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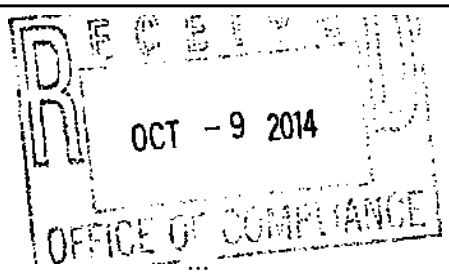
Architect of the Capitol
U.S. Capitol, Room SB-15
Washington, DC 20515
202.228.1793

United States Government

MEMORANDUM



October 9, 2014

Barbara Sapin
Executive Director
Office of Compliance
110 Second Street, SE
Room LA-200, John Adams Building
Washington, D.C. 20540-1999

Subject: Comments on Proposed Amendments to the Office of Compliance (OOC) Rules of Procedure Notice of Proposed Rulemaking (Proposed Rulemaking)

Dear Ms. Sapin:

I provide the following comments on behalf of the Architect of the Capitol (AOC) in response to the Proposed Rulemaking published in the Congressional Record on September 9,2014.

§ 1.03(a) - Filing and Computation of Time. Allowing the Board, Hearing Officer, Executive Director and General Counsel to determine the method by which documents may be filed in a particular proceeding "in their discretion" is overly broad and overreaches. Please clarify whether there will be different methods used for filing in the same case. With respect to time allowance for delivery, please explain whether five (5) additional days will be added no matter the type of service and whether the OOC will inform the opposing party of the prescribed dates for a response.

§ 1.07(a) - Designation of a Representative. The requirement that only one person may be designated as a representative is problematic since there have been situations when- more than one attorney has represented both the employing offices and employees. For example, what if an employee were represented by out of state counsel who could not fly in for depositions or hearings? Would local counsel be permitted? What if the case were so large that it required more than one firm? Perhaps the limitation should be that a party may have only one representative for point of contact purposes with the OOC.

§ 1.07(c) - Revocation of a Designation of Representative. A time limit should be imposed for a party to designate a new representative.

§ 1.08-Confidentiality. Communications between attorneys and clients should never amount to a confidentiality breach absent a protective order. With the deletion of the "Breach of Confidentiality Provisions" section, there is no timeframe listed for when a

party can claim a confidentiality breach. The OOC should institute the previous requirement.

§ 2.03 - Counseling. The employing office should receive the request for counseling once an employee files a complaint with the OOC.

§ 2.03(d) - Overview of the Counseling Period. The strict confidentiality provision discussed in this section should refer to the confidentiality provisions described in §§ 2.03(e)(l)-(2) and § 1.08. In addition, the text "should be used" should be deleted and replaced with the word "shall" so that the counseling period only pertains to the enumerated items.

§ 2.03(e) - Confidentiality and Waiver. Once a complaint is filed, the request for counseling form should be made available to the employing office. This section appears to make the request for counseling non-discoverable and that would have the effect of precluding the employing office from making jurisdictional arguments.

§ 2.03 (m)(l) - Employees of the Office of the Architect of the Capitol and Capitol Police. Since the Executive Director already has the ability to recommend the use of an internal process to an employee, the text "in his or her sole discretion" seems unnecessary.

§ 2.03(m)(4) - Notice in Final Decisions when There Has Been a Recommendation bv the Executive Director. With respect to grievance procedures, please clarify what the term "final decision" refers to since it is not clear based on recent events.

§ 2.04 - Mediation. A mediator should not be allowed to demand the physical presence of any party. Please define the term "good cause" in § 2.04(b) and discuss to whom and how it is shown. In addition, with respect to § 2.03 (k) for violation of confidentiality in mediation, a time limit should be established in which to file a violation.

§ 2.06 - Certification of the Official Record. Once the complaint is filed, the request for counseling as well as the "Certification of Official Record" should be made available. This section as written only provides dates, it does not provide information about what claims the employee sought in counseling.

§ 3.02(a) - Authority for Inspection. Only covered employees and entities, "not operators or agents," should be questioned during inspections and investigations. In addition, only records "maintained" by covered entities, not under the "control" of such entities, should be reviewed. These comments should be applied wherever these phrases are used throughout the proposed rules

S 3.03(a)(2) - Members of the Public. The inspections themselves are not limited to the matters referred to in the notice. This seems overbroad and defeats the idea of notice itself if inspections are open to all possible areas. As a result, the inspections should be limited to items in the notice.

§ 3.04 - Objection to Inspection. Only covered employees and entities, not operators or agents, should be questioned during inspections and investigations.

§ 3.07(a) - Conduct of Inspections. The following sentence is overly broad and should be deleted for reasons discussed above pertaining to § 3.02(a): "However, such designation of records shall not preclude access to additional records specified in section 3.02." Again, only covered employees and entities, not operators or agents, should be questioned during inspections and investigations.

§ 3.08(a) - Representatives of Covered Entities. The covered entity should be able to determine the representatives necessary for the inspection and these persons should be automatically permitted, particularly since the inspection may include "any occupational safety or health standard promulgated by the Secretary of Labor under Title 29 of the U.S. Code." A reasonableness standard should be applied when the General Counsel's designee is considering denying the right of accompaniment to any person whose conduct is thought to be interfering with a fair and orderly inspection.

§ 3.10 - Inspection Not Warranted. Informal Review. A timeframe should be instituted for a period when the General Counsel is affirming, modifying, or reversing a designee's determination and furnishing the complaining party and covered entity with written notification of a decision. If the General Counsel's designee determines that an inspection is not warranted because certain requirements are not met, such determination should be made with prejudice to any other filing alleging the same set of facts.

§ 3.13 - Investigations by the General Counsel. A timeframe should be established in which the General Counsel investigates a charge alleging violations of the CAA. Please clarify what types of "other methods" will be used to investigate a charge.

§ 4.02(a) - Authority for Inspection. Please revise to read, ".. ..the General Counsel is authorized, upon notification to the appropriate employing office(s), to enter without delay and at reasonable times,...". Transparency and collaboration are extremely important in these instances. Employing offices require notification of investigations because employees will be contacted and lack of management awareness results in unintended confusion and conflict. In addition, employing offices require opportunity to participate in site inspections to ensure operational awareness, access, inspector safety (in hazardous areas), and understanding of findings. Notification does not have to be complicated or protracted. Finally, please strike the definition of "place of employment" and reinstitute the original text throughout the proposed rules as the new definition is overly broad.

§ 4.03(a)(1) - Requests for Inspections by Employees and Covered Employing Offices. Please revise ".. .no later than at the time of inspection,..." to include the OOC's standard process of providing advance notice and scheduling an opening conference. Notification and opening conferences are important for transparency, coordination, AOC support and response coordination and overall process efficiency and effectiveness.

§ 4.06 - Advance Notice of Inspections. This section does not reflect the OOC's current, collaborative practice, a practice that has been developed over time in close coordination with a number of covered employing offices to include the AOC. Please align to reflect current OOC practices of notification and coordination by indicating that a lack of notification is only under a limited circumstance. Transparency and collaboration are extremely important in identifying and resolving safety concerns in the most expeditious manner possible.

§4.11 - Citations. Please revise to reflect the actual practice. The OOC rarely issues citations and does not issue notices of de minimis violations. Please include the other processes the OOC uses such as Serious Deficiency Notices, OSH Case reports, and inspection findings reports. In addition, the AOC would like the opportunity to work jointly with the OOC in consultations with the Occupational Safety and Health Administration (OSHA) when there are significant differences in technical interpretation of OSHA regulations. In the past, the OOC and AOC consulted OSHA separately and were not able to attain a common technical understanding. Furthermore, OSHA's past practice was to decline to consult with AOC on any matter under citation. The AOC would like to reach a true common technical understanding when differences arise.

§ 4.12 - Imminent Danger. Please add the OOC's current Serious Deficiency Notice.

§ 4.14 - Failure to Correct a Violation for Which a Citation has been Issued: Notice of Failure to Correct Violation: Complaint. The notification process for the failure to correct a violation should not be optional, notification should be required prior to going to complaint level. The AOC requests that the OOC provide hearing officers with technical experience for complex technical matters.

§ 4.25 - Applications for Temporary Variances and other Relief, and § 4.26 - Applications for Permanent Variances and other Relief. The OOC has used the citation Request for Modification of Abatement process to determine equivalent levels of protection and typically has discouraged variance submittals for citations. Please include the citation Request for Modification of Abatement process in the procedural rules.

§ 5.01(b)(1) - When to File. Please delete the following as it is unfair to the employing office and places the Executive Director in the position of giving legal advice to the complainant: "In cases where a complaint is filed with the Office sooner than 30 days after the date of receipt of the notice under section 2.04(i), the Executive Director, at his or her discretion, may return the complaint to the employee for filing during the prescribed period without prejudice and with an explanation of the prescribed period for filing."

§ 5.02 - Appointment of the Hearing Officer. - The OOC does not appear to be appointing hearing officers on a rotational or random basis as required by 2 U.S.C. § 1405(c)(1). It appears that the same hearing officer is often appointed to hear multiple cases filed by the same covered employee, in contravention of the statutory requirement of a rotational or random basis. While 2 U.S.C. § 1405(c)(1) says that hearing officers

may be chosen based on "specialized expertise" needed for a particular matter, this is reasonably interpreted to refer to expertise in a particular area of law and not "specialized expertise" in hearing cases filed by particular litigants.

§ 5.03(f) - Withdrawal of Complaint bv Complainant. If a withdrawn complaint is approved by a hearing officer, it should be with prejudice so the employee cannot refile.

§ 5.03(g) - Withdrawal of Complaint bv the General Counsel. If the General Counsel withdraws his complaint after the opening of the hearing, the hearing officer should approve such with prejudice.

§ 6.01 - Discovery and Subpoenas. Please clarify the ramifications for not complying with Discovery Procedural Rules.

§ 6.01(b) - Initial Disclosure. An employing office should not be required to turn over witness lists and discovery documents without a request. This seems to benefit the complainant and is an unfair burden to the employing office. In addition, 14 days is too soon in the process to provide the contact information of each individual likely to have discoverable information because it may not be known this early in the process.

§ 6.02(a) - Authority to Issue Subpoenas. The AOC respectfully requests this section be deleted. In the alternative, the AOC asks that the employing office only be required to make available witnesses under the AOC's control during actual work hours and work shifts on the day of the hearing. Subpoenas are used for a reason, as are the provisions for quashing the same.

§ 7.13(d) - Hearing Officer Action. The Board should retain jurisdiction to decide whether an issue is appealable.

§ 7.15(a) - Closing the Record of the Hearing. The AOC objects to allowing documents to be submitted after the end of the hearing. In addition, the word "judge" should be replaced with "hearing officer."

Overall comment: The use of "discretion" and "sole discretion" throughout the proposed rules is overly broad and should be deleted or narrowly tailored to fit each specific situation.

The AOC respectfully requests consideration of the above comments. If there are any questions, please feel free to contact me by electronic mail at ibaltimore@aoc.gov.

Sincerely,

Jason Baltimore General Counsel