



United States  
Department of Energy

# Office of Hearings & Appeals

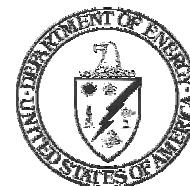


Annual Report  
FY 2013



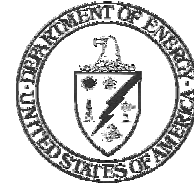
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## MESSAGE FROM THE DIRECTOR...



I am pleased to report on the FY 2013 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 Goals.

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 2013, our average time for issuing a decision after the receipt of the hearing transcript stood at 21 days, its lowest level in any of the last ten years, over 27 percent below our average over the last five years, and over 60 percent below our average for FY 2004-2013. 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 2013. Average processing time was over 33 percent below the average for the last ten years and over 4 percent below our average for fiscal years 2009 through 2013, and no case in our end-of-year inventory was older than 180 days. Also in FY 2013, 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 2013, though receiving a higher-than-average number of appeals, our FOIA and Privacy Act average case-processing time was 14 days, a figure below our most recent five-year average and less than half that of our average from FY 2004 through 2013.

**Exceptions and Special Redress.** OHA considers petitions for special redress, as well as requests for relief from certain regulatory requirements. In FY 2013, OHA again 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 Prevention and Resolution (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. In FY 2013, a record 40 mediation case referrals were received by OCPR; a settlement rate of 44% was achieved in those cases that were mediated.

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 2013.

In FY 2013, we continued using information technology to more efficiently provide the services we offer. Over 85 percent of the hearings we held in FY 2013 were conducted via video teleconferencing, compared to 78 percent in FY 2012, and 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.

Finally, we are happy to report that effective October 1, 2013, the titles of our staff attorneys changed from Hearing Officer to Administrative Judge. *See* 78 Fed. Reg. 52389 (August 23, 2013). The title change was undertaken to bring OHA staff in line with the titles used at other Federal agencies for officials performing identical or similar adjudicatory work, as well as to elevate the stature of the professional adjudicatory services performed by OHA staff.

As we begin FY 2014, 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 2013, 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.

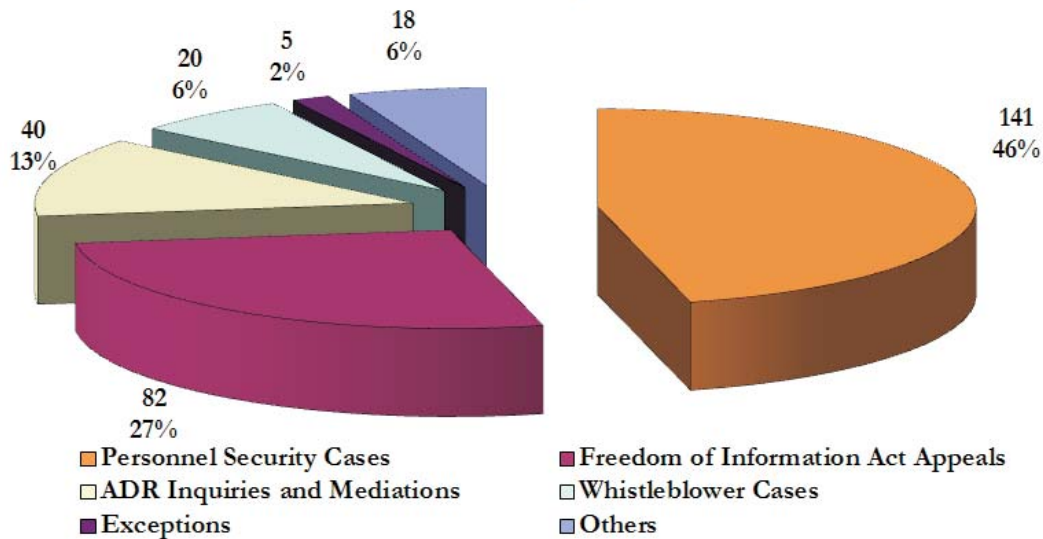
The procedures that OHA uses vary, depending on the type of case involved. OHA procedures are flexible and easily adaptable to new situations, allowing OHA to minimize "start-up" times and to produce high-quality work in new areas. OHA's general procedures and those used for specific proceedings can 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

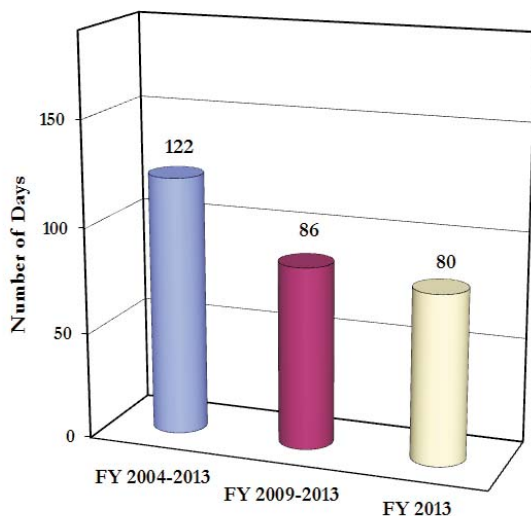
In FY 2013, OHA received a total of 306 cases. The majority of these consisted of personnel security hearings, followed by FOIA and Privacy Act appeals, mediations, whistleblower cases (investigations, hearings, and appeals), exception applications, and others. The following chart shows the volume of cases, by type (full data at Appendix, Table 1).

**Cases Received by Type - FY 2013**

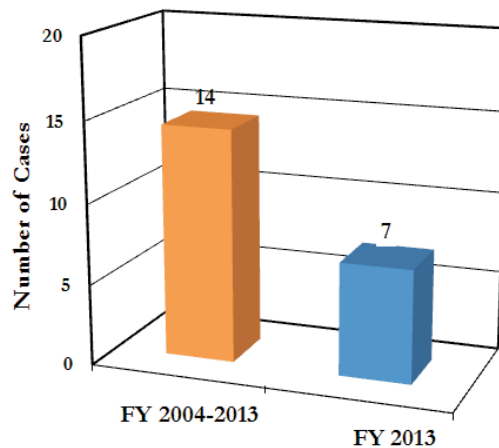


In FY 2013, OHA closed a total of 310 cases. The chart on the left below shows the average case-processing time for cases closed in FY 2013, and over the last five and ten fiscal years (full data at Appendix, Table 2). Our average case-processing time was nearly 7 percent below our most recent five-year averages and 35 percent less than our 10-year average. Over the last five years, we have reduced average case-processing time by over 33 percent. In addition, our inventory of older cases stands at 50 percent below our average over the last ten years (full data at Appendix, Table 3). We attribute these results to a continued emphasis on timeliness, without sacrificing the quality of our adjudicative work.

**Average Case Processing Time**



**End of Year Case Inventory  
Older Than 180 Days**



## I. AREAS OF JURISDICTION

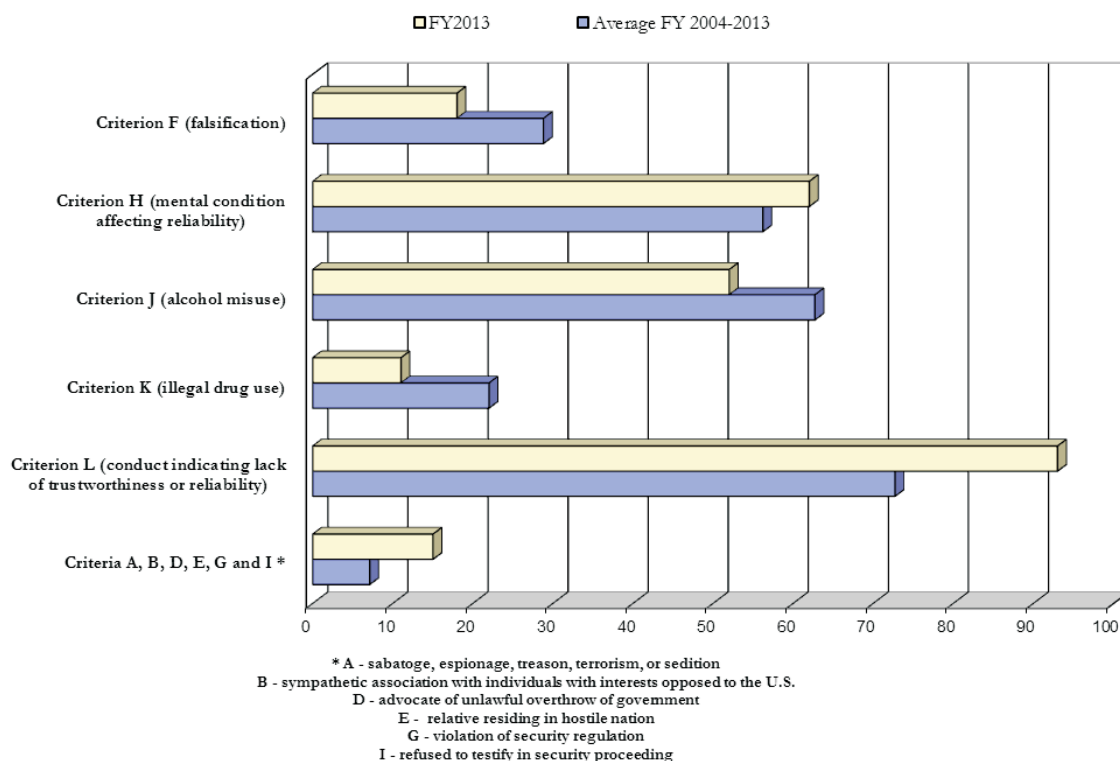
### A. PERSONNEL SECURITY

In FY 2013, 141 or about 46 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, among other issues. Evidence and testimony may include expert medical opinion. The OHA Administrative Judge 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). Notable in FY 2013 were the relatively lower number, compared to our ten-year average, of cases involving concerns raised by falsification, use of illegal drugs, and problematic use of alcohol. In contrast, the number of cases raised under Criterion L (conduct indicating lack of trustworthiness or reliability) in FY 2013 was higher than in nine of the last ten years, exceeded only by those received in FY 2012.

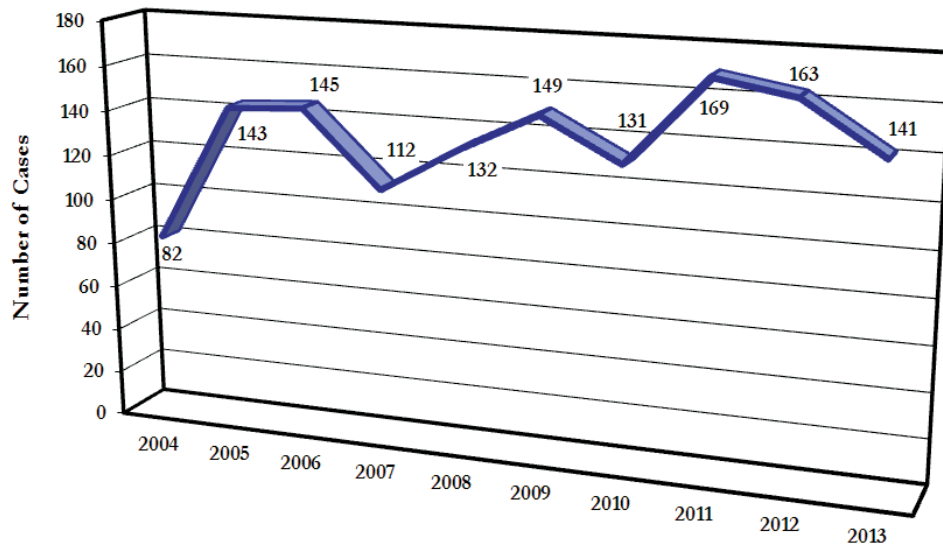
**Criteria Invoked in Personnel Security Cases**





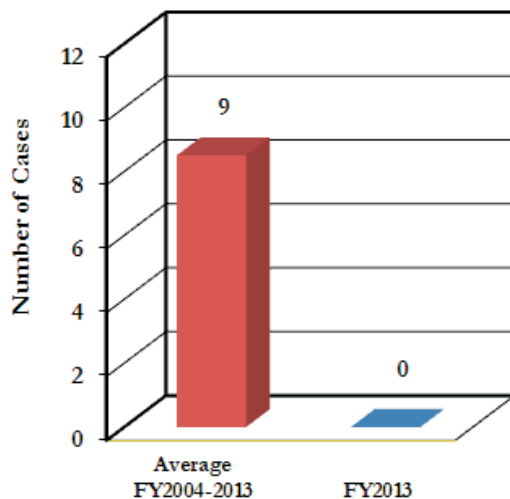
The following chart (full data at Appendix, Table 5) shows the number of personnel security cases received during each of the last ten years. OHA received 141 personnel security cases in FY 2013, fewer than FY 2012, but a number more in line with (and still higher than) our 10 year average.

**Personnel Security Cases Received  
FY 2004-2013**

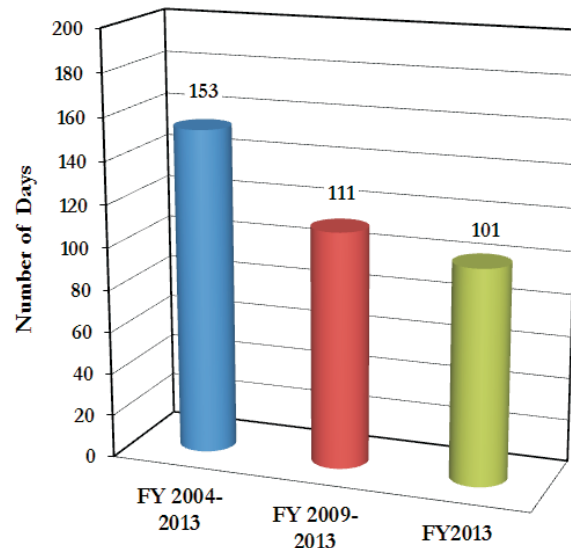


Consistent with our historical trend, in FY 2013, we continued to process personnel security cases in a more timely manner. Average case processing time was nearly 10 percent below our average over the last five years, and nearly 44 percent below our average for FY 2004-2013. At the end of the year, 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 2013 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. This metric (71.9%) is consistent with the ratio of denial/revocations to grant/restorations that OHA has seen in its adjudication of personnel security cases in past years.

**Personnel Security Cases  
End-of-Year Inventory  
Older Than 180 Days**



**Personnel Security Cases  
Average Case Processing Time**





## PERSONNEL SECURITY CASE DECISION SUMMARY

### Case No. PSH-13-0027 - Personnel Security Hearing

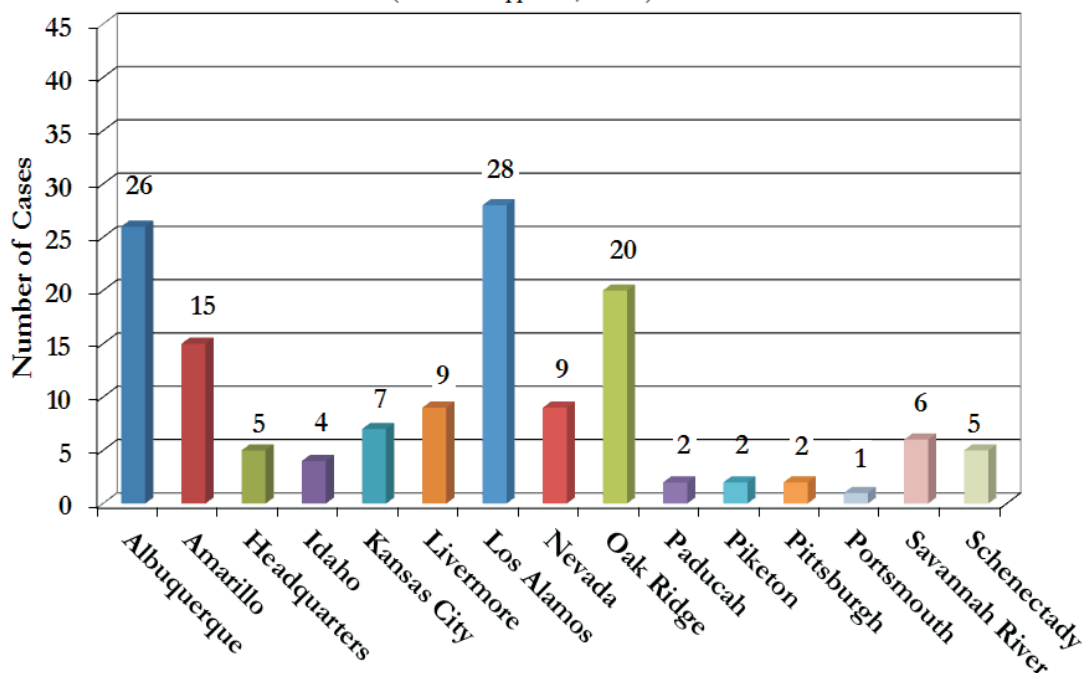
On June 5, 2013, an OHA Hearing Officer issued a Decision in which he determined that the DOE should not restore an individual's access authorization. A DOE Local Security Office (LSO) suspended the individual's security clearance and referred him to administrative review under 10 CFR Part 710. As a basis for the referral, the LSO cited (1) the individual's failure to pay federal and state income taxes owed for 2008-2010; (2) his admission that he owed \$30,000 in federal income taxes; (3) records indicating that he owed over \$6,000 in state income taxes; (4) his admission that he did not file his 2011 federal or state income taxes returns; and (5) his admission that he did not file his 2009 state income tax returns.

During and subsequent to the hearing, the individual presented evidence that he was currently up to date on his federal and state tax filings, and had made arrangements to make monthly payments toward his federal tax liability. However, the Hearing Officer found that, given that he had brought his filings up to date only recently, and had not fully accepted responsibility for his past actions, the concerns raised by the individual's failure to file tax returns had not been resolved. As for the individual's financial irresponsibility in accumulating delinquent tax debt, the Hearing Officer found that the individual had not yet fully established a pattern of financial responsibility, and that there were reasons to doubt that he would be able to sustain such a pattern in the long term. The Hearing Officer therefore concluded that the DOE should not restore the individual's access authorization.

*The full text of this decision can be found at <http://energy.gov/sites/prod/files/2013/06/f1/PSH-13-0027.pdf>.*

### Location of Personnel Security Cases Received in FY 2013

(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 and in educating its Hearing Officers on recent developments in national security law. In June 2013, three 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.

In January 2013, the Chief of the Personnel and Security and Appeals Division discussed the role of OHA in proceedings under 10 C.F.R. Part 710 and answered questions about the regulatory framework underpinning due process hearings at the Appeal Panel Chairperson Workshop. In addition, the Chief designed and deployed a two-day personnel security refresher training in January 2013 for OHA Hearing Officers, collaborating with colleagues from the Office of General Counsel and the Office of Intelligence and Counterintelligence.

## B. WHISTLEBLOWER

In FY 2013, 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). In FY 2013, OHA received 20 whistleblower cases for processing. *See, infra*, page 10.

### *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 Administrative Judge is assigned to the case. The Administrative Judge 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 FY 2013, 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

### WHISTLEBLOWER CASE DECISION SUMMARY

#### **Case No. WBH-12-0004 - In the Matter of Denise Hunter**

On August 5, 2013, an OHA Hearing Officer issued an Order in which he determined that relief should be granted to a complainant under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). The complainant alleged that she had made protected disclosures to DOE and to her former employer, The Whitestone Group (Whitestone) and, as a result of those disclosures, Whitestone retaliated against her by placing her on probation and ultimately terminating her employment.

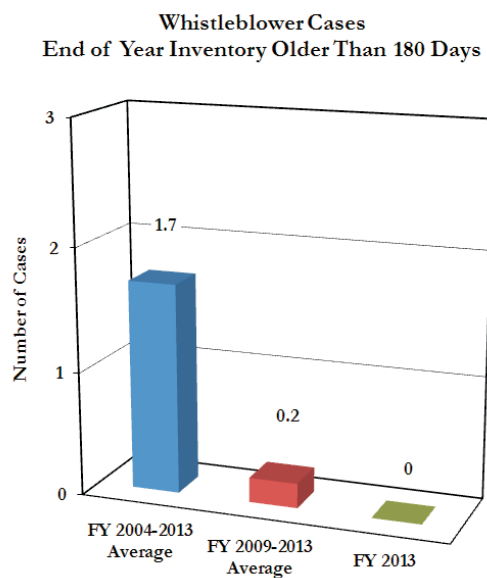
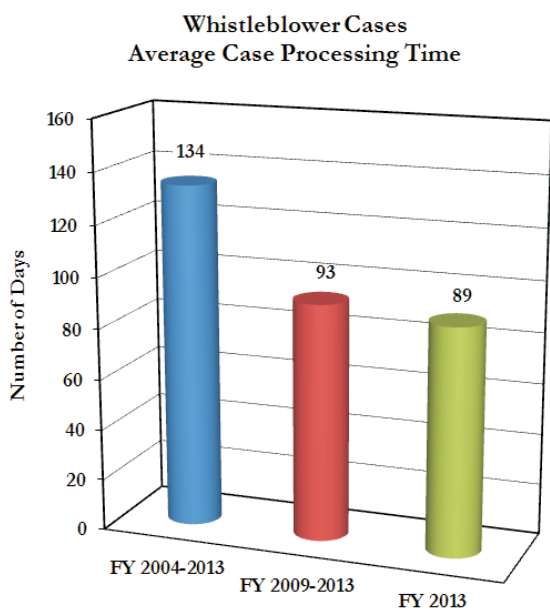
The complainant alleged that she made disclosures pertaining to (1) Whitestone's improper billing practices, (2) Whitestone's failure to complete a required pre-employment check on a new employee, and (3) the theft of official property and Whitestone's failure to report that theft. After convening a two-day hearing on the matter, the Hearing Officer found, with regard to the first alleged disclosure, that the complainant did not reasonably believe that her disclosure revealed a substantial violation of a rule, and therefore had not made a "disclosure" as that term is used in Part 708. With regard to the second disclosure, the Hearing Officer found that the company officials responsible for the probation and the termination did not have actual or constructive knowledge of the disclosure, and therefore the disclosure was not a contributing factor in either personnel action. The Hearing Officer did, however, find that the complainant met her burden of establishing that third disclosure was a protected activity under Part 708, as was her filing of a Part 708 Complaint. The Hearing Officer also found that this protected activity was a contributing factor in her termination. Having determined that the complainant had met her burden under Part 708, the Hearing Officer then considered the company's argument and found that it had not met its burden of showing that it would have terminated the complainant even if she had not engaged in protected activity. The Hearing Officer therefore concluded that the complainant was entitled to relief under Part 708.

*The full text of this decision can be found at <http://energy.gov/sites/prod/files/2013/08/f2/WBH-12-0004.pdf>.*

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 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 20 whistleblower cases in FY 2013 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 2013 was over 33 percent below our average over the last ten years and over 4 percent below our average for fiscal years 2009 through 2013. In addition, no case in our end-of-year inventory was older than 180 days.

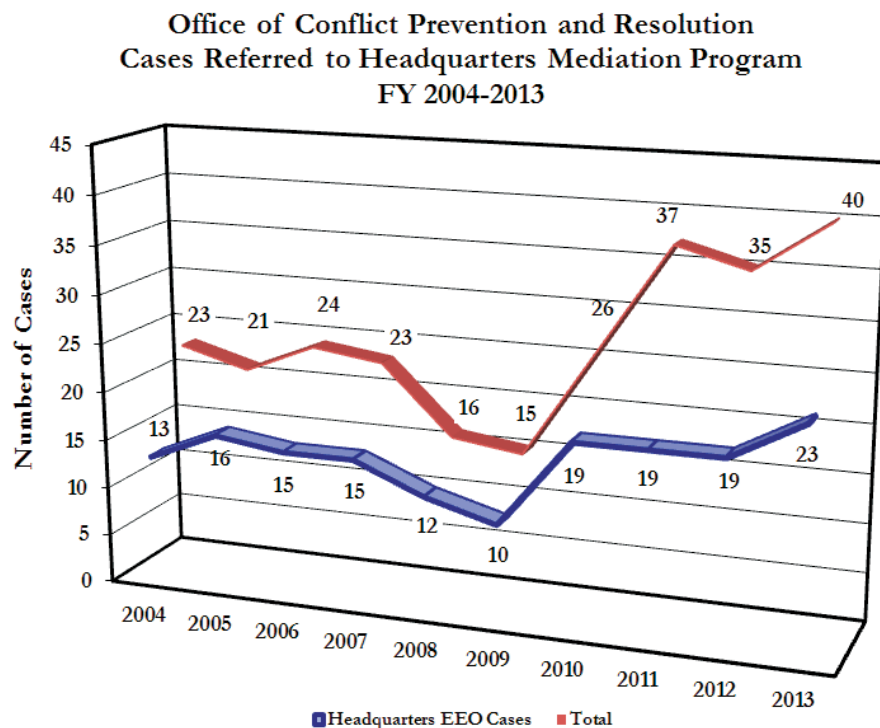


## C. ALTERNATIVE DISPUTE RESOLUTION

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.

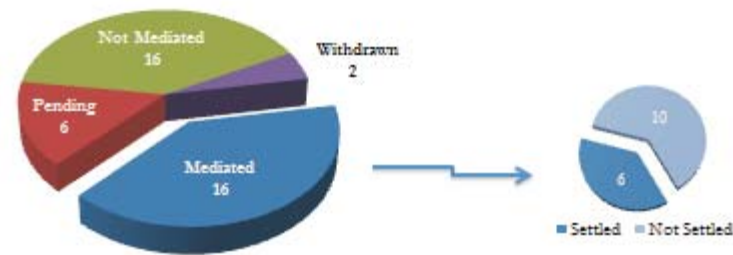
OCPR was created as a result of the Administrative Dispute Resolution Act of 1996 (ADRA), with the mandate to increase the understanding and use of alternative dispute resolution (ADR) within the Department. While ADRA focuses on issues already in controversy, OCPR's mandate was expanded to encourage 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, 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 2013, the OCPR staff and OHA staff attorney mediators conducted fifty percent of the mediations referred to OCPR. The Headquarters Mediation Program received 40 cases in FY 2013 and processed 34 (six remained pending at the end of FY 2013). 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 16 of the 40 cases referred to OCPR in FY 2013, and a settlement rate of 44% was achieved in those cases, as shown in the following chart. Sixteen cases were not mediated, either because one party did not wish to proceed to mediation or because the matter was resolved prior to mediation, and two cases were withdrawn. Six cases remained pending at the end of FY 2013.

Office of Conflict Prevention and Resolution  
Disposition of Cases Referred to the Headquarters Mediation Program  
FY 2013



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 ombudsman (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 2013, 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., the TT ombuds at the National Renewable Energy Laboratory gave a teleconference presentation focused on neutrality and impartiality; another call updated the TT ombuds on recent technology transfer highlights and developments.

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 2013 training and outreach activities included:

- ✓ DOE Headquarters' second annual Conflict Resolution Day, held on October 18, 2012. Among other things, OCPR organized and managed Conflict Resolution Day. OCPR and other sponsoring organizations distributed conflict resolution information to employees and participated in a special ADR program, "Self-Mediation". The day also included a presentation for "De-Stressing in a Stressful Environment" given by a DOE Employee Assistance Program counselor who provided practical ways to manage stress.
- ✓ Eight hours of additional Mediation Skills Training – Additional mediation training was given to OHA attorney-examiners for preparation to participate as co-mediators in the Federal Shared Neutrals program. This training focused on practicing mediation role plays coached by seasoned mediators. – April 2013
- ✓ "Supervisory Essentials" Classes – OCPR gave a presentation about ADR and the HQ mediation program to new supervisors in October 2012, February, July, and September 2013.

- ✓ A variety of other training classes were designed by OCPR staff for specific program offices such as, “First Time Supervisor Development Program” for new supervisors at DOE headquarters held in November 2012; “We Need to MEET: Managing for Respect in the Workplace” at Amarillo, TX held in November 2012; “Communicating Through Conflict” for EIA managers held in January and February 2013 and a follow-up session held in March 2013; a separate “Communicating Through Conflict” session was held for the Chief Information Office managers in September 2013; four sessions of the pilot class “Difficult Conversations” were held for the Chief Financial Officer managers in February and March 2013.
- ✓ “Interagency Dispute Resolution Skills for FOIA Professionals” training – The OCPR dispute resolution specialist, who was on a detail to the National Archives and Records Administration's Office of Government Information Services, presented the ADR portion for two all day “Dispute Resolution Skills for FOIA Professionals” training sessions held in May and June 2013 to participants from various federal agencies held at the National Archives and Records Administration and at the Department of Labor.
- ✓ 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.



## D. FREEDOM OF INFORMATION AND PRIVACY ACTS

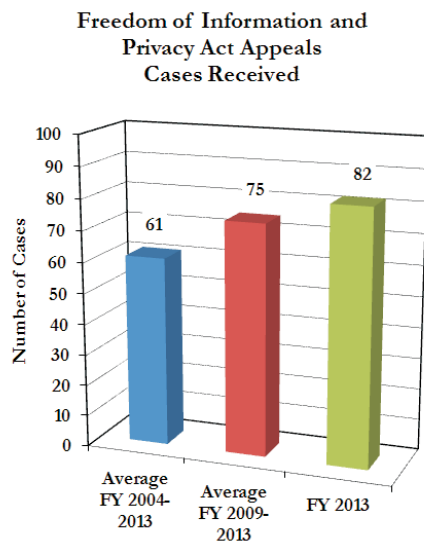
OHA considers appeals of agency determinations under the Freedom of Information Act (FOIA) and Privacy Act. The governing regulations are set forth at 10 C.F.R. Parts 1004 and 1008, respectively.

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.

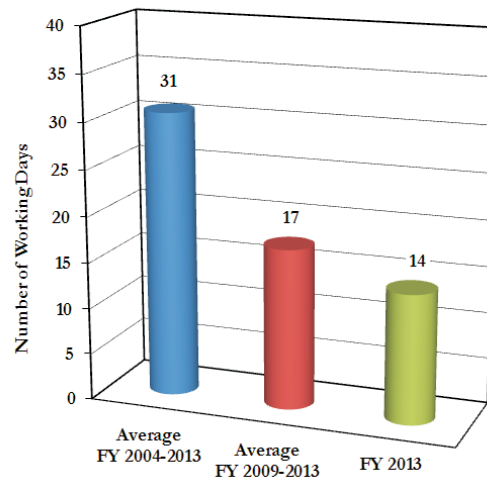
OHA receives a large number of FOIA cases from non-government organizations and other public interest groups concerning the DOE Loan Programs Office, which was created to accelerate the domestic commercial deployment of innovative and advanced clean energy technologies that contribute to the achievement of our national clean energy objectives.

As shown in the chart below, during FY 2013 we received 82 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 13).

Despite the relatively high number of cases received, our case-processing time for FY 2013 was lower than our most recent five-year average and less than half that of our average from FY 2004 through 2013 (full data at Appendix, Table 14).



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



## FREEDOM OF INFORMATION AND PRIVACY ACTS CASE DECISION SUMMARY

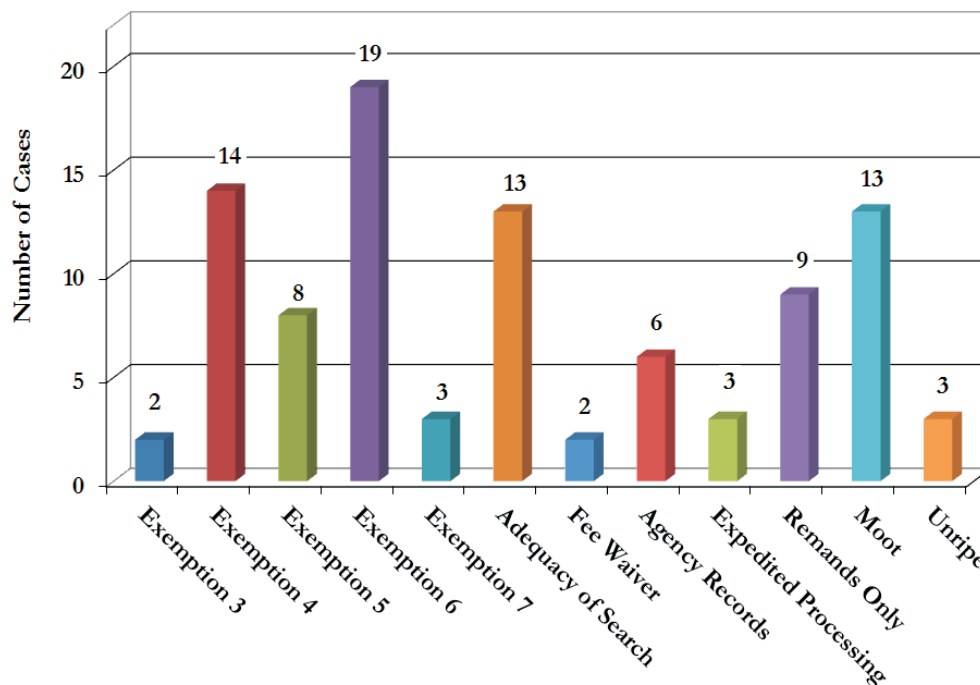
### Case No. FIA-13-0018 - Alliance to Protect Nantucket Sound

On April 4, 2013, the Director of the Office of Hearings and Appeals (OHA) issued a decision remanding in part a determination issued by the DOE's Loan Programs Office (LPO) based on a Freedom of Information Act (FOIA) appeal filed by the Alliance to Protect Nantucket Sound (APNS). APNS appealed the LPO's decision to withhold information in the released documents pursuant to FOIA Exemptions 2, 4, 5 and 6. APNS claimed that the LPO did not adequately justify its redactions and failed to completely respond to its FOIA request. APNS also sought expedited processing of its appeal.

The OHA first concluded that while the Exemption 4 was proper in some cases, there were other redactions that did not appear to contain confidential business or financial information, and that accordingly were not properly withheld pursuant to Exemption 4. Moreover, the OHA held that the LPO inadequately explained why it invoked Exemption 5, stating that the LPO provided generalized statements. Further, the OHA concluded that the LPO properly invoked Exemption 6 to the withheld addresses and personal phone numbers. OHA also noted that while the LPO withheld information pursuant to Exemption 2, the LPO failed to explain why that exemption was invoked in its determination letter. Thus, OHA remanded the Appeal to the LPO to review the redactions and issue a new determination letter with adequate justification for why certain FOIA exemptions were applied.

*The full text of this decision can be found at <http://energy.gov/sites/prod/files/2013/04/f0/FLA-13-0018.pdf>*

### FOIA Cases By Subject - FY 2013



## 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, for example, in FY 2013 exception requests seeking 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

### EXCEPTIONS AND SPECIAL REDRESS CASE DECISION SUMMARY

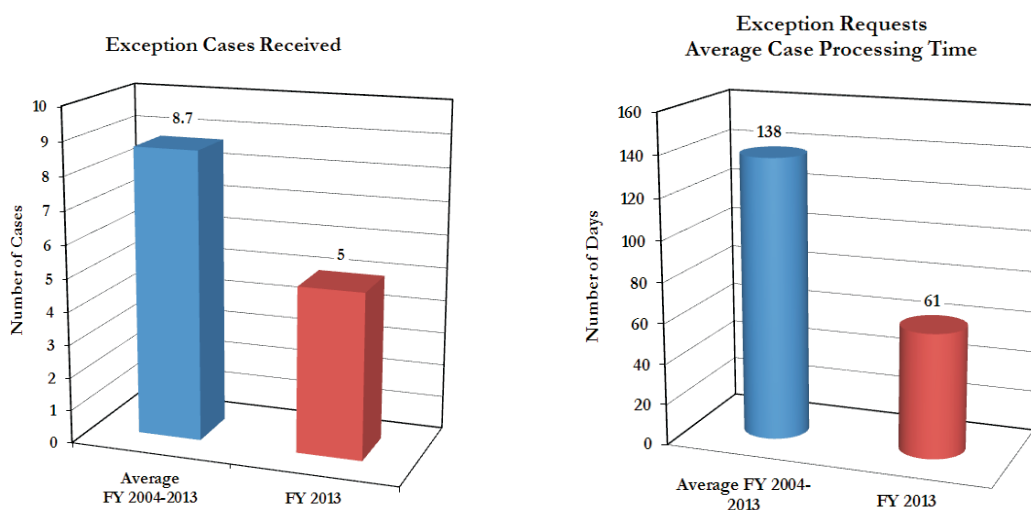
#### **Case Nos. EXC-13-0002 - Technical Consumer Products, Inc.**

On February 22, 2013, Office of Hearings and Appeals (OHA) issued a decision granting an Application for Exception filed by Technical Consumer Products, Inc. (TCP) 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 its exception request, TCP asserted that it will 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 its 700 series T8 General Service Fluorescent Lamps (GSFL). Specifically, TCP cited a previous OHA decision, dated April 16, 2012, in which OHA granted exception relief to Philips Lighting Company (Philips), GE Lighting (GE) and Osram Sylvania, Inc. (OSI), as well as several subsequent cases granting similar relief to other manufacturers, and maintained that TCP will be at an unfair competitive disadvantage if relief is granted to Philips, GE, and OSI, and other manufacturers, but not to TCP. In this case, OHA determined that the rare earth market remains volatile, and, as a result, domestic manufacturers remain subject to fluctuations in rare earth supply and prices for the foreseeable future. OHA further concluded that these circumstances, which compelled our initial approval of exception relief for Philips, GE, and OSI, have by consequence created a gross inequity for domestic manufacturers like TCP because the three companies may continue to market 700 series T8 GSFLs for a period of two years while other manufacturers may not do so. This would give Philips, GE, and OSI an additional competitive advantage over smaller domestic manufacturers, an unintended consequence of both the existing regulations and of our subsequent exception relief to the three companies. Therefore, OHA determined that granting TCP exception relief was warranted in order to prevent inequities among the domestic lighting manufacturers. Accordingly, OHA granted exception relief to TCP authorizing it to continue to manufacture 700 series T8 GSFLs subject to the currently applicable efficiency standards for a period of two years from the effective date of the regulations, until July 14, 2014.

*The full text of this decision can be found at <http://energy.gov/sites/prod/files/EXC-13-0002.pdf>.*

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.

As shown in the chart below, we received a somewhat lower number of exception requests in FY 2013 than the average number of cases received annually during the last ten fiscal years. Our average case-processing time fell to 61 days in FY 2013, over 55 percent below our average from FY 2004 through 2013 (full data at Appendix, Tables 16 and 17).



## II. WORKING WITH OTHERS

Over the years, OHA has collaborated and partnered with other DOE offices and federal agencies, and FY 2013 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 2013 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 in FY 2014.

Ann Augustyn, Chief of OHA's Personnel Security and Appeals Division, collaborated with the Office of Science and the Office of General Counsel on technology transfer from March through September 2013, the period in which the agency's Technology Transfer Coordinator position was vacant, to ensure that Congressional inquiries, OMB requests, internal and external audits, legislative initiatives, and press inquiries were appropriately handled and addressed.

In FY 2013, OHA conducted management inquiries and produced fact-finding reports for several of our sister organizations, including the Office of Science and the Office of Policy and International Affairs. We also provided adjudicative services in the area of personnel security to the U.S. Nuclear Regulatory Commission (NRC). In January 2013, an OHA Hearing Officer, who was appointed as an NRC Hearing Examiner, issued a decision 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 2013 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 and the Interagency Conflict Management Consortium.

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 2013 its series of occasional Brown Bag Lunches. Our distinguished guests in the past year included Suzanne Piper, Employee Worklife Specialist, Office of Chief Human Capital Officer and Daniel Cohen, Assistant General Counsel for Legislation, Regulation & Energy Efficiency. We look forward to continuing this series in the coming year.

The OHA receives cases concerning FOIA and whistleblower cases that involve procurement issues and financial assistance for research and development grants. In February 2013, managers from the Office of Acquisition and Project Management conducted a workshop for the Hearing Officers on contracting principles and the basics of financial assistance. The overview covered statutory and regulatory coverage, DOE policies and procedures and a look at FOIA responses and the exemptions to release of information.

### III. SERVING OUR COMMUNITY

In FY 2013, OHA employees continued their long tradition of generosity to the Combined Federal Campaign, receiving a President's Award for their support of the 2012 campaign. In addition, for the fourteenth year in a row, OHA attorneys supported DOE's partnership with the "Everybody Wins!" lunchtime reading program at Amidon-Bowen Elementary School. Over the course of the fiscal year, three 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 2013, OHA had conducted 101 hearings via video teleconference, 85% of all hearings conducted in the fiscal year, a significantly higher percentage than in FY 2012, when 78% of our hearings were conducted via VTC.

## 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 [OHAFilings@hq.doe.gov](mailto:OHAFilings@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 [steven.goering@hq.doe.gov](mailto:steven.goering@hq.doe.gov). We truly value your observations and suggestions.

## APPENDIX - TABLES

Table 1 - Cases Received by Type, FY 2013

Personnel Security Cases	141	46%
Freedom of Information Act Appeals	82	27%
ADR Inquiries and Mediations	40	13%
Whistleblower Cases	20	6%
Exceptions	5	2%
Others	18	6%
<b>Total</b>	<b>306</b>	<b>100%</b>

Table 2 - Average Case Processing Time (Days)

FY 2004-2013	122
FY 2009-2013	86
FY 2013	80

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

FY 2004-2013	14
FY 2013	7

Table 4 - Criteria Invoked in Personnel Security Cases

	Average FY 2004-2013	FY2013
Criterion F (falsification)	28.8	18
Criterion H (mental condition affecting reliability)	56.2	62
Criterion J (alcohol misuse)	62.7	52
Criterion K (illegal drug use)	22	11
Criterion L (conduct indicating lack of trustworthiness or reliability)	72.7	93
Criteria A, B, D, E, G and I (A - sabotage, espionage, treason, terrorism, or sedition; B - association with person whose interests inimical to U.S. or who advocates unlawful overthrow of government; D - advocate of unlawful overthrow of government; E - relative residing in hostile nation; G - violation security regulations; I - refused to testify in security proceeding)	7.1	15

Table 5 - Personnel Security Cases Received, FY 2004-2013

2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
82	143	145	112	132	149	131	169	163	141



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

Average FY2004-2013	FY2013
9	0

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

FY 2004-2013	FY 2009-2013	FY2013
153	111	101

Table 8 - Location of Personnel Security Cases Received in FY 2013

Albuquerque	Amarillo	Headquarters	Idaho	Kansas City	Livermore	Los Alamos	Nevada	Oak Ridge	Paducah	Pikeston	Pittsburgh	Portsmouth	Savannah River	Schenectady
26	15	5	4	7	9	28	9	20	2	2	2	1	6	5

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

FY 2004-2013	FY 2009-2013	FY 2013
134	93	89

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

FY 2004-2013	FY 2009-2013	FY 2013
1.7	0.2	0

Table 11 - Cases Referred to Headquarters Mediation Program

Fiscal Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total	23	21	24	23	16	15	26	37	35	40
Headquarters EEO Cases	13	16	15	15	12	10	19	19	19	23

Table 12 - Disposition of Cases Referred to Headquarters Mediation Program in FY 2013

		Settled	Not Settled
Mediated	16	6	10
Not Mediated	16		
Pending	6		
Withdrawn	2		
<b>Total</b>	<b>40</b>		

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

Fiscal Year	Average FY 2004-2013	Average FY 2009-2013	FY 2013
Cases Received	61	75	82

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

FY 2004-2013	FY 2009-2013	FY 2013
31	17	14

Table 15 - FOIA Cases by Subject

Unripe	Moot	Remands Only	Expedited Processing	Agency Records	Fee Waiver	Adequacy of Search	Exemption 7	Exemption 6	Exemption 5	Exemption 4	Exemption 3
3	13	9	3	6	2	13	3	19	8	14	2

Table 16 - Exception Cases Received

Fiscal Year	Average FY 2004-2013	FY 2013
Cases Received	8.7	5

Table 17 - Exception Requests, Average Case Processing Time (Days)

Average FY 2004-2013	FY 2013
138	61

