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OGC 2019-220

VIA FACSIMILE

Susan Grundmann
Executive Director
Office of Congressional Workplace Rights
110 Second Street, SE
Room LA-200
Washington, DC 20540-1999

RE: Comments to Notice of Proposed Rulemaking - Amendments to Rules of Procedure

Dear Ms. Grundmann:

The United States Capitol Police, Office of the General Counsel hereby submit the following comments in accordance with section 303(b) of the Congressional Accountability Act ("CAA" or the "Act") regarding the Office of Congressional Workplace Rights ("OCWR") Notice of Proposed Rulemaking ("Notice") concerning Amendments to the OCWR Rules of Procedure. The Notice was published in the Congressional Record on April 9, 2019.

A. PROCEDURAL RULES INCONSISTENT WITH THE CAA AND IN EXCESS OF THE OCWR'S AUTHORITY UNDER THE ACT

As an initial matter, the OCWR has no authority under section 303 of the CAA to promulgate substantive requirements under the guise of procedural rules that are inconsistent with the mandates of the Act. Any such rule is invalid and void and must be deleted from the OCWR Rules of Procedure.

The following procedural rules proposed by the OCWR contradict the provisions of the CAA and should be deleted:

- **§ 9.01(c) Arbitration Awards.**

Section 9.01(c) provides that "[i]n arbitration proceedings, the prevailing party must submit any request for attorney's fees and costs to the arbitrator in accordance with the established arbitration procedures."

Section 225 of the CAA, expressly sets forth to whom attorney's fees and/or costs may be awarded and the requisite conditions of such an award. Specifically, section 225 provides:

> If a covered employee, with respect to any claim under this chapter, or a qualified person with a disability, with respect to any claim under section 1331 of this title, is a prevailing party in any proceeding under section 1405, 1406, 1407, or 1408 of this title, the hearing officer, Board, or court, as the case may be, may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under section 2000e-5(k) of title 42.

2 U.S.C. § 1361(a).

The OCWR's proposed rule conflicts with section 225 because it permits the award of attorney's fees and costs in a proceeding other than those described under section 1405, 1406, 1407, or 1408 of this title. The OCWR's proposed rule also contradicts section 225 because it permits an award to any "prevailing party," which is significantly broader than the CAA's mandate that only "a covered employee . . . [who] is a prevailing party" is entitled to attorney's fees and costs. The OCWR's proposed rule also conflicts with section 225 because it gives an arbitrator the authority to award attorney's fees and costs although section 225 expressly stipulates that only a hearing officer, the Board, or a court may award attorney's fees and costs.

- **§ 9.04(d) Backpay.**

Section 9.04(d) provides that "[w]hen the award or settlement specifies a payment as back pay, the gross amount of the back pay will be paid to the employing office and the employing office will then promptly issue amounts representing back pay (and interest if authorized) to the employee and retain amounts representing withholding and deductions."

Section 415(a) of the CAA provides in relevant part that "only funds which are appropriated to an account of the Office in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements under this chapter." 2 U.S.C. § 1415.

The OCWR's proposed rule conflicts with section 415 in that it requires an Employing Office, such as the USCP, to pay awards and settlements under the CAA. The CAA's mandate is clear: only section 415 funds appropriated to the OCWR's account may be used to pay such awards and settlements. In the scheme proposed by section 9.04(d), however, the Employing Office's appropriations, not the money appropriated under section 415, would be used to pay back pay awarded under the CAA because an Employing Office has the obligation to issue payment to the employee. An Employing Office has no statutory authority to accept section 415 funds from the OCWR, and, even assuming it did, an Employing Office also has no statutory authority to disburse section 415 funds it may receive.

During the OCWR's "Brown Bag Lunch" meeting on the topic of the proposed rules on April 24, 2019, OCWR personnel represented that the section 415 funds are a "permanent indefinite appropriation" by Congress to the Employing Offices and, as such, the Employing Offices may receive and disburse funds from the section 415 account held by the Treasury. However, the OCWR provides no appropriations law support for this conclusion. In addition, this claim is not supported by the plain language of the CAA, which specifies that the funds "are appropriated to an account of the Office" and defines "Office" as the OCWR. 2 U.S.C. §§ 1301(12), 1415. This claim is also undermined by the OCWR's acknowledgement that the OCWR, and not the Employing Office, is responsible for payments of awards and settlements other than those involving back pay under the Act.

- **§ 9.04(f) Tax Reporting and Withholding Obligations.**

Section 9.04(f) provides in relevant part that the OCWR is "not responsible for tax withholding or reporting" and states that "[t]o the extent that W-2 or 1099 forms need to be issued, it is the responsibility of the employing office submitting the payment request."

As already discussed, section 415 of the CAA appropriated funds for the payment of awards or settlements to an account of the OCWR. Section 9.04(f) permits the OCWR to circumvent certain tax reporting obligations it has upon payment as the entity in control of the section 415 account and place those obligations on Employing Offices, who are not responsible for the section 415 account and have no authority to disburse funds from the section 415 account. It is difficult to comprehend why the OCWR has not established a process for the payment of settlements and awards consistent with its statutory authority for such payment given that the authority has been in place since 1995.

- **§ 4.02(a) Authority for Inspection.**

Section 4.02(a) provides in relevant part that "[u]nder section 215(c)(1) of the CAA, upon written request of any employing office or covered employee, the General Counsel is authorized . . . to review records maintained by or under the control of the covered entity."

Section 215(c)(1) of the CAA confers no such authority upon the General Counsel. Indeed, section 215(c)(1) expressly limits the General Counsel's authority to those "granted to the Secretary of Labor under subsections (a), (d), (e), and (f) of section 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 657(a), (d), (e), and (f)) to inspect and investigate places of employment under the jurisdiction of employing offices." 2 U.S.C. § 1341(c)(1). Only section (c) of section 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 657(c)), which is *not* adopted under section 215(c)(1) of the CAA, provides authority for the review of records regarding occupational health and safety as part of an inspection. As this provision was not included among the authorities granted to the General Counsel, the OCWR may not grant the General Counsel such authority in contradiction of the CAA.

- **§ 4.07(a) Conduct of Inspection.**

Section 4.07(a) provides in relevant part that the General Counsel or the General Counsel's designee shall "indicate the scope of the inspection and the records specified in 4.02 which he or she wishes to review. However, such designation of records shall not preclude access to additional records specified in section 4.02."

As described above, section 215(c)(1) of the CAA confers no authority upon the General Counsel to review records. Consequently, the OCWR may not grant the General Counsel such authority in contradiction of the CAA.

B. PROCEDURAL RULES V. SUBSTANTIVE REGULATIONS

Additionally, procedural rules adopted by the OCWR in accordance with section 303 of the CAA may only "govern[ ] the procedures of the [OCWR], including the procedures of hearing officers." 2 U.S.C. § 1383. Such rules may not include regulations "issued for the implementation" of the CAA, which may only be issued in accordance with section 304 of the CAA, and require the OCWR Board of Directors to comply with section 304(b) of the Act.

Several of the procedural rules proposed by the OCWR clearly fall outside of the category of "rules governing the procedures of the [OCWR]," and, instead, establish substantive regulations for the implementation of the CAA.

Specifically, the following procedural rules proposed by OCWR appear to implement section 215 of the CAA, a section for which Congress expressly required the Board to issue regulations to implement in accordance with section 304. 2 U.S.C. § 1384(d):

- §3.02 Authority for Inspection.
- §3.04 Objection to Inspection.
- §3.05 Entry Not a Waiver.
- §3.07 Conduct of Inspections.
- §3.08 Representatives of Employing Offices and Employees.
- §3.09 Consultation with Employees.
- §3.10 Inspection Not Warranted; Informal Review.
- §3.11 Citations.
- §3.12 Imminent Danger.
- §3.13 Posting of Citations.
- §3.15 Informal Conferences.
- §3.22 Effect of Variances.
- §3.25 Applications for Temporary Variances and Other Relief.
- §3.26 Applications for Permanent Variances and Other Relief.
- §3.27 Modification or Revocation of Orders.
- §3.28 Action on Applications.
- §3.30 Consent Findings and Rules or Orders.
- §3.31 Order of Proceedings and Burden of Proof.

Because these rules exceed the OCWR's authority to promulgate procedural rules under section 303 of the CAA and circumvent the stringent process set forth under section 304 of the Act for the adoption of substantive regulations, they should not be adopted.

C. COMMENTS AS TO SPECIFIC PROPOSED PROCEDURAL RULES

- **§4.07(i)**

Section 4.07(i) provides, in part, that, "should the mediator deem it appropriate at any time, the physical presence in mediation of any party may be required."

Comment

Mediation is intended to be a voluntary process under the CAA Reform Act and the role of the mediator generally is that of a facilitator for reconciliation. This proposed rule would enable a mediator, who has no subpoena power, to mandate the attendance of a party in lieu of or in addition to the party's designated representative. The proposed rule is counter to the goals of mediation as it is the parties and their designated representatives, not a mediator, who are in the best position to determine whose attendance is necessary to reach a resolution. The USCP recommends that the language quoted above be deleted from section 4.07(i).

- **§4.08(a) Appointment of Preliminary Hearing Officer.**

Section 4.08(a) provides that "the Executive Director shall appoint a hearing officer to conduct a preliminary review of the claim or claims filed by the claimant. The appointment of the Preliminary Hearing Officer shall be in accordance with the requirements of section 405(c) of the Act."

Comment

The Preliminary Hearing Officer's role is to review claims for legal sufficiency, which requires legal expertise. The proposed rule does not set forth any basic qualifications that a Preliminary Hearing Officer must meet to be appointed. The absence of qualifications for the Preliminary Hearing Officer is in stark contrast to the basic qualifications set forth for the "Confidential Advisor" under section 4.03(a) of the proposed procedural rules. As the Preliminary Hearing Officer adjudicates the claimant's claims, and the decisions of the Preliminary Hearing Officer are not reviewable by any entity, it is imperative that the OCWR set threshold requirements that a Preliminary Hearing Officer must meet for consideration of appointment. The USCP recommends that consistent with section 405(c)(2)(A) & (B) of the CAA, section 4.03(a) set the following minimum qualifications for Preliminary Hearing Officers:

1) They must be a member (in good standing) of the bar of a State or the District of Columbia;
2) They must be 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; and
3) They must have expertise in technical matters relating to accessibility and usability by persons with disabilities or technical matters relating to occupational safety and health.

- **§ 4.08(c) Assessments Required.**

Section 4.08(c) provides:

> [I]n conducting a preliminary review of a claim or claims under this section, the Preliminary Hearing Officer shall assess each of the following:
>
> (1) whether the claimant is a covered employee authorized to obtain relief relating to the claim(s) under the Act;
>
> (2) whether the office which is the subject of the claim(s) is an employing office under the Act;
>
> (3) whether the individual filing the claim(s) has met the applicable deadlines for filing the claim(s) under the Act;
>
> (4) the identification of factual and legal issues in the claim(s);
>
> (5) the specific relief sought by the claimant;
>
> (6) whether, on the basis of the assessments made under paragraphs (1) through (5), the claimant is a covered employee who has stated a claim for which, if the allegations contained in the claim are true, relief may be granted under the Act; and

> (7) the potential for the settlement of the claim(s) without a formal hearing as provided under section 405 of the Act or a civil action as provided under [S]ection 408 of the Act.

Comment

Section 4.08(c) does not specify the standard that the Preliminary Hearing Officer should use to make the preliminary evaluation of the claims. The standard described under section 4.08(c) is most analogous to the standard applied by United States District Courts when considering a Motion to Dismiss under Rules 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the USCP recommends that section 4.08(c) specify that Preliminary Hearing Officers should apply the standard of review applicable under Rules 12(b)(1) and/or 12(b)(6) of the Federal Rules of Civil Procedure, including the applicable burdens of proof. By specifying the standard, the Preliminary Hearing Officers may rely upon guidance from the OCWR Board of Directors and the federal district courts adjudicating Motions to Dismiss. Further, setting a specific standard eliminates arbitrariness and ensures Preliminary Hearing Officers are consistently applying the same standard to all claims they adjudicate in fairness to the parties.

Section 4.08(c) also is silent as it concerns the information or documents the Preliminary Hearing Officer reviews in connection with his or her evaluation of the claims. To ensure consistency as to all Preliminary Hearing Officer's evaluation, the USCP recommends either that section 4.08(c) limit the Preliminary Hearing Officer's review to only the claim form completed by claimants or that the parties be permitted to submit briefs advocating for or against dismissal of the claim(s).

- **§4.08(e) Report on Preliminary Review.**

Section 4.08(e) states:

> Except as provided in subparagraph (2), not later than 30 days after a claim form is filed, the Preliminary Hearing Officer shall submit to the claimant and the respondent(s) a report on the preliminary review. The report shall include a determination whether the claimant is a covered employee who has stated a claim for which, if the allegations contained in the claim are true, relief may be granted under the Act. Submitting the report concludes the preliminary review.

Comment

Section 4.08(e) does not specifically indicate whether litigation, such as the exchange of discovery or other briefing, may proceed during the pendency of the Preliminary Hearing Officer's assessment of the claim(s) and release of a report on the preliminary review. Proceeding with litigation before a preliminary review of the claim(s) has occurred and the claim(s) has been determined actionable would be inefficient and wasteful of taxpayer money. The USCP recommends including language that clarifies that litigation is stayed pending the completion of the preliminary review and release of the report by the Preliminary Hearing Officer.

- **§4.08(f) Effect of Determination of Failure to State a Claim for which Relief may be Granted.**

Section 4.08(f) states:
(1) If the Preliminary Hearing Officer's Report under subparagraph (e) includes the

determination that the claimant is not a covered employee or has not stated a claim for which relief may be granted under the Act:

(A) the claimant (including a Library claimant) may not obtain an administrative hearing as provided under section 405 of the Act as to the claim; and

(B) the Preliminary Hearing Officer shall provide the claimant and the Executive Director with written notice that the claimant may file a civil action as to the claim in accordance with section 408 of the Act.

(2) The claimant must file the civil action not later than 90 days after receiving the written notice referred to in subparagraph (1)(B).

Comment

Section 4.08(f) fails to address the situation in which a claimant files multiple claims, for which the Preliminary Review Officer determines the claimant has not stated a claim for which relief may be granted under the Act as to some of the claims, but determines that other claims are actionable. As section 4.08(f) is currently written, it would appear that a claimant could file a civil action in the United States District Court for the claims deemed not actionable and proceed to an administrative hearing before an OCWR Merit Hearing Officer on the claims the Preliminary Review Officer deems actionable, thereby utilizing both the judicial forum and administrative forum to litigate over the same set of facts. The likelihood of this outcome is great given that many claimants assert multiple claims arising from the same factual circumstances. This would lead to two separate bodies making factual determinations that could potentially contradict one another and to numerous inefficiencies that arise when litigating in two different forums.

To avoid separate litigation arising from the same factual dispute, the USCP recommends that section 4.08(f) specify that if the Preliminary Hearing Officer's report under subparagraph (e) includes the determination that the claimant is not a covered employee or has not stated a claim for which relief may be granted as to any claim asserted, the claimant either may not obtain an administrative hearing as provided under section 405 of the Act as to any claim, or may obtain an administrative hearing as to claims the Preliminary Hearing Officer's report deemed actionable only if the claimant waives his or her right to file a civil action as to any claim in accordance with section 408 of the Act.

- **§ 4.09(d)(1) Answer.**

Section 4.09(d)(1) provides, in part, that: "Within 10 days after the filing of a request for an administrative hearing under subparagraph (a), the respondent(s) shall file an answer with the Office and serve one copy on the claimant. Filing a motion to dismiss a claim does not stay the time period for filing the answer."

Section 5.01(f) provides, in part, that: "Within 10 days after receipt of a copy of a complaint or an amended complaint, the respondent shall file an answer with the Office and serve one copy on the General Counsel. Filing a motion to dismiss a claim does not stay the time period for filing the answer."

Comment

Section 5.01(f) of the 2016 Procedural Rules provides that a Respondent must file an answer within 15 days after receipt of a copy of a complaint or an amended complaint. The Proposed Rules Sections 4.09(d)(1) and Section 5.01(f) changes the filing of an answer within 10 days. The USCP recommends that Sections 4.09(d)(1) and Section 5.01(f) provides that a Response must file an answer within 15 days.

- **§ 4.10(d) Withdrawal of Claim.**

Section 4.10(d) provides that "[a]t any time, a claimant may withdraw his or her own claim(s) by filing a notice with the Office for transmittal to the Preliminary or Merits Hearing Officer and by serving a copy on the respondent(s). Any such withdrawal must be approved by the relevant Hearing Officer and may be with or without prejudice to refile at that Hearing Officer's discretion."

Comment

Section 4.10(d) does not provide any limitations for the refiling of claims withdrawn without prejudice. The USCP recommends that section 4.10(d) specify that claims may only be refiled if the refiling occurs within 180 days from the date of the alleged violation.

- **§ 5.02 Appointment of the Merits Hearing Officer.**

Provides that the "Executive Director will appoint an independent Merits Hearing Officer, who shall have the authority specified in subparagraphs 5.03 and 7.01(b) of the Rules below."

Comment

The Merits Hearing Officer's role is to make factual findings, evidentiary rulings, and a legal conclusion as to whether the claimant has shown a violation of the Act, which requires legal expertise. The proposed rule does not set forth any basic qualifications that a Merits Hearing Officer must meet to be appointed. The absence of qualifications for the Merits Hearing Officer is in stark contrast to the basic qualifications set forth for the "Confidential Advisor" under section 4.03(a) of the proposed procedural rules. As the Merits Hearing Officer adjudicates the claimant's claims, it is imperative that the OCWR set threshold requirements that a Merits Hearing Officer must meet for consideration for appointment. The USCP recommends that consistent with section 405(c)(2)(A) & (B) of the CAA, section 5.02 set the following minimum qualifications for Merits Hearing Officers:

1) They must be a member (in good standing) of the bar of a State or the District of Columbia;

2) They must be 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; and

3) They must have expertise in technical matters relating to accessibility and usability by persons with disabilities or technical matters relating to occupational safety and health.

- **§ 6.01 Discovery.**

Section 6.01 provides, in part, that "[d]iscovery is the process by which a party may obtain from another person, including a party, information that is not privileged and that is reasonably calculated to lead to the

discovery of admissible evidence, to assist that party in developing, preparing and presenting its case at the hearing."

Comment

The proposed language of section 6.01 is based on an outdated discovery standard that has been updated in the Federal Rules of Civil Procedure. The USCP recommends that section 6.01 be updated to reflect the new standard set forth by Rule 26(b) of the Federal Rules of Civil Procedure. If the USCP's proposal is adopted, section 6.01 would read:

> Discovery is the process by which a party may obtain from another person, including a party, information that is not privileged and that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

* * * * *

Thank you for the opportunity to provide comments as to the proposed procedural rules. We hope that the OCWR considers our recommendations and continues to work with Employing Offices to achieve the common goal of protecting congressional employees' workplace rights in a fair and equitable manner and consistent with the provisions of the CAA.

Respectfully submitted,

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