PART 2423—UNFAIR LABOR PRACTICE PROCEEDINGS

AUTHORITY: 3 U.S.C. 431; 5 U.S.C. 7134.

SOURCE: 62 FR 40916, July 31, 1997, unless otherwise noted.

§ 2423.0 Applicability of this part.

This part applies to any unfair labor practice cases that are pending or filed with the FLRA on or after July 25, 2012.

[77 FR 37759, June 25, 2012]

Subpart A—Filing, Investigating, Resolving, and Acting on Charges

SOURCE: 77 FR 37759, June 25, 2012, unless otherwise noted.

§ 2423.1 Can a Regional Office help the parties resolve unfair labor practice disputes before a Regional Director decides whether to issue a complaint?

(a) *Resolving unfair labor practice disputes before filing a charge.* The purposes and policies of the Federal Service Labor-Management Relations Statute (Statute) can best be achieved by the collaborative efforts of all persons covered by that law. The General Counsel encourages all persons to meet and, in good faith, attempt to resolve unfair labor practice disputes before filing unfair labor practice charges. If requested, and the parties agree, a representative of the Regional Office, in appropriate circumstances, may participate in these meetings to assist the parties to identify the issues and their interests and to resolve the dispute. Parties' attempts to resolve unfair labor practice disputes before filing an unfair labor practice charge do not toll the time limitations for filing a charge set forth at 5 U.S.C. 7118(a)(4).

(b) *Resolving unfair labor practice disputes after filing a charge.* The General Counsel encourages the informal resolution of unfair labor practice allegations after a charge is filed and before

the Regional Director makes a merit determination. A representative of the appropriate Regional Office, as part of the investigation, may assist the parties in informally resolving their dispute.

§ 2423.2 What Alternative Dispute Resolution (ADR) services does the OGC provide?

(a) *Purpose of ADR services.* The Office of the General Counsel furthers its mission and implements the agency-wide Federal Labor Relations Authority Collaboration and Alternative Dispute Resolution Program by promoting stable and productive labor-management relationships governed by the Statute and by providing services that assist labor organizations and agencies, on a voluntary basis, to:

(1) Develop collaborative labor-management relationships;

(2) Avoid unfair labor practice disputes; and

(3) Informally resolve unfair labor practice disputes.

(b) *Types of ADR Services.* Agencies and labor organizations may jointly request, or agree to, the provision of the following services by the Office of the General Counsel:

(1) *Facilitation.* Assisting the parties in improving their labor-management relationship as governed by the Statute;

(2) *Intervention.* Intervening when parties are experiencing or expect significant unfair labor practice disputes;

(3) *Training.* Training labor organization officials and agency representatives on their rights and responsibilities under the Statute and how to avoid litigation over those rights and responsibilities, and on using problem-solving and ADR skills, techniques, and strategies to resolve informally unfair labor practice disputes; and

(4) *Education.* Working with the parties to recognize the benefits of, and establish processes for, avoiding unfair labor practice disputes, and resolving any unfair labor practice disputes that arise by consensual, rather than adversarial, methods.

(c) *ADR services after initiation of an investigation.* As part of processing an unfair labor practice charge, the Office of the General Counsel may suggest to the parties, as appropriate, that they may benefit from these ADR services.

§ 2423.3 Who may file charges?

(a) *Filing charges.* Any person may charge an activity, agency, or labor organization with having engaged in, or engaging in, any unfair labor practice prohibited under 5 U.S.C. 7116.

(b) *Charging Party.* Charging Party means the individual, labor organization, activity, or agency filing an unfair labor practice charge with a Regional Director.

(c) *Charged Party.* Charged Party means the activity, agency, or labor organization charged with allegedly having engaged in, or engaging in, an unfair labor practice.

§ 2423.4 What must you state in the charge and what supporting evidence and documents should you submit?

(a) *What to file.* You, the Charging Party, may file a charge alleging a violation of 5 U.S.C. 7116 by providing the following information on a form designated by the General Counsel, or on a substantially similar form, or electronically through the use of the eFiling system on the FLRA's Web site at *www.flra.gov,* or by facsimile transmission:

(1) The Charging Party's name and mailing address, including street number, city, state, and zip code;

(2) The Charged Party's name and mailing address, including street number, city, state, and zip code;

(3) The Charging Party's point of contact's name, address, telephone number, facsimile number, if known, and email address, if known;

(4) The Charged Party's point of contact's name, address, telephone number, facsimile number, if known, and email address, if known;

(5) A clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the Statute, and the date and place of occurrence of the particular acts; and

(6) A statement whether the subject matter raised in the charge:

(i) Has been raised previously in a grievance procedure;

(ii) Has been referred to the Federal Service Impasses Panel, the Federal Mediation and Conciliation Service, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, or the Office of Special Counsel for consideration or action;

(iii) Involves a negotiability issue that you raised in a petition pending before the Authority under part 2424 of this subchapter; or

(iv) Has been the subject of any other administrative or judicial proceeding.

(7) A statement describing the result or status of any proceeding identified in paragraph (a)(6) of this section.

(b) *When and how to file.* Under 5 U.S.C. 7118(a)(4), a charge alleging an unfair labor practice must be in writing and signed or filed electronically using the eFiling system on the FLRA's Web site at *www.flra.gov*. It is normally filed within six (6) months of its occurrence unless one of the two (2) circumstances described under paragraph (B) of 5 U.S.C. 7118(a)(4) applies.

(c) *Declarations of truth and statement of service.* A charge must also contain a declaration by the individual signing the charge, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of that individual's knowledge and belief.

(d) *Statement of service.* You must also state that you served the charge on the Charged Party, and you must list the name, title and location of the individual served, and the method of service.

(e) *Self-contained document.* A charge must be a self-contained document describing the alleged unfair labor practice without a need to refer to supporting evidence and documents submitted under paragraph (f) of this section.

(f) *Submitting supporting evidence and documents and identifying potential witnesses.* When filing a charge, you must submit to the Regional Director any supporting evidence and documents, including, but not limited to, correspondence and memoranda, records, reports, applicable collective bargaining agreement clauses, memoranda of understanding, minutes of meetings, applicable regulations, statements of position, and other documentary evidence. You also must identify potential witnesses with contact information (telephone number, email address, and facsimile number) and provide a brief synopsis of their expected testimony.

§ 2423.5 [Reserved]

§ 2423.6 What is the process for filing and serving copies of charges?

(a) *Where to file.* You must file the charge with the Regional Director for the region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more regions may be filed with the Regional Director in any of those regions.

(b) *Date of filing.* When a Regional Director receives a charge, it is deemed filed. A charge filed during business hours by facsimile or electronic means is deemed received on the business day on which it is received (either by the Regional Office fax machine or by the eFiling system), until midnight local time in the Region where it is filed. But when a Region receives a charge after the close of the business day by any other method, it will be deemed received and docketed on the next business day. The business hours for each of the Regional Offices are set forth at *http://www.FLRA.gov*.

(c) *Method of filing.* You may file a charge with the Regional Director in person or by commercial delivery, first class mail, certified mail, facsimile, or electronically through use of the eFiling system on the FLRA's Web site at *www.flra.gov*. If filing by facsimile transmission or by electronic means, you are not required to file an original copy of the charge with the Region. You assume responsibility for the Regional Director's receipt of a charge. Supporting evidence and documents must be submitted to the Regional Director in person, by commercial delivery, first class mail, certified mail, facsimile transmission, or through the FLRA's eFiling system.

(d) *Service of the charge.* You must serve a copy of the charge (without supporting evidence and documents) on the Charged Party. Where facsimile equipment is available, you may serve the charge by facsimile transmission,

as paragraph (c) of this section discusses. Alternatively, you may serve the charge by electronic mail (''email''), but only if the Charged Party has agreed to be served by email. The Region routinely serves a copy of the charge on the Charged Party, but you remain responsible for serving the charge, consistent with the requirements in this paragraph.

§ 2423.7 [Reserved]

§ 2423.8 How are charges investigated?

(a) *Investigation.* The Regional Director, on behalf of the General Counsel, conducts an investigation of the charge as deemed necessary. During the course of the investigation, all parties involved are given an opportunity to present their evidence and views to the Regional Director.

(b) *Cooperation.* The purposes and policies of the Statute can best be achieved by the parties' full cooperation and their timely submission of all relevant information from all potential sources during the investigation. All persons must cooperate fully with the Regional Director in the investigation of charges. A failure to cooperate during the investigation of a charge may provide grounds to dismiss a charge for failure to produce evidence supporting the charge. Cooperation includes any of the following actions, when deemed appropriate by the Regional Director:

(1) Making union officials, employees, and agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation;

(2) Producing documentary evidence pertinent to the matters under investigation;

(3) Providing statements of position on the matters under investigation; and

(4) Responding to an agent's communications during an investigation in a timely manner.

(c) *Investigatory subpoenas.* If a person fails to cooperate with the Regional Director in the investigation of a charge, the General Counsel, upon recommendation of a Regional Director, may decide in appropriate circumstances to issue a subpoena under 5 U.S.C. 7132 for the attendance and testimony of witnesses and the production of documentary or other evidence. However, no subpoena, which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management, will issue under this section.

(1) A subpoena can only be served by any individual who is at least 18 years old and who is not a party to the proceeding. The individual who served the subpoena must certify that he or she did so:

(i) By delivering it to the witness in person;

(ii) By registered or certified mail; or

(iii) By delivering the subpoena to a responsible individual (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended. The subpoena must show on its face the name and address of the Regional Director and the General Counsel.

(2) Any person served with a subpoena who does not intend to comply must, within 5 days after the date of service of the subpoena upon such person, petition in writing to revoke the subpoena. A copy of any petition to revoke must be served on the General Counsel.

(3) The General Counsel must revoke the subpoena if the witness or evidence, the production of which is required, is not material and relevant to the matters under investigation or in question in the proceedings, or the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. The General Counsel must state the procedural or other grounds for the ruling on the petition to revoke. The petition to revoke becomes part of the official record if there is a hearing under subpart C of this part.

(4) Upon the failure of any person to comply with a subpoena issued by the General Counsel, the General Counsel must determine whether to institute proceedings in the appropriate district court for the enforcement of the subpoena. Enforcement must not be

sought if to do so would be inconsistent with law, including the Statute.

(d) *Confidentiality*. It is the General Counsel's policy to protect the identity of individuals who submit statements and information during the investigation, and to protect against the disclosure of documents obtained during the investigation, to ensure the General Counsel's ability to obtain all relevant information. However, after a Regional Director issues a complaint and when necessary to prepare for a hearing, the Region may disclose the identification of witnesses, a synopsis of their expected testimony, and documents proposed to be offered into evidence at the hearing, as required by the prehearing disclosure requirements in § 2423.23.

§ 2423.9 How are charges amended?

Before the issuance of a complaint, the Charging Party may amend the charge under the requirements set forth in § 2423.6.

§ 2423.10 What actions may the Regional Director take with regard to your charge?

(a) *Regional Director action*. The Regional Director, on behalf of the General Counsel, may take any of the following actions, as appropriate:

(1) Approve a request to withdraw a charge;

(2) Dismiss a charge;

(3) Approve a written settlement agreement under § 2423.12;

(4) Issue a complaint; or

(5) Withdraw a complaint.

(b) *Request for appropriate temporary relief*. Parties may request the General Counsel to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d). The General Counsel may initiate and prosecute injunctive proceedings under 5 U.S.C. 7123(d) only upon approval of the Authority. A determination by the General Counsel not to seek approval of the Authority to seek temporary relief is final and cannot be appealed to the Authority.

(c) *General Counsel requests to the Authority*. When a complaint issues and the Authority approves the General Counsel's request to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d), the General Counsel may make application for appropriate temporary relief (including a restraining order) in the district court of the United States within which the unfair labor practice is alleged to have occurred or in which the party sought to be enjoined resides or transacts business. The General Counsel may seek temporary relief if it is just and proper and the record establishes probable cause that an unfair labor practice is being committed. Temporary relief will not be sought if it would interfere with the ability of the agency to carry out its essential functions.

(d) *Actions subsequent to obtaining appropriate temporary relief*. The General Counsel must inform the district court that granted temporary relief under 5 U.S.C. 7123(d) whenever an Administrative Law Judge recommends dismissal of the complaint, in whole or in part.

§ 2423.11 What happens if a Regional Director decides not to issue a complaint?

(a) *Opportunity to withdraw a charge*. If the Regional Director determines that the charge has not been timely filed, that the charge fails to state an unfair labor practice, or for other appropriate reasons, the Regional Director may request the Charging Party to withdraw the charge.

(b) *Dismissal letter*. If the Charging Party does not withdraw the charge within a reasonable period of time, the Regional Director will dismiss the charge and provide the parties with a written statement of the reasons for not issuing a complaint.

(c) *Appeal of a dismissal letter*. The Charging Party may obtain review of the Regional Director's decision to dismiss a charge by filing an appeal with the General Counsel, either in writing or by email to *ogc.appeals@flra.gov*, within 25 days after the Regional Director served the decision. A Charging Party must serve a copy of the appeal on the Regional Director. The General Counsel must serve notice on the Charged Party that the Charging Party has filed an appeal.

(d) *Extension of time*. The Charging Party may file a request, either in writing or by email to *ogc.appeals@flra.gov*, for an extension of

time to file an appeal, which must be received by the General Counsel not later than five (5) days before the date the appeal is due. A Charging Party must serve a copy of the request for an extension of time on the Regional Director.

(e) *Grounds for granting an appeal.* The General Counsel may grant an appeal when the appeal establishes at least one of the following grounds:

(1) The Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint;

(2) The Regional Director's decision is based on a finding of a material fact that is clearly erroneous;

(3) The Regional Director's decision is based on an incorrect statement or application of the applicable rule of law;

(4) There is no Authority precedent on the legal issue in the case; or

(5) The manner in which the Region conducted the investigation has resulted in prejudicial error.

(f) *General Counsel action.* The General Counsel may deny the appeal of the Regional Director's dismissal of the charge, or may grant the appeal and remand the case to the Regional Director to take further action. The General Counsel's decision on the appeal states the grounds listed in paragraph (e) of this section for denying or granting the appeal, and is served on all the parties. Absent a timely motion for reconsideration, the General Counsel's decision is final.

(g) *Reconsideration.* After the General Counsel issues a final decision, the Charging Party may move for reconsideration of the final decision if it can establish extraordinary circumstances in its moving papers. The motion must be filed within 10 days after the date on which the General Counsel's final decision is postmarked. A motion for reconsideration must state with particularity the extraordinary circumstances claimed and must be supported by appropriate citations. The decision of the General Counsel on a motion for reconsideration is final.

§ 2423.12 What types of settlements of unfair labor practice charges are possible after a Regional Director decides to issue a complaint but before issuance of a complaint?

(a) *Bilateral informal settlement agreement.* Before issuing a complaint, the Regional Director may give the Charging Party and the Charged Party a reasonable period of time to enter into an informal settlement agreement to be approved by the Regional Director. When a Charged Party complies with the terms of an informal settlement agreement approved by the Regional Director, no further action is taken in the case. If the Charged Party fails to perform its obligations under the approved informal settlement agreement, the Regional Director may institute further proceedings.

(b) *Unilateral informal settlement agreement.* If the Charging Party elects not to become a party to a bilateral settlement agreement, which the Regional Director concludes fulfills the policies of the Statute, the Regional Director may choose to approve a unilateral settlement between the Regional Director and the Charged Party. The Regional Director, on behalf of the General Counsel, must issue a letter stating the grounds for approving the settlement agreement and declining to issue a complaint. The Charging Party may obtain review of the Regional Director's action by filing an appeal with the General Counsel under § 2423.11(c) and (d). The General Counsel may grant an appeal when the Charging Party has shown that the Regional Director's approval of a unilateral settlement agreement does not fulfill the purposes and policies of the Statute. The General Counsel must take action on the appeal as set forth in § 2423.11(b) through (g).

§§ 2423.13–2423.19 [Reserved]

Subpart B—Post Complaint, Prehearing Procedures

§ 2423.20 Issuance and contents of the complaint; answer to the complaint; amendments; role of Office of Administrative Law Judges.

(a) *Complaint.* Whenever formal proceedings are deemed necessary, the Regional Director shall file and serve, in accordance with § 2429.12 of this subchapter, a complaint with the Office of Administrative Law Judges. The decision to issue a complaint shall not be subject to review. Any complaint may be withdrawn by the Regional Director prior to the hearing. The complaint shall set forth:

(1) Notice of the charge;

(2) The basis for jurisdiction;

(3) The facts alleged to constitute an unfair labor practice;

(4) The particular sections of 5 U.S.C., chapter 71 and the rules and regulations involved;

(5) Notice of the date, time, and place that a hearing will take place before an Administrative Law Judge; and

(6) A brief statement explaining the nature of the hearing.

(b) *Answer.* Within 20 days after the date of service of the complaint, but in any event, prior to the beginning of the hearing, the Respondent shall file and serve, in accordance with part 2429 of this subchapter, an answer with the Office of Administrative Law Judges. The answer shall admit, deny, or explain each allegation of the complaint. If the Respondent has no knowledge of an allegation or insufficient information as to its truthfulness, the answer shall so state. Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission. Motions to extend the filing deadline shall be filed in accordance with § 2423.21.

(c) *Amendments.* The Regional Director may amend the complaint at any time before the answer is filed. The Respondent then has 20 days from the date of service of the amended complaint to file an answer with the Office of Administrative Law Judges. Prior to the beginning of the hearing, the answer may be amended by the Respondent within 20 days after the answer is filed. Thereafter, any requests to amend the complaint or answer must be made by motion to the Office of Administrative Law Judges.

(d) *Office of Administrative Law Judges.* Pleadings, motions, conferences, hearings, and other matters throughout as specified in subparts B, C, and D of this part shall be administered by the Office of Administrative Law Judges, as appropriate. The Chief Administrative Law Judge, or any Administrative Law Judge designated by the Chief Administrative Law Judge, shall administer any matters properly submitted to the Office of Administrative Law Judges. Throughout subparts B, C, and D of this part, ''Administrative Law Judge'' or ''Judge'' refers to the Chief Administrative Law Judge or his or her designee.

§ 2423.21 Motions procedure.

(a) *General requirements.* All motions, except those made during a prehearing conference or hearing, shall be in writing. Motions for an extension of time, postponement of a hearing, or any other procedural ruling shall include a statement of the position of the other parties on the motion. All written motions and responses in subparts B, C, or D of this part shall satisfy the filing and service requirements of part 2429 of this subchapter.

(b) *Motions made to the Administrative Law Judge.* Prehearing motions and motions made at the hearing shall be filed with the Administrative Law Judge. Unless otherwise specified in subparts B or C of this part, or otherwise directed or approved by the Administrative Law Judge:

(1) Prehearing motions shall be filed at least 10 days prior to the hearing, and responses shall be filed within 5 days after the date of service of the motion;

(2) Responses to motions made during the hearing shall be filed prior to the close of hearing;

(3) Posthearing motions shall be filed within 10 days after the date the hearing closes, and responses shall be filed within 5 days after the date of service of the motion; and

(4) Motions to correct the transcript shall be filed with the Administrative

Law Judge within 10 days after receipt of the transcript, and responses shall be filed within 5 days after the date of service of the motion.

(c) *Post-transmission motions.* After the case has been transmitted to the Authority, motions shall be filed with the Authority. Responses shall be filed within 5 days after the date of service of the motion.

(d) *Interlocutory appeals.* Motions for an interlocutory appeal of any ruling and responses shall be filed in accordance with this section and § 2423.31(c).

§ 2423.22 Intervenors.

Motions for permission to intervene and responses shall be filed in accordance with § 2423.21. Such motions shall be granted upon a showing that the outcome of the proceeding is likely to directly affect the movant's rights or duties. Intervenors may participate only: on the issues determined by the Administrative Law Judge to affect them; and to the extent permitted by the Judge. Denial of such motions may be appealed pursuant to § 2423.21(d).

§ 2423.23 Prehearing disclosure.

Unless otherwise directed or approved by the Judge, the parties shall exchange, in accordance with the service requirements of § 2429.27(b) of this subchapter, the following items at least 14 days prior to the hearing:

(a) *Witnesses.* Proposed witness lists, including a brief synopsis of the expected testimony of each witness;

(b) *Documents.* Copies of documents, with an index, proposed to be offered into evidence; and

(c) *Theories.* A brief statement of the theory of the case, including relief sought, and any and all defenses to the allegations in the complaint.

§ 2423.24 Powers and duties of the Administrative Law Judge during prehearing proceedings.

(a) *Prehearing procedures.* The Administrative Law Judge shall regulate the course and scheduling of prehearing matters, including prehearing orders, conferences, disclosure, motions, and subpoena requests.

(b) *Changing date, time, or place of hearing.* After issuance of the complaint or any prehearing order, the Administrative Law Judge may, in the Judge's discretion or upon motion by any party through the motions procedure in § 2423.21, change the date, time, or place of the hearing.

(c) *Prehearing order.* (1) The Administrative Law Judge may, in the Judge's discretion or upon motion by any party through the motions procedure in § 2423.21, issue a prehearing order confirming or changing:

(i) The date, time, or place of the hearing;

(ii) The schedule for prehearing disclosure of witness lists and documents intended to be offered into evidence at the hearing;

(iii) The date for submission of procedural and substantive motions;

(iv) The date, time, and place of the prehearing conference; and

(v) Any other matter pertaining to prehearing or hearing procedures.

(2) The prehearing order shall be served in accordance with § 2429.12 of this subchapter.

(d) *Prehearing conferences.* The Administrative Law Judge shall conduct one or more prehearing conferences, either by telephone or in person, at least 7 days prior to the hearing date, unless the Administrative Law Judge determines that a prehearing conference would serve no purpose and no party has moved for a prehearing conference in accordance with § 2423.21. If a prehearing conference is held, all parties must participate in the prehearing conference and be prepared to discuss, narrow, and resolve the issues set forth in the complaint and answer, as well as any prehearing disclosure matters or disputes. When necessary, the Administrative Law Judge shall prepare and file for the record a written summary of actions taken at the conference. Summaries of the conference shall be served on all parties in accordance with § 2429.12 of this subchapter. The following may also be considered at the prehearing conference:

(1) Settlement of the case, either by the Judge conducting the prehearing conference or pursuant to § 2423.25;

(2) Admissions of fact, disclosure of contents and authenticity of documents, and stipulations of fact;

(3) Objections to the introduction of evidence at the hearing, including oral

or written testimony, documents, papers, exhibits, or other submissions proposed by a party;

(4) Subpoena requests or petitions to revoke subpoenas;

(5) Any matters subject to official notice;

(6) Outstanding motions; or

(7) Any other matter that may expedite the hearing or aid in the disposition of the case.

(e) *Sanctions.* The Administrative Law Judge may, in the Judge's discretion or upon motion by any party through the motions procedure in § 2423.21, impose sanctions upon the parties as necessary and appropriate to ensure that a party's failure to fully comply with subpart B or C of this part is not condoned. Such authority includes, but is not limited to, the power to:

(1) Prohibit a party who fails to comply with any requirement of subpart B or C of this part from, as appropriate, introducing evidence, calling witnesses, raising objections to the introduction of evidence or testimony of witnesses at the hearing, presenting a specific theory of violation, seeking certain relief, or relying upon a particular defense.

(2) Refuse to consider any submission that is not filed in compliance with subparts B or C of this part.

§ 2423.25 Post complaint, prehearing settlements.

(a) *Informal and formal settlements.* Post complaint settlements may be either informal or formal.

(1) Informal settlement agreements provide for withdrawal of the complaint by the Regional Director and are not subject to approval by or an order of the Authority. If the Respondent fails to perform its obligations under the informal settlement agreement, the Regional Director may reinstitute formal proceedings consistent with this subpart.

(2) Formal settlement agreements are subject to approval by the Authority, and include the parties' agreement to waive their right to a hearing and acknowledgment that the Authority may issue an order requiring the Respondent to take action appropriate to the terms of the settlement. The formal settlement agreement shall also contain the Respondent's consent to the Authority's application for the entry of a decree by an appropriate federal court enforcing the Authority's order.

(b) *Informal settlement procedure.* If the Charging Party and the Respondent enter into an informal settlement agreement that is accepted by the Regional Director, the Regional Director shall withdraw the complaint and approve the informal settlement agreement. If the Charging Party fails or refuses to become a party to an informal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the Regional Director shall enter into the agreement with the Respondent and shall withdraw the complaint. The Charging Party then may obtain a review of the Regional Director's action by filing an appeal with the General Counsel as provided in subpart A of this part.

(c) *Formal settlement procedure.* If the Charging Party and the Respondent enter into a formal settlement agreement that is accepted by the Regional Director, the Regional Director shall withdraw the complaint upon approval of the formal settlement agreement by the Authority. If the Charging Party fails or refuses to become a party to a formal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the agreement shall be between the Respondent and the Regional Director. The formal settlement agreement together with the Charging Party's objections, if any, shall be submitted to the Authority for approval. The Authority may approve a formal settlement agreement upon a sufficient showing that it will effectuate the policies of the Federal Service Labor-Management Relations Statute.

(d) *Settlement judge program.* The Administrative Law Judge, in the Judge's discretion or upon the request of any party, may assign a judge or other appropriate official, who shall be other

than the hearing judge unless otherwise mutually agreed to by the parties, to conduct negotiations for settlement.

(1) The settlement official shall convene and preside over settlement conferences by telephone or in person.

(2) The settlement official may require that the representative for each party be present at settlement conferences and that the parties or agents with full settlement authority be present or available by telephone.

(3) The settlement official shall not discuss any aspect of the case with the hearing judge.

(4) No evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement official shall be admissible in any proceeding before the Administrative Law Judge or Authority, except by stipulation of the parties.

§ 2423.26 Stipulations of fact submissions.

(a) *General.* When all parties agree that no material issue of fact exists, the parties may jointly submit a motion to the Administrative Law Judge or Authority requesting consideration of the matter based upon stipulations of fact. Briefs of the parties are required and must be submitted within 30 days of the joint motion. Upon receipt of the briefs, such motions shall be ruled upon expeditiously.

(b) *Stipulations to the Administrative Law Judge.* Where the stipulation adequately addresses the appropriate material facts, the Administrative Law Judge may grant the motion and decide the case through stipulation.

(c) *Stipulations to the Authority.* Where the stipulation provides an adequate basis for application of established precedent and a decision by the Administrative Law Judge would not assist in the resolution of the case, or in unusual circumstances, the Authority may grant the motion and decide the case through stipulation.

(d) *Decision based on stipulation.* Where the motion is granted, the Authority will adjudicate the case and determine whether the parties have met their respective burdens based on the stipulation and the briefs.

§ 2423.27 Summary judgment motions.

(a) *Motions.* Any party may move for a summary judgment in its favor on any of the issues pleaded. Unless otherwise approved by the Administrative Law Judge, such motion shall be made no later than 10 days prior to the hearing. The motion shall demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Such motions shall be supported by documents, affidavits, applicable precedent, or other appropriate materials.

(b) *Responses.* Responses must be filed within 5 days after the date of service of the motion. Responses may not rest upon mere allegations or denials but must show, by documents, affidavits, applicable precedent, or other appropriate materials, that there is a genuine issue to be determined at the hearing.

(c) *Decision.* If all issues are decided by summary judgment, no hearing will be held and the Administrative Law Judge shall prepare a decision in accordance with § 2423.34. If summary judgment is denied, or if partial summary judgment is granted, the Administrative Law Judge shall issue an opinion and order, subject to interlocutory appeal as provided in § 2423.31(c) of this subchapter, and the hearing shall proceed as necessary.

§ 2423.28 Subpoenas.

(a) *When necessary.* Where the parties are in agreement that the appearance of witnesses or the production of documents is necessary, and such witnesses agree to appear, no subpoena need be sought.

(b) *Requests for subpoenas.* A request for a subpoena by any person, as defined in 5 U.S.C. 7103(a)(1), shall be in writing and filed with the Office of Administrative Law Judges not less than 10 days prior to the hearing, or with the Administrative Law Judge during the hearing. Requests for subpoenas made less than 10 days prior to the hearing shall be granted on sufficient explanation of why the request was not timely filed.

(c) *Subpoena procedures.* The Office of Administrative Law Judges, or any

other employee of the Authority designated by the Authority, as appropriate, shall furnish the requester the subpoenas sought, provided the request is timely made. Requests for subpoenas may be made ex parte. Completion of the specific information in the subpoena and the service of the subpoena are the responsibility of the party on whose behalf the subpoena was issued.

(d) *Service of subpoena.* A subpoena may be served by any person who is at least 18 years old and who is not a party to the proceeding. The person who served the subpoena must certify that he or she did so:

(1) By delivering it to the witness in person,

(2) By registered or certified mail, or

(3) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended. The subpoena shall show on its face the name and address of the party on whose behalf the subpoena was issued.

(e)(1) *Petition to revoke subpoena.* Any person served with a subpoena who does not intend to comply shall, within 5 days after the date of service of the subpoena upon such person, petition in writing to revoke the subpoena. A copy of any petition to revoke a subpoena shall be served on the party on whose behalf the subpoena was issued. Such petition to revoke, if made prior to the hearing, and a written statement of service, shall be filed with the Office of Administrative Law Judges for ruling. A petition to revoke a subpoena filed during the hearing, and a written statement of service, shall be filed with the Administrative Law Judge.

(2) The Administrative Law Judge, or any other employee of the Authority designated by the Authority, as appropriate, shall revoke the subpoena if the person or evidence, the production of which is required, is not material and relevant to the matters under investigation or in question in the proceedings, or the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. The Administrative Law Judge, or any other employee of the Authority designated by the Authority, as appropriate, shall state the procedural or other ground for the ruling on the petition to revoke. The petition to revoke, any answer thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(f) *Failure to comply.* Upon the failure of any person to comply with a subpoena issued and upon the request of the party on whose behalf the subpoena was issued, the Solicitor of the Authority shall institute proceedings on behalf of such party in the appropriate district court for the enforcement thereof, unless to do so would be inconsistent with law and the Federal Service Labor-Management Relations Statute.

§ 2423.29 [Reserved]

Subpart C—Hearing Procedures

§ 2423.30 General rules.

(a) *Open hearing.* The hearing shall be open to the public unless otherwise ordered by the Administrative Law Judge.

(b) *Administrative Procedure Act.* The hearing shall, to the extent practicable, be conducted in accordance with 5 U.S.C. 554–557, and other applicable provisions of the Administrative Procedure Act.

(c) *Rights of parties.* A party shall have the right to appear at any hearing in person, by counsel, or by other representative; to examine and cross-examine witnesses; to introduce into the record documentary or other relevant evidence; and to submit rebuttal evidence, except that the participation of any party shall be limited to the extent prescribed by the Administrative Law Judge.

(d) *Objections.* Objections are oral or written complaints concerning the conduct of a hearing. Any objection not raised to the Administrative Law Judge shall be deemed waived.

(e) *Oral argument.* Any party shall be entitled, upon request, to a reasonable period prior to the close of the hearing for oral argument, which shall be included in the official transcript of the hearing.

(f) *Official transcript.* An official reporter shall make the only official transcript of such proceedings. Copies of the transcript may be examined in the appropriate Regional Office during normal working hours. Parties desiring a copy of the transcript shall make arrangements for a copy with the official hearing reporter.

§ 2423.31 Powers and duties of the Administrative Law Judge at the hearing.

(a) *Conduct of hearing.* The Administrative Law Judge shall conduct the hearing in a fair, impartial, and judicial manner, taking action as needed to avoid unnecessary delay and maintain order during the proceedings. The Administrative Law Judge may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions and taking official notice of material facts when appropriate. No provision of these regulations shall be construed to limit the powers of the Administrative Law Judge provided by 5 U.S.C. 556, 557, and other applicable provisions of the Administrative Procedure Act.

(b) *Evidence.* The Administrative Law Judge shall receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the hearing. The Administrative Law Judge may exclude any evidence that is immaterial, irrelevant, unduly repetitious, or customarily privileged. Rules of evidence shall not be strictly followed.

(c) *Interlocutory appeals.* Motions for an interlocutory appeal shall be filed in writing with the Administrative Law Judge within 5 days after the date of the contested ruling. The motion shall state why interlocutory review is appropriate, and why the Authority should modify or reverse the contested ruling.

(1) The Judge shall grant the motion and certify the contested ruling to the Authority if:

(i) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and

(ii) Immediate review will materially advance completion of the proceeding, or the denial of immediate review will cause undue harm to a party or the public.

(2) If the motion is granted, the Judge or Authority may stay the hearing during the pendency of the appeal. If the motion is denied, exceptions to the contested ruling may be filed in accordance with § 2423.40 of this subchapter after the Judge issues a decision and recommended order in the case.

(d) *Bench decisions.* Upon joint motion of the parties, the Administrative Law Judge may issue an oral decision at the close of the hearing when, in the Judge's discretion, the nature of the case so warrants. By so moving, the parties waive their right to file posthearing briefs with the Administrative Law Judge, pursuant to § 2423.33. If the decision is announced orally, it shall satisfy the requirements of § 2423.34(a)(1)–(5) and a copy thereof, excerpted from the transcript, together with any supplementary matter the judge may deem necessary to complete the decision, shall be transmitted to the Authority, in accordance with § 2423.34(b), and furnished to the parties in accordance with § 2429.12 of this subchapter.

(e) *Settlements after the opening of the hearing.* As set forth in § 2423.25(a), settlements may be either informal or formal.

(1) *Informal settlement procedure: Judge's approval of withdrawal.* If the Charging Party and the Respondent enter into an informal settlement agreement that is accepted by the Regional Director, the Regional Director may request the Administrative Law Judge for permission to withdraw the complaint and, having been granted such permission, shall withdraw the complaint and approve the informal settlement between the Charging Party and Respondent. If the Charging Party fails or refuses to become a party to an informal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the Regional Director shall enter into the agreement with the Respondent and shall, if

granted permission by the Administrative Law Judge, withdraw the complaint. The Charging Party then may obtain a review of the Regional Director's decision as provided in subpart A of this part.

(2) *Formal settlement procedure: Judge's approval of settlement.* If the Charging Party and the Respondent enter into a formal settlement agreement that is accepted by the Regional Director, the Regional Director may request the Administrative Law Judge to approve such formal settlement agreement, and upon such approval, to transmit the agreement to the Authority for approval. If the Charging Party fails or refuses to become a party to a formal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the agreement shall be between the Respondent and the Regional Director. After the Charging Party is given an opportunity to state on the record or in writing the reasons for opposing the formal settlement, the Regional Director may request the Administrative Law Judge to approve such formal settlement agreement, and upon such approval, to transmit the agreement to the Authority for approval.

§ 2423.32 Burden of proof before the Administrative Law Judge.

The General Counsel shall present the evidence in support of the complaint and have the burden of proving the allegations of the complaint by a preponderance of the evidence. The Respondent shall have the burden of proving any affirmative defenses that it raises to the allegations in the complaint.

§ 2423.33 Posthearing briefs.

Except when bench decisions are issued pursuant to §2423.31(d), posthearing briefs may be filed with the Administrative Law Judge within a time period set by the Judge, not to exceed 30 days from the close of the hearing, unless otherwise directed by the judge, and shall satisfy the filing and service requirements of part 2429 of this subchapter. Reply briefs shall not be filed absent permission of the Judge. Motions to extend the filing deadline or for permission to file a reply brief shall be filed in accordance with §2423.21.

§ 2423.34 Decision and record.

(a) *Recommended decision.* Except when bench decisions are issued pursuant to §2423.31(d), the Administrative Law Judge shall prepare a written decision expeditiously in every case. All written decisions shall be served in accordance with §2429.12 of this subchapter. The decision shall set forth:

(1) A statement of the issues;

(2) Relevant findings of fact;

(3) Conclusions of law and reasons therefor;

(4) Credibility determinations as necessary; and

(5) A recommended disposition or order.

(b) *Transmittal to Authority.* The Judge shall transmit the decision and record to the Authority. The record shall include the charge, complaint, service sheet, answer, motions, rulings, orders, prehearing conference summaries, stipulations, objections, depositions, interrogatories, exhibits, documentary evidence, basis for any sanctions ruling, official transcript of the hearing, briefs, and any other filings or submissions made by the parties.

§§ 2423.35–2423.39 [Reserved]

Subpart D—Post-Transmission and Exceptions to Authority Procedures

§ 2423.40 Exceptions; oppositions and cross-exceptions; oppositions to cross-exceptions; waiver.

(a) *Exceptions.* Any exceptions to the Administrative Law Judge's decision must be filed with the Authority within 25 days after the date of service of the Judge's decision. Exceptions shall satisfy the filing and service requirements of part 2429 of this subchapter. Exceptions shall consist of the following:

(1) The specific findings, conclusions, determinations, rulings, or recommendations being challenged; the grounds relied upon; and the relief sought.

(2) Supporting arguments, which shall set forth, in order: all relevant facts with specific citations to the record; the issues to be addressed; and a separate argument for each issue, which shall include a discussion of applicable law. Attachments to briefs shall be separately paginated and indexed as necessary.

(3) Exceptions containing 25 or more pages shall include a table of legal authorities cited.

(b) *Oppositions and cross-exceptions.* Unless otherwise directed or approved by the Authority, oppositions to exceptions, cross-exceptions, and oppositions to cross-exceptions may be filed with the Authority within 20 days after the date of service of the exceptions or cross-exceptions, respectively. Oppositions shall state the specific exceptions being opposed. Oppositions and cross-exceptions shall be subject to the same requirements as exceptions set out in paragraph (a) of this section.

(c) *Reply briefs.* Reply briefs shall not be filed absent prior permission of the Authority.

(d) *Waiver.* Any exception not specifically argued shall be deemed to have been waived.

[62 FR 40916, July 31, 1997, as amended at 77 FR 26433, May 4, 2012]

§ 2423.41 Action by the Authority; compliance with Authority decisions and orders.

(a) *Authority decision; no exceptions filed.* In the absence of the filing of exceptions within the time limits established in § 2423.40, the findings, conclusions, and recommendations in the decision of the Administrative Law Judge shall, without precedential significance, become the findings, conclusions, decision and order of the Authority, and all objections and exceptions to the rulings and decision of the Administrative Law Judge shall be deemed waived for all purposes. Failure to comply with any filing requirement established in § 2423.40 may result in the information furnished being disregarded.

(b) *Authority decision; exceptions filed.* Whenever exceptions are filed in accordance with § 2423.40, the Authority shall issue a decision affirming or reversing, in whole or in part, the decision of the Administrative Law Judge or disposing of the matter as is otherwise deemed appropriate.

(c) *Authority's order.* Upon finding a violation, the Authority shall, in accordance with 5 U.S.C. 7118(a)(7), issue an order directing the violator, as appropriate, to cease and desist from any unfair labor practice, or to take any other action to effectuate the purposes of the Federal Service Labor-Management Relations Statute. With regard to employees covered by 3 U.S.C. 431, upon finding a violation, the Authority's order may not include an order of reinstatement, in accordance with 3 U.S.C. 431(a).

(d) *Dismissal.* Upon finding no violation, the Authority shall dismiss the complaint.

(e) *Report of compliance.* After the Authority issues an order, the Respondent shall, within the time specified in the order, provide to the appropriate Regional Director a report regarding what compliance actions have been taken. Upon determining that the Respondent has not complied with the Authority's order, the Regional Director shall refer the case to the Authority for enforcement or take other appropriate action.

[62 FR 40916, July 31, 1997, as amended at 63 FR 46158, Aug. 31, 1998]

§ 2423.42 Backpay proceedings.

After the entry of an Authority order directing payment of backpay, or the entry of a court decree enforcing such order, if it appears to the Regional Director that a controversy exists between the Authority and a Respondent regarding backpay that cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a notice of hearing before an Administrative Law Judge to determine the backpay amount. The notice of hearing shall set forth the specific backpay issues to be resolved. The Respondent shall, within 20 days after the service of a notice of hearing, file an answer in accordance with § 2423.20. After the issuance of a notice of hearing, the procedures provided in subparts B, C, and D of this part shall be followed as applicable.

§§ 2423.43–2423.49 [Reserved]

PART 2424—NEGOTIABILITY PROCEEDINGS

Subpart A—Applicability of This Part and Definitions

Subpart B—Alternative Dispute Resolution; Requesting and Providing Allegations Concerning the Duty To Bargain

Subpart C—Filing and Responding to a Petition for Review; Conferences

Subpart D—Processing a Petition for Review

Subpart E—Decision and Order

Subpart F—Criteria for Determining Compelling Need for Agency Rules and Regulations

AUTHORITY: 5 U.S.C. 7134.

SOURCE: 63 FR 66413, Dec. 2, 1998, unless otherwise noted.

Subpart A—Applicability of This Part and Definitions

§ 2424.1 Applicability of this part.

This part applies to all petitions for review filed on or after October 12, 2023.

[88 FR 62455, Sept. 12, 2023]

§ 2424.2 Definitions.

In this part, the following definitions apply:

(a) *Bargaining obligation dispute* means a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated by law to bargain over a proposal that otherwise may be negotiable. Examples of bargaining obligation disputes include disagreements between an exclusive representative and an agency concerning agency claims that:

(1) A proposal concerns a matter that is covered by a collective bargaining agreement;

(2) Bargaining is not required because there has not been a change in bargaining-unit employees' conditions of employment or because the effect of the change is de minimis; and

(3) The exclusive representative is attempting to bargain at the wrong level of the agency.

(b) *Collaboration and Alternative Dispute Resolution Program* refers to the Federal Labor Relations Authority's program that assists parties in reaching agreements to resolve disputes.

(c) *Negotiability dispute* means a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. A negotiability dispute exists when an exclusive representative disagrees with