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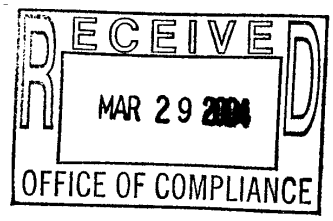

VIA HAND DELIVERY

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Re: Comments to Second Notice of Proposed Procedural Rule Making

Dear Mr. Thompson:

The Office of the Senate Chief Counsel for Employment submits the following comments to the Second Notice of Proposed Procedural Rule Making.

§1.03 Filing and Computation of Time

(a) Method of Filing

The ability to file documents with the Office of Compliance ("the OC") by electronic transmittal is a useful alternative but should be authorized only if the OC implements appropriate security measures to safeguard the confidentiality of electronically submitted documents. Further, the OC should propose rules that specify which documents may be submitted electronically and any requirements for the submission (*e.g.*, requiring portable document format (pdf) to ensure that the documents are not modified after filing). This would eliminate burdening the parties with making a separate request every time they wish to submit a document by electronic means and the uncertainty of whether their request will be approved.

The proposed rule should address how receipt of electronic filings will be confirmed or what happens if there is a technical problem that prohibits the submission of a document by electronic means or the submission is interrupted and not completely received.

2.03 Counseling

The employing office should be provided with the request for counseling when the employee proceeds to mediation. Because the CAA is a waiver of sovereign immunity, the conditions on which Congress waived its immunity must be strictly complied with. One such condition is that the employee must exhaust the administrative process with respect to all of his/her claims. The employing office has the right to assert a defense if the employee fails to exhaust the administrative process. The employing office cannot know, however, whether the claims the employee addressed in mediation and/or litigation are the same as those raised in counseling unless the employing office receives a copy of the request for counseling at the time the employee requests mediation. Accordingly, the rule should state that the employing office will receive a copy of the written request for counseling when/if the employee proceeds to the mediation stage. Such a provision would be consistent with the CAA's confidentiality provision for two reasons. First, section 416 of the CAA provides only that the "counseling" of the employee shall be strictly confidential; the CAA does not provide that the request for counseling shall be confidential. The terms "counseling" and "request for counseling" are not synonymous. Second, the employing office has a due process right to know what claims the employee is asserting against it and to attempt to mediate those claims. In more than one case, an employee has asserted a claim during the litigation stage that the employee never expressly raised during mediation but claimed to have raised during counseling. If the employing office does not receive the request for counseling, the employing office has no means of ensuring that the conditions of the waiver of sovereign immunity were met.

2.04 Mediation

(e) Duration and Extension

The phrase "joint written request of the parties" in subparagraph (2) is ambiguous in that it is unclear whether both parties must sign the request. Requiring both parties to sign the written request could cause unnecessary delays, particularly when a party does not have ready access to a facsimile machine and the mediator is unreachable, which sometimes occurs. In such circumstances, it has been common practice for the employing office to submit the written request for an extension to the Executive Director, with the representation that both parties have agreed to the extension. The ability to continue this practice benefits both the employing office and complainants.

2.06 Filing of Civil Action

Proposed rule 2.06 (c) is a substantive, not procedural, rule. As such, the rule exceeds the OC's authority; section 303 (b) of the CAA limits the Executive Director to issuing procedural rules for the OC and the hearing officers.

Further, proposed rule 2.06 (c) attempts to allow the OC to control the actions of litigants in federal district court when the OC no longer has jurisdiction of the matter. The Federal Rules of Civil Procedure, not the rules of the OC, govern federal court litigants. Also, because proposed rule 2.06 (c) exceeds the OC's authority and imposes a requirement in a case over which the OC has no jurisdiction, the OC is powerless to impose any sanction for violation of the rule.

Moreover, Rule 1.6(a) of the Rules of Professional Conduct for the District of Columbia mandate that an attorney "shall not" reveal a confidence or secret of a client. Client confidences include all information gained in the course of the professional relationship that the client requests be held inviolate or the disclosure of which would be embarrassing or detrimental to the client. Such confidences include public documents such as court files and the fact that one's client is involved in litigation. Further, the duty of confidentiality "exists without regard to the nature or source of the information or the fact that others share the knowledge." Rules of Prof. Conduct, Rule 1.6, Note 6. Accordingly, absent party consent, an attorney would breach a client's confidences by, and could be sanctioned for, disclosing that the client is a party to litigation. *See Lawyer Disciplinary Bd. v. McGraw,* 461 S.E.2d 850, 859 (Sup. Ct. App. W.Va. 1995) (an attorney's duty to protect confidential information "is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other sources available for such information, or by the fact that the lawyer received the same information from other sources") (citation omitted); *Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth,* 686 A.2d 755, 758 (Sup. Ct. N.H. 1996) (an attorney's duty to protect confidential information "does not disappear simply because portions of that information have been included in public documents or discussed in public forums"); *X Corp. v. Doe,* 805 F. Supp. at 1309 (the duty of confidentiality exists without regard to the fact that others share the knowledge).[1] The OC does not have the authority to supercede the Rules of Professional Conduct by requiring the disclosure of client confidences.

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[1] Each of these cases involved a duty of confidence rule identical or similar to Rule 6 of the Rules of Professional Conduct for the District of Columbia Bar.

§4.16 Comments on Occupational Safety and Health Reports

The proposed rule states that it applies to "any report authorized under section 215(c)(1) or 215(e)(2) of the Act that is intended by the General Counsel for general public distribution. . . ." Section 215(c)(1) does not authorize the preparation or distribution to the general public of any reports. Section 215(c)(1) provides authority only for the General Counsel to conduct inspections and investigations. The proposed rule, therefore, seeks to create a substantive rule. The OC has no authority to issue substantive rules under the procedures the CAA provides for issuance of procedural rules.

Further, although section 215(e)(2) authorizes the preparation of a report based on statutorily mandated periodic inspections, the statute limits distribution of that report to "the Speaker of the House of Representatives, the President *pro tempore* of the Senate, and the Office of the Architect of the Capitol or other employing office responsible for correcting the violation. . . ." Again, the OC seeks to expand its statutorily conferred powers, and this cannot be accomplished through procedural rulemaking.

In addition, the proposed rule does not specify how the report will be transmitted to the employing office for comment. Given that mail security procedures within the Capitol complex can cause substantial delays, an employing office's ability to comment within the specified period may be substantially impaired. The rule should specify the manner of transmission of the report to the employing office.

Further, the Board's attempt to empower itself as the final arbiter of whether information is released to the public is beyond the powers Congress granted it. The lack of appeal rights is particularly troublesome when security sensitive information is at issue.

§7.02(a) Sanctions

The CAA neither authorizes the hearing officer to impose sanctions on a representative nor provides a means for payment of such sanctions. Subsection (a) is not a rule regarding the procedures of the Office or of the hearing officer; rather, it is a substantive change to the rules and, therefore, exceeds the OC's authority to issue procedural rules.

Moreover, except as otherwise specified by the CAA, hearings under the CAA are to be conducted "to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code." 2 U.S.C. §405(d)(3). The proposed rule allowing a hearing officer to sanction a party representative to regulate the course of a hearing exceeds the authority the Administrative Procedure Act ("APA") confers on hearing officers. Although section 556(c)(5) enables hearing officers to "regulate the course of a

hearing," no decision reported in the federal courts has ever applied section 556(c)(5) to support a sanctions order. Sanctions are separately addressed by section 556(d) of the APA; a hearing officer's authority to impose sanctions is limited by that section, which does not provide for sanctions against a representative.

§8.01 Appeal to the Board

The proposed rule cannot be implemented through the procedural rule making process because the rule affects substantive rights.

Further, even as revised, the rule creates a potential conflict of interest for the Executive Director when a party requests an extension of time due to the OC's alleged malfeasance or negligence.

In addition, the rule is ambiguous in that one could interpret it to allow the petitioner to amend the petition for review after the statutory period for filing the petition.

§9.01 Filing, Service and Size Limitations of Motions, Briefs, Responses and Other Documents.

As written, the original rule is ambiguous and should be clarified. The term "whenever required" creates the ambiguity. Does the rule require filing multiple copies of any document that is required to be filed, or is it the case that multiple copies must be filed only when required? Further, it is unclear how the rule applies to electronic filings.

Further, the reference to "Officer" in the last sentence of the proposed rule appears to be a typographical error for the word "Office."

§9.03 Attorney's Fees and Costs

(a) Request

By law, employees and employing offices may move for costs and fees. The rule continues to be deficient and reflects a bias against employing offices because it specifies only the date by which a complainant must move for fees and costs.

§9.05 Informal Resolutions and Settlement Agreements

(d) Violation of a Formal Settlement Agreement

Subsection (d) infringes on Congress's sovereign immunity. Because each employing office is a sovereign, a hearing officer's jurisdiction to hear claims is limited to those Congress specifies. The CAA does not waive sovereign immunity with respect to breach of contract claims. Accordingly, hearing officers have no jurisdiction to adjudicate breach of contract claims. Furthermore, the OC has no authority to waive such immunity through the issuance of a procedural rule.

Moreover, neither the CAA nor any other law requires the parties to a CAA settlement agreement to stipulate the method of dispute resolution. Sovereign immunity is waived upon the conditions the sovereign, not the OC, establishes. The fact that the Executive Director must approve all settlement agreements does not authorize him/her to impose settlement conditions that the law does not require.

Finally, subsection (d) constitutes a substantive, not a procedural, rule, and, therefore, the OC lacks authority to issue it pursuant to section 303 (b) of the CAA.

Sincerely,

Jean M. Manning
Senate Chief Counsel for Employment

JMM/kj