

we have begun to change the paradigm and we are going to make this Government do what they have to do every single week and every month, and that is live within their means. That is the American thing to do and the morally right thing to do.

I am proud to be a part of this Congress and part of the group of freshmen, and if we take the credit, so be it. And if we take the blame, so be it. But some day I hope that future generations of Americans will look back and say, "Finally, they had the courage to do the right thing."

Mr. SCARBOROUGH. Mr. Speaker, reclaiming my time, I thank the gentleman. This past weekend while we were in session on Saturday, during lunch I went down and had lunch with the gentleman from Ohio [JOHN KASICH] the budget director, and what you said reminded me of our conversation when you said you do not know whether the Americans will reward us for this. You do not know whether we are going up in the polls.

I turned to Mr. KASICH and I said, "How do you think this is going to turn out?" And he said, "JOE, I don't care. That is not relevant. We are going to balance this budget. I don't care if we get defeated. If I get defeated because of balancing the budget, what a grand and glorious way to go out."

Mr. Speaker, that is the way I feel. It has been such an honor this past week to see the freshman class on Monday and Tuesday and Wednesday and Thursday of this week, when poll numbers shot up for the President and down for us, it was so great to talk to them and not a single one said they were going to budge.

Reporters would come and say, "What about the poll numbers?" And we would cut them off and say, "That does not really matter. The polls do not matter. What matters is we keep our word."

Mr. Speaker, if I could read what we passed tonight, it is a commitment to a 7-year balanced budget and this is the language I would like to end on:

The President and Congress shall enact legislation in the first session of the 104th Congress to achieve a balanced budget not later than fiscal year 2002, as estimated by the Congressional Budget Office. The balanced budget agreement shall be estimated by the Congressional Budget Office based on the most recent current economic and technical assumptions.

Mr. Speaker, it goes on and has some more verbiage in there. But what a great honor that tonight we truly were a part of history. We have started down the path that James Madison and Thomas Jefferson and our Founding Fathers intended for us. As James Madison, one of the framers of the Constitution said,

We have staked the entire future of the American civilization not upon the power of government, but upon the capacity of the individuals to govern themselves, control themselves, and sustain themselves according to the Ten Commandments of God.

Tonight we started down that path. We dared to make a difference. We dared to balance the budget. I am going to be very proud tomorrow when I fly home and get off the plane and see my 7-year-old and 4-year-old and know that we had a part in history and a part in ensuring that their history will be even brighter than our own. That is all we can ask.

#### LEAVE OF ABSENCE

By unanimous consent, leave of absence was granted to:

Mr. BRYANT of Tennessee (at the request of Mr. ARMEY) for today on account of a death in the family.

#### SPECIAL ORDERS GRANTED

By unanimous consent, permission to address the House, following the legislative program and any special orders heretofore entered, was granted to:

(The following Members (at the request of Mr. ROEMER) to revise and extend their remarks and include extraneous material:

Mr. DOGGETT, for 5 minutes, today.

Mr. WISE, for 5 minutes, today.

Mr. FALEOMAVAEGA, for 5 minutes, today.

Ms. JACKSON-LEE, for 5 minutes, today.

(The following Members (at the request of Mr. TIAHRT) to revise and extend their remarks and include extraneous material:)

Mr. RIGGS, for 5 minutes, today.

Mr. TIAHRT, for 5 minutes, today.

Mr. DORNAN, for 5 minutes, today.

Mr. UPTON, for 5 minutes, today.

Mr. FOX of Pennsylvania, for 5 minutes, today.

Mr. KIM, for 5 minutes, today.

(The following Member (at his own request) to revise and extend his remarks and include extraneous materials:)

Mr. BURTON of Indiana, for 5 minutes, today.

#### ENROLLED BILLS SIGNED

Mr. THOMAS, from the Committee on House Oversight, reported that that committee had examined and found truly enrolled bills of the House of the following titles, which were thereupon signed by the Speaker:

H.J. Res. 122. Joint resolution making further continuing appropriations for the fiscal year 1996, and for other purposes; and

H.J. Res. 123. Joint resolution making further continuing appropriations for the fiscal year 1996, and for other purposes.

#### BILLS PRESENTED TO THE PRESIDENT

Mr. THOMAS, from the Committee on House Oversight, reported that that committee did on this day present to the President, for his approval, bills of the House of the following title:

H.J. Res. 122. Joint resolution making further continuing appropriations for the fiscal year 1996, and for other purposes.

On November 19, 1995:

H.J. Res. 123. Joint resolution making further appropriations for the fiscal year 1996, and for other purposes.

#### ADJOURNMENT

Mr. GUTKNECHT. Mr. Speaker, pursuant to Senate Concurrent Resolution 32, I move the House do now adjourn.

The motion was agreed to.

The SPEAKER pro tempore (Mr. BARR). Pursuant to the provisions of Senate Concurrent Resolution 32, 104th Congress, the House stands adjourned until 12:30 p.m. on Tuesday, November 28, 1995, for morning hour debate.

Thereupon (at 9 o'clock and 7 minutes p.m.), pursuant to Senate Concurrent Resolution 32, the House adjourned until Tuesday, November 28, 1995, at 12:30 p.m.

#### NOTICE OF PROPOSED RULEMAKING

U.S. CONGRESS,  
OFFICE OF COMPLIANCE,

Washington, DC, November 13, 1995.

Hon. NEWT GINGRICH,  
Speaker of the House of Representatives,  
Washington, DC.

DEAR MR. SPEAKER: Pursuant to Section 303 of the Congressional Accountability Act of 1995 (2 U.S.C. §1384(b)), I am transmitting the enclosed notice of proposed rulemaking for publication in the CONGRESSIONAL RECORD.

The Congressional Accountability Act specifies that the enclosed notice be published on the first day on which both Houses are in session following this transmittal.

Sincerely,

RICKY SILBERMAN,  
Executive Director.

OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Procedural Rules

#### NOTICE OF PROPOSED RULEMAKING

**Summary:** The Executive Director of the Office of Compliance is publishing proposed rules to govern the procedures for consideration and resolution of alleged violations of the laws made applicable under Part A of Title II of the Congressional Accountability Act (P.L. 104-1). The proposed rules have been approved by the Board of Directors, Office of Compliance.

**Dates:** Comments are due within 30 days after publication of this notice in the CONGRESSIONAL RECORD.

**Addresses:** Submit written comments to the Executive Director, Office of Compliance, Room LA 200, 110 Second Street, S.E., Washington, DC 20540-1999. Those wishing to receive notification of receipts of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile ("FAX") machine to (202) 252-3115. This is not a toll-free call. Copies of comments submitted by the public will be available for review at the Law Library Reading Room, Room LM-201, Law Library of Congress, James Madison Memorial Building, Washington, D.C., Monday through Friday, between the hours of 9:30 a.m. and 4:00 p.m.

**For Further Information Contact:** Executive Director, Office of Compliance at (202) 252-3100. This notice is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this notice in an alternative

format should be made to Mr. Russell Jackson, Director, Service Department, Office of the Sergeant at Arms and Doorkeeper of the Senate, (202) 224-2705.

#### Supplementary Information:

#### Background—General

The Congressional Accountability Act of 1995 ("CAA"), PL 104-1, was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of eleven federal labor and employment law statutes to covered employees and employing offices within the legislative branch. Section 301 of the CAA establishes the Office of Compliance as an independent office within that branch. Section 303 of the CAA directs that the Executive Director, the chief operating officer of the Office of Compliance, shall, subject to the approval of the Board, adopt rules governing the procedures for the Office of Compliance. The rules that follow establish the procedures by which the Office of Compliance will provide for the consideration and resolution of alleged violations of the laws made applicable under Part A of Title II of the CAA. The rules include procedures for counseling, mediation, and for electing between filing a complaint with the Office of Compliance and filing a civil action in a district court of the United States. The rules also address the procedures for the conduct of hearings held as a result of the filing of a complaint and for appeals to the Board of Directors of the Office of Compliance from Hearing Officer decisions, as well as other matters of general applicability to the dispute resolution process and to the operations of the Office of Compliance.

The Executive Director invites comment from interested persons on the content of these proposed rules.

#### PART I—OFFICE OF COMPLIANCE

##### OFFICE OF COMPLIANCE RULES OF PROCEDURE

#### Subpart A—General Provisions

- §1.01 Scope and policy
- §1.02 Definitions
- §1.03 Filing and Computation of Time
- §1.04 Availability of Official Information
- §1.05 Designation of Representative
- §1.06 Maintenance of Confidentiality

#### §1.01 Scope and policy

These rules of the Office of Compliance govern the procedures for consideration and resolution of alleged violations of the laws made applicable under Part A of title II of the Congressional Accountability Act of 1995. The rules include procedures for counseling, mediation, and for electing between filing a complaint with the Office of Compliance and filing a civil action in a district court of the United States. The rules also address the procedures for the conduct of hearings held as a result of the filing of a complaint and for appeals to the Board of Directors of the Office of Compliance from Hearing Office decisions as well as other matters of general applicability to the dispute resolution process and to the operations of the Office of Compliance. It is the policy of the Office that these rules shall be applied with due regard to the rights of all parties and in a manner that expedites the resolution of disputes.

#### §1.02 Definitions

Except as otherwise specifically provided in these rules, for purposes of this Part:

- (a) *Act*. The term "Act" means the Congressional Accountability Act of 1995;
- (b) *Covered Employee*. The term "covered employee" means any employee of
  - (1) the House of Representatives;
  - (2) the Senate;
  - (3) The Capitol Guide Service;
  - (4) the Capitol Police;
  - (5) the Congressional Budget Office;

- (6) the Office of the Architect of the Capitol;
- (7) the Office of the Attending Physician;
- (8) the Office of Compliance; or
- (9) the Office of Technology Assessment.

(c) *Employee*. The term "employee" includes an applicant for employment and a former employee.

(d) *Employee of the Office of the Architect of the Capitol*. The term "employee of the Office of the Architect of the Capitol" includes any employee of the Office of the Architect of the Capitol, the Botanic Garden or the Senate Restaurants.

(e) *Employee of the Capitol Police*. The term "employee of the Capitol Police" includes any member or officer of the Capitol Police.

(f) *Employee of the House of Representatives*. The term "employee of the House of Representatives" includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representative, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) of paragraph (b) above.

(g) *Employee of the Senate*. The term "employee of the Senate" includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by an entity listed in subparagraph (3) through (9) of paragraph (b) above.

(h) *Employing Office*. The term "employing office" means:

- (1) the personal office of a Member of the House of Representatives or a Senator;
- (2) a committee of the House of Representatives or the Senate or a joint committee;
- (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or
- (4) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

(i) *Party*. The term "party" means the employee or the employing office or the designated representatives of either of them.

(j) *Office*. The term "Office" means the Office of Compliance.

(k) *Board*. The term "Board" means the Board of Directors of the Office of Compliance.

(l) *Chair*. The term "Chair" means the Chair of the Board of Directors of the Office of Compliance.

(m) *Executive Director*. The term "Executive Director" means the Executive Director of the Office of Compliance.

(n) *General Counsel*. The term "General Counsel" means the General Counsel of the Office of Compliance.

(o) *Hearing Officer*. The term "Hearing Officer" means any individual designated by the Executive Director to preside over a hearing conducted on matters within the Office's jurisdiction.

#### §1.03 Filing and Computation of Time

(a) *Method of Filing*. Documents may be filed in person or by mail, including express, overnight and other expedited delivery. Requests for mediation under Section 2.04 and complaints under Section 2.06 of these rules may also be filed by facsimile (FAX) transmission. The original copies of documents filed by FAX must also be mailed to the office no later than the day following FAX transmission. The filing of all documents is subject to the limitations set forth below.

(1) *In Person*. A document shall be deemed timely filed if it is hand delivered to the Office in: Adams Building, Room LA 200, 110 Second Street, S.E., Washington, D.C. 20540-1999, before the expiration of the applicable time period.

(2) *Mailing*. (a) If mailed, a request for mediation or a complaint is deemed filed on the date of its receipt in the Office of Compliance.

(b) A document, other than a request for mediation or a complaint, is deemed filed on the date of its postmark or proof of mailing. Parties, including those using franked mail, are responsible for ensuring that any mailed document bears a postmark date or other proof of the actual date of mailing. In the absence of a legible postmark a document will be deemed timely if it is received by the Office at Adams Building, Room LA 200, 110 Second Street, S.E., Washington, D.C. 20540-1999, by mail within five (5) days of the expiration of the applicable filing period.

(3) *Faxing Documents*. Documents transmitted by FAX machine will be deemed filed on the date received at the Office of Compliance at 202-252-3115. A FAX filing will be timely only if the Office receives the document no later than 5:00 PM Eastern Time on the day that it is due under the applicable filing period. Any party using a FAX machine to file a document bears the responsibility for ensuring both that the document is timely and accurately transmitted and confirming that the Office has received a facsimile of the document. The party or individual filing the document may rely on its FAX status report sheet to show that it filed the document in a timely manner.

(c) *Computation of Time*. All time periods in these rules that are stated in terms of days are calendar days unless otherwise noted. However, when the period of time prescribed is five (5) days or less, intermediate Saturdays, Sundays and Federal government holidays shall be excluded in the computation. To compute the number of days for taking any action required or permitted under these rules, the first day shall be the day after the event from which the time period begins to run and the last day for filing or service shall be included in the computation. When the last day falls on a Saturday, Sunday, or federal government holiday, the last day for taking the action shall be the next regular federal government workday.

(d) *Time Allowances for Mailing of Official Notices*. Whenever a person or party has the right or is required to do some act within a prescribed period after the service of a notice or other document upon him or her and the notice or document is served by regular mail, five (5) days shall be added to the prescribed period. Only two (2) days shall be added if a document is served by express mail or other form of expedited delivery. When documents are served by certified mail, return receipt requested, the prescribed period shall be calculated from the date of receipt as evidenced by the return receipt.

#### §1.04 Availability of Official Information

(a) *Policy*. It is the policy of the Board, the Office and the General Counsel, except as otherwise ordered by the Board, to make available for public inspection and copying final decisions and orders of the Board and the Office, as specified and described in paragraph (d) below.

(b) *Availability*. Any person may examine and copy items described in paragraph (a) above at the Office of Compliance, Adams Building, Room LA200, 110 Second Street, S.E., Washington, D.C. 20540-1999, under conditions prescribed by the Office, including requiring payment for copying costs, and at reasonable times during normal working

hours so long as it does not interfere with the efficient operations of the Office. As ordered by the Board, identifying details or other necessary matters may be deleted and placed under seal, and, in each case, the reason for the deletion shall be stated in writing.

(c) *Copies of Forms.* Copies of blank forms prescribed by the Office for the filing of complaints and other actions or requests may be obtained from the Office.

(d) *Final Decisions.* Pursuant to Section 416(f) of the Act, a final decision entered by a Hearing Officer or by the Board under Section 405(g) or 406(e) of the Act, which is in favor of the complaining covered employee or reverses a Hearing Officer's decision in favor of a complaining covered employee, shall be made public, except as otherwise ordered by the Board.

#### **§ 1.05 Designation of Representative**

(a) An employee, a witness, or an employing office wishing to be represented by another individual must file with the Office a written notice of designation of representative. The representative may be, but is not required to be, an attorney.

(b) *Service where there is a representative.* All service of documents shall be directed to the representative, unless the represented individual specifies otherwise and until such time as that individual notifies the Executive Director of an amendment or revocation of the designation of representative. Where a designation of representative is outstanding, all time limitations for receipt of materials by the represented individual shall be computed in the same manner as for unrepresented individuals with service of the documents, however, directed to the representative, as provided.

#### **§ 1.06 Maintenance of Confidentiality**

(a) *Policy.* In accord with Section 416 of the Act, it is the policy of the Office to maintain, to the fullest extent possible, the confidentiality of the proceedings and of the participants in proceedings conducted under Sections 402, 403, and 405 and 406 of the Act and these rules.

(b) At the time that any individual, employing office or party, including a designated representative, becomes a participant in counseling under Section 402, mediation under Section 403, the complaint and hearing process under Section 405, or an appeal to the Board under Section 406 of the Act, or any related proceeding, the Office will advise the participant of the confidentiality requirements of Section 416 of the Act and these rules and that sanctions might be imposed for a violation of those requirements.

#### **Subpart B—Procedures Applicable to Consideration of Alleged Violations of Part A title II of the Congressional Accountability Act of 1995**

- § 2.01 Matters Covered by Subpart B
- § 2.02 Requests for Advice and Information
- § 2.03 Counseling
- § 2.04 Mediation
- § 2.05 Election of Proceedings
- § 2.06 Complaints
- § 2.07 Appointment of the Hearing Officer
- § 2.08 Filing, Service and Size Limitations of Motions, Briefs, Responses and other Documents
- § 2.09 Dismissal of Complaint
- § 2.10 Confidentiality
- § 2.11 Filing of Civil Action

#### **§ 2.01 Matters Covered by Subpart B**

(a) These rules govern the processing of any allegation that Sections 201 through 206 of the Act have been violated and any allegation of intimidation or reprisal prohibited under Section 207 of the Act. Sections 201 through 206 apply to covered employees and

employing offices certain rights and protections of the following laws:

- (1) The Fair Labor Standards Act of 1938
- (2) Title VII of the Civil Rights Act of 1964
- (3) The Americans with Discrimination in Employment Act of 1990
- (4) The Age Discrimination in Employment Act of 1967
- (5) The Family and Medical Leave Act of 1993
- (6) The Employee Polygraph Protection Act of 1988
- (7) The Worker Adjustment and Retraining Notification Act
- (8) The Rehabilitation Act of 1973
- (9) Chapter 43 (relating to veterans' employment and reemployment) of title 38, United States Code.

(b) This subpart applies to the covered rules and any activities within the coverage of the laws referred to in Section 2.01(a).

#### **§ 2.02 Requests for advice and information**

At any time, an employee or an employing office may seek from the Office informal advice and information on the procedures of the Office and under the Act and information on the protections rights and responsibilities under the Act and these rules. The Office will maintain the confidentiality of requests for such advice or information.

#### **§ 2.03 Counseling**

(a) *Initiating a proceeding: formal request for counseling.* In order to initiate a proceeding under these rules, an employee who believes that he or she is covered by the Act shall formally request counseling from the Office regarding an alleged violation of the Act, as referred to in Section 2.01(a), above. All formal requests for counseling shall be confidential, unless the employee agrees to waive his or her right to confidentiality under Section 2.03(e)(2), below.

(b) *Who may request counseling.* A covered employee who believes that he or she has been or is the subject of a violation of the Act as referred to in Section 2.01(a) may formally request counseling.

(c) *When, how and where to request counseling.* A formal request for counseling:

- (1) Shall be made not later than 180 days after the date of the alleged violation of the Act;
- (2) May be made to the Office in person, by telephone, or by written request;
- (3) A request for counseling shall be directed to: Office of Compliance, Adams Building, Room LA 200, 110 Second Street, S.E., Washington, D.C. 20540-1999; telephone: (202) 252-3100; FAX (202) 252-3115; TDD (202) 252- .

(d) *Purpose of counseling period.* The purpose of the counseling period shall be: to discuss the employee's concerns and elicit information regarding the matter(s) which the employee believes constitute a violation(s) of the Act; to advise the employee of his or her rights and responsibilities under the Act and the procedures of the Office under these rules; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.

(e) *Confidentiality and waiver.* (1) Absent a waiver under paragraph 2, below, all counseling shall be strictly confidential. Nothing in these rules shall prevent a counselor from consulting with personnel within the Office concerning a matter in counseling, except that, when the person being counseled is an employee of the Office, the counselor shall not consult with any individual within the Office who might be a party or witness without the consent of the person requesting counseling. Nothing contained in these rules shall prevent the Executive Director from reporting statistical information to the Senate and House of Representatives, so long as that statistical information does not reveal

the identity of the employees involved or of employing offices that are the subject of a request for counseling.

(2) The employee and Office may agree to waive confidentiality of the counseling process for the limited purpose of contacting the employing office to obtain information to be used in counseling the employee or to attempt a resolution of any disputed matter(s). Such a limited waiver must be written on the form supplied by the Office and signed by both the counselor and the employee.

(f) *Role of Counselor in informing employee of his or her rights and responsibilities.* The counselor will provide the employee with appropriate information concerning rights and responsibilities under the Act and these rules.

(g) *Role of Counselor in defining concerns.* The counselor may:

- (1) obtain the name, home and office mailing addresses, and home and office telephone numbers of the person being counseled;
- (2) obtain the name and title of the person(s) whom the employee claims has engaged in a violation of the Act and the employing office in which this person(s) works;
- (3) obtain a detailed description of the action(s) at issue, including all relevant dates, and the covered employee's reason(s) for believing that a violation may have occurred;

(4) inquire as to the relief sought by the covered employee;

(5) obtain the name, address and telephone number of the employee's representative, if any, and whether the representative is an attorney.

(h) *Role of Counselor in attempting informal resolution.* In order to attempt to resolve the matter brought to the attention of the counselor, the counselor must obtain a waiver of confidentiality pursuant to Section 2.03(e)(2) of this chapter. If the employee executes such a waiver, the counselor may:

(1) conduct a limited inquiry for the purpose of obtaining any information necessary to attempt an informal resolution or formal settlement;

(2) reduce to writing any formal settlement achieved and secure the signatures of the employee, his or her representative, if any, and a member of the employing office who is authorized to enter into a settlement on the employing office's behalf; and, pursuant to Section 414 of the Act and Section 9.03 of these rules, seek the approval of the Executive Director.

(i) *Counselor not a representative.* The counselor shall inform the person being counseled that the counselor does not represent either the employing office or the employee. The counselor provides information and may act as a third-party intermediary with the goals of increasing the individual's understanding of his or her rights and responsibilities under the Act and of promoting the early resolution of the matter.

(j) *Duration of counseling period.* The period for counseling shall be 30 days, beginning on the date that the request for counseling is received by the Office unless the employee and the Office agree to reduce the period.

(k) *Duty to proceed.* An employee who initiates a proceeding under this part shall be responsible at all times for proceeding, regardless of whether her or she has designated a representative. An employee, however, may withdraw from counseling at any time without prejudice to the employee's right to reinstate counseling regarding the same matter, provided that counseling on a single matter will not last longer than a total of 30 days.

(l) *Conclusion of the counseling period and notice.* The Executive Director shall notify the employee in writing of the end of the counseling period, by certified mail, return receipt requested. The Executive Director, as part of the notification of the end of the

counseling period, shall inform the employee of the right to file with the Office a request for mediation within 15 days after receipt by the employee of the notice of the end of the counseling period.

(m) *Employees of the Office of the Architect of the Capitol and Capitol Police.*

(1) Where an employee of the Office of the Architect of the Capitol or of the Capitol Police requests counseling under the Act and these rules, the Executive Director may recommend that the employee use the grievance procedures of the Architect of the Capitol or the Capitol Police. Pursuant to Section 401 of the Act and by agreement with the Architect of the Capitol and the Capitol Police Board, when the Executive Director makes such a recommendation, the following procedures shall apply:

(i) The Executive Director shall recommend to the employee that the employee use the procedures of the Architect or of the Capitol Police Board, as appropriate, for a period generally up to 90 days, unless the Executive Director determines a longer period is appropriate for resolution of the employee's complaint through the internal procedures of the Architect or the Capitol Police Board;

(ii) After having contacted the Office and having utilized the grievance procedures of the Architect or to the Capitol Police Board, the employee may return to the procedures under these rules:

(A) after the expiration of the period recommended by the Executive Director, if the matter has not been resolved; or

(B) within 20 days after receiving a final decision as a result of the procedures of the Architect or of the Capitol Police Board.

(iii) The period during which the matter is pending in the internal procedure shall not count against the time available for counseling or mediation under the Act. If the grievance is resolved to the employee's satisfaction, the Office will consider the case to be closed in its official files.

(2) *Notice to employees who have not initiated counseling with the Office.* When an employee of the Architect of the Capitol or the Capitol Police raises in the internal procedures of the Architect or of the Capitol Police Board an allegation which may also be raised under the procedures set forth in this subpart, the Architect or the Capitol Police Board should advise the employee in writing that a request for counseling about the allegation must be initiated with the Office within 180 days after the alleged violation of law occurred if the employee intends to use the procedures of the Office.

(3) *Notice in final decisions when employees have not initiated counseling with the Office.* When an employee raises in the internal procedures of the Architect or of the Capitol Police Board an allegation which may also be raised under the procedures set forth in this subpart, any final decision pursuant to the procedures of the Architect of the Capitol or of the Capitol Police Board should include notice to the employee of his or her right to initiate the procedures under these rules within 180 days after the alleged violation occurred.

(4) *Notice in final decisions when there has been a recommendation by the Executive Director.* When the Executive Director has made a recommendation under paragraph 1 above, the Architect or the Capitol Police Board should include notice to the employee of his or her right to resume the procedures under these rules within 20 days after service on the employee of the final decision and shall transmit a copy of the final decision, settlement agreement, or other final decision, settlement agreement, or other final disposition of the case of the Executive Director.

## §2.04 Mediation

(a) *Explanation.* Mediation is a process in which employees, employing offices and their representatives meet separately and/or jointly with a neutral trained to assist them in resolving disputes. As parties to the mediation, employees, employing offices and their representatives openly discuss alternatives to continuing their dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution. The neutral has no power to impose a specific resolution, and the mediation process, whether or not a resolution is reached, is strictly confidential, pursuant to Section 416 of the Act.

(b) *Initiation.* Not more than 15 days after receipt by the employee of the notice of the conclusion of the counseling period under section 2.03(l), the employee may file with the Office a written request for mediation. The request for mediation shall contain the employee's name, address, and telephone number, and the name of the employing office. Failure to request mediation within the prescribed period, will preclude the employee's further pursuit of his or her claim.

(c) *Notice of commencement of the mediation period.* The Office shall notify the employing office or its designated representative of the commencement of the mediation period.

(d) *Selection of Neutrals; Disqualification.* Upon receipt of the request for mediation, the Executive Director shall assign one or more neutrals to commence the mediation process. In the event that a neutral considers him or herself unable to perform in a neutral role in a given situation, he or she shall withdraw from the matter and immediately shall notify the Office of the withdrawal. Any party may ask the Office to disqualify a neutral by filing a written request, including the reasons for such request, with the Executive Director. This request shall be filed as soon as the party has reason to believe there is a basis for disqualification. The Executive Director's decision on this request shall be final and unreviewable.

(e) *Duration and Extension.* (1) The mediation period shall be 30 days beginning on the date the request for mediation is received, unless the Office grants an extension.

(2) The Office may extend the mediation period upon the joint request of the parties. The request shall be written and filed with the Office no later than the 28th day of the mediation period. The request shall set forth the joint nature of the request and the reasons therefor, and specify when the parties expect to conclude their discussions. Requests for additional extensions may be made in the same manner. Approval of any extensions shall be within the sole discretion of the Office.

(f) *Procedures.* (1) *The Neutral's Role.* After assignment of the case, the neutral will promptly contact the parties. The neutral has the responsibility to conduct the mediation, including deciding how many meetings are necessary and who may participate in each meeting. The neutral may accept written submissions from the parties.

(2) *The Agreement to Mediate.* At the commencement of the mediation, the neutral will ask the parties to sign an agreement ("the Agreement to Mediate") to adhere to the confidentiality of the process. The Agreement to Mediate will also provide that the parties to the mediation will not seek to have the counselor or the neutral testify or otherwise present evidence in any subsequent civil action under Section 408 of the Act or any other proceeding.

(g) *Who may participate.* The covered employee, the employing office, their respective representatives, and the Office may meet, jointly or separately, with the neutral. A

representative of an employing office who has actual authority to agree to a settlement agreement on behalf of the employing office must be present at the mediation or must be immediately accessible by telephone during the mediation.

(h) *Conclusion of the Mediation Period and Notice.* If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the Office shall provide the employee and the employing office, and their representatives, with written notice that the mediation period has concluded. At the same time, the Office will notify the employee of his or her right to elect to file a complaint with the Office in accordance with Section 405 of the Act and Section 2.06 of these rules or to file a civil action pursuant to Section 408 of the Act and Section 2.11 of these rules.

(i) *Independence of the Mediation Process and the Neutral.* The Office will maintain the independence of the mediation process and the neutral. No individual, who is appointed by the Executive Director to mediate, may conduct or aid in a hearing conducted under Section 405 of the Act with respect to the same matter or shall be subject to subpoena or any other compulsory process with respect to the same matter.

(j) *Confidentiality.* Except as necessary to consult with the parties, their counsel or other designated representatives, the parties to the mediation, the neutral, and the Office shall not disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the Mediation process. This rule shall not preclude a neutral from consulting with the Office, except that a neutral shall not consult with a party or witness within the Office when the covered employee is an employee of the Office. This rule shall also not preclude the Office from reporting statistical information that does not reveal the identity of the employees or employing offices involved in the mediation. All parties to the action and their representatives will be advised of the confidentiality requirements of this process and of the sanctions that might be imposed for violating these requirements.

## §2.05 Election of Proceeding

(a) Pursuant to Section 404 of the Act, not later than 90 days after a covered employee receives notice of the end of mediation under Section 2.04(h) of these rules, but no sooner than 30 days after that date, the covered employee may either: file a complaint with the Office in accordance with Section 405 of the Act and the procedure set out in Section 2.06, below; or file a civil action in accordance with Section 408 of the Act and Section 2.11 below in the United States District Court for the district in which the employee is employed or for the District of Columbia.

(b) A covered employee who files a civil action pursuant to Section 2.11, may not thereafter file a complaint under Section 2.06 on the same matter.

## §2.06 Complaints

(a) *Who may file.* An employee who has completed mediation under Section 2.04 may timely file a complaint with the Office.

(b) *When to file.* A complaint may be filed no sooner than 30 days after the date of receipt of the notice under Section 2.04(h), but no later than 90 days after that notice.

(c) *Form and Contents.* A complaint shall be written or typed on a complaint form available from the Office. All complaints shall be signed by the covered employee, or his or her representative, and shall contain the following information:

(1) the name, mailing address, and telephone number(s) of the complainant;

(2) the name(s) and title(s) of the individual(s) involved in the action that the employee claims is a violation of the Act;

(3) the name, address and telephone number of the employing office involved;

(4) a description of the conduct being challenged, including the date(s) of the conduct;

(5) a brief description of why the complainant believes the challenged conduct is a violation of the Act and the Section(s) of the Act involved;

(6) a statement of the relief or remedy sought; and

(7) the name, address, and telephone number of the representative, if any, who will act on behalf of the complainant.

(d) *Amendments.* Amendments to the complaint may be permitted by the Office or, after assignment, by a Hearing Officer, on the condition that all parties to the proceeding have adequate notice to prepare to meet the new allegations, and so long as the amendments related to the violations for which the employee has completed counseling and mediation and permitting such amendments will not unduly prejudice the rights of the employing office or other parties, unduly delay the completion of the hearing or otherwise interfere with or impede the proceedings.

(e) *Service of Complaint.* Upon receipt of a complaint or an amended complaint, the Office shall serve the employing office named in the complaint, or its designated representative, with a copy of the complaint or amended complaint and a copy of these rules. The Office shall include a service list containing the names and addresses of the parties and their designated representatives.

(f) *Answer.* Within 15 days after service of a copy of a complaint or an amended complaint, the respondent employing office shall file an answer with the Office and serve one copy on the complainant. The answer shall contain a statement of the position of the respondent employing office on each of the issues raised in the complaint, including admissions, denials, or explanations of each allegation made in the complaint and any other defenses to the complaint. Failure to raise a claim or defense in the answer shall not bar its submission later unless to do so would unduly prejudice the rights of the other party or unduly delay or otherwise interfere with or impede the proceedings.

#### **§2.07 Appointment of the Hearing Officer**

Upon the filing of a complaint, the Executive Director will appoint an independent Hearing Officer, who shall have the authority specified in Section 7.01(b) below. The Hearing Officer shall not be the neutral who mediated the matter under Section 2.04 of these rules.

#### **§2.08 Filing, Service, and Size Limitations of Motions, Briefs, Responses or Other Documents**

(a) *Filing with the Office: Number.* One original and three copies of all motions, briefs, responses, or other documents, must be filed, whenever required, with the Office or Hearing Officer. However, when a party aggrieved by the decision of a Hearing Officer files an appeal with the Board, one original and seven copies of both any appeal brief and any responses must be filed with the Office.

(b) *Service.* The parties shall serve on each other one copy of all brief or motions filed with the Office, other than the Complaint, which the Office will serve pursuant to Section 2.06(e) of these rules. Service shall be made by mailing or by hand delivering a copy of the motion, brief, response or other document to each party on the service list previously provided by the Office. Each of these documents, other than the Complaint, must be accompanied by a certificate of service specifying how and when service was made. It shall be the duty of all parties to notify the Office and one another in writing of any changes in the names or addresses on the service list.

(c) *Time limitations of response to motions or brief and reply.* Unless otherwise specified by the Hearing Officer or these rules, a party shall file a response to a motion or brief within 15 days of the service of the motion or brief upon the party. Any reply to such response shall be filed and served within 5 days of the service of the response.

(d) *Size limitations.* Except as otherwise specified by the Hearing Officer or these rules, no brief, motion, response, or supporting memorandum filed with the Office shall exceed 35 pages, or 8,750 words, exclusive of attachments. The Board, the Office or Hearing Officer may waive, raise or reduce this limitation for good cause shown or on its own initiative. Briefs, motions, responses, and supporting memorandum shall be on standard letter size paper (8½" 11").

#### **§2.09 Dismissal of Complaints**

(a) A Hearing Officer may, after notice and opportunity to respond, dismiss any claim that the Hearing Officer finds to be frivolous or that fails to state and claim upon which relief may be granted.

(b) A Hearing Officer may, after notice and an opportunity to respond, dismiss a complaint because it fails to comply with the applicable time limits or other requirements under these rules.

(c) If any employee fails to proceed with an action, the Hearing Officer may dismiss the complaint with prejudice.

(d) *Appeal.* A dismissal by the Hearing Officer made under Section 7.17 of these rules may be subject to appeal before the Board if the aggrieved party files a timely petition for review under Section 8.01.

(e) *Withdrawal of Complaint by Complainant.* At any time an employee may withdraw his or her own complaint by filing a notice with the Office for transmittal to the Hearing Officer and by serving a copy on the employing office or representative. Any such withdrawal must be approved by the Executive Director.

#### **§2.10 Confidentiality**

Pursuant to Section 416(c) of the Act, all proceedings and deliberations of Hearing Officers and the Board, including any related records, shall be confidential. A violation of the confidentiality requirements of the Act and these rules could result in the imposition of sanctions. Nothing in these rules shall prevent the Executive Director from reporting statistical information to the Senate and House of Representatives, so long as that statistical information does not reveal the identity of the employees involved or of employing offices that are the subject of a matter.

#### **§2.11 Filing of Civil Action**

(a) *Filing.* Section 4.04 of the Act provides that as an alternative for filing a complaint under Section 2.06, an employee who receives notice of the end of mediation pursuant to Section 2.04(h) may elect to file a civil action in accordance with Section 408 of the Act in the United States District court for the district in which the employee is employed or for the District of Columbia.

(b) *Time for filing.* A covered employee may file such a civil action no earlier than 30 days after receipt of the notice under the Section 2.04(h), but no later than 90 days after that receipt.

#### **Subpart C—[Reserved (Part B—Section 210—ADA Public Services)]**

#### **Subpart D—[Reserved (Part C—Section 215—OSHA)]**

#### **Subpart E—[Reserved (Part D—Section 220—LMR)]**

#### **Subpart F—Discovery and Subpoenas**

##### **§6.01 Discovery**

##### **§6.02 Requests for Subpoenas**

##### **§6.03 Service**

##### **§6.04 Return of Service**

##### **§6.05 Motion to Quash**

##### **§6.06 Enforcement**

#### **§6.01 Discovery**

(a) *Explanation.* Discovery is the process by which a party may obtain relevant information, not privileged, from another person, including a party, for the purpose of assisting that party in developing, preparing and presenting its case at the hearing.

(b) *Office policy regarding discovery.* It is the policy of the Office to encourage the early and voluntary exchange of relevant and material nonprivileged information between the parties, including the names and addresses of witnesses and copies of relevant and material documents, and to encourage Hearing Officers to develop procedures which allow for the greatest exchange of relevant and material information and which minimize the need for parties to formally request such information.

(c) *Discovery availability.* Pursuant to Section 405(e) of the Act, the Hearing Officer in his or her discretion may permit reasonable prehearing discovery. In exercising that discretion, the Hearing Officer may be guided by the Federal Rules of Civil Procedure.

(1) The Hearing Officer may authorize discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; physical and mental examinations; and requests for admission.

(2) The Hearing Officer may make any order setting forth the forms and extent of discovery, including orders limiting the number of depositions and interrogatories and requests for production of documents, and may also limit the length of depositions.

(3) The Hearing Officer may issue any other order to prevent discovery or disclosure of confidential or privileged materials or information, as well as hearing or trial preparation materials and any other information deemed not discloseable, or to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

(d) *Claims of privilege.* Whenever a party withholds information otherwise discoverable under these rules by claiming that it is privileged or confidential or subject to protection as hearing or trial preparation materials, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

#### **§6.02 Request for subpoena**

(a) *Authority to issue subpoenas.* At the request of a party, a Hearing Officer may issue subpoenas for the attendance and testimony of witnesses and for the production of correspondence, books, papers, documents, or other records. The attendance of witnesses and the production of records may be required from any place within the United States.

(b) *Request.* A request for the issuance of a subpoena requiring the attendance and testimony of witnesses or the production of documents or other evidence under paragraph (a) above shall be submitted to the Hearing Officer at least 15 days in advance of the date scheduled for the commencement of the hearing. If the subpoena is sought as part of the discovery process, the request shall be submitted to the Hearing Officer at least 10

days in advance of the date set for the attendance of the witness at a deposition or the production of documents.

(c) *Forms and showing.* Requests for subpoenas shall be submitted in writing to the Hearing Officer and shall specify with particularity the witness, correspondence, books, papers, documents, or other records desired and shall be supported by a showing of general relevance and reasonable scope.

(d) *Rulings.* The Hearing Officer shall promptly rule on the request.

### § 6.03 Service

Service of a subpoena may be made by any person who is over 18 years of age and not a party to the proceeding. Service may be made either:

- (a) In person,
- (b) By registered or certified mail, or express mail with return receipt, or
- (c) By delivery to a responsible person (named) at the residence or place of business (as appropriate) of the person to be served.

### § 6.04 Return of service

When service of a subpoena is effected, the person serving the subpoena shall certify on the return of service the date and the manner of service.

### § 6.05 Motion to quash

Any person against whom a subpoena is directed may file a motion to quash or limit the subpoena setting forth the reasons why the subpoena should not be complied with or why it should be limited in scope. This motion shall be filed with the Hearing Officer within 10 days after service of the subpoena.

### § 6.06 Enforcement

(a) *Objections and Requests for enforcement.* If a person has been served with a subpoena pursuant to Section 6.03 but fails or refuses to comply with its terms or otherwise objects to it, the party or person objecting or the party seeking compliance may seek a ruling from a Hearing Officer. The request for a ruling should be submitted in writing to the Hearing Officer. However, it may be made orally on the record at the hearing at the Hearing Officer's discretion. The party seeking compliance shall present the return of service and, except where the witness was required to appear before the Hearing Officer, shall submit evidence, by affidavit or declaration, of the failure or refusal to obey the subpoena.

(b) *Ruling by Hearing Officer.* (1) The Hearing Officer shall promptly rule on the request for enforcement and/or the objection(s).

(2) On request of the objecting witness or any party, the Hearing Officer shall, or on the Hearing Officer's own initiative the Hearing Officer may, refer the ruling to the Board for review.

(c) *Review by the Board.* The Board may overrule, modify, remand or affirm the ruling of the Hearing Officer and in its discretion, may direct the General Counsel to apply in the name of the Office for an order from a United States district court to enforce the subpoena.

(d) *Application to an appropriate court; civil contempt.* If a person fails to comply with a subpoena, the Board may direct the General Counsel to apply, in the name of the Office, to an appropriate United States district court for an order requiring that person to appear before the Hearing Officer to give testimony or produce records. Any failure to obey a lawful order of the district court may be held by such court to be a civil contempt thereof.

### Subpart G—Hearings

- § 7.01 The Hearing Officer
- § 7.02 Sanctions
- § 7.03 Disqualification of the Hearing Officer

- § 7.04 Motions and Prehearing Conference
- § 7.05 Scheduling the Hearing
- § 7.06 Consolidation and Joinder of Cases
- § 7.07 Conduct of Hearing; disqualification of representatives
- § 7.08 Transcript
- § 7.09 Admissibility of Evidence
- § 7.10 Stipulations
- § 7.11 Official Notice
- § 7.12 Confidentiality
- § 7.13 Immediate Board Review of a Ruling by a Hearing Officer

- § 7.14 Briefs
- § 7.15 Closing the record
- § 7.16 Official Record
- § 7.17 Hearing Officer Decisions; Entry in Records of the Office

### § 7.01 The Hearing Officer

(a) *Exercise of authority.* The Hearing Officer may exercise authority as provided in paragraph (b) of this Section upon his or her own initiative or upon the motion of a party, as appropriate.

(b) *Authority.* Hearing Officers shall conduct fair and impartial hearings and take all necessary action to avoid undue delay in the disposition of all proceedings. They shall have all powers necessary to that end unless otherwise limited by law, including, but not limited to, the authority to:

- (1) Administer oaths and affirmations;
- (2) Rule on motions to disqualify designated representatives;
- (3) Issue subpoenas in accordance with Section 6.02;
- (4) Rule upon offers of proof and receive relevant evidence;
- (5) Rule upon discovery issues as appropriate under Sections 6.01 to 6.06;
- (6) Hold prehearing conferences for the settlement and simplification of issues;
- (7) Convene a hearing as appropriate, regulate the course of the hearing, and maintain decorum and exclude from the hearing any person who disrupts, or threatens to disrupt, that decorum;
- (8) Exclude from the hearing any person, except any complainant, any party, the attorney or representative of any complainant or party, or any witness while testifying;
- (9) Rule on all motions, witness and exhibit lists and proposed findings, including motions for summary judgment;
- (10) Require the filing of briefs, memoranda of law and the presentation of oral argument with respect to any question of law;
- (11) Order the production of evidence and the appearance of witnesses;
- (12) Impose sanctions as provided under Section 7.02 of these rules;
- (13) File decisions on the issues presented at the hearing;
- (14) Maintain the confidentiality of proceedings; and
- (15) Waive or modify any procedural requirements of Sections 6 and 7 of these rules so long as permitted by the Act.

### § 7.02 Sanctions

The Hearing Officer may impose sanctions upon the parties, under, but not limited to, the circumstances set forth in this Section.

(a) *Failure to comply with an order.* When a party fails to comply with an order (including an order for the taking of a deposition, for the production of evidence within the party's control, or for production of witnesses), the Hearing Officer may:

- (1) Draw an inference in favor of the requesting party on the issue related to the information sought.
- (2) Stay further proceedings until the order is obeyed.
- (3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought.
- (4) Permit the requesting party to introduce secondary evidence concerning the information sought.

(5) Strike any part of the complaint, briefs, answer, or other submissions of the party failing to comply with such request.

(6) Direct judgment against the non-complying party in whole or in part.

(7) Order that the non-complying party, or the representative advising that party, pay all or part of the attorney's fees and reasonable expenses of the other party or parties or of the Office, caused by the failure, unless the Hearing Officer or the Board finds that the failure was substantially justified or that other circumstances make an award of attorney's fees and/or expenses unjust.

(b) *Failure to prosecute or defend.* If a party fails to prosecute or defend a position, the Hearing Officer may dismiss the action with prejudice or rule for the petitioner.

(c) *Failure to make timely filing.* The Hearing Officer may refuse to consider any request, motion or other action that is not filed in a timely fashion in compliance with this Part.

### § 7.03 Disqualification of the Hearing Officer

(a) In the event that a Hearing Officer considers himself or herself disqualified, either because of personal bias or of an interest in the case or for some other disqualifying reason, he or she shall withdraw from the case, stating in writing or on the record the reasons for his or her withdrawal, and shall immediately notify the Office of the withdrawal.

(b) Any party may file a motion requesting that a Hearing Officer withdraw on the basis of personal bias or of an interest in the case or for some other disqualifying reason. This motion shall specifically set forth the reasons supporting the request and be filed as soon as the party has reason to believe that there is a basis for disqualification.

(c) The Hearing Officer shall rule on the withdrawal motion. If the motion is denied, the party requesting withdrawal may take the motion to the Executive Director. The motion to the Executive Director, together with a supporting brief, shall be filed within 5 days of service of the denial of the motion by the Hearing Officer. Upon receipt of the motion, the Executive Director will determine whether a response from the other party or parties is required, and if so, will fix by order the time for the filing of the response. Any objection to the ruling of the Executive Director on the withdrawal motion shall not be deemed waived by further participation in the hearing and may be the basis for an appeal to the Board from the decision of the Hearing Officer under Section 8.01 of these rules. Such objection will not stay the conduct of the hearing.

### § 7.04 Motions and Prehearing Conference

(a) *Motions.* When a case is before a Hearing Officer, motions of the parties shall be filed with the Hearing Office and shall be in writing except for oral motions made on the record during the hearing. All written motions and any responses to them shall include a proposed order, where applicable. Only with the Hearing Officer's advance approval may either party file additional responses to the motion or to the response to the motion. Motions for extension of time will be granted only for good cause shown.

(b) *Scheduling of the Prehearing Conference.* Within 7 days after assignment, the Hearing Office shall service on the employee and the employing office and their designated representatives written notice setting forth the time, date, and place of the prehearing conference.

(c) *Prehearing conference memoranda.* The Hearing Officer may order each party to prepare a prehearing conference memorandum. That memorandum may include:

- (1) The major factual contentions and legal issues that the party intends to raise at the hearing in short, successive, and numbered

paragraphs, along with any proposed stipulations of fact or law. For example, in a case of alleged unlawful discrimination, a complainant's statement of legal issues should include that party's statement of the appropriate prima facie case; and employing office's statement should include the alleged legitimate, non-discriminatory reason(s) that the employing office will articulate; and affirmative defenses, if any, which may be raised.

(2) An estimate of the time necessary for presentation of the party's case;

(3) The specific relief, including the amount of monetary relief, that is being or will be requested;

(4) The names of potential witnesses for the party's case, except for potential rebuttal witnesses, and the purpose for which they will be called and a list of documents that the party is seeking from the opposing party, and, if discovery was permitted, the status of any pending request for discovery. (It is not necessary to list each document requested. Instead, the party may refer to the request for discovery.)

(5) A brief description of any other unresolved issues.

(d) At the prehearing conference, the Hearing Officer may discuss the subjects specified in paragraph 4 above and the manner in which the hearing will be conducted and proceed. In addition the Hearing Officer may explore settlement possibilities and consider how the factual and legal issues might be simplified and any other issues that might expedite the early resolution of the dispute. The Hearing Officer shall issue an order, which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of the parties. Such order, when entered, controls the course of the proceeding, subject to later modification by the Hearing Officer by his or her own order or upon proper request of a party for good cause shown.

#### **§ 7.05 Scheduling the Hearing**

(a) *Date, time, and place of hearing.* The Office shall issue the notice of hearing, which shall fix the date, time, and place of hearing. In no event, absent a postponement granted by the Office will a hearing commence later than 60 days after the filing of the complaint.

(b) *Motions for postponement or a continuance.* Motions for postponement or for a continuance by either party shall be made in writing to the Office, shall set forth the reasons for the request and the position of the opposing party on the postponement. Such a motion may be granted upon a showing of good cause. In no event will a hearing commence later than 90 days after the filing of the complaint.

#### **§ 7.06 Consolidation and Joinder of Cases**

(a) *Explanation.* (1) Consolidation is when two or more parties have cases that might be treated as one because they contain identical or similar issues or in such other appropriate circumstances.

(2) Joinder is when one person has two or more claims pending and they are united for consideration. For example, where a single individual who has one appeal pending challenging a 30-day suspension and another appeal pending challenging a subsequent dismissal, joinder might be warranted.

(b) The Board, the Office, or a Hearing Officer may consolidate or join cases on their own initiative or on the motion of a party if to do so would expedite processing of the cases and not adversely affect the interests of the parties, taking into account the confidentiality requirements of Section 416 of the Act.

#### **§ 7.07 Conduct of Hearing; disqualification of representatives**

(a) Pursuant to Section 405(d)(1) of the Act, the Hearing Officer will conduct the hearing in closed session on the record. Only the Hearing Officer, the parties and their representatives, and witnesses during the time they are testifying, will be permitted to attend, except that the Office may not be precluded from observing the hearings. The Hearing Officer, or a person designated by the Hearing Officer or the Executive Director, shall control the recording of the proceedings.

(b) The hearing will be conducted as an administrative proceeding. Witnesses shall testify under oath or affirmation. Except as specified in the Act and in these rules, the Hearing Officer will conduct the hearing, to the greatest extent practicable, in accordance with the principles and procedures in Sections 554 through 557 of title 5 of the United States Code.

(c) No later than the opening of the hearing, or as otherwise ordered by the Hearing Officer, each party shall submit to the Hearing Officer and to the opposing party a typed list of the witnesses, except rebuttal witnesses, expected to be called to testify.

(d) At the commencement of the hearing, or as otherwise ordered by the Hearing Officer, the Hearing Officer may consider any stipulations of facts and law pursuant to Section 7.10, take official notice of certain facts pursuant to Section 7.11, rule on objections made by the parties and hear the examination and cross-examination of witnesses. Each party will be expected to present his or her cases in a concise manner, limiting the testimony of witnesses and submission of documents to relevant matters.

(e) If the Hearing Officer concludes that a representative of an employee, a witness, or an employing office has a conflict of interest, he or she may, after giving the representative an opportunity to respond, disqualify the representative. In that event, within the time limits established by the Act, the affected party will have a reasonable time to retain other representation.

#### **§ 7.08 Transcript**

(a) *Preparation.* An accurate electronic or stenographic record of the hearing shall be kept and shall be the sole official record of the proceeding. The Office shall be responsible for the cost of transcription of the hearing. Upon request, a copy of a transcript of the hearing shall be provided to each party, provided, however, that such party has first agreed to maintain and respect the confidentiality of such transcript in accordance with the applicable rules prescribed by the Office or the Hearing Officer in order to effectuate Section 416(c) of the Act. Additional copies of the transcript shall be made available to a party upon payment of costs. Exceptions to the payment requirement may be granted for good cause shown. A motion for an exception shall be made in writing and accompanied by an affidavit or declaration setting forth the reasons for the request and shall be granted upon a showing of good cause. Requests for copies of transcripts shall be directed to the Office. The Office may, by agreement with the person making the request, make arrangements with the official hearing reporter for required services to be charged to the requester.

(b) *Corrections.* Corrections to the official transcript will be permitted. Motions for correction must be submitted within 10 days of service of the transcript upon the party. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the Hearing Officer. The Hearing Officer may make corrections at any time with notice to the parties.

#### **§ 7.09 Admissibility of Evidence**

The Hearing Officer shall apply the Federal rules of evidence to the greatest extent practicable. These rules provide that the Hearing Officer may exclude evidence if, among other things, it constitutes inadmissible hearsay or its probative value is substantially outweighed by the danger of unfair prejudice, by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

#### **§ 7.10 Stipulations**

The parties may stipulate as to any matter of fact. Such a stipulation will satisfy a party's burden of proving the fact alleged.

#### **§ 7.11 Official Notice**

The Hearing Officer on his or her own motion or on motion of a party, may take official notice of a fact that is not subject to reasonable dispute because it is either: (a) A matter of common knowledge; or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Official notice taken of any fact satisfies a party's burden of proving the fact noticed.

Where a decision, or part thereof, rests on the official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

#### **§ 7.12 Confidentiality**

Pursuant to Section 416 of the Act, all proceedings and deliberations of Hearing Officers and the Board, including the transcripts of hearings and any related records, shall be confidential, except as specified in Section 416(d), (e), and (f) of the Act. All parties to the proceeding and their representatives, and witnesses who appear at the hearing, will be advised of the importance of confidentiality in this process and of their obligations, subject to sanctions, to maintain it.

#### **§ 7.13 Immediate Board Review of a Ruling by a Hearing Officer**

(a) *Review strongly disfavored.* Board review of a ruling by a hearing officer while a proceeding is ongoing (an "interlocutory appeal") is strongly disfavored. In general, a request for interlocutory review may go before the Board for consideration only if the Hearing Officer, on his or her own motion or by motion of the parties, determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention.

(b) *Standards for review.* In determining whether to forward a request for interlocutory review to the Board, the Hearing Officer shall consider the following:

(1) Whether the ruling involves a significant question of law or policy about which there is substantial ground for difference of opinion; and

(2) Whether an immediate review of the Hearing Officer ruling by the Board will materially advance the completion of the proceeding; and

(3) Whether denial of immediate review will cause undue harm to a party or the public.

(c) *Time for Filing.* A motion by a party for interlocutory review of a ruling of the Hearing Officer shall be filed with the Hearing Officer within 5 days after service of the ruling upon the parties. The motion shall include arguments in support of both interlocutory review and the determination to be made by the Board upon review. Responses, if any, shall be filed with the Hearing Officer within 3 days after service of the motion.

(d) *Hearing Officer Action.* If the conditions set forth in paragraph (b) above are met, the

Hearing Officer may forward a request for interlocutory review to the Board for its immediate consideration. Any such submission shall explain the basis on which the Hearing Officer concluded that the standards for interlocutory review have been met.

(e) *Grant of Interlocutory Review Within Board's Sole Discretion.* The Board, in its sole discretion, may grant interlocutory review.

(f) *Stay pending review.* Unless otherwise directed by the Board, the stay of any proceedings during the pendency of either a request for interlocutory review or the review itself shall be within the discretion of the Hearing Officer.

(g) *Denial of Motion not Appealable; Mandamus.* The grant or denial of a motion for a request for interlocutory review shall not be appealable. The Hearing Officer shall promptly bring a denial of such a motion, and the reasons therefor, to the attention of the Board. If, upon consideration of the motion and the reason for denial, the Board believes that interlocutory review is warranted, it may grant the review *sua sponte*. In addition, the Board may in its discretion, in extraordinary circumstances, entertain directly from a party a writ of mandamus to review a ruling of a Hearing Officer.

(h) *Procedures before Board.* Upon its acceptance of a ruling of the Hearing Officer for interlocutory review, the Board shall issue an order setting forth the procedures that will be followed in the conduct of that review.

(i) *Review of a Final Decision.* Denial of interlocutory review will not affect a party's right to challenge rulings, which are otherwise appealable, as part of an appeal to the Board from the Hearing Officer's decision issued under Section 7.17 of these rules.

#### **§7.14 Briefs**

(a) *May be filed.* The Hearing Officer may permit the parties to file posthearing briefs on the factual and the legal issues presented in the case.

(b) *Length.* No principal brief shall exceed 50 pages, or 12,500 words, and no reply brief 25 pages, or 6,250 words, exclusive of tables and pages limited only to quotations of statutes, rules, and the like. Motions to file extended briefs shall be granted only for good cause shown; the Hearing Officer may in his or her discretion also reduce the page limits. Briefs in excess of 10 pages shall include an index and a table of authorities.

(c) *Format.* Every brief must be easily readable. Briefs must have double spacing between each line of text, except for quoted texts and footnotes, which may be single-spaced.

#### **7.15 Closing the record**

(a) The record shall be closed at the conclusion of the hearing. However, when the Hearing Officer allows the parties to submit additional evidence previously identified for introduction, the Hearing Officer may allow an additional period before the conclusion of the hearing as is necessary for that purpose.

(b) Once the record is closed, no additional evidence or argument shall be accepted into the record except upon a showing that new and material evidence has become available that was not available despite due diligence prior to the closing of the record. However, the Hearing Officer shall make part of the record any motions for attorney fees, supporting documentation, and determinations thereon, and any approved correction to the transcript.

#### **§7.16 Official Record**

The transcript of testimony and the exhibits, together with all papers and motions filed in the proceeding, shall constitute the exclusive and official record.

#### **§7.17 Hearing Officer Decisions; Entry in Records of the Office**

(a) Pursuant to Section 405(g) of the Act, no later than 90 days after the conclusion of the hearing, the Hearing Officer shall issue a written decision.

(b) Upon issuance, the decision and order of the Hearing Officer shall be entered into the records of the Office.

(c) The Office shall promptly provide a copy of the decision and order of the Hearing Officer to the parties.

(d) If there is no appeal of a decision and order of a Hearing Officer, that decision becomes a final decision of the Office, which is subject to enforcement under Section 8.01 of these rules.

#### **Subpart H—Proceedings Before the Board**

##### **§8.01 Appeal to the Board**

##### **§8.02 Compliance with Final Decisions, Requests for Enforcement**

##### **§8.03 Judicial Review**

##### **§8.01 Appeal to the Board**

(a) No later than 30 days after the entry of the decision of the Hearing Officer in the records of the Office, an aggrieved party may seek review of that decision by the Board by filing with the Office a petition for review by the Board. The appeal must be served on the opposing party or its representative.

(b) Unless otherwise ordered by the Board, within 21 days following the filing of a petition for review to the Board, the appellant shall file and serve a supporting brief. That brief shall identify with particularity those findings or conclusions in the decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or rules that are alleged to support each assertion made on appeal.

Unless otherwise ordered by the Board, within 21 days following the service of the appellant's brief, the opposing party may file and serve a responsive brief. Unless otherwise ordered by the Board, within 10 days following the service of the appellee's responsive brief, the appellant may file and serve a reply brief.

(c) Upon the request of any party or upon its own order, the Board, in its discretion, may hold oral argument on an appeal.

(d) Upon appeal, the Board shall issue a written decision setting forth the reasons for its decision. The Board may affirm, reverse, modify or remand the decision of the Hearing Officer in whole or in part.

(e) The Board may remand the matter to the Hearing Officer for further action or proceedings, including the reopening of the record for the taking of additional evidence. The Hearing Officer shall render a report to the Board on the remanded matters. Upon receipt of the report, the Board shall determine whether the views of the parties on the content of the report should be obtained in writing and, where necessary, shall fix by order the time of the submission of those views. A decision of the Board following completion of the remand shall be the final decision of the Board and shall be subject to judicial review.

(g) Pursuant to Section 406(c) of the Act, in conducting its review of the decision of a Hearing Officer, the Board shall set aside a decision if it determines that the decision was:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

(h) In making determinations under paragraph (g), above, the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(i) *Record: what constitutes.* The complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, stipulations, exhibits, documentary evidence, depositions, and the transcript of the hearing (together with any electronic recording of the hearing if the original reporting was performed electronically) together with the hearing officer's decision and the petition for review, and any cross-petition, shall constitute the record in the case.

#### **§8.02 Compliance with Final Decisions, Requests for Enforcement**

(a) A party required to take any action under the terms of a final decision of the Office shall carry out its terms promptly, and shall within 30 days after the decision or order becomes final and goes into effect by its terms, provide the Office and all parties to the proceedings with a compliance report specifying the manner in which compliance with the provisions of the decision or order has been accomplished. If complete compliance has not been accomplished within 30 days, the party required to take any such action shall submit a compliance report specifying why compliance with any provision of the decision order has not yet been fully accomplished, the steps being taken to assure full compliance, and the anticipated date by which full compliance will be achieved.

(b) The Office may require additional reports as necessary;

(c) If the Office does not receive notice of compliance in accordance with paragraph (a) of this Section, the Office shall make inquiries to determine the status of compliance. If the Office cannot determine that full compliance is forthcoming, the Office shall report the failure to comply to the Board and recommend whether court enforcement of the decision should be sought.

(d) Any party may petition the Board for enforcement of a final decision of the Office or the Board. The petition shall specifically set forth the reasons why the petitioner believes enforcement is necessary.

(e) Upon receipt of a report of non-compliance or a petition for enforcement of a final decision, or as it otherwise determines, the Board may issue a notice to any person or party to show cause why the Board should not seek judicial enforcement of its decision or order.

(f) Within the discretion of the Board, it may direct the General Counsel to petition the Court for enforcement of a decision under Section 406(e) of the Act whenever the Board finds that a party has failed to comply with its decision and order.

#### **§8.03 Judicial Review**

Pursuant to Section 407 of the Act, a party aggrieved by a final decision of the Board under Section 406(e) in cases arising under Part A of Title II of the Act may file a petition for review with the United States Court of Appeals for the Federal Circuit.

#### **Subpart I—Other Matters of General Applicability**

##### **§9.01 Attorney's Fees and Costs**

##### **§9.02 Ex parte Communications**

##### **§9.03 Settlement Agreements**

##### **§9.04 Revocation, amendment or waiver of rules**

##### **§9.01 Attorney's Fees and Costs**

(a) *Request.* No later than 20 days after the entry of a Hearing Officer's decision under Section 7.17 or after service of a Board decision by the Office, the complainant, if he or she is a prevailing party, may submit to the Hearing Officer who heard the case initially a request for the award of reasonable attorney's fees and costs, following the form specified in paragraph (b) below. The Board or the Hearing Officer, after giving the respondent an appointment to reply, shall rule on the request.

(b) *Form of Request.* In addition to setting forth the legal and factual bases upon which the attorney's fees and/or costs are sought, a request for attorney's fees and/or costs shall be accompanied by:

- (1) accurate and contemporaneous time records;
- (2) a copy of the terms of the fee agreement (if any);
- (3) the attorney's customary billing rate for similar work; and
- (4) an itemization of costs related to the matter in question.

#### **§9.02 [Reserved—Ex parte Communications]**

#### **§9.03 Settlement Agreements**

(a) *Application.* This Section applies to formal settlement agreements between parties under Section 414 of the Act.

(b) *Informal Resolution.* At any time before a covered employee files a complaint under Section 405, a covered employee and the employing office, on their own, may agree voluntarily and informally to resolve a dispute, so long as the resolution does not require a waiver of a covered employee's rights or the commitment by the employing office to an enforceable obligation.

(c) *Formal Settlement Agreement.* The parties may agree formally to settle all or part of a disputed matter. In that event, the agreement shall be in writing and submitted to the Executive Director for review and approval.

#### **§9.04 Revocation, amendment or waiver of rules**

(a) The Executive Director, subject to the approval of the Board, may revoke or amend these rules by publishing proposed changes in the Congressional Record and providing for a comment period of not less than 30 days. Following the comment period, any changes to the rules are final once they are published in the Congressional Record.

(b) The Board or a Hearing Officer may waive a procedural rule contained in this Part in an individual case for good cause shown if application of the rule is not required by law.

Signed at Washington, D.C., on this 13th day of November, 1995.

R. GAULL SILBERMAN,  
Executive Director,  
Office of Compliance.

#### **EXECUTIVE COMMUNICATIONS, ETC.**

Under clause 2 of rule XXIV, executive communications were taken from the Speaker's table and referred as follows:

1695. A letter from the Director, the Office of Management and Budget, transmitting the cumulative report on rescissions and deferrals of budget authority as of November 1, 1995, pursuant to 2 U.S.C. 685(e) (H. Doc. No. 104-136); to the Committee on Appropriations and ordered to be printed.

1696. A letter from the Chairman, Nuclear Regulatory Commission, transmitting a report on abnormal occurrences at licensed nuclear facilities for the second quarter of calendar year 1995, pursuant to 42 U.S.C. 5848; to the Committee on Commerce.

1697. A letter from the Secretary of Transportation, transmitting the Department's fiscal year 1995 annual report to Congress on progress in conducting environmental remedial action at federal owned or operated facilities, pursuant to Public Law 99-499, section 120(e)(5) (100 Stat. 1669); to the Committee on Commerce.

1698. A letter from the Acting Director, Defense Security Assistance Agency, transmitting notification concerning the Department

of the Army's proposed Letter(s) of Offer and Acceptance [LOA] to Israel for defense articles and services (Transmittal No. 96-14), pursuant to 22 U.S.C. 2776(b); to the Committee on International Relations.

1699. A letter of the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed issuance of export license agreement for the transfer of defense articles or defense services sold commercially to Canada (Transmittal No. DTC-2-96), pursuant to 22 U.S.C. 2776(c); to the Committee on International Relations.

1700. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed issuance of export license agreement for the transfer of defense articles or defense services sold commercially to Singapore (Transmittal No. DTC-4-96), pursuant to 22 U.S.C. 2776(c); to the Committee on International Relations.

1701. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed issuance of export license agreement for the transfer of defense articles or defense services sold commercially to the United Kingdom (Transmittal No. DTC-9-96), pursuant to 22 U.S.C. 2776(c); to the Committee on International Relations.

1702. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed issuance of export license agreement for the transfer of defense articles or defense services sold commercially to the United Kingdom (Transmittal No. DTC-11-96), pursuant to 22 U.S.C. 2776(c); to the Committee on International Relations.

1703. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed issuance of export license agreement for the transfer of defense articles or defense services sold commercially to Spain (Transmittal No. DTC-12-96), pursuant to 22 U.S.C. 2776(c); to the Committee on International Relations.

1704. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed issuance of export license agreement for the transfer of defense articles or defense services sold commercially to the International Maritime Satellite Organization [INMARSAT] (Transmittal No. DTC-61-96), pursuant to 22 U.S.C. 2776(c); to the Committee on International Relations.

1705. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed manufacturing license agreement for production of major military equipment with Japan (Transmittal No. DTC-3-96), pursuant to 22 U.S.C. 2776(d); to the Committee on International Relations.

1706. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed manufacturing license agreement for production of major military equipment with the Republic of Korea (Transmittal No. DTC-7-96), pursuant to 22 U.S.C. 2776(d); to the Committee on International Relations.

1707. A letter from the Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed issuance of export license Agreement for the transfer of defense articles or defense services sold commercially to Japan (Transmittal No. DTC-8-96), pursuant to 22 U.S.C. 2776(c) and (d); to the Committee of International Relations.

1708. A letter from the U.S. Agency for International Development, transmitting the Agency's financial statements on USAID's

micro and small enterprise development [MSED] program for fiscal year 1994; to the Committee on International Relations.

1709. A letter from the Director, Office of Management and Budget, transmitting OMB estimate of the amount of change in outlays or receipts, as the case may be, in each fiscal year through fiscal year 2000 resulting from passage of H.R. 402 and H.R. 716, pursuant to Public Law 101-508, section 13101(a) (104 Stat. 1338-582); to the Committee on Government Reform and Oversight.

1710. A letter from the Office of Independent Counsel, transmitting the Counsel's annual report in compliance with the Inspector General Act Amendments of 1988, pursuant to 5 U.S.C. app. (Insp. Gen. Act) Sec. 5(b); to the Committee on Government Reform and Oversight.

1711. A letter from the President and CEO, U.S. Enrichment Corporation, transmitting the Corporation's annual report in compliance with the Inspector General Act Amendments of 1988, pursuant to 5 U.S.C. app. (Insp. Gen. Act) Sec. 5(b); to the Committee on Government Reform and Oversight.

1712. A letter from the Executive Director, Office of Compliance, transmitting notice of proposed rulemaking for publication in the CONGRESSIONAL RECORD, pursuant to Public Law 104-1, section 303(b) (109 Stat. 28); to the Committee on House Oversight.

1713. A letter from the Secretary of Transportation, transmitting a report on the national maximum speed limits, travel speeds, enforcement efforts and speed related highway statistics for fiscal year 1993, pursuant to Public Law 102-240, section 1029(e) (105 Stat. 1970); to the Committee on Transportation and Infrastructure.

1714. A letter from the Director, Corporate Financial Audits, General Accounting Office, transmitting a report on the 1995 fiscal year interest rate on rural telephone bank loans, pursuant to 7 U.S.C. 948(b)(3); jointly, to the Committees on Agriculture and Government Reform and Oversight.

1715. A letter from the Secretary of Energy, transmitting the Department's report entitled "Report to Congress: Expressions of Interest in Commercial Clean Technology Projects in Foreign Countries; jointly, to the Committees on Appropriations, Commerce, and Science.

#### **REPORTS OF COMMITTEES ON PUBLIC BILLS AND RESOLUTIONS**

Under clause 2 of rule XIII, reports of committees were delivered to the Clerk for printing and reference to the proper calendar, as follows:

Mr. GEKAS: Committee on the Judiciary. H.R. 234. A bill to amend title 11 of the United States Code to make nondischargeable a debt for death or injury caused by the debtor's operation of watercraft or aircraft while intoxicated; with an amendment (Rept. 104-356). Referred to the Committee of the Whole House on the State of the Union.

#### **PUBLIC BILLS AND RESOLUTIONS**

Under clause 5 of rule X and clause 4 of rule XXII, public bills and resolutions were introduced and severally referred to as follows:

By Mr. BUNNING of Kentucky (for himself, Mr. HASTERT, Mr. ARCHER, Mr. MCCOLLUM, Mr. EWING, Mr. BILIRAKIS, Mr. COOLEY, Mr. FOX, Mr. LEWIS of Kentucky, Mr. ENGLISH of Pennsylvania, Ms. DUNN of Washington, Mr. HASTINGS of Washington,