Congress of the United States

COMMITTEE ON HOUSE ADMINISTRATION

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October 9, 2014

Barbara Sapin Executive
Director Office of Compliance
110 Second Street, S.E.,
Room LA 200
Washington, D.C. 20540-1999

Dear Ms. Sapin:

The Committee on House Administration submits the following comments and regarding the revised proposed amendments to the Procedural Rules of the Office of Compliance ("OO C") which were submitted for publication in the Congressional Record on September 9, 2014. The following comments are submitted in the Committee's capacity as a representative of House employing offices pursuant to 2 U.S.C. § 1383(b).

Introduction

The Committee welcomes a number of the changes the 00C has proposed to the Procedural RLiles ("Rules"). However, some of the proposed changes appear to exceed the OOC's authority and/or are inconsistent with the Congressional Accountability Act ("CAA"), and/or are one-sided and unduly benefit complainants to the potential detriment of employing offices. Our comments therefore include suggestions for proposed changes to the Rules intended to ensure the efficient administration of claims and fairness to all parties. Further, there are a number of instances where the language of the proposed changes to the Rules is unclear or ambiguous and we request clarification in these areas. Finally, during our review we noted minor typographical inconsistencies in the text of the proposed changes to the Rules and we have identified these issues in the comments below.

Comments

1. Filing and Computation of Time: pages 6-9. Sections 1.03(a). 1.03(a)(4), 1.03(b), 1.03(d). and 1.04(b).[1] We strongly applaud the OOC's decision to permit filing and service of documents by email. Because mail to House employing offices is delayed (and sometimes damaged) due to the irradiation process, combined with the fact that the federal courts have now moved to electronic filing, this change is a welcome modernization to OOC's administrative processes. To further enhance this amendment we propose that the OOC incorporate the additional changes discussed below.

    a. Clarify ambiguity in section 1.03(a)(4) regarding email time display. There is some ambiguity regarding the effective date of email service. For instance, the final sentence of section 1.03(a)(4) on page 8, states that when the OOC serves a document electronically, "the time displayed as sent by the Office will be used to show the time that the document was served." The term "the time displayed as sent by the Office" is ambiguous. For instance, suppose the OOC's email "displays" the time sent as 4:00pm on a Monday, but the recipient's email "displays" that the document was sent at 7:00 am Tuesday. In litigation, employing offices often see discrepancies between the time sent as displayed in the sender's email, and the time sent or received as displayed in the recipient's version of the email (which could be based on time zone differences, as well as other technical issues). If there is a dispute as to when a document attached to an email was served, a hearing officer could be shown two emails (one from the OOC or sender, and one from the recipient) with two different dates/times "displayed as sent." The proposed Rule does not provide a basis for the hearing officer to resolve the ambiguity. We suggest that this be clarified.

    b. Provide new Rule requiring prompt acknowledgement of receipt of documents served by email. One issue that often arises during pre-hearing discovery and motions practice involves pro se complainants (and occasionally represented complainants) claiming .

[1] Specific citations or references to the Rules in this letter are to the page numbers as listed on the version of the proposed Rules as identified on the OOC's website, as well as the section number(s) contained in the proposed

they have not received emails. This can be very problematic, particularly given the strict time deadlines for commencement of a hearing. For instance, if a hearing officer gives a complainant 15 days to oppose a motion to dismiss, the complainant can appear on the 16th day after having been served with the motion and state that he or she never received the document - which typically results in the complainant being given additional time to file an opposition, and thereby further delaying the proceedings. We have been informed that, on at least one occasion, when a complainant's representative regularly refused to acknowledge receipt of documents by email in what appeared to be an effort to manipulate the administrative process, a hearing officer ultimately ordered the complainant to affirmatively acknowledge receipt of all email from the employing office within 24 hours of receipt. We believe cases will proceed more efficiently if this were a standing rule applicable to all parties. Accordingly we propose a provision similar to the following be added to this proposed Rule.[2]

The acknowledgment of receipt would not change the effective date of service; however, it would permit the parties to attempt to resolve issues in a timely manner. For example, if such a rule existed, and the employing office or OOC did not receive an acknowledgment of receipt within 24 hours of sending a document by email, the OOC or the employing office could follow up promptly with the complainant to ensure that the email was received (e.g., that it had not gone unnoticed by the complainant or into the complainant's spam folder). This proposed acknowledgment requirement is not intended to be burdensome or to alter any time periods set forth in the Rules. We, therefore, suggest that the OOC add language to the new Rules similar to the following:

[2] The final clause of section 1.04(a) (formerly 9.01(a)) ("with receipt confirmed by electronic transmittal in the same format") has not been effective in all cases, particularly in those involving pro se complainants. We believe more specificity in this regard is warranted and request that the OOC adopt a new, explicit, and separate Rule requiring affirmative acknowledgment of receipt, particularly given that most service of documents now occurs by email.

"(a) Whenever the Office or a party serves a document or documents by email, the recipient(s) of the email must acknowledge receipt of the email containing the served documents) within one business day.

(b)Acknowledgment of receipt shall be accomplished by responding to the sender of the initial email containing the served document(s) with terminology such as "Receipt Acknowledged" or some other mutually- agreed upon equivalent and verifiable method of acknowledging receipt.

(c) A party who is unable to acknowledge receipt within one business day due to technical error, or other eodgent circumstances, shall acknowledge receipt as soon thereafter as reasonably practicable, and briefly explain the reason for the failure to acknowledge receipt within one business day.

(d) This Rule applies whenever the Office or a party serves one or more of the following documents by email: complaint or answer (or any other pleading, e.g., amended answer); Notice of End of Mediation; Certification of Official Record; order or decision of a Hearing Officer, the Executive Director, or the Board; motion, opposition, or reply (or any other motion, e.g., surreply); interrogatories, document requests, requests for admission, notice of deposition (and any responses or objections thereto or other discovery request or response); and any other document permitted or required to be served by these Rules.

(e) The failure of a recipient to acknowledge receipt of an email pursuant to this Rule shall have no effect whatsoever on the determination as to the timing or effectiveness of service under these Rules.

(f) A party that consistently fails to acknowledge receipt of documents served by email pursuant to this Rule shall, after appropriate admonishment from the Office or the Hearing Officer, be subject to appropriate sanctions. "

Size Limitations: page 9. Section 1.04(d). We recommend two changes to this provision. First, the Rule should make clear that block quotes in the main text and footnotes can be single-spaced, and that a filing may not be rejected because block quotes in the main text and/or footnotes are single-

spaced. Second, the proposed provision provides that a non-conforming filing may be rejected or the party may be permitted to refile at the "discretion" of the Hearing Officer, Board, or Executive Director. We have been informed that such discretionary rules are often applied very leniently to complainants and very harshly to employing offices. We suggest, therefore, that this provision be modified to delete the discretionary language and allow refiling in all cases of a non-conforming filing, or, alternatively, to provide clear guidance regarding how the discretion is to be exercised.

3. Typographical point: page 11. section 1.07(c). The term "hearing officer" in the final sentence should be appropriately capitalized consistent with all other references to Hearing Officer(s) in the Rules.

4. Maintenance of Confidentiality: page 12. section 1.08. The proposed Rules make a number of changes regarding confidentiality. We believe some of these changes are contrary to the CAA and others are one-sided to the detriment of employing offices.

    a. Waiver: page 13. section 1.08(e). This new provision states that participants may agree to waive confidentiality. There is no basis in the statute for such a waiver. Moreover, the language as written does not make clear that all participants must agree to waive confidentiality. This waiver provision should therefore be deleted from the Rules. If, however, the OOC determines that this waiver provision is appropriate to retain, it should expressly state that the agreement to waive confidentiality must be by all participants.[3]

    b. Asserting a claim for breach of confidentiality. The changes to the Rules regarding confidentiality are significant and exist in several disparate locations of the new Rules. As best we can tell, it appears that the OOC is proposing two ways for breach of confidentiality claims to be addressed — with the mediator (if the breach occurs during mediation), or with the hearing officer (if the breach of confidentiality claim is pursued to hearing). *See* page 23, section 2.04(k); page 43

[3] Under this Rule, participant is expressly defined to include the party, representative or witness. Presumably, then, this means that all parties, all representatives and all witnesses must be in agreement in order to waive confidentiality. If this is the intent, it should be made explicit in the

section 7.02(b)(5); and page 46, section 7.12(b). The difficulty with this approach is that it is unfairly one-sided. The reason for strict confidentiality in the statute is to benefit both complainants and respondents. Under this proposed change, a complainant could blithely, and without consequence, breach confidentiality the day mediation ends and then choose not to file a complaint with the OOC. Because this means there would be no proceeding before a hearing officer, there would be no mechanism for the employing office to assert a claim for breach of confidentiality under the new sections 2.04(k) or 7.12(b). The effect, therefore, is to give any employee a free pass to breach confidentiality after mediation if he or she chooses not to file a complaint. The OOC should provide a clear mechanism for either a complainant or an employing office to bring a claim for breach of confidentiality even when a complainant has not brought a complaint.

Former section 1.07(e), which allowed a claim for breach of confidentiality to be made to the Executive Director, but gave the Executive Director discretion to appoint a hearing officer to handle such a claim, has been deleted. Under that provision, employing offices were able to at least attempt to assert claims for breach of confidentiality, subject to the exercise of discretion of the Executive Director. Not only should former 1.07(e) be included in the new Rules, but employing offices should have the same right to have a confidentiality breach claim addressed, as complainants currently have. Accordingly, the Executive Director should be required to refer a breach of confidentiality claim to a hearing officer.[4]

[4] Should the OOC take the position that there is no provision in the CAA authorizing an employing office to bring a claim against a complainant, which is one possible reading of the Board's decisions in *Eric J.J. Massa v. Debra S. Katz and Alexis H. Rickher*, Case No.: 10-HS-59 (CFD), 2012 WL 1655280 (C.A.O.C. May 8, 2012) and *Taylor v. United States Senate Budget Committee*, Case No.: 10-SN-31 (CFD), 2012 WL 588440 (C.A.O.C. Feb. 14, 2012), the OOC should make this clear as the reason for its deletion of 1.07(e). The Committee strongly disagrees with this conclusion and believes that, just as the confidentiality obligations of the CAA clearly and unambiguously apply equally to employing offices and employees, so too should the ability to assert claims for breach of statutory confidentiality. The Committee further believes that a contrary reading of the statute, as appears to have been implicitly suggested in the above-

c. Limiting remedy for breach of confidentiality to procedural and evidentiary sanctions is inappropriate. The proposed Rules appear to eliminate all but procedural and evidentiary sanctions for breach of confidentiality. *See* page 39, section 5.04; page 13, section 1. 08(f); page 46, section 7.12(b). If that is the intent of the new Rules, then the effect is to make the penalty for breach of confidentiality nonexistent for a complainant who chooses not to file a complaint with the OOC (because no procedural or evidentiary sanctions would ever be applicable). The Committee requests that the OOC revise the proposed Rules to make clear that monetary damages may be awarded against both employing offices *and employees* for a demonstrated breach of confidentiality. There is, however, some ambiguity in this regard. The remedies for breach of confidentiality include the sanctions listed in section 7.02. *See* page 46, section 7.12(b). Because section 7.02(b)(1)(G) refers to monetary sanctions, it is at least arguable that a claim for monetary damages could still be brought for breach of confidentiality. Given the language in the other Rules limiting sanctions to "procedural and evidentiary" sanctions, however, the Rules should be clarified to expressly state that monetary sanctions are available for a breach of confidentiality pursuant to section 7.02(b)(1)(G).

5. Mediation does not bestow confidentiality to facts or evidence that exist outside of mediation: page 12. section 1.08(c). This section states that no communication "that occurs during counseling, mediation, and the proceedings" may be disclosed. We fully concur with this language. However, we believe this language needs the significant qualification that currently exists in section 1.07(d) ("… A participant is free to disclose facts and other information obtained from any source outside of the confidential

employing offices the ability to bring claims for breach of confidentiality against employees) is inconsistent with the purpose and intent of the confidentiality provisions of the CAA. If, however, the OOC has concluded that a statutory change to the CAA is necessary to ensure that independent breach of confidentiality claims may be brought by *both* employees and employing offices, please advise us of this conclusion and identify how the OOC would propose that the statute be amended to ensure such parity.

proceedings... . "). Without all of the qualifying language of former 1.07(d), the new Rule *could* be viewed as suggesting that anything that is revealed in the confidential proceedings automatically becomes cloaked with confidentiality, even if that very same information is equally available outside of the proceedings. It should be clear, for example, that if a party makes an admission in mediation, but the party has made the same admission in an email sent during employment and outside of the mediation, the latter admission is not confidential even though it has been repeated in the mediation. We believe the entire language of former 1.07(d) should be retained in the new Rules.

6. Mediators should not discuss substantive matters from mediation with the OOC: page 12. section 1.08(d). The proposed revision states "[t]hese rules do not preclude a mediator from consulting with the Office.. However, the CAA provides that "[a]ll mediation shall be strictly confidential." 2 U.S.C. § 1416(b). To permit the mediator to consult with the OOC regarding the substance of the mediation violates this principle and is inconsistent with the OOC's role as a neutral. Specifically, the OOC appoints the hearing officer to handle the subsequent complaint and the Executive Director rules on a number of procedural issues in any subsequent case (e.g., to extend the deadline for hearing from 60 to 90 days). Given the OOC's adjudicative role in the complaint process, allowing the mediator to consult with the OOC regarding substantive issues related to the mediation may negatively impact the OOC's neutrality, and/or the perception of the parties that the OOC is neutral.

7. Counseling must be on official form: page 16. section 2.03. Subsection (a) provides that a written request for counseling "should be on an official form." Because an employee's request for counseling is directly relevant to a federal court's jurisdiction of any subsequent claim, *see*, *e.g.,* 2 U.S.C. § 1408(a); *Taylor v. Office of Rep. John J. Duncan, Jr.,* Case No. 3:09—CV—318, 2011 WL 826170 (E.D. Tenn. Mar. 2, 2011), the OOC should require use of the official form. Thus, "should be on an official form" should be changed to "must be on an official form."

8. Counseling forms should be available to the employing office when. and only when, the employee elects to pursue mediation: page_16, section 2.03(e)(2). We fully agree that counseling is strictly confidential in accordance with the statutory requirement at 2 U.S.C. § 1416(a). However, if

a complainant, at the conclusion of counseling, chooses to pursue mediation, then the employing office should be aware of the claims asserted by the complainant in counseling.

Much of the time, the employing office has extremely limited information when it appears for mediation regarding what the employee claims is discriminatory or otherwise a violation of law. The form letter the OOC provides to the employing office contains very little information; indeed, one federal court found that the OOC notice provides only "a few lines on a notice and initials in a case number" and is "laconic." *Taylor v. Office of Rep. John J. Duncan, Jr.,* Case No. 3:09-CV-318, 2011 WL 826170 at *8, n.4 (E.D. Term Mar. 2, 2011). For an employing office to have only such limited information when it approaches mediation does not advance the presumed goals of the mediation process to resolve the dispute. We understand that oftentimes a complainant and/or his or her representative is disturbed to appear for the mediation and hear that the employing office is not aware of and has not received a copy of the information that the complainant had previously submitted to the OOC. As a result, it is not uncommon for complainants to become frustrated at the employing office's lack of knowledge so that the tone of the mediation is negatively altered and loses much of its effectiveness.
(This is particularly the case with mediations that occur outside of the metropolitan area, where the appointed mediator and counsel for complainants are typically unfamiliar with the CAA administrative process). To avoid this situation, we suggest that once a complainant has decided to pursue mediation and has, therefore, affirmatively decided to notify the employing office of the claim, there is no reason why the employing office cannot be made aware of the specific allegations of the complainant's claims by receiving a copy of any complaint documentation the complainant submitted in counseling. The employing office would, of course, be required to maintain the confidentiality of the complaint form and other documentation under Section 416 of the Act. Additionally, if, at the conclusion of counseling, the employee decided not to pursue the matter to mediation, then, of course, the employing office would not receive this information.

If the OOC has concluded that the full panoply of the information complainants submit to the OOC in counseling cannot be made available to the employing office once the employee elects mediation absent a statutory

OOC would propose that the statute be amended to allow such information to be shared with the employing office.

9. Time to elect mediation is statutory: page 20. section 2.04(b). Section 403 of the CAA provides that "[n]ot later than 15 days after receipt by the employee of notice of the end of the counseling period ... the covered employee ... shall file a request for mediation. .. ." The proposed change to section 2.04 provides that "[f|ailure to request mediation within the prescribed period may preclude the employee's further pursuit of his or her claim." The word "may" has been replaced with the word "will" and thereby purports to make discretionary what the statute makes mandatory. The Rule should follow the statute's mandatory command and continue to use the word **"win."**

10. Everything in mediation is confidential: page 21. section 2.04(f)(2).

The proposed change states that the mediation agreement will "define what is to be kept confidential during mediation." This suggests that only some parts of the mediation are confidential and, further, that defining what parts of the mediation are confidential is a matter for contractual agreement between the parties. This is inconsistent with the statutory requirement that "[a]ll mediation shall be strictly confidential." 2 U.S.C. § 1416(b). The statute does not permit the parties, the mediator, or the OOC to redefine or limit what aspects of the mediation are confidential and which are not. Accordingly, this proposed change should not be adopted.

11. Representatives at mediation: page 22. section 2.04(g). Proposed section 2.04(g) states that a representative may appear at the mediation only if they have actual authority to agree to a settlement agreement or immediate access to someone who does. As the OOC is aware, House employing offices may not agree to a settlement that involves payments from the judgment fund without obtaining the approval of both the Chair and Ranking Member of the Committee on House Administration. *See* House Rule X(4)(d)(2) ("An employing office of the House may enter into a settlement of a complaint under the Congressional Accountability Act of 1995 that provides for the payment of funds only after receiving the joint approval of the chair and ranking minority member of the Committee on House Administration concerning the amount of such payment"). The Committee on House Administration has its own procedures for approving settlements that would not permit an immediate approval as envisioned by the OOC's

proposed Rule. Therefore, this proposed change should be modified to make clear that the Chair and Ranking Member of the Committee need not be present for a mediation, nor must they be reachable by phone during the mediation.

12. OOC should not alter established practice by participating in mediations; page 22. section 2.04(g). The CAA has been in effect for nearly 20 years and it is our understanding that the OOC has never participated in a mediation involving a House employing office (apart from the limited circumstance when an OOC employee has been designated as the mediator). Accordingly, we are deeply concerned about the proposed language in this section stating that the OOC "may participate in the mediation process through a representative and/or observer." Absent a clearly-explained and justified rationale for effecting such a substantial change to the mediation process, this provision should be deleted. *See also* our Comment 6 above with respect to section 1.08(c) regarding how the OOC's neutrality, or perceived neutrality, would be compromised by permitting the OOC to have involvement in mediation. Furthermore, the effect of this change is to add yet another person to be present for the mediation. The OOC has not provided an explanation as to why the OOC believes expanding the group of participants (even to include an observer) is necessary or appropriate. Without clear justification for this proposed change, the Committee believes the mediation process should remain as it has for the past two decades - limited to the mediator, the parties, and their representatives.

13. Presumption regarding receipt of mediation notice: page 22. section 2.04(i). We welcome the OOC's decision to delete the "certified mail, return receipt requested" mode of service of the end of mediation notice. We understand that this requirement has been particularly problematic in a number of cases and has allowed some complainants to intentionally manipulate the timing of the CAA adjudicative process. To further alleviate the difficulties that frequently arise in this regard, we recommend that the OOC add a presumption to the new Rule, stating that the notice is presumed to have been received on the day it is sent by facsimile or email, or within 5 calendar days if sent by first class mail. The OOC could also add language permitting the employee to rebut this presumption through an affidavit signed, under penalty of perjury, stating the date of receipt and this would ameliorate any harsh results of adopting the presumption we recommend.

14. Time for issuance of Certification of Official Record: page 24. section 2.05(c). We suggest adding a time frame for issuance of the Certification of Official Record to the parties, such as within two business days after the OOC receives notice that a civil action has been filed in district court.

15. Notice of end of filing period. We have been informed that typically the employing office does not know exactly when the OOC has sent the end of mediation notice to the complainant and cannot appropriately determine when the 90-day time period for the complainant to file a complaint or civil action expires. Employing offices understandably desire to know definitively when the time for ~~fil~~ing has passed, and are often left guessing or estimating. There is no valid reason to deny this information or certainty to the employing office. If the OOC advises the employing office of the date and mode of transmission of the notice to the complainant, and adopts the above-referenced recommended presumption of receipt by the employee (Comment 13), that would resolve this issue. Alternatively, if the OOC decides not to adopt the presumption of receipt suggested at Comment 13, it should add a provision to the Rule stating that the OOC will, upon request of the employing office, identify in writing the date on which the OOC presumes a complainant received the end of mediation notice.

16. Subpart C - Compliance. Investigation, and Enforcement under Section 210 of the CAA (ADA Public Services) - Inspections and Complaints: pages 24-29. sections 3.01 - 3.10. Proposed Procedural Rules 3.01 through 3.10 are all grounded in the Board's conflation of the General Counsel's inspection authority under the ADA public access provisions of the CAA (Section 210) with that of its inspection authority under the Occupational Safety and Health Act ("OSHAct") provisions of the CAA (Section 215).

    Section (a) of Proposed Procedural Rule 3.02 states that section 210(f)(1) authorizes the General Counsel to:

> enter without delay and at reasonable times any facility or any entity listed in section 210(a)… to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any facility and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any covered entity, employee, operator, or

> agent; and to review records maintained by or under the control of the covered entity.

Yet, the text of Section 210(0(1) of the CAA is quite different:

> On a regular basis, and at least once each Congress, the General Counsel shall inspect the facilities of the entities listed in subsection (a) of this section to ensure compliance with subsection (b) of this section.

Thus, there is no independent "inspection authority" under the ADA provisions of the CAA, save those to conduct biennial inspections. The language referenced in Proposed Rule 3.02 is not found anywhere in section 210 of the CAA. Rather, this is the language describing the inspection authority of the Secretary of Labor under section 8 of the OSHAct, as incorporated in section 215(c)(1) of the CAA.[5] While the General Counsel may have such inspection authority under the OSHAct provisions of the CAA, there is no indication that such authority also extends to the ADA public access provisions of the CAA.

In addition, these procedural rules are based on the faulty assumption that the CAA authorizes "Requests for Inspections" by members of the public — regardless of whether or not they are qualified individuals with a disability.[6] There is no such authority anywhere in the ADA access provisions incorporated in the CAA.

[5] The Board has apparently taken the language of the procedural rules regarding inspections under section 215 of the CAA *(see* Subpart D of the OOC's current Procedural Rides - "Compliance, Investigation, Enforcement of Variance Process under Section 215 Of the CAA) and superimposed it on the requirements of Section 210, without explanation or justification.

[6] Section 3.03(a)(3) states that "any person" may "notify the General Counsel's designee, in writing, of any violation of section 210 of the CAA which he or she has reason to believe exist in the such facility." Similar language is found in Proposed Procedural Rule 3.09. As described in the Committee's Comments on the NPRM for the Board's Substantive Regulations (incorporated by reference herein), "[t]his means that if an individual were to become inspired to disrupt the work of the office of a Member of Congress, or a Senator, or a House or Senate Committee, all he or she would have to do is call the General Counsel's office and claim a violation of the ADA and request an inspection. Hopefully, the Board can see the fallacy and potential havoc that could be wrought if such a [rule] is adopted." *See* Committee Response to OOC NPRM for ADA Substantive

The procedures for members of the public to pursue a charge for an alleged violation of the public access provisions of Title II and Title III of the ADA are set forth quite clearly in Section 210(d) of the CAA. This section sets forth the process for *a qualified individual with a disability* to file a charge with the General Counsel against a covered entity for an alleged violation of the applicable public access provisions of the CAA. This process allows the General Counsel to conduct an investigation and/or refer the parties to mediation. This section also contemplates the ability of the General Counsel to file a complaint against a covered entity for submission to a hearing officer in accordance with section 405 of the CAA. Section 210 does *not* reference, let alone authorize, members of the public, *regardless of whether or not they are qualified individuals with a disability*, to file requests for inspection with the General Counsel.[7]

Accordingly, the Committee has concerns about the ultra vires expansion of the authority of the General Counsel through issuance of procedural rules. Therefore, the Committee recommends that Proposed Procedural Rules 3.01-3.10 be revised to contemplate the actual inspection authority and responsibility under Section 210(f)(1) of the CAA. In making this recommendation, the Committee also defers to other appropriate entities, such as the U.S. Capitol Police, to address any safety and security concerns posed by the Board's Proposed Procedural Rules (such as the Rules concerning security clearances, picture-taking, and the removal of documents from the facilities of covered entities).

17. Charge filed with the General Counsel: page 30. section 3.11. Section (c) of this Rule states that a charge "must be written or typed on a charge form available from the Office." This section then goes on to describe the specific requirements for the content of the charge. The requirement of the use of the Office form, coupled with the detailed requirements for the charge itself, directly contradict the language of Proposed Regulation 2.102(a) regarding the definition of a "charge" under section 210 of the CAA. Proposed Substantive Regulation 2.102(a) states that a "charge" means *"any written document* from a qualified individual with a disability .. which suggests or

[7] In addition, the language of Rule 3.03 detailing the requirements for a written "request for inspection" by a member of the public directly contradicts the requirements for how a member of the public may "file a charge" according to the Board's Proposed Substantive Regulations. Rule 3.03(a)(1) requires the reasons for the request to be "reduced to writing on a form available from the [OOC]" while Proposed Substantive Regulation 2.102(b) states that the General Counsel can file a charge by filing "any written document. .. that suggests or alleges that a covered entity denied [the filer] the rights and protections" enumerated in section 210(b)(1) of the CAA.

alleges that a covered entity denied that individual" the protections afforded under section 210 of the CAA (emphasis supplied). We suggest reconciling the Proposed Procedural Rule and the Proposed Regulation in such a manner as to provide qualified individuals with a disability clear direction regarding the manner for, and required content of, a charge filed with the General Counsel under section 210 of the CAA.

18. Service of charge or notice of charge: page 30. section 3.12. There is no explanation or discussion of what "law enforcement functions" are specifically referenced in this section, or how such functions could affect service of a charge. Accordingly, the Committee requests clarification of this term. In addition, this section states that the "notice" to the covered entity may remain anonymous. Yet, there is no discussion of if and how the General Counsel would verify that the charging party is a qualified individual with a disability, as required under section 210. The Committee recommends the Board address this issue.

19. Investigations by the General Counsel: page 31. section 3.13. The Committee is concerned over the language in this section stating that the General Counsel will "use other methods to investigate the charge as appropriate." Concerns over the assumption of such broad and non-specific authority by the General Counsel is addressed in the Committee's response to the Board's NPRM for its proposed Substantive Regulations. The Committee recommends that the Board provide a specific description of the "methods" referred to in this section to allow covered entities the opportunity to comment as appropriate. For example, these "methods" might raise issues of safety, security, and/or confidentiality, which could implicate the responsibilities of a number of legislative branch entities.

20. Complaint by the General Counsel: page 31. section 3.16. Section (a) of this proposed rule is based on Section 210(d)(3) of the CAA. Yet, this section states that the General Counsel may proceed with filing a complaint after completing its investigation and "where mediation under section 3.14, if any has not succeeded in resolving the dispute." The term "if any," however, does not appear in Section 210(d)(3). The Committee recommends that the Board clarify how it interprets this phrase in determining when the General Counsel may pursue a complaint.

21. Filing a motion to dismiss should suspend obligation to file an answer: page 38. section 5.01(g). One of the most welcome changes to the Rules is the OOC's adoption of a provision expressly allowing the filing of motions to dismiss. For the reasons explained in detail at Comment 34 below, however, the Rule should provide that the filing of a motion to dismiss

suspends the obligation to file an answer until 15 days after the motion to dismiss is denied.

22. Dismissal; pages 38- 39. section 5.03(f). The Rule should identify what factors a hearing officer must consider in determining whether to dismiss a complaint, with or without prejudice, when the complainant has withdrawn it or is allowed to refile the complaint.

23. Sufficient notice of representative's withdrawal, page 39. section 5.03(h). The Rule should define what period of time is sufficient notice of a representative's withdrawal.

24. Dis coyery suspended when motion to dismiss filed, page 39. section 6. 01(c)(1). The new Rule permits reasonable discovery to commence immediately and does not require the advance authorization of the hearing officer to engage in any form of discovery. The Rule should be modified to state that, when a motion to dismiss is filed, discovery is stayed until the hearing officer has ruled on the motion. *See* discussion at Comment 34 below.

25. Employees of employing offices: page 41. section 6.02(a). We suggest that the final sentence be revised to state: "Employing offices shall make reasonable efforts to make their management-level employees available for discovery and hearing without requiring a subpoena." This practice is more consistent with federal court practice and minimizes the likelihood that a non-management employee will associate any feelings of undue burden with the employing office. For instance, to require, as a command from the employer, that a non-management employee appear for a deposition requested by a complainant creates a risk that the employing office will be viewed negatively by the employee. Non-management employees should be subpoenaed unless the employing office agrees otherwise.

26. Suspension of discovery when a claim may be frivolous: page 43. section 7.02(b)(4). The addition of language authorizing the hearing officer to dismiss frivolous claims is also a welcome addition. This Rule should be modified to make clear that, when a respondent has moved to dismiss a claim on the grounds that it is frivolous, no answer is to be filed and no discovery may be taken unless and until the motion is denied. It is unduly burdensome to require a respondent to expend the time and resources to prepare and file

an answer and engage in discovery when a complainant has filed a frivolous claim.

27. Delete default language as penalty for breach of confidentiality: nagp. 44, section 7.02(b)(5)(F). We agree that judgment entered against a party breaching confidentiality can be an appropriate remedy. However, we question the use of the word "default." Typically, this term is used when a party has failed to respond to a complaint. Breaching confidentiality is not necessarily the same as failure to respond to a complaint; accordingly, we recommend that the word "default" be deleted.

28. Complainant must be present at hearing: page 45. section 7.07(f), If a complainant wishes to prosecute a claim against the employing office, the complainant should be required to appear at the hearing, just as the employing office is required to appear by having one of its employees or a Member present. To require an employee (or Member) from the employing office to modify their schedules and be away from the office in order to be present at the hearing, but not to require the same of the person bringing the claim is one-sided and unfair, particularly in those cases where the complainant's claim is not meritorious or arguably frivolous.

29. Typographical correction: page 47. section 7.13(d). The phrase "Hearing Office" should be "Hearing Officer."

30. Typographical correction: page 48. section 7.15(a). The word "judge" should be "Hearing Officer."

31. Timing for record to remain open: page 48. section 7.15(a). We request that the OOC identify what factors or guidance a hearing officer must follow in determining the amount of time that the record is to remain open.

32. Clarification requested: page 49: section 7.16(b)(3). We request that the OOC clarify what the phrase "or discretion presented on the record" means.

33. Define discretion and typographical correction; page 49: section 7.16(g). This language states that "the Hearing Officer may move to alter. . ." It is unclear to whom the hearing officer makes such a motion. This should be clarified. Additionally, there is a missing parenthetical in

34. Procedural Rules should provide additional direction for hearing officers. Since the enactment of the CAA nearly twenty years ago, a number of House employing offices have been parties to administrative trials before OOC hearing officers. Many hearing officers manage the pre-hearing discovery and motions process and the conduct of the hearings consistently, efficiently, and fairly. However, there have been unfortunate exceptions when a few hearing officers have not done so to the prejudice of one or both parties and the requirements and spirit of the CAA. The OOC's proposed revisions to the Rules contain language to address some of these concerns and we whole-heartedly welcome these changes *(e.g.,* page 49, section 7.16(b), requiring hearing officer decisions to contain a description of the evidence, findings of facts, etc.). However, we request that the OOC consider other issues that we believe should be addressed in the Rules to provide guidance to *all* hearing officers, and to ensure a consistent practice.

    a. Allow sufficient time to respond to motions. We are aware of instances where a complainant has filed a substantive written motion during the pre-hearing discovery, and the hearing officer required the employing office to respond in writing within a matter of hours.[8] Such a time frame is, absent extraordinary circumstances, inappropriate and unduly burdensome on employing offices. We recommend that a provision be added to the Rules stating that a hearing officer shall provide a party at least two business days to respond to a written motion. If a matter requires the immediate attention of the hearing officer, then the Rides should provide that the hearing officer will promptly conduct a telephonic conference with the parties, decide whether further written briefing is required, and then set a reasonable expedited briefing schedule.

    b. Adopt a rule that expressly permits the hearing to be opened for purposes of arguing a dispositive motion. The CAA expressly authorizes pre-hearing discovery and pre-hearing dismissal of complaints, as do the Rules.[9] We thus applaud the OOC's decision to propose

[8] We are not aware of a similar instance where a complainant was given only a matter of hours to respond to a written motion filed by an employing

[9] *See* 2 U.S.C. § 1405(b) ("[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"); 2 U.S.C. §1405(e) (authorizing reasonable pre-hearing

amending the Rules to expressly authorize the filing of motions to dismiss (page 38; section 5.01(g)), in addition to the already-existing rule authorizing the hearing officer to issue summary judgment to either party. Despite filing such motions, however, oftentimes the parties are required to expend significant time and expense engaging in discovery and preparing witnesses for hearing because there are hearing officers that inexplicably do not decide such motions until just before, or on the day of, the hearing. In these cases, although dismissal may ultimately be granted based on the motion, the parties have been forced to spend a great deal of unnecessary time and resources engaging in discovery and preparing for an administrative trial *while a potentially dispositive motion was pending*.

Other hearing officers appropriately address this timing issue by staying discovery while the motions are briefed and opening the hearing to hear oral argument on the dispositive motion (in order to comply with the 60/90 day hearing deadline under Section 405(d) of the CAA). Then, if the motion is granted, the case is dismissed without the need for the parties to engage in discovery and/or prepare an evidentiary hearing. If the motion is ultimately denied in whole or in part, the parties then have sufficient time to engage in discovery because the hearing officer continues and reopens the hearing at a later date.

This practice - opening the hearing to permit argument on a pretrial dispositive motion to comply with the timing requirements of section 405(d) - is useful because it allows the parties to avoid needlessly expending time and resources when a case is dismissed because it is frivolous or because it fails to state a claim. In the case of summary judgment, this practice allows the parties to avoid the expense of preparing for an evidentiary hearing (and, for employing offices, the burden of preparing witnesses, including Members) that may never take place.

As noted above, the lack of clarity in the Rules has led to a divergence of practice among hearing officers. The OOC should, therefore, clarify this matter for hearing officers and parties. Indeed one of the guiding

U.S.C. § 1405(d) (authorizing dismissal of a complaint "before a hearing"); current Procedural Rule section 5.03(d) (authorizing hearing officer to issue summary judgment).

principles of procedural rules is to minimize the element of surprise concerning the administrative process and to provide parties with written notice of what to expect. Unfortunately, because the current process is sometimes dictated by which hearing officer is assigned the complaint, the results are literally all over the map. We request that the OOC add provisions such as the following:

(a) *When a respondent files a motion to dismiss a complaint, all discovery is stayed pending the resolution of the motion. The Hearing Officer shall set a date to open the hearing within 60 days (or 90 days if an extension has been granted) under Section 405 of the Act. The hearing shall be opened for purposes of entertaining argument on the motion and/or ruling on the motion. If the motion is denied, the parties may begin discovery immediately, the respondent must file an answer within 15 days after the denial of the motion, and the Hearing Officer shall set a date for the resumption of the hearing at the conclusion of discovery.*

(b) *When either a complainant or a respondent, or both, express an intent to the Hearing Officer that they intend to file a motion for summary judgment, the Hearing Officer shall promptly set a date to open the hearing within 60 days (or 90 days if an extension has been granted) under Section 405 of the Act. The hearing shall be opened for purposes of entertaining argument on the motion and/or ruling on the motion. If the motion is denied, the Hearing Officer shall then set a date for the resumption of the hearing.*

Presumptive Limits on Length of Hearings. Most hearing officers attempt to conduct orderly and expeditious hearings. However, we have been advised that there have been some occasions where hearing officers allow relatively straightforward cases to extend for weeks at hearing - requiring staff and even Members to needlessly be away from the office and their legislative work for extended periods. This is inconsistent with the purpose of the CAA that the administrative trials be expedited. It is our understanding that evidentiary hearings for anything but the most complicated or unusual cases can be completed within a week. Therefore, we suggest that a rule be added stating that an evidentiary hearing shall be limited to the equivalent of five business days, but allowing for this period to be extended automatically by *& joint* request of the parties, or by

the Executive Director upon the request of either party or the Hearing Officer for good cause shown.

d. Direct hearing officers to *sua sponte* dismiss abated cases. When a Member of the House of Representatives leaves office, the Member's personal office ceases to exist and the case abates. *Hamilton-Hayyim v. Office of Congressman Jackson,* Case No. 12-C-6392, 2014 WL 1227243 (N.D. 111. Mar. 25, 2014); *accord Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259-260 (1927); *Bowles v. Wilke.* 175 F.2d 35. 38-39 (7th Cir. 1949). The CAA "demonstrates a congressional mandate ... to end any employment action liability of that respective Member's personal office" at the time the Member leaves office. *Hamilton-Hayyim,* 2014 WL 1227243 at * 2.[10] When a hearing officer becomes aware that a Member's personal office ceases to exist, the Rules should provide that the hearing officer will *sua sponte* dismiss the case.

35. When does OOC initiate settlement: page 56. section 9.02(b)(2). We request that the OOC clarify under what circumstances it would initiate settlement discussions once the mediation period has ended.

36. Settlement agreement submission: page 56. section 9.03(c). We suggest that the language stating that a "formal settlement agreement cannot be submitted" be modified to state "should not be submitted."

37. New rule when res iudicata principles mav apply. We have been informed that there are some occasions when an employee or former employee will file multiple claims against the same employing office

[10] Moreover, "Congress could have statutorily created successor liability in this instance. Congress, however, chose not to do so. That decision by Congress not to create successor liability or to continue liability in a former Member's "employing office" is logical. Congress certainly does not want to burden a new Member with

regarding the same or virtually the same conduct, despite the fact that a *hearing office?* may have previously dismissed such claims. When the employee subsequently files a duplicative claim, the employing office would naturally want to make the subsequent hearing officer or federal court aware of the prior resolution of the claims and argue that the claims should be dismissed based on res judicata. However, we understand that when employing offices have asked the OOC to make the prior decisions available for the employing office to submit to the hearing officer or a court to show that the claims have been previously litigated and determined, the OOC has refused to do so. This creates an unnecessary barrier for the proper adjudication of claims. Moreover, we see no valid reason for denying employing offices the ability to use information concerning the resolution or dismissal of prior claims in such cases. Accordingly, we request that the OOC adopt a new Rule providing that, when a complainant brings a subsequent claim involving the same or similar conduct or allegations that were the subject of a prior complaint, at the request of the employing office or the employee, the OOC will make the prior decision available.

You and your staff have clearly devoted much time and effort to these proposed amendments to the procedural rules, which the Committee greatly appreciates. As you reconsider your proposal in light of our and others' comments, we urge you to work more closely with all stakeholders to ensure the process can proceed as efficiently as possible.

We appreciate your consideration of this letter and welcome any discussion concerning our comments and suggestions.

Sincerely,

Candice S. Miller Chairman

Robert A. Brady Ranking