

a hearing conducted under section 1405 of this title with respect to the same matter or shall be subject to subpoena or any other compulsory process with respect to the same matter.

(Pub. L. 104-1, title IV, §403, Jan. 23, 1995, 109 Stat. 32.)

#### § 1404. Election of proceeding

Not later than 90 days after a covered employee receives notice of the end of the period of mediation, but no sooner than 30 days after receipt of such notification, such covered employee may either—

- (1) file a complaint with the Office in accordance with section 1405 of this title, or
- (2) file a civil action in accordance with section 1408 of this title in the United States district court for the district in which the employee is employed or for the District of Columbia.

(Pub. L. 104-1, title IV, §404, Jan. 23, 1995, 109 Stat. 33.)

#### § 1405. Complaint and hearing

##### (a) In general

A covered employee may, upon the completion of mediation under section 1403 of this title, file a complaint with the Office. The respondent to the complaint shall be the employing office—

- (1) involved in the violation, or
- (2) in which the violation is alleged to have occurred,

and about which mediation was conducted.

##### (b) Dismissal

A hearing officer may dismiss any claim that the hearing officer finds to be frivolous or that fails to state a claim upon which relief may be granted.

##### (c) Hearing officer

###### (1) Appointment

Upon the filing of a complaint, the Executive Director shall appoint an independent hearing officer to consider the complaint and render a decision. No Member of the House of Representatives, Senator, officer of either the House of Representatives or the Senate, head of an employing office, member of the Board, or covered employee may be appointed to be a hearing officer. The Executive Director shall select hearing officers on a rotational or random basis from the lists developed under paragraph (2). Nothing in this section shall prevent the appointment of hearing officers as full-time employees of the Office or the selection of hearing officers on the basis of specialized expertise needed for particular matters.

###### (2) Lists

The Executive Director shall develop master lists, composed of—

- (A) members of the bar of a State or the District of Columbia and retired judges of the United States courts who are experienced in adjudicating or arbitrating the kinds of personnel and other matters for which hearings may be held under this chapter, and

- (B) individuals expert in technical matters relating to accessibility and usability by persons with disabilities or technical matters relating to occupational safety and health.

In developing lists, the Executive Director shall consider candidates recommended by the Federal Mediation and Conciliation Service or the Administrative Conference of the United States.

##### (d) Hearing

Unless a complaint is dismissed before a hearing, a hearing shall be—

- (1) conducted in closed session on the record by the hearing officer;
- (2) commenced no later than 60 days after filing of the complaint under subsection (a), except that the Office may, for good cause, extend up to an additional 30 days the time for commencing a hearing; and
- (3) conducted, except as specifically provided in this chapter and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5.

##### (e) Discovery

Reasonable prehearing discovery may be permitted at the discretion of the hearing officer.

##### (f) Subpoenas

###### (1) In general

At the request of a party, a hearing officer may issue subpoenas for the attendance of witnesses and for the production of correspondence, books, papers, documents, and other records. The attendance of witnesses and the production of records may be required from any place within the United States. Subpoenas shall be served in the manner provided under rule 45(b) of the Federal Rules of Civil Procedure.

###### (2) Objections

If a person refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with a proceeding before a hearing officer, the hearing officer shall rule on the objection. At the request of the witness or any party, the hearing officer shall (or on the hearing officer's own initiative, the hearing officer may) refer the ruling to the Board for review.

###### (3) Enforcement

###### (A) In general

If a person fails to comply with a subpoena, the Board may authorize the General Counsel to apply, in the name of the Office, to an appropriate United States district court for an order requiring that person to appear before the hearing officer to give testimony or produce records. The application may be made within the judicial district where the hearing is conducted or where that person is found, resides, or transacts business. Any failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a civil contempt thereof.

**(B) Service of process**

Process in an action or contempt proceeding pursuant to subparagraph (A) may be served in any judicial district in which the person refusing or failing to comply, or threatening to refuse or not to comply, resides, transacts business, or may be found, and subpoenas for witnesses who are required to attend such proceedings may run into any other district.

**(g) Decision**

The hearing officer shall issue a written decision as expeditiously as possible, but in no case more than 90 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the parties. The decision shall state the issues raised in the complaint, describe the evidence in the record, contain findings of fact and conclusions of law, contain a determination of whether a violation has occurred, and order such remedies as are appropriate pursuant to subchapter II. The decision shall be entered in the records of the Office. If a decision is not appealed under section 1406 of this title to the Board, the decision shall be considered the final decision of the Office.

**(h) Precedents**

A hearing officer who conducts a hearing under this section shall be guided by judicial decisions under the laws made applicable by section 1302 of this title and by Board decisions under this chapter.

(Pub. L. 104-1, title IV, § 405, Jan. 23, 1995, 109 Stat. 33.)

## REFERENCES IN TEXT

This chapter, referred to in subsecs. (c)(2)(A), (d)(3), and (h), was in the original "this Act", meaning Pub. L. 104-1, Jan. 23, 1995, 109 Stat. 3 which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1301 of this title and Tables.

Rule 45(b) of the Federal Rules of Civil Procedure, referred to in subsec. (f)(1), is set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Subchapter II, referred to in subsec. (g), was in the original "title II", meaning title II of Pub. L. 104-1, Jan. 23, 1995, 109 Stat. 7, which is classified principally to subchapter II of this chapter. For complete classification of title II to the Code, see Tables.

**§ 1406. Appeal to Board****(a) In general**

Any party aggrieved by the decision of a hearing officer under section 1405(g) of this title may file a petition for review by the Board not later than 30 days after entry of the decision in the records of the Office.

**(b) Parties' opportunity to submit argument**

The parties to the hearing upon which the decision of the hearing officer was made shall have a reasonable opportunity to be heard, through written submission and, in the discretion of the Board, through oral argument.

**(c) Standard of review**

The Board shall set aside a decision of a hearing officer if the Board determines that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

**(d) Record**

In making determinations under subsection (c), the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**(e) Decision**

The Board shall issue a written decision setting forth the reasons for its decision. The decision may affirm, reverse, or remand to the hearing officer for further proceedings. A decision that does not require further proceedings before a hearing officer shall be entered in the records of the Office as a final decision.

(Pub. L. 104-1, title IV, § 406, Jan. 23, 1995, 109 Stat. 35.)

**§ 1407. Judicial review of Board decisions and enforcement****(a) Jurisdiction****(1) Judicial review**

The United States Court of Appeals for the Federal Circuit shall have jurisdiction over any proceeding commenced by a petition of—

(A) a party aggrieved by a final decision of the Board under section 1406(e) of this title in cases arising under part A of subchapter II,

(B) a charging individual or a respondent before the Board who files a petition under section 1331(d)(4) of this title,

(C) the General Counsel or a respondent before the Board who files a petition under section 1341(c)(5) of this title, or

(D) the General Counsel or a respondent before the Board who files a petition under section 1351(c)(3) of this title.

The court of appeals shall have exclusive jurisdiction to set aside, suspend (in whole or in part), to determine the validity of, or otherwise review the decision of the Board.

**(2) Enforcement**

The United States Court of Appeals for the Federal Circuit shall have jurisdiction over any petition of the General Counsel, filed in the name of the Office and at the direction of the Board, to enforce a final decision under section 1405(g) or 1406(e) of this title with respect to a violation of part A, B, C, or D of subchapter II.

**(b) Procedures****(1) Respondents**

(A) In any proceeding commenced by a petition filed under subsection (a)(1)(A) or (B), or filed by a party other than the General Counsel under subsection (a)(1)(C) or (D), the Office shall be named respondent and any party before the Board may be named respondent by filing a notice of election with the court within 30 days after service of the petition.

(B) In any proceeding commenced by a petition filed by the General Counsel under sub-