012



OCPR works closely with ADR Points of Contact (POCs) in each Departmental Element to address their unique ADR needs, including convening quarterly meetings with the ADR POCs. It has also convened live and VTC quarterly meetings to provide ADR discussion forums and share conflict prevention best practices employed by the various Departmental Elements.

OCPR also supports the DOE Technology Transfer Coordinator and the 22 technology transfer ombudsmen (TTOs) that are located at various sites throughout the DOE complex. The role of the TTO is to assist the public and industry in resolving complaints and disputes with National Laboratories or research facilities regarding technology partnerships, patents, and technology licensing. In FY 2012, OCPR continued to collect data on ombudsman activity as required by the Technology Transfer Commercialization Act of 2000 and provide conflict prevention and resolution to the TTOs. OCPR hosted quarterly teleconferences to update the TTOs on DOE developments and initiatives that impacted their TTO responsibilities. These calls also provided essential education for the TTOs to perform their TTO role; e.g., one teleconference focused on Intellectual Property basics.

OCPR consults throughout the DOE complex on the potential uses of ADR in environmental controversies. OCPR works with the Office of the General Counsel (GC-51) and the Office of Health, Safety and Security (HS-21) to report annually on DOE's environmental conflict resolution (ECR) efforts as required by the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ).

On September 7, 2012, the CEQ and OMB jointly signed a new memorandum directing federal agencies to seek to increase the effective use of ECR and collaborative problem solving. This memo highlighted the expanded use of ECR to include not only the use of a third-party neutral but also collaborative processes that may not involve the use of a third-party neutral. DOE and OCPR have been advocating for this expanded use of ECR since the original joint memorandum was issued in 2005.

In addition to consulting and developing programs that employ alternative means of conflict prevention and dispute resolution, OCPR designs and delivers training in communication, negotiation and mediation techniques. FY 2012 training and outreach activities included:

- ✓ DOE Headquarters' first annual Conflict Resolution Day. OCPR distributed conflict resolution information to employees and a special ADR program, "Lessons from Hollywood: Conflict Resolution," was presented. The trainers used video clips to demonstrate the good, the bad, and the ugly in dispute resolution - October 2011

- ✓ EEO Training for mediators (continuing education) for OHA employees and employees from other organizations who are potential participants in the mediation process - October 2011
- ✓ Basic Mediation Skills Training (two days) provided for Oak Ridge Employees by VTC and on-site instruction - November 2011
- ✓ Confidentiality Training for mediators (continuing education) for OHA employees and employees from other organizations who are potential participants in the mediation process - January 2012
- ✓ “Let's Talk”, a one-half day workshop, developed by OCPR staff. The workshop teaches participants how to communicate effectively with their peers to enhance employee satisfaction and improve productivity. The course encourages the use of a simple feedback model to avoid misunderstandings, builds on the strength of diverse viewpoints and of a diverse workforce, and provides strategies for resolving conflict before its escalates. Although peer-to-peer communication is the focus, the skills gained can also be used to enhance communications between supervisors and employees. A pilot training was held in April 2012 and classes were offered to headquarters employees in June through August 2012.
- ✓ “Don't Wait, Mediate!”, a 1.5 hour interactive workshop, also designed by OCPR staff. In this workshop, participants are introduced to ADR and the mediation processes, and learn how these tools can assist in resolving workplace conflicts. Participants learn the benefits of mediation and how to access the services at the DOE. They also learn how a traditional dispute resolution win/lose process differs from a mediated resolution in which the parties are empowered to design a win/win outcome. A pilot training was held in March - April 2012 and classes were offered to headquarters employees in June through August 2012.
- ✓ A facilitator guide for conflict prevention and resolution training, developed by OCPR in collaboration with the Office of Human Capital Management. The module was part of a “We're Here for You” employee onboarding learning session. Newly hired employees learn about the services offered by OCPR and a brief overview of the Headquarters Mediation Program - July 2012
- ✓ ADR Lunchtime Series: OCPR sponsored, in conjunction with the Interagency ADR Working group, six presentations at DOE Headquarters, featuring speakers presenting various ADR topics. This program is designed for ADR practitioners and conflict resolution managers located in the Washington, DC metropolitan area. Due to the success of the program, it is now one of the best known free educational ADR programs in the federal government and is administered telephonically to nationwide audiences throughout the federal government and to private sector ADR practitioners.
- ✓ Conflict Management Consortium (CMC): OCPR hosted three bi-monthly meetings and served as a leader of the CMC. It is a networking and learning forum in which members can exchange experiences and share their knowledge about federal workplace ADR programs.

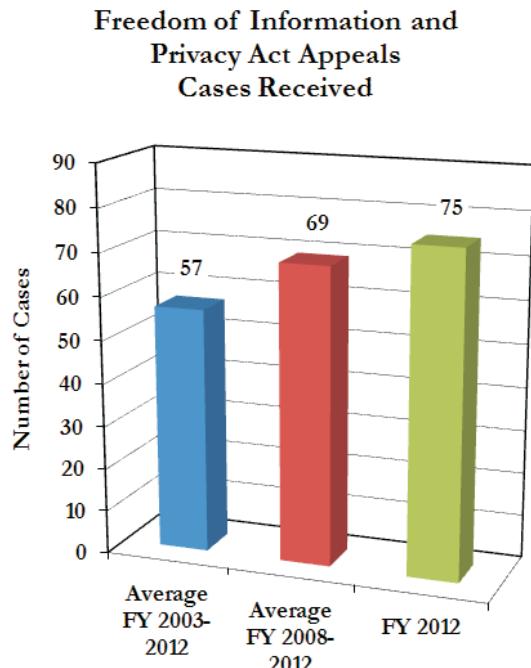
## D. FREEDOM OF INFORMATION AND PRIVACY ACTS

OHA considers appeals of agency determinations under the Freedom of Information Act (FOIA) and Privacy Act. The governing regulations are set forth at 10 C.F.R. Parts 1004 and 1008, respectively.

These appeals arise from determinations across the DOE complex and involve diverse subject matter areas. OHA facilitates communication between the requester and the agency, which in some cases permits the resolution of the issues without adjudication. OHA works closely with the DOE's FOIA and Privacy Act offices, and participates in complex-wide training.

OHA continues to receive a number of FOIA and Privacy Act appeals by DOE workers seeking exposure and medical records to support compensation claims under the Energy Employees Occupational Illness Compensation Program Act. The Department of Labor administers that program.

As shown in the chart below, during FY 2012 we received 75 FOIA and Privacy Act Appeals, a higher than average number compared to the averages of the last five and ten fiscal years (full data at Appendix, Table 12).



### FREEDOM OF INFORMATION AND PRIVACY ACTS CASE DECISION SUMMARY

#### Case No. FIA-12-0028 - USA Today

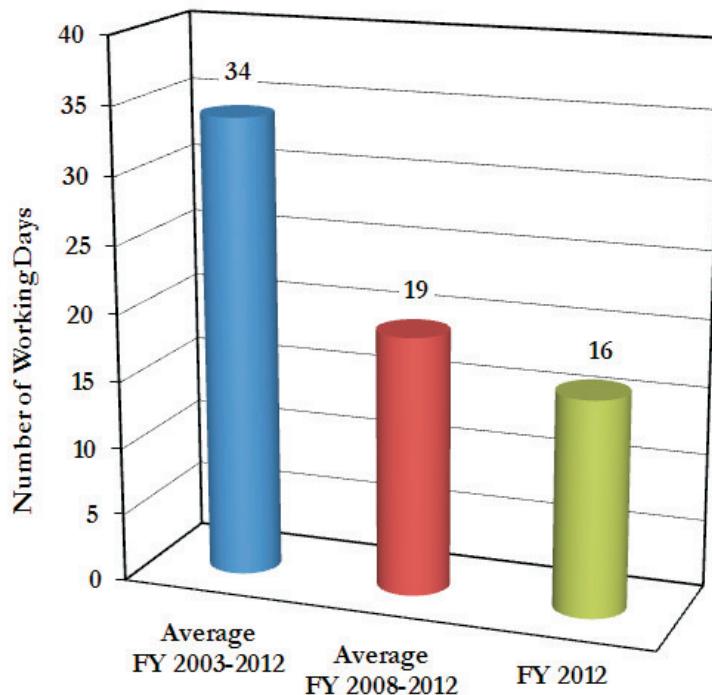
On June 5, 2012, the Director of the Office of Hearings and Appeals (OHA) granted a Freedom of Information Act (FOIA) Appeal filed by Gregory Korte, on behalf of USA Today. Mr. Korte filed a request with DOE's Office of Information Resources (OIR) for records pertaining to a loan guarantee application filed by the United States Enrichment Corporation (USEC) for the American Centrifuge Project. Mr. Korte asked for expedited processing of the request, stating that the requested information was urgently needed to inform the public about Congressional oversight of energy loan guarantee and grant programs and would enhance public debate on a transportation reauthorization bill that included \$106 million in research, demonstration, and development grants.

In granting the Appeal, OHA noted that the FOIA provides for expedited processing where a requester demonstrates a "compelling need," and cited court decisions finding sufficient urgency to grant expedited processing where there is a significant interest in quickly disseminating news regarding a subject currently under debate by Congress. Given the pendency of legislation before Congress concerning funding of the American Centrifuge Project, OHA concluded that USA Today had demonstrated a sufficient "urgency to inform" the public regarding the actions of the government with respect to the project. OHA therefore found that the DOE should grant USA Today's request for expedited processing, and remanded the matter to OIR, to process as soon as practicable USA Today's request for records.

*The full text of this decision can be found at <http://energy.gov/prod/files/oha/FOLA/FIA-12-0028.pdf>.*

Despite the relatively high number of cases received, our case-processing time for FY 2012 was lower than our most recent five-year average and less than half that of our average from FY 2003 through 2012 (full data at Appendix, Table 13).

### **Freedom of Information and Privacy Act Appeals Average Case Processing Time**



## E. EXCEPTIONS AND SPECIAL REDRESS

OHA considers petitions for special redress, as well as requests for exceptions from certain DOE regulations and orders. The exception process is a regulatory relief valve. An exception is granted where the application of a rule or order would constitute a gross inequity, serious hardship, or unfair distribution of regulatory burdens. OHA may grant an exception, for example, if applying a rule to a specific firm would be inconsistent with the overall purpose of a program or would impose a burden on the firm that would be grossly disproportionate to the burden imposed on other firms by the rule. In all cases, OHA consults with the affected DOE office.

The nature of relief requested varies depending on the DOE regulations at issue, and the number of requests received tends to increase as the deadline for compliance with a regulation approaches. Thus, nearly all of the exception requests considered in FY 2012 sought additional time to comply with lighting efficiency standards that took effect in July 2012. These standards were adopted by DOE in 2009 pursuant to the requirements of the Energy Policy Act of 1992. In a case that illustrates well the value of the exceptions process, OHA granted exception relief made necessary by recent policies adopted by the government of China that significantly limited the availability of rare earth elements used in the production of energy efficient fluorescent lamps, a circumstance unforeseen at the time of the adoption of the 2009 standards (see inset on next page for a summary of this case).

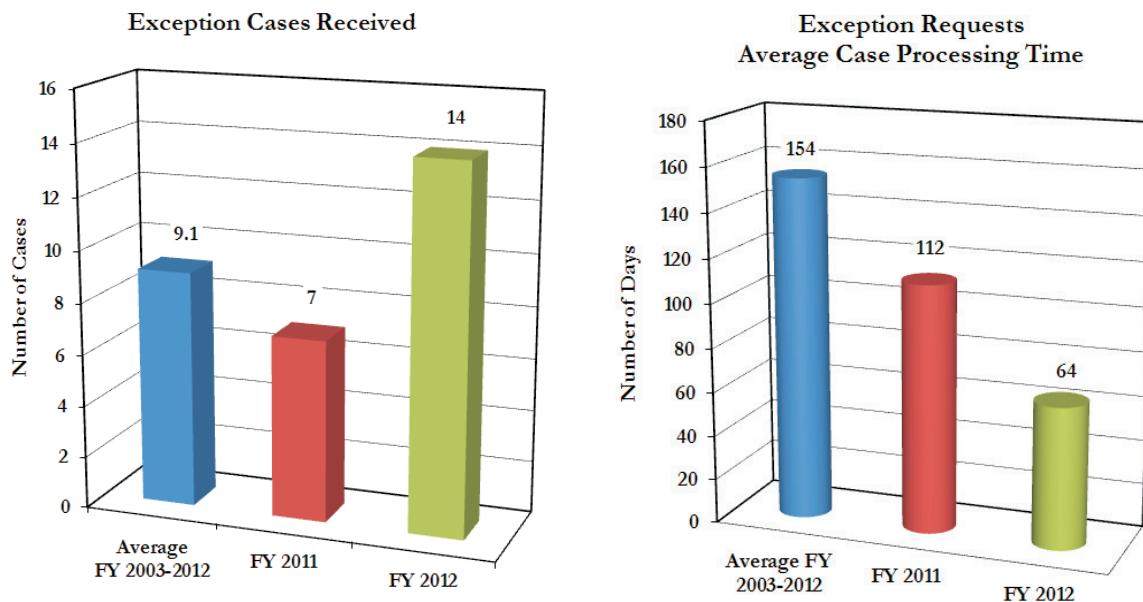
## EXCEPTIONS AND SPECIAL REDRESS CASE DECISION SUMMARY

### Case Nos. EXC-12-0001, EXC-12-0002, & EXC-12-0003 - Philips Lighting Company, GE Lighting, OSRAM SYLVANIA, Inc.

On April 16, 2012, OHA issued a decision granting Applications for Exception filed respectively by Philips Lighting Company (Philips), GE Lighting (GE) and OSRAM SYLVANIA, Inc. (OSI) (collectively, “the Applicants”), for relief from the provisions of 10 C.F.R. Part 430, Energy Conservation Program: Energy Conservation Standards and Test Procedures for General Service Fluorescent Lamps and Incandescent Reflector Lamps (Lighting Efficiency Standards). In their exception requests, the Applicants asserted that they would suffer a serious hardship, gross inequity and an unfair distribution of burdens if required to adhere to the new Lighting Efficiency Standards, effective July 14, 2012 (2009 Final Rule), with respect to 700 series T8 General Service Fluorescent Lamps (GSFLs) manufactured by the firms. In granting exception relief, OHA found that the agency's projections in the 2009 Final Rule had been overtaken by unforeseen circumstances and are no longer valid. OHA determined that the Applicants had presented compelling evidence that, at the present time, they do not have stable access to sufficient quantities of the necessary rare earth elements to produce T-8 GSFLs at the energy efficiency levels established by the 2009 Final Rule, as a result of policies adopted by the Chinese government which have significantly limited the exportation of these materials. Accordingly, OHA granted exception relief to the Applicants authorizing them to continue to manufacture 700 series T8 GSFLs subject to the currently applicable efficiency standards for a period of two years, until July 14, 2014.

*The full text of this decision can be found at <http://energy.gov/prod/files/oba/EE/EXC-12-0001thru03.pdf>.*

As shown in the chart below, we received twice as many exception requests in FY 2012 than in FY 2011, and significantly more than the average number of cases received annually during the last ten fiscal years. Despite the increased case load, our average case-processing time fell to 64 days in FY 2012, down from 112 days in FY 2011, and nearly 60 percent below our average from FY 2003 through 2012 (full data at Appendix, Tables 14 and 15).



## II. WORKING WITH OTHERS

Over the years, OHA has collaborated and partnered with other DOE offices and federal agencies, and FY 2012 was no exception.

Bill Schwartz, OHA's FOIA subject matter expert organized and, with the assistance of the Office of General Counsel (GC), hosted a series of five one-hour discussion sessions in FY 2012 on various topics of current interest. The sessions were conducted by conference call, allowing between 30 and 40 FOIA practitioners and attorneys from throughout the DOE complex to participate in each session. After OHA and GC attorneys delivered a brief presentation on the session's topic, the participants aired their questions, perspectives, and suggestions. We will continue this well-received program on a monthly basis in FY 2013.

In FY 2012, OHA conducted several management inquiries and produced fact-finding reports for our sister organizations, including the Office of Human Capital, Energy Information Administration, and Office of Nuclear Energy. We also provided adjudicative services in the area of personnel security to the U.S. Nuclear Regulatory Commission (NRC). In June 2012, an OHA Hearing Officer was appointed as an NRC Hearing Examiner in a case regarding the eligibility of an individual for a security clearance under Executive Order 12968, the federal Adjudicative Guidelines, and NRC regulations.

OHA's Employee Protections and Exceptions Division continued to collaborate during FY 2012 with other DOE offices concerning the Department's processes for addressing employee concerns. Staff from our Office of Conflict Prevention and Resolution regularly participates in activities coordinated among federal agencies, including the Interagency Dispute Resolution Working Group, the Interagency Conflict Management Consortium, and the Environmental Conflict Resolution Policy Forum.

We continue to learn from our colleagues, and hope that those with a better understanding of OHA and what we do can take advantage of the expertise, resources, and services we offer in support of DOE's mission. In this spirit, OHA continued in FY 2012 its series of occasional Brown Bag Lunches. Our distinguished guests in the past year included:

Sean Lev, Acting General Counsel, DOE  
Bruce Diamond, General Counsel, National Nuclear Security Administration (NNSA)  
Pamela Arias-Ortega, Assistant General Counsel for Litigation, NNSA, and attorneys from the NNSA's Litigation Group  
Karen Finnegan, Deputy Director, Office of Government Information Services (OGIS), National Archives and Records Administration  
David P. Lopez, General Counsel, Equal Employment Opportunity Commission  
Suzanne Orenstein, Director, D.C. Office of the Udall Foundation and the U.S. Institute for Environmental Conflict Resolution

We look forward to continuing this series in the coming year.

## III. SERVING OUR COMMUNITY

In FY 2012, OHA employees continued their long tradition of generosity to the Combined Federal Campaign, receiving a Chairman's Award for their support of the 2011 campaign. In addition, for the thirteenth year in a row, OHA attorneys supported DOE's partnership with the "Everybody Wins!" lunchtime reading program at Amidon Elementary School. Over the course of the fiscal year, four OHA attorneys participated in the weekly reading program. Apart from DOE-sponsored activities, OHA staff members donate their time and skills to their communities in a variety of ways.

## IV. INFORMATION TECHNOLOGY

OHA makes broad use of technology to accomplish its mission. OHA maintains a website where it publishes its decisions and other information. Internally, OHA uses a case management system to record new case filings, track the status of pending cases, produce productivity and case status reports, and assist staff attorneys in the timely resolution of assigned cases.

By the end of FY 2012, OHA had conducted 98 hearings via video teleconference, 78% of all hearings conducted in the fiscal year, a significantly higher percentage than in FY 2011, when 54% of our hearings were conducted via VTC.

In March 2012, Secretary of Energy Steven Chu presented the Secretary's Appreciation Award to OHA's Janet Gibson, in recognition of "her efforts to reduce reliance on paper records by shifting to electronic records,.... [T]his initiative results in less need for storage space and will free up building space toward achieving the Department's sustainability efforts. Ms. Gibson completed a project of shifting historical Office of Hearings and Appeals records from paper to electronic format, as well as eliminating over twenty years of dated OHA records."



*Secretary of Energy Chu presents Janet Gibson  
with the Secretary's Appreciation Award*

In September 2012, OHA's Information Technology Specialist Lee Blackard also received the Secretary's Appreciation Award, his second in as many years, in recognition of "his leadership in the digital reform efforts ... migrating into the new Energy.gov platform, which is projected to help the save the Department \$10 million annually in reduced and avoided costs while improving the Department's communications infrastructure."

## V. GENERAL INFORMATION

- ✍ Extensive information is available on our website at <http://energy.gov/oha>. The website includes information about OHA's jurisdiction, including applicable regulations, Frequently Asked Questions, and OHA decisions.
- ✍ For copies of submissions in OHA proceedings, you may contact our Docket and Publications Branch at doretha.colter@hq.doe.gov. You may also fax your inquiries to (202) 287-1415.
- ✍ For general information, you may contact the Office of the Director at (202) 287-1566 or the Docket Room at the email address listed above.
- ✍ To give us feedback on any aspect of our operations, please email us at janet.gibson@hq.doe.gov. We truly value your observations and suggestions.

## APPENDIX - TABLES

Table 1 - Cases Received by Type, FY 2012

Personnel Security Cases	163	54%
Freedom of Information Act Appeals	76	25%
Mediations	21	7%
Whistleblower Cases	16	5%
Exceptions	14	4%
Others	14	5%

Table 2 - Average Case Processing Time (Days)

FY 2003-2008	129
FY 2008-2012	93
FY 2012	84

Table 3 - End of Year Case Inventory Older Than 180 Days

FY 2003-2012	16
FY 2012	10

Table 4 - Criteria Invoked in Personnel Security Cases

	Average FY 2003-2012	FY 2012
Criterion F (falsification)	29.3	36
Criterion H (mental condition affecting reliability)	52.3	68
Criterion J (alcohol misuse)	60.2	61
Criterion K (illegal drug use)	22.3	15
Criterion L (conduct indicating lack of trustworthiness or reliability)	67.3	111
Criteria B (sympathetic association with individuals with interests opposed to the U.S.), D (advocate of unlawful overthrow of government), E (relative residing in hostile nation), G (violation of security regulations), and I (refused to testify in security proceeding)	5.9	18

Table 5 - Personnel Security Cases Received, FY 2000-2009

Fiscal Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Cases Received	66	82	143	145	112	132	149	131	169	163

Table 6 - Personnel Security Cases, End-of-Year Inventory Older Than 180 Days

Average FY2003-2012	FY2012
9	0

Table 7 - Personnel Security Cases, Average Case Processing Time (Days)

FY 2003-2012	FY 2008-2012	FY2012
160	121	97

Table 8 - Location of Personnel Security Cases Received in FY 2012

Schenectady									
Savannah River									
Richland									
Piketon									
Paducah									
Oak Ridge									
Los Alamos									
Nevada									
Livermore									
Kansas City									
Idaho									
Headquarters									
Amarillo									
Albuquerque									
39	14	5	9	12	19	28	9	17	3

Table 9 - Whistleblower Cases, Average Case Processing Time (Days)

FY 2003-2012	FY 2008-2012	FY 2012
140	109	95

Table 10 - Whistleblower Cases, End-of-Year Inventory Older Than 180 Days

FY 2003-2012	FY 2008-2002	FY 2012
1.9	0.6	0

Table 11 - Cases Referred to Headquarters Mediation Program

Fiscal Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total	30	23	21	24	23	16	15	26	37	35
Headquarters EEO Cases	23	13	16	15	15	12	10	19	19	19

Table 12 - Disposition of Cases Referred to Headquarters Mediation Program in FY 2012

	Settled	Not Settled
Mediated	12	6
Not Mediated	15	
Pending	8	

Table 13 - Freedom of Information and Privacy Act Appeals Cases Received

Fiscal Year	Average FY 2003-2012	Average FY 2008-2012	FY 2012
Cases Received	57	69	75

Table 14 - Freedom of Information and Privacy Act Appeals, Average Case Processing Time (Working Days)

FY 2003-2012	FY 2008-2012	FY 2012
34	19	16

Table 15 - Exception Cases Received

Fiscal Year	Average FY 2003-2012	FY 2011	FY 2012
Cases Received	9.1	7	14

Table 16 - Exception Requests, Average Case Processing Time (Days)

Average FY 2003-2012	FY 2011	FY 2012
154	112	64

