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October 3, 2003

Via Facsimile and First Class Mail

William W. Thompson II
Executive Director
Office of Compliance
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20540-1999

Dear Mr. Thompson:

The Committee on House Administration is pleased to submit the following comments and suggestions regarding the proposed amendments to the Procedural Rules of the Office of Compliance.

Introduction

On September 4, 2003, the Executive Director of the Office of Compliance ("Executive Director") submitted for publication in the Congressional Record, a Notice of Proposed Rulemaking for Proposed Amendments to the Office of Compliance's Procedural Rules ("Proposed Amendments").[1] According to the Executive Director, the Proposed Amendments, which span a wide variety of issues regarding the administrative processes established by the Congressional Accountability Act ("CAA" or "the Act"), are the result of "the experience of the Office in processing disputes under the CAA during the period since the original adoption of the [Procedural Rules] in 1995."[2]

In his introductory statement to the Proposed Amendments, the Executive Director states that the Proposed Amendments to the Procedural Rules are promulgated in accordance with Section 303 of the CAA.[3] Several of the Proposed Amendments create efficient solutions and alternatives to the current practices of the Office of Compliance

1 149 CONG. REC. H7944-04 (daily ed. Sept. 4, 2003).
2 149 CONG. REC. H7944-04, H7945 (daily ed. Sept. 4, 2003).
3 2 U.S.C. § 1383.

("the Office"). Yet, although some of these rules may be intended to streamline internal procedures concerning the operation of the Office itself, several of the Proposed Amendments vest various officials of the Office with unappealable decision-making authority not contemplated by the CAA. Such Amendments go beyond "retaining latitude in organizing [the Office's] internal operations" and affect the substantive rights of the parties. *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (citing *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)).

The CAA provides that regulations affecting substantive rights are properly promulgated under Section 304,[4] using a different approval method than that of the procedural rules issued under Section 303. A regulation is characterized as substantive if it "grant[s] rights, impose[s] obligations or produce[s] other significant effects on private interests." *Chamber of Commerce*, 174 F.3d at 211 (quoting *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)) (internal quotation omitted). Although a procedural rule may alter the manner in which parties present their claims and viewpoints to the agency, such rules may not "alter the rights or interests of parties." *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C.Cir. 1987) (citing *Batterton*, 648 F.2d at 707). Thus, Proposed Amendments such as those affecting a party's ability to choose its designated representative or those altering the statutorily created deadlines for counseling and mediation affect the substantive rights of the parties participating in the administrative processes of the CAA and should be promulgated under Section 304.[5]

Accordingly, the discussion below raises a number of questions and requests more information regarding the language and reasoning behind several of the Proposed Amendments. We urge the Executive Director and the Board of Directors of the Office of Compliance ("the Board") to reconsider some of the language and requirements as stated in the Proposed Amendments in accordance with the suggestions below.

Comments to Proposed Procedural Rules

§ 1.03(a) - Method of Filing.

The Proposed Amendment to this procedural rule allows parties to file documents electronically, in a designated format, when specifically authorized by the Executive Director. The option of filing documents electronically is a progressive method for submitting documents and it addresses the delays that invariably affect the mail on

[4] 2 U.S.C. § 1384.

[5] Although the Executive Director states that the Procedural Rules are promulgated under Section 303 of the CAA, "the label that [the Office of Compliance] puts on its given exercise of administrative power is not conclusive; rather, it is what the [Office of Compliance] does in fact" that is dispositive of whether a rule is procedural or substantive. *Associated Builders & Contractors, Inc. v. Reich*, 922 F.Supp. 676, 680 (D.D.C. 1996) (citing *National Family Planning & Reproductive Health Assoc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992)).

Capitol Hill because of the security measures implemented after the anthrax incidents of October 2001.

However, the requirement that a document filed electronically must be "in a designated format" determined by the Executive Director may pose an undue burden upon a party that does not have the software for the "designated format." A party should not be expected to purchase a particular software application to file a document with the Office of Compliance. We recommend that parties have the option of filing all documents electronically (in a format designated by the parties), not just those for which the Executive Director provides specific authorization. If specific authorization for electronic filing is required, we recommend that the authorization be in writing. We suggest adding a paragraph § 1.03(a)(4) to Procedural Rule § 1.03 to address: an electronic filing deadline, the web address for submitting electronic filings, and a uniform method for confirmation of receipt.

§ 1.05 - Designation of Representative.

This Proposed Amendment allows the Executive Director to disqualify a party's representative during the period of counseling and mediation and upon the request of a party if the Executive Director determines that the representative has a conflict of interest.

The language of this Proposed Amendment is troubling for several reasons. As a preliminary matter, it is unclear where the Executive Director derives the authority to "disqualify" a representative of any party involved in a matter before the Office of Compliance. There is no such grant of authority in the CAA. As discussed above, the right to be represented by a counsel of one's choosing is a substantive right that should not be summarily trammeled through a procedural rule.

Furthermore, the proposed language states that the Executive Director may disqualify a representative *during the period of counseling*. As the counseling period is confidential (unless confidentiality is expressly waived by the employee) and the employing office is not aware of the charging party's allegations or participation in the counseling process, it is puzzling how a representative could be disqualified during the counseling period.

Moreover, the term "conflict of interest" is not defined in the Proposed Amendment. Accordingly, it is impossible for a party to respond adequately to the potential disqualification of its representative without knowing the standards by which disqualification decisions will be made. There is also no indication whether the Executive Director's disqualification determination would be in writing. If a party is expected to challenge the determination adequately, the determination, and the reasons therefore, should be in writing.

In addition to the problems with the vague nature of the Executive Director's "conflict of interest" determination, there are statutory prohibitions to the Executive Director's *sua sponte* extension of the counseling and mediation periods. Specifically, Section 402(b)[6] of the CAA clearly states that "[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period." Thus, the CAA only allows the counseling period to be shortened, not extended, regardless of any "request" of a party or a "conflict of interest" determination by the Executive Director. Similarly, Section 403(c)[7] states that the mediation period shall be 30 days unless it is extended "at the joint request of the covered employee and the employing office." Again, there is no provision in the CAA allowing the Executive Director to extend the mediation period at his or her own behest.

Extending the period of counseling and/or mediation affects the substantive rights of both the employee and employing office and the time limitations are set forth within the CAA itself. Accordingly, the Executive Director cannot be granted the authority to alter these time frames through the promulgation of a procedural rule under Section 303 of the CAA. Such a rule would "effect a change in existing law" and is therefore substantive rather than procedural. *See generally Associated Builders & Contractors*, 922 F.Supp. at 682.

Furthermore, the language of the Proposed Amendment ignores the limited waiver of sovereign immunity granted under the CAA. This limited waiver is premised on the use of a specific administrative process for pursuing claims under the CAA. In particular, sovereign immunity is waived for an employing office only where the plaintiff has pursued counseling and mediation in accordance with Sections 402 and 403 of the CAA. *See* 2 U.S.C. § 1408(a). Therefore, any attempt to alter the specific requirements and specifications set forth in Section 402 and 403 ignores the specific boundaries of the limited waiver of sovereign immunity created by the statute.

If this Proposed Amendment was intended to address the problem of one complainant serving as another complainant's "representative" when the employing office for both complainants is the same, such disqualification can be achieved through use of the confidentiality provisions of the CAA and the current procedural rules. *See* 2 U.S.C. § 1416, Office of Compliance Procedural Rule §§ 2.04(k), 7.12. As the term "conflict of interest" is generally a term of art that applies to attorney representatives, such a justification for disqualification of a representative may not be applicable to non-attorneys. Thus, the problem that this Proposed Amendment is arguably intended to address remains unsolved.

Finally, even if the Proposed Amendment is adopted, despite the problems enumerated above, a decision of such magnitude to disqualify a party's counsel should be subject to appeal.

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[6] 2 U.S.C. § 1402(b).
[7] 2 U.S.C. § 1403(c).

§ 2.03(a) – Initiating a Proceeding; Formal Request for Counseling.

The language of this Proposed Amendment requires an employee wishing to initiate the administrative process under the CAA to file a *written* request for counseling with the Office.

Requiring requests for counseling to be in writing will help avoid confusion over the timing and content of such requests - essential elements in establishing jurisdiction of the Hearing Officer or a federal court over complaints under the CAA. Taking this Proposed Amendment to its logical conclusion, we believe that confidentiality of the written request for counseling should be automatically waived if the complainant files a complaint with the Office or in federal court, and the Office should provide the request for counseling to the employing office upon written request. Because the written request for counseling is necessary for the employing office to determine if the Hearing Officer or federal court has jurisdiction over a complaint, there is no reason for it to be withheld. As discussed further in Section 2.06(c)(2) below, it is a waste of resources for employing offices to have to file a subpoena to determine whether the Hearing Officer or federal court has jurisdiction over a claim.

§ 2.03(l) - Conclusion of Counseling Period and Notice.

This Proposed Amendment allows the Executive Director to send the written notice of the end of the counseling period to an employee by personal delivery, as an alternative to certified mail.

While the addition of the availability of personal delivery of the notice of the conclusion of counseling allows greater flexibility for the Office to deliver such notices, the proposed language does not detail how delivery would be certified. If the notice is to be delivered by an employee of the Office of Compliance, we suggest that the employee execute a document verifying the date and method of delivery. If the notice is to be delivered *via* messenger service, we suggest that the Office require the messenger service to provide written certification of the time and date of delivery.

§ 2.04(e)(2) - Mediation - Duration and Extension.

The proposed language to amend this procedural rule requires the parties to submit joint requests for extension of the mediation period in writing to the attention of the Executive Director.

We support the proposed requirement that a request for extension of mediation must be in writing and directed to the attention of the Executive Director and recommend that the following sentence be added to this subsection: "The joint written request may be submitted by the neutral on behalf of the parties." This language is consistent with the

current practice of many neutrals and often serves as a time-saving method for submitting requests for an extension of the mediation period.

§ 2.04(i) - Conclusion of the Mediation Period and Notice.

As in § 2.03(l) above, the proposed language for this procedural rule allows the Executive Director to hand deliver (as an alternative to certified mail) the Notice of End of Mediation to the employee. We suggest that the Office provide a verification of the delivery process like that discussed in our comments to Section 2.03(l) above.

§ 2.06(c)(1) - Communication Regarding Civil Actions Filed with District Court.

This Proposed Amendment requires an employee filing a complaint in federal district court to provide the Office with a copy of the complaint.

While this proposed rule has no effect on employing offices, we do not understand the purpose for the proposed change. If the purpose is to track outcomes following mediation, this could be accomplished by requiring employees to file a simple notice of suit with the Office rather than the entire complaint. In addition, are employees expected to provide the Office with any amended complaints filed in federal court? The lack of information regarding the necessity for the Proposed Amendment prevents an immediate answer to this question.

§ 2.06(c)(2) - Communication Regarding Civil Actions Filed with District Court.

The language of this Proposed Amendment prohibits a party to any civil action in federal court from requesting information from the Office regarding proceedings which took place under Section 402 (counseling) or Section 403 (mediation), unless the requesting party notifies the other parties to the litigation of the request. This Proposed Amendment also states that "the Office" will determine whether the release of the information requested is appropriate under the CAA and the Office's Procedural Rules.

The reasoning behind this Proposed Amendment is unclear and the requirement itself is unnecessary. An employing office's request for information which directly determines whether a Hearing Officer or federal court has jurisdiction over a matter is directly relevant to the employee's ability to pursue a claim and should not be subject to a "determination" by "the Office" as to whether the release of such information is "appropriate." Indeed, in the case of a subpoena issued by a federal court, the decision of whether or not to produce information regarding proceedings under Sections 402 and 403 of the CAA is no longer within the discretion of the Office.

The employing office has a right to argue all viable legal defenses, whether before a Hearing Officer or in federal court. Any attempt to impede such a right directly affects the employing office's substantive right to present jurisdictional defenses to an employee's claim. Therefore, curtailing or hindering the employing office's ability to

assert an affirmative defense before a Hearing Officer or in federal court is inappropriate for inclusion in any regulation, let alone a "procedural rule." *See generally U.S. v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (imposing additional conditions, as opposed to simply explaining or interpreting an existing requirement, is substantive in nature) As discussed in § 2.03(a) above, we recommend that information related to the jurisdictional requirements of the statute (*e.g.*, dates of counseling and mediation and the nature of the request for counseling) be provided to the employing office upon request as a matter of course, and not subject to the procedural hoops created by this Proposed Amendment.

In addition, the Proposed Amendment does not specify who determines whether information will be released (*i.e.* who is "the Office" as referenced in the proposed language?), and by what criteria such decisions are made. Finally, there is no discussion of whether the determinations by "the Office" regarding release of information are appealable, and if so, to whom.

§ 4.16 - Comments on Occupational Safety and Health Reports.

This Proposed Amendment creates an entirely new procedural rule regarding the submission and review of the comments of responsible parties to reports issued by the Office of the General Counsel of the Office of Compliance ("General Counsel").[8]

Several aspects of this proposed procedural rule are problematic and require clarification. First, the issuances from the General Counsel regarding safety and health inspections have come in a variety of forms prompting the question: what constitutes a "report"? Are *all* draft reports subject to the strict timetable referenced in the proposed rule? If not, which reports are subject to this timetable? How, if at all, does a party's request for a closing conference affect this timetable?

Second, what is meant by "general distribution"? Does this mean distribution to all persons or entities who request a copy of a report, or simply distribution to the individual or entity who requested the inspection? The reports issued in the past have been distributed to a wide spectrum of "interested parties" without stating the reasoning behind the list of recipients. Accordingly, we request clarification of what constitutes "general distribution."

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[8] For purposes of this commentary, we assumed that the "reports" referenced in this Proposed Amendment are those created by the General Counsel as a result of a request for inspection under Section 215(c)(1) of the CAA. If this Proposed Rule is intended to apply to the reports generated at the conclusion of the periodic inspections of Congressional facilities as required under Section 215(e), the Proposed Amendment is lacking in both clarity and realistic assessment of the time required to review and respond to the General Counsel's periodic reports.

Third, all of the deadlines in the procedural rule are written in terms of days except for the requirement that the responsible parties submit their comments within "48 hours prior to the scheduled issuance date." This language is puzzling because the responsible party cannot control the time of day that the Office issues a report and there is no indication of whether (and how) the General Counsel would notify the responsible parties of the time of issuance.[9] Therefore, responsible parties wishing to submit comments would not be able to determine the deadline for submission. We suggest that all time measurements be expressed in terms of days. In addition, reconciling the language of the Proposed Amendment with Procedural Rule 1.03(b),[10] does the Office intend to allow the issuance of a report to be delayed up to five *business* days while the remainder of the days are calculated in terms of calendar days?

Fourth, how does the General Counsel determine which comments will be included and which will not? If the decision is not to include the comments as an addendum to the report, the General Counsel should issue a written statement explaining the basis for his/her decision.

Although requiring the General Counsel to issue a written statement on why comments will or will not be included may arguably impede his or her ability to respond "immediately," as required in the Proposed Amendment, the potential impediment underscores a larger issue: why is the issuance of the report so time sensitive that it demands a rushed review of the comments of the responsible parties?[11] If the goal of a General Counsel's report is to present the most accurate and reliable information regarding the safety and health of Capitol Hill facilities, it seems incongruous to impose a requirement that the comments of the responsible parties are treated as impediments to releasing a report rather than as valuable resources of pertinent information which may impact the findings of the report itself.

The importance of the General Counsel's arbitrarily assigned deadline for the issuance of a report is also apparent in the discussion of the process for the issuance and appeal of the General Counsel's decision not to publish the comments with the report. Specifically, the General Counsel must *immediately* decide whether or not to attach the comments of the responsible party to the report. If the General Counsel declines to attach the responsible party's comments, the responsible party may then appeal the decision to

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[9] In addition, there is no explanation of how responsible parties would submit comments if the date of issuance of a report falls on a Monday or Tuesday. Does the General Counsel anticipate comments would be filed on a Saturday or Sunday in anticipation of a Monday or Tuesday issuance deadline?

[10] Procedural Rule 1.03(b) states that "when the period of time prescribed is five (5) days or less, intermediate Saturdays, Sundays and federal government holidays shall be excluded in the computation."

[11] Please note that this commentary only pertains to reports that do *not* involve conditions posing an imminent danger to the health and/or safety of employees of or visitors to the Capitol Hill facilities.

the Board. Under no circumstances, however, according to the Proposed Amendment, shall the General Counsel be required to postpone the issuance of a report for more than five days. This process raises several questions. How can the General Counsel carefully consider any comments if he or she is to issue a decision on their inclusion in the report *immediately*? If there is an appeal of the General Counsel's decision, can the Board realistically review the report, the comments, the General Counsel's decision not to include the comments submitted by the responsible parties, and then issue a "final and non-appealable" decision in as little as two and at most seven days? What if the comments highlight the need for further investigation by the General Counsel? The Proposed Amendment's aversion to the General Counsel missing the self-imposed deadline should not outweigh the goal of compiling an accurate report based on the most immediate information. Yet, the strict deadlines of the language do not allow for such contingencies.

Finally, the history of the issuance of occupational safety and health reports from the Office of Compliance is fraught with security concerns. It is our understanding that the Office of Compliance has forged a working relationship with the U.S. Capitol Police regarding the review of reports and the mutual desire to prevent information from being released publicly which may compromise the safety of the Capitol Hill complex. However, the proposed rule fails to mention or account for how the General Counsel and/or the Board would proceed if there is a conflict between the Office and the U.S. Capitol Police with regard to security sensitive information. Surely, the Board does not assert that it should have the "final and non-appealable" decision-making authority on matters which may touch upon local and national security. Yet, under the current language of the proposed rule, there is no accommodation for the special circumstances which may arise when security sensitive information is necessarily included in a safety and health investigation.

In conclusion, although responsible parties have, for the most part, been the beneficiaries of a good working relationship with the General Counsel's office with regard to reviewing draft reports and providing input such as correcting inaccurate information and updating the Office on abatement efforts, the proposed language does not guarantee that such an approach will continue in the future. Accordingly, we suggest that the term "report" should be defined and that the General Counsel should work with responsible parties to develop more realistic deadlines for commentary. In addition, it is imperative that the issue of how to manage security sensitive information must be addressed in a manner to ensure the continued safety and health concerns of the General Counsel, the responsible parties and the occupants of and visitors to the Capitol Hill facilities.

§ 5.03(d) - Dismissal, *Summary Judgment*, and Withdrawal of Complaints.

This Proposed Amendment adds a specific section to the procedural rules allowing a Hearing Officer to issue summary judgment "on some or all of the complaint."

Although we firmly believe that the Hearing Officer already possesses the power to grant summary judgment, we support the more explicit rule with minor changes in language. Specifically, we propose that the rule be modified as follows: "A Hearing Officer may, after notice and an opportunity to respond, issue summary judgment on some or all of the *allegations or claims in* the complaint."

§ 5.03(e) - Appeal.

This current rule should be amended to incorporate the new section 5.03(d) (the language, as written, only covers appeals of final decisions made under sections 5.03 (a) through (c)).

§ 7.02(a) - Sanctions.

This section allows a Hearing Officer to impose sanctions on a party's representative for "inappropriate or unprofessional conduct." Yet, there is no discussion of how a Hearing Officer has the authority to impose sanctions against a party's representative. The CAA does not create any such authority, either for the Hearing Officer or for the Office of Compliance itself. Finally, because the specific sanctions contemplated are not enumerated in the Proposed Amendment, it is impossible to determine whether allowing a Hearing Officer to impose sanctions is a substantive, rather than procedural, rule.

Regardless of whether or not the Hearing Officer has any authority to impose sanctions, the Proposed Rule, as written, fails to (1) include a list of sanctions, (2) provide a standard for what constitutes "inappropriate" or "unprofessional conduct," or (3) establish a process for appealing sanctions (it is unclear from the language of the Proposed Amendment whether current Office of Compliance Procedural Rule § 8.01 would address this scenario).

§ 8.01(3) - Appeal to the Board.

This Proposed Amendment allows the Board to authorize the Executive Director to rule on requests for extensions of time for filing documents with the Board.[12]

Although this Proposed Amendment seems to allow for an effective time-saving method for addressing requests for extension of time, it is unclear how the CAA allows for such a delegation of authority. Even if the CAA does convey such authority, we suggest that the Board's delegation of authority to the Executive Director, and any

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[12] Section 8.01(b)(2) is not indicated as being subject to proposed revision in the Office of Compliance's Notice of Proposed Rulemaking, yet the language *is* revised and truncated from the current Procedural Rule § 8.01(b)(2). For purposes of these comments, we assume that the oversight is typographical and is not an indication of the Executive Director's intention to alter Procedural Rule § 8.01(b)(2).

subsequent revocation of such delegation, be in writing and distributed to the interested parties.

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

The proposed revisions to this procedural rule addresses the method of filing documents. Specifically, "the Officer[13] [*sic*], the Hearing Officer or the Board" may require a party to submit a document either electronically or on disk in a designated format. Overall, we support the proposal to have documents filed electronically with the Office and recommend that all parties be given this option. However, we have concerns about the Proposed Amendment as currently written.

The proposed revision to § 1.03 (electronic filing) appears to obviate the need for the proposed revision to § 9.01 (submission of an electronic version of a document on disk). It is our belief that the parties do not need to submit a disk if they can file electronically. Moreover, as stated in § 1.03, the requirement that parties file documents "in a designated format" may create an undue burden for parties who must purchase the particular software (*i.e.*, Word of WordPerfect) for the sole purpose of filing documents with the Office in the required format. Finally, the rule mentions that "a party" may be required to submit documents on a disk. This language creates an implication that one party could be required to comply with this rule while another party to the same litigation would not be subject to the same requirement.

If the proposed revision to § 9.01 is amended as written, we suggest that notice of the requirement to submit an electronic version of a document on disk should be made in writing.

§ 9.03 - Attorney's Fees and Costs.

This Proposed Amendment requires all motions for attorney's fees to be submitted to the Hearing Officer.

We support the proposed change that all motions for attorney's fees and costs be submitted to the Hearing Officer, but note that the proposed rule does not indicate whether an award of attorney's fees and costs is appealable and, if so, to whom. There should be a method for appeal of an award of attorney's fees and costs in accordance with the provisions of § 8.01.

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[13] We assume this term is supposed to be "the Office." Accordingly, it is unclear who "the Office" is for purposes of requiring a party to submit a document electronically.

§ 9.05(c) – Requirements for a Formal Settlement Agreement.

This Proposed Amendment creates a variety of new procedural rules regarding signed settlement agreements. The proposed language requires any decision of the Executive Director to reject a settlement agreement to be in writing. In addition, the new rule states that signed settlement agreements cannot be rescinded unless by written revocation signed by all parties, or "as otherwise required by law."

We propose modifying the rule to permit formal settlement agreements to contain the "signature of all parties *or their designated representatives,*" thus allowing attorneys for complainant and Administrative Assistant or Chief of Staff of employing offices to bind their parties.

Furthermore, we believe that the phrase "as otherwise required by law" swallows the proposed rule regarding revocation of a settlement agreement and does not address the situation for which this rule was apparently intended. In other words, a declaratory statement in a Procedural Rule that a party cannot rescind an agreement does not supercede applicable contract law. Settlement agreements will generally be governed by the common law of contracts, which will be determinative of whether a party can successfully rescind an executed settlement agreement.

§ 9.05(d) – Violation of a Formal Settlement Agreement.

This Proposed Amendment establishes a dispute resolution process for alleged violations of executed settlement agreements in the event that the settlement agreement itself does not contain "formal dispute resolution procedures."

We believe the Office of Compliance lacks the statutory authority to settle disputes regarding settlement agreements. Specifically, Section 414 of the CAA[14] only gives the Office of Compliance authority to approve settlement agreements. Accordingly, this Proposed Amendment creates a statutory scheme for resolving contract disputes not found in the CAA. As such, this section "grants right[s], impose[s] obligations" and otherwise has a significant effect on private interests. *Batterton*, 648 F.2d at 701-02. Therefore, this rule affects the substantive rights of the parties and is not appropriate for promulgation under Section 303 of the CAA.

Furthermore, any dispute regarding settlement agreements reached after district court litigation should be resolved by the district court and we are suspect of any attempt by the Executive Director to remove jurisdiction of a matter from a federal court.

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[14] 2 U.S.C. §1414.

§ 9.06 - Destruction of Closed Files.

This proposed Amendment sets a five year timetable for the destruction of "closed case files regarding counseling, mediation, hearing and/or appeal."

Although effective record keeping and space management is an understandable goal for any organization, there is no explanation in this Proposed Amendment of what constitutes a "closed file." Is the Office file closed if the charging party proceeds to federal court rather than an administrative hearing? Is the filed closed only after all appeals have been exhausted? We recommend providing a definition of when a file is considered "closed."

In addition, there is no explanation of the origin of the "fifth anniversary" determination for the destruction of records. Is this modeled after a particular statute?

Finally, the proposed language contemplates destruction of "case files" regarding, among other things, mediation and hearings. The language implies that the Office may have some control over the records of the Neutrals and Hearing Officers appointed by the Office. If this is the case, how and under what statutory authority does the Office exercise control over the records of the individuals or entities appointed to mediate and/or hear cases? If the language refers simply to the Office's administrative files, such as the identity of the Neutral and/or Hearing Officer and any contracts with those individuals, the language of the Proposed Amendment should be clarified to recognize the limited nature of the documents to which the Office has access for destruction.

§ 9.07 Payment of Decisions, Awards, or Settlements under section 415(a) of the Act.

This Proposed Amendment provides that whenever a settlement is reached or a decision or award is granted at any juncture during the administrative process, the "decision, award or settlement shall be submitted to the Executive Director" to be processed and paid. Although this process is currently in place with regard to executed settlement agreements, as written, the Executive Director could release damage awards and attorney's fees to a complainant while a matter is on appeal.[15] No payment should be authorized from the settlement fund until a *final* decision or award has been made *and* the appeals process has been exhausted. There is a significant risk that funds disbursed to a

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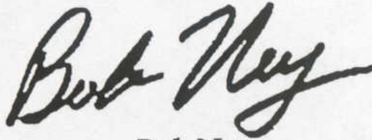
[15] Interestingly, the Federal Circuit recently ruled on this very issue and held that payment was inappropriate, pending the decision on the merits on appeal. *The Office of the Architect of the Capitol vs. The Office of Compliance and Juanita Johnson*, No. 03-6001 (Fed. Cir. May 1, 2003) (order enjoining payment of Hearing Officer's award).

complainant prior to exhaustion of appeals will not be recoverable to the U.S. Treasury if an award is reduced or vacated on appeal, resulting in a needless waste of taxpayer dollars.

Sincerely,



Bob Ney
Chairman

John B. Larson
Ranking Member