OFFICE OF COMPLIANCE: NOTICE OF ADOPTION OF SUBSTANTIVE REGULATIONS, AND SUBMISSION FOR CONGRESSIONAL APPROVAL

Adoption of the Office of Compliance Regulations Implementing Certain Substantive Employment Rights and Protections for Veterans, as Required by 2 U.S.C. 1316, the Congressional Accountability Act of 1995, as Amended

Procedural Summary:

Issuance of the Board's Initial Notice of Proposed Rulemaking:

On April 21, 2008 and May 8, 2008, the Office of Compliance published a Notice of Proposed Rulemaking ("NPR") in the Congressional Record (154 Cong. Rec. S3188 (daily ed. April 21, 2008) H3338 (daily ed. May 8, 2008))

Why did the Board propose these new Regulations?

Section 206 of the Congressional Accountability Act ("CAA"), 2 U.S.C. §1316, applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits. Subsection 1316(c) requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may only modify the Department of Labor regulations if it can establish good cause as to why a modification would be more effective for the application of the protections to the legislative branch. In addition, Section 1384 provides procedures for the rulemaking process in general.

What procedure followed the Board's April 16 Notice of Proposed Rulemaking?

The May 8, 2008 Notice of Proposed Rulemaking included a thirty day comment period, which began on May 9, 2008. A number of comments to the proposed substantive regulations were received by the Office of Compliance from interested parties. The Board of Directors has reviewed the comments from interested parties, made a number of changes to the proposed substantive regulations in response to comments, and on December 3, 2008 adopted the amended regulations.

What is the effect of the Board's "adoption" of these proposed substantive regulations?
Adoption of these substantive regulations by the Board of Directors does not complete the promulgation process. Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for promulgating such substantive regulations requires that:

(1) the Board of Directors issue proposed substantive regulations and publish a general notice of proposed rulemaking in the *Congressional Record*;
(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking; and
(3) after consideration of comments by the Board of Directors, that the Board adopt regulations and transmit notice of such action together with the regulations and a recommendation regarding the method for Congressional approval of the regulations to the Speaker of the House and President pro tempore of the Senate for publication in the *Congressional Record*.

This **Notice of Adoption of Substantive Regulations and Submission for Congressional Approval** completes the third step described above.

What are the next steps in the process of promulgation of these regulations?
Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to "include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution." The Board of Directors recommends that the House of Representatives adopt the "H" version of the regulations by resolution; that the Senate adopt the "S" version of the regulations by resolution; and that the House and Senate adopt the "C" version of the regulations applied to the other employing offices by a concurrent resolution.

Which employment and reemployment protections are applied to eligible employees in 2 U.S.C. 1316?
USERRA was enacted in December 1994, and the Department of Labor final regulations for the executive branch became effective in 2006. USERRA's provisions ensure that entry and re-entry into the civilian workforce are not hindered by participation in military service. USERRA provides certain reemployment rights; protection from discrimination based on military service, denial of an employment benefit as a result of military service; and protection from retaliation for enforcing USERRA protections.

The selected statutory provisions which Congress incorporated into the CAA and determined "shall apply" to eligible employees in the legislative branch include nine sections: sections 4303(13), 4304, 4311(a)(b), 4312, 4313, 4316, 4317, 4318, and paragraphs (1), (2)(A), and (3) of 4323(c)[1] of title 38.

The first section, section 4303(13), provides a definition for "service in the uniformed services."

[1] As written in Section 206 of the CAA, reference is made to application of paragraphs (1), (2)(A), and (3) of section 4323(c) (Venue). However, in USERRA, section 4323(c) is not comprised of paragraphs (1), (2)(A), and (3) - - section 4323(d) (Remedies) is comprised of those paragraphs. Because of this apparent typographical error, where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), the Board refers to section 4323(d).

This is the only definition in USERRA that Congress made applicable to the legislative branch. Section 4303(13) references Section 4304, which describes the "character of service" and illustrates situations which would terminate eligible employees' rights to USERRA benefits.

Congress applied section 4311 to the legislative branch in order to provide discrimination and retaliation protections, respectively to eligible and covered employees. Interestingly, although Congress adopted these protections, it did not adopt the legal standard by which to establish a violation of this section of the regulations.

Sections 4312 and 4313 outline the reemployment rights that are provided to eligible employees. These rights are automatic under the statute, and if an employee meets the eligibility requirements, he or she is entitled to the rights provided therein.

Sections 4316, 4317, and 4318 provide language on the benefits given to eligible employees.

Are there veterans' employment regulations already in force under the CAA?
No. The Board has issued to the Speaker of the House and the President Pro Tempore of the Senate its Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval for Veterans Employment Opportunities Act (VEOA). The Board is awaiting Congressional approval of those regulations.

Why are there substantive differences in the proposed regulations for the House of Representatives, the Senate, and the other employing offices?
As the Board of Directors has identified "good cause" to modify the executive branch regulations to implement more effectively the rights and protections for veterans, there are some differences in other parts of the proposed regulations applicable to the Senate, the House of Representatives, and the other employing offices. Therefore, the Board is submitting three separate sets of regulations: an "H" version, an "S" version, and a "C" version, each denoting those provisions in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Are these proposed regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?
Yes, as required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), these regulations have also been recommended by the Executive Director and Deputy Executive Directors of the Office of Compliance.

Are these proposed CAA regulations available to persons with disabilities in an alternate format?
This Notice of Adoption of Substantive Regulations, and Submission for Congressional Approval is available on the Office of Compliance web site, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. 794d. This Notice can also be made available in large print or Braille. Requests for this Notice in an alternative format should be made to: Annie Leftwood, Executive Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA-200, Washington, D.C. 20540; 202-724-9250; TDD:

202-426-1912; FAX: 202-426-1913.

Supplementary Information: The Congressional Accountability Act of 1995 (CAA), PL 104-1, was enacted into law on January 23, 1995. The CAA applies the rights and protections of 12 federal labor and employment statutes to covered employees and employing offices within the Legislative Branch of Government. Section 301 of the CAA (2 U.S.C. 1381) establishes the Office of Compliance as an independent office within the Legislative Branch.

The Board's Responses to Comments

SUMMARY OF MAJOR COMMENTS

General Comments

The Board noted in the Notice of Proposed Regulations (NPR) that it had not identified any "good cause" for issuing three separate sets of regulations and that if the regulations were approved as proposed, there would be one text applicable to all employing offices and covered employees. During the notice and comment period, the Board received comments from the Committee on House Administration ("CHA"), Senate Employment Counsel ("Counsel"), and the United States Capitol Police ("Capitol Police"). All of the commenters noted, in different places throughout the regulations, the need for modifications that would apply specifically to the House, Senate or other employing offices. Although the Board has not found "good cause" to vary the Department of Labor (DOL) regulations in all instances where requested, there are a number of places where such variances are warranted. In light of that and the comment by the CHA that the Congressional Accountability Act (CAA) requires the publication of separate regulations for the Senate, House and other covered employees and employing offices, the Board has made that change and put forward three separate sets of regulations, an "H" version, an "S" version, and a "C" version, each denoting the provisions that are included in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Eligible Employees

In its comments, CHA maintains that the definition of "eligible employee" in the regulations is overly broad. Pointing to Section 206(a)(2)(A) of the CAA, which defines an "eligible employee" as "a covered employee performing service in the uniformed service, within the meaning of section 4303(13) of title 38, whose service has not been terminated upon occurrence of any of the events enumerated in section 4304 of title 38," the CHA notes that the definition references only the present tense of the verb "performing" and makes no mention of the past tense. CHA also notes the Section 206 does not define eligible employee to include an individual who was previously a member of the uniformed services or one who applies or has applied to perform service in the uniformed services. CHA acknowledges that this "stands in marked contrast to the general USERRA statute's protection of individuals who currently serve as well as to those who have previously served, to those who have an obligation to serve, and to those who have applied to serve in the uniformed services (regardless of whether they actually served)." CHA further recognizes "that USERRA's intent is to provide broad protections for those who serve and have served in the uniformed services…" CHA comments that the regulations are inappropriately broad, notwithstanding language in Section 206(a)(2)(A) that strongly suggests inclusion of an individual who has been honorably discharged and is therefore not currently serving, but who has served in the past.

The Board acknowledges the tension in the language in Section 206(a)(2)(A), but does not agree with the conclusions reached by the CHA, that, absent a statutory amendment revising the

definition in Section 206(a)(2)(A), the proposed regulations should be revised to reflect that, "as applied by the CAA, USERRA only protects employees who are currently 'performing service in the uniformed services.'"

The Board's authority to promulgate substantive regulations is found in Section 206 of the CAA, 2 U.S.C. §1316, which applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits.

Subsection 1316(c) of the CAA requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may modify the Department of Labor regulations only if it can establish good cause as to why a modification would be more effective for application of the protections to the legislative branch. The Board chooses to apply a broad definition of "eligible employee".

The Board does not read the "performing service" language in Section 206(a)(2)(A) as limiting the discrimination protection of USERRA to only those employees who are currently serving in the uniformed services. Rather, we interpret the phrase "performing service" in this context to refer to covered employees who have some form of military status (i.e., those who have performed service or who have applied or have an obligation to perform military service, as well as those who are currently members of or who are serving in the uniformed services) as distinguished from covered employees who do not have this military status.

This application of the phrase "performing service" is supported by several indicia of Congressional intent. First, Section 206(a)(2)(A) prohibits discrimination against eligible employees "within the meaning of" subsection (a) of section 4311 of Title 38, which states: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." Most, if not all, of these protections would be lost if the phrase "performing service" were applied to exclude covered employees who are not currently performing service at the moment of the alleged violation. It would vitiate the reemployment rights under USERRA because employees would lose their statutory rights at the moment of discharge, whether honorable or not. Similarly, had Congress intended to so limit the coverage of USERRA, it could have said that "any" discharge was a disqualifying condition, not those that are other than honorable.

Congressional intent is also reflected in the USERRA statute itself, passed in 1994, which states, "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 USC 4301(b). A narrow application of the phrase "performing service" would be directly contrary to this statement of the sense of Congress.

Finally, we note that after the CAA was enacted, Congress enacted the Veteran Employment Opportunities Act and thereby granted certain preferences in hiring and retention during layoffs to *all* covered employees who are "veterans" as defined in 5 U.S.C. § 2108, or any superseding legislation. We conclude that Congress intended a broad application of the phrase "performing service" so that covered employees who will or have performed service are also protected against discrimination and the improper denial of reemployment or benefits.

In light of the above, the Board has found "good cause" to modify the Department of Labor's definition of "eligible employee". Further, in order to avoid any confusion as to the application of the regulations to "eligible" employees, the Board has made the appropriate editorial changes throughout the adopted regulations.

Other Definitions

Section 1002.5 contains the definitions used in the regulations. Several commenters have recommended that some of the definitions in this section be edited to be consistent with the CAA. Where appropriate, the Board has made those changes.[2]

Section 1002.5(i) defines an employee of the House of Representatives. The Committee on House Administration noted that because there may be some joint employees of the House and Senate, the definition of an employee of the House of Representatives should also include individuals employed by the Senate. We agree and have made the necessary revisions.

Section 1002.5(k) defines employing office. CHA commented that the definition in 1002.5(k)(4) was broader than the definition of "employing office" in Section 101(9) of the CAA. We note that during the rulemaking procedures for the Veterans Equal Opportunities Act (VEOA), the Board determined that in view of the selection process for certain Senate employees, the words "or directed" would be added to the definition of "covered employee" to include any employee who is hired at the direction of a Senator, but whose appointment form is signed by an officer of either House of Congress. Although we included such language in the proposed rules on USERRA, it appears that this language would be overreaching for the House and other employing offices. As the House has different methods of making appointments and selections, this language is unnecessary and may create confusion given the practices of the House. Accordingly, the Board has deleted this provision from the House and other employing offices version, but will include it in the Senate version.

Section 1002.5(l) defines health plan. The Capitol Police has recommended that the language in the definition of health care plans be limited to the FEHB program. As discussed more fully below, the Board is mandated to follow, as closely as possible, the regulations applied to the executive branch. In view of the fact that the DOL regulations apply to federal employees in the executive branch who are also only covered under the Federal Employees Health Benefits (FEHB) program, the Board finds that there is no good cause to limit the definition.

[2] On October 20, 2008, Congress passed the Capitol Visitor Center Act (PL 110-437) amending Sections 101(3)(C) and 101(9)(D) of CAA to substitute "the Office of Congressional Accessibility Services" for both "the Capitol Guide Service" and "the Capitol Guide Board". The Board has modified its regulations to reflect this change in §1002.5(e)(3) in all versions and in §1002.5(k)(1) in the "C" version.

Section 1002.5(q) defines seniority. The Capitol Police has also recommended that this definition of seniority be deleted because of potential conflict with definitions of seniority in various collective bargaining agreements. The Board has determined that there is no good cause for such a change. The definition in the adopted regulations are not limiting and are consistent with §4316 of USERRA. Further, as DOL indicated in its notice to the final USERRA regulations, section 4316(a) of USERRA is not a statutory mandate to impose seniority systems on employers. Rather, USERRA requires only that those employers who provide benefits based on seniority restore the returning service member to his or her proper place on the seniority ladder. Because each employing office defines and determines how seniority is to be applied, the definition of seniority in the adopted regulations should not conflict with collective bargaining agreements.

Section 1002.5(s) defines undue hardship. The CHA has noted that in setting out the standards for considering when an action might require significant difficulty or expense, the proposed regulations did not include the language from §1002.5(n)(2) of the DOL's regulations. In the DOL's regulations, §1002.5(n)(2) provides that an action may be considered to be an undue hardship if it requires significant difficulty or expense when considered in light of: the overall financial resources of the *facility or facilities* involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility. Section 1002.5(s)(2) of the proposed regulations similarly referred to the overall financial resources of the *employing office*. However, in view of the fact that employing offices also may have multiple facilities, the Board agrees with the CHA comments and finds that there is no "good cause" to delete what was §1002.5(n)(2) of the DOL regulations. Therefore, what was §1002.5(n)(2) of the DOL regulations has been included in the adopted regulations as §1002.5(s)(2) and subsequent sections have been renumbered accordingly.

The Relationship Between USERRA and Other Laws, Contracts and Practices

Section 1002.7 states that USERRA supersedes any state and local law, contract, or policy that reduces or limits any rights or benefits provided by USERRA, but does not supersede those provisions that are more beneficial. Senate Employment Counsel has commented that reference to the fact that USERRA supersedes any state and local laws is superfluous and does not apply to legislative offices. Further, Counsel has recommended that the section referring to the fact that USERRA does not supersede more beneficial state or local laws be omitted. The Board acknowledges that state and local laws do not apply to federal employees or the employing offices covered under the CAA. Therefore, in order to avoid any confusion, the Board has made the appropriate changes.

Anti-Discrimination and Anti-Retaliation Provisions

As a general comment, the Capitol Police has raised questions about the Board's reference in the notice to *Britton v. Office of the Architect of the Capitol*. The Capitol Police maintains that *Britton* is not applicable to §4311(a) or (b) and that the USERRA regulations should not be changed to include substantive regulations under section 207 of the CAA. The Board notes that

the reference to the *Britton* case and retaliation under Section 207 of the CAA is merely explanatory and not a part of the substantive regulations. In the NPR, there is a typographical error and the correct statement is that the Board does not propose a particular standard for claims of discrimination or retaliation brought by eligible employees under section 206. Any discussion referring to Section 207 retaliation was for explicative purposes only. Accordingly, it should be noted that in these regulations, the Board is not discussing claims of retaliation under Section 207 and that references to Section 207 have been omitted from the adopted regulations.

Section 1002.20, as set out in the proposed regulations, discussed the extent of the coverage of USERRA's prohibitions against discrimination and retaliation. Several commenters noted that §1002.20 and §1002.21 were confusing and did not clearly differentiate discrimination and retaliation protections as applied by §206 and §207 of the CAA. The Board agrees and has modified section 1002.20 and replaced section 1002.21 with a new section to reflect that USERRA protects eligible employees in all positions with covered employing offices. Thus, because Section 206 of the CAA only covers "eligible employees" as defined in §1002.5(f), "covered employees" would only be protected by the anti-retaliation provisions under Section 207 of the CAA.

Additionally, in its comments, the Capitol Police asks why the numbering of §1002.20 and §1002.21 was reversed and why §1002.22 covering the burden of proving discrimination or retaliation was excluded. The Board notes that it had good cause to delete §1002.22 as Congress specifically did not adopt the "but for" test (38 U.S.C 4311 (c) (1) and (2)) and therefore it was confusing and unnecessary to include this provision. In view of the revisions to sections 1002.20 and 1002.21 noted above, the Board has kept the order as it was in the proposed regulations to be more consistent with these edits.

Eligibility for Reemployment

As a general comment, the CHA notes that with respect to employees in the House, the statement in the NPR that "it is not permitted for an employee to work for a Member office and a Committee at the same time" is incorrect. Although this statement is not part of the substantive regulations, where there are variations in the employment requirements of different employing offices, the Board has made the necessary changes to each of the versions of the adopted regulations.

Section 1002.32 sets out the criteria that an employee must meet to be eligible under USERRA for reemployment after service in the uniformed services. The CHA has recommended that this section be changed to be consistent with the definition of eligible employee in section 206(a)(2)(A) of the CAA, and for clarity as applied to individual employing offices which may cease to exist while an eligible employee is performing service. The Board agrees and has changed the House and Senate versions to reflect that generally, if an eligible employee is absent from a position in an employing office by reason of service in the uniformed services, he or she will be eligible for employment in the same employing office if that employing office continues to exist at such time.

Section 1002.34 of the proposed regulations established that USERRA applies to all covered employing offices of the legislative branch as defined in Subpart A, section 1002.5(e). Both the Capitol Police and Senate Employment Counsel commented that the definition of "employing office" should be changed to track the CAA, rather than the definition in the proposed regulations. Thus, Counsel notes that any regulation the Office of Compliance issues for an "employing office" should track 2 U.S.C. §1301(9), and include the General Accounting Office and Library of Congress, as required under 2 U.S.C. §1316(a)(2)(C). The Board agrees and has changed the definition to more closely follow the CAA.

Section 1002.40 states that in protecting against discrimination in initial hiring decisions, an employing office need not actually employ an individual to be his or her employer. The CHA commented that it is not correct to say that "[a]n employing office need not actually employ an individual to be his or her 'employer'." The CHA notes that while the result is the same-- an applicant who is otherwise an eligible employee cannot be discriminated against in initial employment based on his or her performing service in the uniformed service, to say that the employing office is his or her employer is incorrect. The Board agrees and has made the change to reflect that while an employing office may not technically be the "employer" of an applicant, the result is the same -- the employing office is *liable* under the Act if it engages in discrimination against an applicant based on his or her performing service in the uniformed service.

Section 1002.120 allows an employee to seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. The proposed regulations stated that such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. The CHA has noted that because employees of the House are "at-will", reference to termination and/or discipline for "cause" in this section is inapplicable and could be confusing. While the Board recognizes that employees of the House are "at-will", the same issues raised by the CHA can apply to many executive branch and private sector employees, as well. In view of the fact that the DOL regulations contain the same provision, notwithstanding the different employment arrangements in the private sector and executive branch agencies, the Board finds no good cause to make the change.

Health and Pension Plan Coverage

USERRA ensures that eligible employees are provided with health and pension plan coverage on a continuing basis in certain circumstances and reinstatement of coverage upon reemployment. All of the commenters have raised concerns over the inclusion of provisions concerning health and pension plan benefits and ask that these provisions be withdrawn or limited specifically to the specific health and pension plans covering federal employees. For example, the CHA notes that House employing offices do not provide health or retirement benefits to their employees and do not pay or administer contributions and/or premiums for such plans. Similarly, Senate Employment Counsel explains that while employees of Senate employing offices are entitled to health plan coverage and pension benefits under the FEHB and Civil Service Retirement System

(CSRS) or the Federal Employment Retirement System (FERS), their respective employing offices do not provide the "employer contribution" for such coverage and do not determine when such coverage starts or is reinstated or any terms or conditions of the coverage. Moreover, while the Senate appropriates monies for any agency contribution to such plans, these contributions do not come from the monies appropriated to individual employing offices.

The Board recognizes that the role of the Senate and House employing offices, in administering health and pension plans is somewhat attenuated. With the caveat in mind that it is the U.S. Office of Personnel Management that controls not only federal employee health plans, but pension plans as well, the Board nonetheless does not find good cause to exclude these provisions from the adopted regulations. In support of this, the Board notes that the DOL regulations cover federal employees in the executive branch who are also covered under the FEHB, CSRS and FERS. Moreover, USERRA itself states in Section 4318 that a right provided under any Federal or State law governing pension benefits for governmental employees (except for benefits under the Thrift Savings Plan) is covered. The Board is not aware of every employment relationship in the legislative branch and there is always the possibility that there may be situations where employees are not covered under the FEHB or CSRS/FERS, or may be covered under craft union or multi-employer plans. The Board further notes that to the extent that an employing office does not control nor is responsible for assuring that eligible employees are properly covered under health and pension plans, these provisions would not apply. Although employing offices may not have direct control over health and pension plans, they are responsible for ensuring that eligible employees are covered by facilitating or requesting that the necessary contribution or funding is made. Rather than deleting sections of the regulations, the Board has revised the regulations to reflect the responsibility of the employing offices and where appropriate, has made changes to reflect that while employing agencies may not have control over the plans, they do have some responsibility in assuring that eligible employees are covered as required under USERRA.

Protection Against Discharge

Section 1002.247 protects an employee against discharge. Rather than state that a discharge except for cause is prohibited if an employee's most recent period of service was for more than 30 days, the proposed regulations stated that, because legislative employees are at will, a discharge without cause could create a rebuttable presumption of a violation. In its comments, the CHA notes that in modifying this section, the explanation regarding the discharge of a returning employee was unclear. The Board agrees that there is no "good cause" for making the revisions originally contained in the proposed regulations and has changed this section to be consistent with DOL regulations.

Enforcement of Rights and Benefits Against an Employing Office

Section 102.303 requires that employees who file claims under USERRA are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance. The proposed regulations contained language that provided for "covered" rather than "eligible" employees to bring claims under USERRA to the Office of Compliance. The CHA commented that to be consistent with Section 206(a)(2)(A) of the CAA, this provision

should be modified to make clear that only "eligible employees" may bring claims under Section 206. The Board agrees and because only eligible employees are covered under Section 206 discrimination and retaliation provisions, this section has been modified.

Section 1002.312 provides for the various remedies that may be awarded for violations of USERRA, including liquidated damages. The CHA comments that because of a technical error in the CAA, there is no statutory authority to provide for liquidated damages remedies under USERRA. In its notice of rulemaking, the Board noted the same error. Thus, as written in Section 206 of the CAA, reference is made to the application of paragraphs (1), (2)(A), and (3) of section 4323(c). However, in USERRA, section 4323(c), which refers to venue, is not comprised of paragraphs (1), (2)(A), and (3). Rather, section 4323(d), which does address remedies, is comprised of those paragraphs. Because of this apparent typographical error, the Board noted that where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), it would read it as referring to section 4323(d). The Board disagrees with CHA's position that because of this technical error, the liquidated damages remedy section of USERRA is not incorporated into the CAA. There is no question from the context and the express language of §206(b) which specifically provides that the remedy for a violation of §206(a) of the CAA shall be the same as remedies awarded under USERRA, that there has been a waiver of sovereign immunity sufficient to provide for all the remedies covered in paragraphs (1), (2)(A), and (3) of section 4323(d). Contrary to the CHA's observations, it does not require a court to look beyond the express language of the statute to understand Congress's intent that the liquidated damages provision of USERRA be applied under the CAA.

Under sections 1002.310 and 1002.314 of the proposed regulations, respectively, fees and court costs may not be charged against individuals claiming rights under the CAA and courts and/or hearing officers may use their equity powers in actions or proceedings under the Act. The CHA commented that because § 1002.314 and the first sentence of § 1002.310 are based on sections of USERRA that are not incorporated by the CAA (§4323(e) and §4323(h) respectively), these provisions should be deleted from the adopted regulations. The Board has reviewed these comments and while we would find that, notwithstanding any "technical" error, the CAA does incorporate the remedies set out in §1002.314 (a)-(c), we agree that the CAA does not include the remedies articulated in §4323(e) and §4323(h) of USERRA. As the first sentence in §1002.310 of the proposed regulations does appear to mirror §4323(h) of USERRA and §1002.314 of the proposed regulations similarly mirrors §4323(e), in order to avoid any confusion, the Board has found good cause to delete these provisions. The Board has retained the part of §1002.310 pertaining to the awarding of fees and costs. As discussed in the NPR, the Board found that the DOL regulations permitting an award of fees and court costs for an individual who has obtained counsel and prevailed in his or her claim against the employer was consistent with Section 225(a) of the CAA, permitting a prevailing covered employee to be awarded reasonable fees and costs. To be more fully consistent with the CAA, the Board has kept its modification of the language removing the requirement that the individual retain private counsel as a condition of such an award.