



## Department of Energy

Washington, DC 20585

December 7, 1999

Mary Lou Blazek  
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Dear Ms. Blazek:

This letter is in response to your letter of October 7, 1999 to Secretary Richardson concerning reimbursing Hanford contractors for litigation costs and fostering a reprisal-free workplace.

The Department of Energy's (DOE) reimbursement of costs, including the costs of litigation, is governed by the specific terms of each contract and by general government contracting procedures. As with most cost-based Federal Government contracts, litigation expenses have been considered to be a cost of doing business, and therefore "allowable" expenses, unless senior management personnel of the contractor engaged in willful misconduct.

Over the past several years, DOE has made substantial changes to its contract provisions governing the reimbursement of litigation costs. For example, in current contracts DOE has broadened the unallowability provisions to include not just losses (including litigation expenses, attorneys fees, and settlements) that result from willful misconduct or lack of good faith, but also losses that result from "failure to exercise prudent business judgment" on the part of any of the contractor's "key" management personnel. Under these more stringent provisions, contractors have the burden of demonstrating to the Department that managerial willful misconduct, lack of good faith, or failure to exercise prudent business judgment was not the cause of the claim, if the contracting officer believes there is a reason to challenge the contractor's conduct. Where costs are allowable, the Department's Contractor Litigation Management program was established to oversee the reasonableness of costs and ensure that litigation is handled as efficiently as possible.

With regard to your concern about the litigation of whistleblower claims, DOE is working on a regulation that would generally prohibit reimbursement of litigation costs for whistleblower cases if there is an adverse determination against the contractor. On January 5, 1998 DOE published in the Federal Register a Notice of Proposed Rulemaking on "Costs Associated with Whistleblower Actions." Once finalized, this regulation would authorize contracting officers to disallow litigation costs after a contractor has been found liable in a whistleblower case. The regulation is also designed to encourage the use of alternative dispute resolution mechanisms to resolve cases before they get mired in administrative or judicial litigation, and at less cost. Although this regulation has not yet been finalized, since 1995 most DOE contracts have contained a negotiated provision similar to what would be required by the new regulation.

Another mechanism that we believe has reduced the number and costs of litigation cases is DOE's Office of Employee Concerns, which was established in September 1996 as part of former Secretary O'Leary's Whistleblower Initiative. There is an Office of Employee Concerns at each of the DOE Operations Offices and major field offices, including Richland, as well as at DOE's Headquarters. Some of the objectives of the Office of Employee Concerns are to "oversee and bolster employee concerns offices in the field" and "reach full, fair and final resolution of employee concerns, while involving both management and employees more directly in the process." In addition, DOE's Richland Operations Office requires that its major contractors have an employee concerns program.

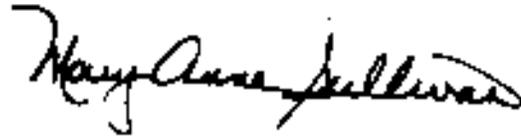
The Office of Employee Concerns Activity Reports for 1996, 1997 and 1998 show that these objectives are being met. During this period, over 1000 concerns, out of approximately 1500, were resolved by DOE field element employee concern programs nationwide. Many of the remaining concerns were transferred to the contractor or other offices in the Department such as Environment Safety and Health, Human Resources and Security. At Richland, for the same period, at least 85% of the concerns filed with the employee concerns program were closed each year.

In addition to the procedures and programs discussed above, the Department has an active Office of Dispute Resolution, pursuant to the Administrative Dispute Resolution Act. This office works with Headquarters and the DOE operations and field offices to encourage and convene mediations in all types of cases, including whistleblower and wrongful discharge matters. Numerous cases have been resolved through mediation, at an early stage and for minimal amounts of money. In addition to costing less, mediation is also an effective mechanism for addressing issues that create tension in the workplace because it gives the parties an opportunity to resolve differences more quickly and informally, which can result in employees working together more productively. We intend to continue to encourage the use of mediation as much as possible.

With respect to your call for DOE "to articulate a more definitive proposal leading to the development of a workplace infrastructure, which truly supports the goal of 'zero tolerance' for reprisals," you should be aware that in addition to the programs discussed above, DOE in 1992 promulgated regulations establishing a system for handling reprisal complaints by contractor employees. See 10 C.F.R. Part 708. These procedures are designed specifically to protect employees who believe they have suffered retaliation for disclosing information related to such matters as health or safety concerns, and to provide relief where appropriate. DOE is in the process of revising these regulations, see 64 Federal Register 12862 (March 15, 1999), to streamline the process and make it more responsive to the needs of both complainants and contractors.

I hope this helps you understand the efforts that have been taken and are underway to address the concerns described in your letter.

Sincerely,

A handwritten signature in cursive script that reads "Mary Anne Sullivan". The signature is written in black ink and is positioned above the printed name.

Mary Anne Sullivan  
General Counsel