

May 10, 2019
Susan Tsui Grundmann
Executive Director
Office of Congressional Workplace Rights
110 Second Street, S.E., Room LA- 200
Washington, D.C. 20540-1999

RE: Comments on the Proposed Amendments to the Procedural Rules

Dear Ms. Grundmann,

The Library of Congress (Library) submits the following comments to the Office of Congressional Workplace Rights (OCWR) in response to the Notice of Proposed Rulemaking published in the Congressional Record on April 9, 2019.

Thank you for the opportunity to review and provide comments to the proposed rules.

Library Specific Comments

Section 4.04(d) Election of Remedies for Library of Congress Employees

Section 4.04 (d) of the proposed rules is inconsistent with section 401(d)(2) of the Congressional Accountability Act of 1995 Reform Act (CAA) (2 USC § 1401(d)(2)). Section 4.04(d) states that a Library claimant who initially files a claim with OCWR may “at any time *within* 10 days after a Preliminary Hearing Officer submits the report on the preliminary review of the claim” elect to bring the claim before the Library (emphasis added). However, the CAA states that a Library claimant who initially files a claim with OCWR may “at any time *before* the date that is 10 days after a hearing officer submits the report on the preliminary review of the claim” elect to bring the claim before the Library (emphasis added).

The rules limit the time period a Library claimant can switch from OCWR to the Library's process. Under the rules, a Library claimant can elect to switch to the Library's process only after the preliminary review report is submitted. The rules should be corrected to be consistent with the language in the CAA and clarify that a Library claimant, who initiates a claim in OCWR, can switch to the Library's process at any time until 10 days after the preliminary review report is submitted.

Section 4.06(d) Special Rule for Architect of the Capitol, Capitol Police and Library of Congress Employees.

Section 4.06(d) of the proposed rules is inconsistent with section 401(c) of the CAA (2 USC § 1401(c)). Section 4.06(d) of the proposed rules contains a special rule for Architect of the Capitol, Capitol Police, and Library employees. The rule states that OCWR's Executive Director may recommend that a claimant use "the grievance procedures referenced in any Memorandum of Understanding between the Office and the Architect of the Capitol, the Capitol Police, or the Library of Congress." However, in the CAA, this Special Rule applies only to the Architect of the Capitol and Capitol Police, not to the Library. In addition, the CAA does not require, and the Library does not have a memorandum of understanding with OCWR concerning grievance procedures. The rules should be amended to be consistent with the language of the CAA.

General Comments

Section 4.03 Confidential Advising Services

The records maintained by the confidential advisor should be the property of OCWR, not the confidential advisor. The confidential advisor should not have the authority to destroy records. The proposed rules state that the records may be destroyed in "appropriate circumstances." However, "appropriate circumstances" are not defined or described. The proposed rules would inhibit proper oversight of the confidential advising services and should be amended.

Section 4.08 Preliminary Review of Claims

The rules should clarify the standard of review that must be used by the preliminary hearing officer when conducting a preliminary review of a claim. Since the proposed rules do not address the standard of review, the preliminary hearing officer has the discretion to set the standard. This discretion will lead to inconsistent results. In addition, providing the standard of review will make the preliminary review process more transparent to both parties. The standard of review should be the same standard used in evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure (and applying relevant precedent such as the Supreme Court standards in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and precedent in the United States Court of Appeals for the District of Columbia Circuit).

The rules should also allow parties to request a reconsideration of the preliminary hearing officers' decision. In making a request for reconsideration, the parties should be permitted to submit in writing the reasons for requesting the reconsideration.

Furthermore, the rules should address split claims. An individual should not be allowed to file a civil action while continuing with OCWR's administrative process at the same time concerning a portion of the same claim.

Section 5.01(f) Answer

A respondent should have 15 days, not 10 days, to file an answer with OCWR. 10 days is not a sufficient amount of time to respond to a complaint. The rules should go back to the longer time period.

Section 6.01 Discovery

The Federal Rules of Civil Procedure should provide the standards for discovery. Specifically, the “proportionality” amendments to Rule 26 of the Federal Rules of Civil Procedure should be reflected in OCWR’s rules.

Section 7.07 Conduct of Hearing Disqualifying a Representative

The term “conflict of interest” is not defined in subsection “g.” The rules should provide a definition of this term.

Reference sections of the US Code

The proposed rules reference parts of the CAA, but do not give the corresponding section of the US Code. Reading the proposed rules is much easier if the Code section is referenced. For example, §1.02(s)(5) of the rules states that “employing office” means “the Library of Congress, except for section 220 of the Act.” It would be a useful addition for the rules to indicate that section 220 of the Act is codified as 2 USC § 1351. It is especially useful since the CAA amended portions of the Code, so having the Code reference aids in reading. The reference to the CAA would not need to be changed, but additional information added to the rules (for example, “. . . except for section 220 of the Act (2 USC § 1351)”). These Code references could be made throughout the document.

The Library appreciates your consideration of this letter and welcome any discussion concerning our comments.

Sincerely,

A handwritten signature in blue ink that reads "Elizabeth Pugh".

Elizabeth Pugh
General Counsel