

rights or the commitment by the employing office to an enforceable obligation.

Signed at Washington, D.C., on this 10th day of July, 1996.

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

NOTICE OF ADOPTION OF REGULATIONS

U.S. CONGRESS,
OFFICE OF COMPLIANCE,
Washington, DC, July 9, 1996.

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

DEAR MR. SPEAKER: Pursuant to Section 304(b) of the Congressional Accountability Act of 1995 (2 U.S.C. §1384(b)), I am transmitting on behalf of the Board of Directors the enclosed notice of Adoption of Regulations and Submission for Approval for publication in the Congressional Record. The notice, which the Board has approved, is being issued pursuant to §220(d).

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,

GLEN D. NAGER,
Chair of the Board.

OFFICE OF COMPLIANCE—THE CONGRESSIONAL
ACCOUNTABILITY ACT OF 1995: EXTENSION OF
RIGHTS, PROTECTIONS AND RESPONSIBILITIES
UNDER CHAPTER 71 OF TITLE 5, UNITED
STATES CODE, RELATING TO FEDERAL SERVICE
LABOR-MANAGEMENT RELATIONS (REGU-
LATIONS UNDER SECTION 220(d) OF THE CON-
GRESSIONAL ACCOUNTABILITY ACT)

NOTICE OF ADOPTION OF REGULATIONS AND SUBMISSION FOR APPROVAL

Summary: The Board of Directors of the Office of Compliance, after considering comments to its Notice of Proposed Rulemaking published May 15, 1996 in the Congressional Record, has adopted, and is submitting for approval by the Congress, final regulations implementing section 220 of the Congressional Accountability Act of 1995, Pub. L. 104-1, 109 Stat. 3. Specifically, these regulations are adopted under section 220(d) of the CAA.

For Further Information Contact: Executive Director, Office of Compliance, Room LA 200, John Adams Building, 110 Second Street, S.E., Washington, DC 20540-1999, Telephone: (202) 724-9250.

SUPPLEMENTARY INFORMATION

I. Background and Summary

The Congressional Accountability Act of 1995 ("CAA" or "Act") 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 Congressional employees and employing offices. Section 220 of the CAA concerns the application of chapter 71 of title 5, United States Code ("chapter 71") relating to Federal service labor-management relations. Section 220(a) of the CAA applies the rights, protections and responsibilities established under sections 7102, 7106, 7111 through 7117, 7119 through 7122 and 7131 of title 5, United States Code to employing offices and to covered employees and representatives of those employees.

Section 220(d) authorizes the Board of Directors of the Office of Compliance ("Board") to issue regulations to implement section 220 and further states that, except as provided in subsection (e), such regulations "shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority

["FLRA"] to implement the statutory provisions referred to in subsection (a) except— (A) to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section; or (B) as the Board deems necessary to avoid a conflict of interest or appearance of a conflict of interest."

On March 6, 1996, the Board of Directors of the Office of Compliance ("Office") issued an Advance Notice of Proposed Rulemaking ("ANPR") that solicited comments from interested parties in order to obtain participation and information early in the rule-making process. 142 Cong. R. S1547 (daily ed., Mar. 6, 1996).

On May 15, 1996, the Board published in the Congressional Record a Notice of Proposed Rulemaking ("NPR") (142 Cong. R. S5070-89, H5153-72 (daily ed., May 15, 1996)). In response to the NPR, the Board received three written comments, two of which were from offices of the Congress and one of which was from a labor organization.

Parenthetically, it should also be noted that, on May 23, 1996, the Board published a Notice of Proposed Rulemaking (142 Cong. R. S5552-56, H5563-68 (daily ed., May 23, 1996)) inviting comments from interested parties on proposed regulations under section 220(e). That subsection further authorizes the Board to issue regulations on the manner and extent to which the requirements and exemptions of chapter 71 should apply to covered employees who are employed in certain specified offices, "except . . . that the Board shall exclude from coverage under [section 220] any covered employees who are employed in [the specified offices] if the Board determines that such exclusion is required because of (i) a conflict of interest or appearance of a conflict of interest; or (ii) Congress' constitutional responsibilities." Final regulations under section 220(e) will be adopted and submitted for Congressional approval separately.

II. Consideration of Comments and Conclusions

A. Investigative and adjudicatory responsibilities

In the NPR, the Board proposed that, like the FLRA, it would decide representation issues, negotiability issues and exceptions to arbitral awards based upon a record developed through direct submissions from the parties and, where necessary, through further investigation by the Board (through the person of the Executive Director). Under the Board's proposed rule, only unfair labor practice issues (and not representation, arbitrability or negotiability issues) would be referred to hearing officers for initial decision under section 405 of the CAA.

One commenter expressly approved of this proposal. Conversely, two commenters argued that the proposal violates the plain and unambiguous language of the statute, which they read as requiring the Board to refer all section 220 issues, including representation, arbitrability, and negotiability issues, to hearing officers for initial decision under section 405.

Contrary to the argument that the statutory text *unambiguously* requires referral of representation, arbitrability, and negotiability issues (as well as unfair labor practice issues) to hearing officers for initial decision pursuant to section 405, section 220(c)(1) simply does not define the "matter[s]" that must be referred to hearing officers for initial decision under section 405, much less specify that these "matter[s]" include disputed issues of representation, negotiability and/or arbitrability. Moreover, contrary to the assumption of the commenters, there is

no sound reason to assume that the "matter[s]" that the Board must refer to hearing officers for initial decision under section 405 are co-extensive with the "petition[s], or other submission[s]" that the Board receives under section 220(c)(1). Since Congress did *not* require the Board to refer to a hearing officer for initial decision "any petition or other submission" that it receives under section 220(c)(1), but rather only "any matter under this paragraph," the interpretive presumption of fact must be that the "matter[s]" which the Board must refer are not co-extensive with the "petitions or other submissions" that it receives under section 220(c)(1) (but, rather, are only a subset of them.) Whether or not this interpretive presumption can be overcome by other relevant interpretive materials, it is plain that, contrary to the assertion of the commenters, the statutory text is in fact seriously ambiguous about whether controversies involving representation, negotiability, and arbitrability issues are "matter[s]" within the meaning of section 220(c)(1) that must be referred to a Hearing Officer pursuant to section 405.

Moreover, as explained in the NPR, this textual ambiguity is best resolved by interpreting the statutory phrase "matter" in section 220(c)(1) to encompass only controversies involving disputed unfair labor practice issues. The term "matter" in section 220(c)(1) simply does not appear to refer to representation or other such issues arising out of the Board's "investigative authorities." Indeed, section 220(c)(1) expressly contemplates that the Board may direct the General Counsel (and, a fortiori, not a hearing officer) to carry out these "investigative authorities," which under chapter 71 include the authority, for example, to decide (and not, as one commenter suggests, merely to investigate) disputed representation issues such as whether an individual must be excluded from a unit because he or she is a supervisor.

Under chapter 71, only controversies involving unfair labor practice issues are subject to formal adversarial processes like those established by section 405; and nothing in the CAA's legislative history shows that Congress understood itself to be departing from chapter 71 in this respect. In these circumstances, under the CAA, the textual ambiguity must be resolved by reference to the interpretive presumption that Congress has subjected itself to the same rules that the executive branch is subject to under chapter 71.

Furthermore, contrary to the suggestion of one commenter, the reference in the last sentence of section 220(c)(2) to initial hearing officer consideration of unfair labor practice complaints does not detract in any way from the Board's construction of the term "matter" in section 220(c)(1). The Board's construction of the term "matter" in section 220(c)(1) simply does not render this reference in section 220(c)(2) to initial hearing officer consideration of unfair labor practice complaints "redundant and meaningless," as the commenter claims; rather, the reference in section 220(c)(2) simply completes the statute's instruction to the General Counsel concerning how he should process a controversy involving an unfair labor practice issue (just as section 220(c)(1) in parallel instructs the Board concerning how it should process a controversy involving an unfair labor practice issue). Indeed, construing the phrase "matter" in section 220(c)(1) to encompass more than just controversies involving unfair labor practice issues would not in any way reduce the redundancy and lack of meaning that the commenter perceives (since, in all events, both section 220(c)(1) and (2) would effectively encompass

initial hearing officer consideration of unfair labor practice issues).

The commenters similarly err in suggesting that the judicial review provisions of section 220(c)(3) demonstrate that the Board must refer more than just unfair labor practice issues to a hearing officer for initial decision under section 405. In making this suggestion, the commenters omit mention of the critical statutory language in section 220(c)(3) that only the General Counsel or the respondent to the complaint may seek judicial review of a final Board decision under section 220(c)(1) or (2). This language appears to limit judicial review to cases involving unfair labor practice issues, because it is only in unfair labor practice cases that the parties include either "the General Counsel or the respondent to the complaint." In all events, even if section 220(c)(3) authorized judicial review of more than just unfair labor practice issues, referral of more than controversies involving unfair labor practice issues would not be required: Judicial review does not always require a record created by a formal adversary process, and the Board still has not found a statutory command sufficient to require a formal adversary process where chapter 71 does not do so.

Finally, there is simply no foundation for the suggestion that the "real reason" for the Board's reading of the statute is that referral of representation, arbitrability, or negotiability issues to a hearing officer for initial decision under section 405 would be "overly cumbersome." It is in fact the judgment of the Board, based on its members' many years of practice and experience in this area, that referral of such issues for formal adversary hearings would be overly cumbersome and would undermine considerably the effective implementation of section 220 of the CAA. Indeed, it is difficult for the Board's members to even conceive of how an election could practically be conducted in the confidential, adversarial processes contemplated by section 405. But, while the Board is in fact entitled in its interpretive process to presume that Congress did not intend to be so impracticable, the "real reason" for the Board's construction of section 220 is not this significant practical concern. Rather, the "real reason" is the one that is stated in the NPR and here—to wit, that neither the statutory language nor the legislative history contain a sufficiently clear command that, in supposedly subjecting itself to the same labor laws as are applicable to the executive branch, Congress intended to make an exception for itself and require formal adversarial proceedings where they are not required under chapter 71. As the Supreme Court has stated: "In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that [suggested] here, [we] think judges as well as detectives may take into consideration the fact that a watch dog did not bark in the night." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991), quoting *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

B. Pre-election investigatory hearings

In the NPR, the Board proposed to add a new subsection 2422.18(d) to provide that the parties have an obligation to produce existing documents and witnesses for pre-election investigatory hearings, in accordance with the instructions of the Board (acting through the person of the Executive Director), and that a willful failure to comply with such instructions could result in an adverse inference being drawn on the issue for which the evidence is sought. The Board noted that section 7132 of chapter 71, which authorizes the issuance of subpoenas by various FLRA officials, was not made applicable

by the CAA and that, as pre-election investigatory hearings are not conducted under section 405 of the CAA, subpoenas for documents or witnesses in such pre-election proceedings are not available under the CAA, as they are under chapter 71. The Board thus concluded that there is good cause to modify section 2422.18 of the FLRA's regulations to include subsection (d) because, in order to properly decide disputed representation issues and effectively implement section 220 of the CAA, a complete investigatory record comparable to that developed under chapter 71 is necessary.

One commenter asserted, consistent with that commenter's view that pre-election investigatory hearings must be conducted under section 405 of the CAA, that the addition of subsection 2422.18(d) is not necessary. Based upon the same rationale, another commenter suggested (1) that section 2422.18(b) be modified to provide that the Federal rules of evidence shall apply in pre-election investigatory hearings, and (2) that the Board "should make the proposed regulations governing service of subpoenas consistent with its own procedural regulations." This same commenter also suggested that the Board specifically not adopt that portion of section 2422.18(b) which provides that pre-election investigatory hearings are open to the public, because this provision allegedly "appears to be included to comply with the Sunshine Act" which "does not apply to Congress."

As noted above, the Board continues to be of the view that pre-election investigatory hearings need not and should not be conducted under section 405 of the CAA. Accordingly, since the commenters' criticisms of this proposed regulation are based upon a contrary false premise, the Board adheres to its original conclusion that there is good cause to modify section 2422.18 of the FLRA's regulations by including section 2422.18(d). Further, because pre-election investigatory hearings should not be conducted under section 405 of the CAA, there is no good cause to modify section 2422.18 to require the application of the Federal rules of evidence or to provide for the issuance or service of subpoenas in connection with such investigatory hearings. Finally, contrary to the assertion of one commenter, there is no indication that the "Sunshine Act" (Pub. L. 94-409) formed the basis for the section 2422.18(b) requirement that pre-election hearings be open to the public, and there is no basis for not adopting that subsection, as suggested by the commenter.

C. Selection of the unfair labor practice procedure or the negotiability procedure

In the NPR, the Board determined that there is good cause to delete the concluding sentences of sections 2423.5 and 2424.4 of the FLRA's regulations. Specifically, the Board proposed to omit the requirement that a labor organization file a petition for review of a negotiability issue, rather than an unfair labor practice charge, in cases that solely involve an employing office's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and that do not involve actual or contemplated changes in conditions of employment. The Board reasoned that, by eliminating that restriction, a labor organization could choose to seek a Board determination on the issue, as it can with respect to other assertions by employing offices that there is no duty to bargain, through an unfair labor practice proceeding and, if the determination is unfavorable, the labor organization could possibly obtain judicial review by persuading the General Counsel to file a petition for review of the unfavorable Board decision under section 220(c)(3) of the Act. In this regard, the Board stated its view that,

unlike chapter 71, the CAA does not provide for direct judicial review of Board decisions and orders on petitions for review of negotiability issues.

One commenter expressly and specifically agreed that there is good cause for this proposed modification of the FLRA's regulations. The two other commenters asserted that there is not good cause to delete the pertinent sentences from the FLRA's regulations because of their view that, under section 220(c)(3), direct judicial review of Board decisions on petitions for review of negotiability issues is available.

The Board has further considered this issue and has concluded, for reasons different than those urged by the commenters, that it should not delete the concluding sentences of the referenced sections of the FLRA's regulations. Under section 7117 of chapter 71, which is incorporated into the CAA, a labor organization is the only party that may file a petition for Board review of a negotiability issue; the labor organization is always the petitioner and never a respondent, and the General Counsel is never a party. Moreover, section 220(c)(3) provides that only "the General Counsel or the respondent to the complaint, if aggrieved by a final decision of the Board" may file a petition for judicial review of a Board decision. Accordingly, it is clear that, under the CAA, it was Congress' intent not to accord labor organizations the right to seek direct judicial review of unfavorable decisions on negotiability issues. Further, in the Board's judgment, questions involving the duty to bargain, where there are no actual or contemplated changes in conditions of employment, are best resolved through a negotiability determination; procedures for the consideration of petitions for review of negotiability issues are more expeditious and less adversarial than unfair labor practice proceedings, and thus the requirement that labor organizations utilize the negotiability procedures is more effective for the implementation of section 220. Accordingly, the concluding sentences of section 2423.5 and 2424.5 of the FLRA's regulations will be included in the Board's final regulations.

D. Exclusion of certain employing offices from coverage under section 220

One commenter urged the Board to exclude certain specific employing offices from coverage under section 220 of the CAA. The commenter reasoned that, since section 7103(a)(3) of chapter 71 specifically defines "agency" not to include certain named executive branch agencies, the Board should exempt "parallel" employing offices in the House of Representatives from the definition of "employing office" in the Board's regulations.

The Board declines this suggestion. Just as Congress defined the term "agency" under chapter 71, Congress has defined "employing office" in the CAA. The Board cannot, as the commenter has requested, redefine "employing office" by regulation to exclude employing offices that are encompassed by statutory definition.

E. Exercise of the Board's authority under section 7103(b) of chapter 71, as applied by the CAA

Under section 220(c)(1) of the CAA, the Board has been granted the authority that the President has under section 7103(b) of chapter 71 to "issue an order excluding any [employing office] or subdivision from coverage under this chapter if the [Board] determines that—

(a) the [employing office] or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(b) the provisions of this chapter cannot be applied to that [employing office] or subdivision in a manner consistent with national security requirements and considerations."

Two commenters requested that the Board issue regulations under this authority. In doing so, one commenter named five employing offices that it simply asserted should be excluded because their "primary function . . . is intelligence investigative or national security work"; the other commenter made no specific suggestions as to appropriate exclusions.

While the Board is willing to exercise its authority derived from section 7103(b) of chapter 71 (when and if it receives information that would allow it to do so), the authority that the Board possesses is to exclude employing offices from coverage under section 220 by "order," not by regulation. Congress wisely recognized that sensitive security issues of this type are not properly addressed in a public rulemaking procedure, but rather are better addressed by executive or administrative order.

F. Definition of labor organization

One commenter correctly pointed out that the words "bylaws, tacit agreement among its members," were omitted from the definition of "labor organization" in section 2421.3(d). The final regulation has been modified to correct this inadvertent omission.

G. Substitution of the term "disability" for "handicapping condition"

The proposed regulations, in sections 2421.3(d)(1) and 2421.4(d)(2)(iv), make reference to the term "handicapping condition". That term appears in the FLRA regulations and is derived from the Rehabilitation Act of 1973. In section 201(a)(3) of the CAA, the Congress used the term "disability," rather than the term "handicap" or "handicapping condition". Accordingly, as urged by one commenter, the Board finds good cause to substitute the term "disability" for the term "handicapping condition" wherever it appears in the regulations.

H. Conditions of employment

One commenter suggested that the Board should modify the definition of the term "conditions of employment" in section 2421.3(m)(3) of the proposed regulations to provide that, in addition to "matters specifically provided for by Federal statute," matters specifically provided for by "resolutions, rules, regulations and other pronouncements of the House of Representatives and/or the Senate having the force and effect of law" are among the matters excluded from that term. But the definition of "conditions of employment" in section 2421.3(m) of the proposed regulations is identical to the statutory definition incorporated by reference into the FLRA's regulations. Moreover, to the extent that resolutions, rules, regulations and pronouncements of the House or Senate have the force and effect of Federal statutes, matters specifically provided for therein are already excluded from "conditions of employment" under section 220. The Board thus does not find good cause to change the FLRA's regulation.

I. Applicability of certain terms

1. Government-wide rule or regulation.—The term "Government-wide rule or regulation" is found in various contexts in the incorporated provisions of chapter 71 and applicable regulations of the FLRA. One commenter asked that the Board clarify that the term includes "rules or regulations issued by the House or Senate, as appropriate." The commenter cited no authority for the requested change.

The Board has carefully considered the matter. Its own research reveals that the FLRA has interpreted this term to include only rules or regulations that are generally applicable to the Federal civilian workforce within the executive branch. The Board thus does not find good cause to revise the term

to apply to rules or regulations that are not generally applicable to covered employees throughout the entire legislative branch.

2. Activity; primary national subdivision.—One commenter asserted that the terms "activity" and "primary national subdivision" have no applicability in the legislative branch and should be omitted from the regulations. However, there was not sufficient information in the comment to allow the Board to make an informed judgment about the validity of the assertion. The Board therefore does not have good cause to modify the FLRA's regulations by deleting these terms; indeed, if the terms are inapplicable, their inclusion in the regulations will have no substantial consequence.

J. Consultation rights

1. National.—Under section 2426.1(a) of the proposed rules, an employing office shall accord national consultation rights to a labor organization that holds exclusive recognition for 10% or more of the total number of personnel employed by the employing office. In this regard, the Board noted that the FLRA has considered 10% of the employees of an agency or primary national subdivision to be a significant enough proportion of the employee complement to allow for meaningful consultations, no matter the size of the agency or the number of its employees. The Board determined that there is no apparent reason why there should be a different threshold requirement for small legislative branch employing offices from that applicable to small executive branch agencies.

One commenter urged that the Board reconsider its determination. The commenter argued that the threshold should be raised, because in a small employing office of 10 employees "a union could gain consultation rights on the basis of the interest of one employee."

The commenter's concern that one employee's "interest" in a 10-employee office could require consultations is unfounded. In order to obtain national consultation rights, a labor organization must hold "exclusive recognition" for 10% of the employees. Section 2421.4(c) of the Board's proposed rules defines the term "exclusive recognition" to mean that "a labor organization has been selected as the sole representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast ballots in an election." The mere "interest" of employees does not constitute "exclusive recognition." Further, exclusive recognition cannot, under applicable precedent, be granted for a single employee, because a one-employee unit is not appropriate for exclusive recognition. The Board thus has decided to adhere to its conclusion that there is not good cause to change the 10% threshold.

2. Government-wide rules or regulations.—In the NPR, the Board concluded that it had good cause to modify the threshold requirement contained in the FLRA's regulations that provide for an agency, in appropriate circumstances, to accord consultation rights on Government-wide rules or regulations to a labor organization that holds exclusive recognition for 3,500 or more employees. The Board reasoned that, because of the size of employing offices covered by the CAA, the 3,500 employee threshold could never be met and needed to be revised. Accordingly, by analogy to the eligibility requirement for national consultation rights, the Board adopted a threshold requirement of 10% of employees.

One commenter asserted that the Board improperly replaced the 3,500 employee threshold requirement with the 10% requirement, arguing that the intent of the 3,500 employee threshold was to permit consultation only in large agencies. The commenter

stated that, because no covered employing office has 3,500 employees, "consultation on government-wide rules or regulations should not be a requirement under the CAA."

The Board has carefully considered the comment and has now concluded that the substitution of a 10% threshold for the 3,500 employee requirement would not result in the appropriate standard for the grant of consultation rights on Government-wide rules or regulations. However, contrary to the commenter's assertion, such consultation rights should be, and indeed are, accorded under the CAA.

Section 7117(d) of chapter 71, which is incorporated into the CAA, provides that a labor organization that is the exclusive representative of a substantial number of employees, as determined in accordance with criteria prescribed by the FLRA, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency that effects any substantive change in any condition of employment. For example, under the FLRA's regulations, in appropriate circumstances, the Office of Personnel Management (OPM) would be required to accord consultation rights on an OPM-issued government-wide regulation to labor organizations that are the exclusive representatives of at least 3,500 executive branch employees, even if those employees are not employees of OPM. Section 7117(d) of chapter 71 was incorporated into the CAA. Thus, in the legislative branch, consultation rights on legislative branch-wide rules or regulations issued by an employing office that effect any substantive change in any condition of employment must be granted to the exclusive representative(s) of a substantial number of covered legislative branch employees.

The FLRA determined in its regulations that 3,500 employees is a "substantial" number of employees in the executive branch. The most recent statistics compiled by OPM's Office of Workforce Information reveal that there are approximately 1,958,200 civilian, non-postal, Federal employees. In contrast, the Congressional Research Service reports that there are only approximately 20,100 legislative branch employees currently covered by the CAA. As the covered workforce in the legislative branch is approximately one-tenth the size of the analogous executive branch employee complement, the Board concludes that the appropriate threshold requirement for the grant of consultation rights in the legislative branch is 350 employees, or one-tenth the requirement in the executive branch. Accordingly, the Board finds that there is good cause to modify section 2426.11(a) of the FLRA's rules to provide that requests for consultation rights on Government-wide rules or regulations (e.g. rules or regulations that are generally applicable to the legislative branch) will be granted by an employing office, as appropriate, to a labor organization that holds exclusive recognition for 350 or more covered employees in the legislative branch.

K. Posting of notices in representation cases

One commenter asserted that sections 2422.7 and 2422.23, which provide for the posting or distribution of certain notices by employing offices, should be modified. In this regard, the commenter argued that these sections of the proposed rules "give the Executive Director the authority to determine the placement" of the notice posting and that such determination should be left to the discretion of the employing office. Contrary to the commenter's assertions, however, nothing in the aforementioned regulations deprives an employing office of the desired discretion so long as the notices are posted "in places where notices to employees are

customarily posted and/or distributed in a manner by which notices are normally distributed." Accordingly, there is no reason to modify the regulations, as requested by the commenter.

L. Enforcement of decisions of the Assistant Secretary of Labor

In the NPR, the Board found good cause to modify section 2428.3 of the FLRA's regulations to delete the requirement in section 2428.3(a) that the Board enforce any decision or order of the Assistant Secretary of Labor (Assistant Secretary) unless it is "arbitrary and capricious or based upon manifest disregard of the law." Noting that section 225(f)(3) of the CAA specifically states that the CAA does not authorize executive branch enforcement of the Act, the Board concluded that it should not adopt a regulatory provision that would require the Board to defer to decisions of an executive branch agency.

Two commenters asserted that the Board did not have good cause to modify the FLRA's regulation. Both argued that requiring the Board to enforce a decision and order of the Assistant Secretary is not tantamount to executive branch enforcement of the Act.

The Board continues to be of the view that, in order to give full effect to section 225(f)(3) of the CAA, it should not defer to decisions of the Assistant Secretary. There is thus good cause to modify section 2428.3 of the FLRA's regulations.

M. Regulations under section 220(d)(2)(B) of the CAA

Section 220(d)(2)(B) of the CAA provides that, in issuing regulations to implement section 220, the Board may modify the FLRA's regulations "as the Board deems necessary to avoid a conflict of interest or appearance of a conflict of interest." In the ANPR, the Board requested commenters to identify, where applicable, why a proposed modification of the FLRA's regulations is necessary to avoid a conflict of interest or appearance thereof. In this regard, commenters were advised not only to fully and specifically describe the conflict of interest or appearance thereof that they believed would exist were the pertinent FLRA regulations not modified, but also to explain the necessity for avoiding the asserted conflict or appearance of conflict and how any proposed modification would avoid the identified concerns.

In response to the ANPR, one commenter argued that the posting requirements of sections 2422.7 and 2422.23 of the FLRA's regulations should be modified. In the NPR, the Board discussed the commenter's suggested modifications and determined that the modifications were not necessary under section 220(d)(2)(B). No other modifications were requested or discussed.

Another commenter has now urged the Board to "promulgate a regulation for the exclusion from a bargaining unit of any employee whose membership or participation in the labor organization would present an actual or apparent conflict of interest with the duties of the employee" in order to "eliminate by regulation the possibility, or even the appearance of the possibility, that the contents of legislation or legislative policy might be influenced by union membership of Congressional employees." This commenter provided no additional explanation for the proposed regulation. Nor did the commenter provide a list of the employees who should be so excluded (or, indeed, any examples).

The Board has concluded that it is appropriate to adopt a regulation authorizing parties in appropriate circumstances to assert, and the Board to decide where appropriate and relevant, that a conflict of interest (real or apparent) exists that makes it necessary for the Board to modify a requirement that

would otherwise be applicable. The regulation is found at section 2420.2.

III. Method of Approval

The Board received no comments on the method of approval for these regulations. Therefore, the Board continues to recommend that (1) the version of the regulations that shall apply to the Senate and employees of the Senate should be approved by the Senate by resolution; (2) the version of the regulations that shall apply to the House of Representatives and employees of the House of Representatives should be approved by the House of Representatives by resolution; and (3) the version of the regulations that apply to other covered employees and employing offices should be approved by concurrent resolution.

Accordingly, the Board of Directors of the Office of Compliance hereby adopts and submits for approval by the Congress the following regulations.

Signed at Washington, D.C., on this 9th day of July, 1996.

GLEN D. NAGER,
*Chair of the Board of Directors,
Office of Compliance.*

ADOPTED REGULATIONS

Subchapter C

- 2420 Purpose and scope
- 2421 Meaning of terms as used in this subchapter
- 2422 Representation proceedings
- 2423 Unfair labor practice proceedings
- 2424 Expedited review of negotiability issues
- 2425 Review of arbitration awards
- 2426 National consultation rights and consultation rights on Government-wide rules or regulations
- 2427 General statements of policy or guidance
- 2428 Enforcement of Assistant Secretary standards of conduct decisions and orders
- 2429 Miscellaneous and general requirements

Subchapter D

- 2470 General
- 2471 Procedures of the Board in impasse proceedings

Subchapter C

PART 2420—PURPOSE AND SCOPE

§2420.1 Purpose and scope.

The regulations contained in this subchapter are designed to implement the provisions of chapter 71 of title 5 of the United States Code, as applied by section 220 of the Congressional Accountability Act (CAA). They prescribe the procedures, basic principles or criteria under which the Board and the General Counsel, as applicable, will:

(a) Determine the appropriateness of units for labor organization representation under 5 U.S.C. 7112, as applied by the CAA;

(b) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of 5 U.S.C. 7111, as applied by the CAA, relating to the according of exclusive recognition to labor organizations;

(c) Resolve issues relating to the granting of national consultation rights under 5 U.S.C. 7113, as applied by the CAA;

(d) Resolve issues relating to determining compelling need for employing office rules and regulations under 5 U.S.C. 7117(b), as applied by the CAA;

(e) Resolve issues relating to the duty to bargain in good faith under 5 U.S.C. 7117(c), as applied by the CAA;

(f) Resolve issues relating to the granting of consultation rights with respect to conditions of employment under 5 U.S.C. 7117(d), as applied by the CAA;

(g) Conduct hearings and resolve complaints of unfair labor practices under 5 U.S.C. 7118, as applied by the CAA;

(h) Resolve exceptions to arbitrators' awards under 5 U.S.C. 7122, as applied by the CAA; and

(i) Take such other actions as are necessary and appropriate effectively to administer the provisions of chapter 71 of title 5 of the United States Code, as applied by the CAA.

§2420.2

Notwithstanding any other provisions of these regulations, the Board may, in deciding an issue, add to, delete from or modify otherwise applicable requirements as the Board deems necessary to avoid a conflict of interest or the appearance of a conflict of interest.

PART 2421—MEANING OF TERMS AS USED IN THIS SUBCHAPTER

Sec.

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§2421.1 Act; CAA.

The terms "Act" and "CAA" mean the Congressional Accountability Act of 1995 (P.L. 104-1, 109 Stat. 3, 2 U.S.C. §§1301-1438).

§2421.2 Chapter 71.

The term "chapter 71" means chapter 71 of title 5 of the United States Code.

§2421.3 General Definitions.

(a) The term "person" means an individual, labor organization or employing office.

(b) Except as noted in subparagraph (3) of this subsection, the term "employee" means an individual—

(1) Who is a current employee, applicant for employment, or former employee of: the House of Representatives; the Senate; the Capitol Guide Service; the Capitol Police; the Congressional Budget Office; the Office of the Architect of the Capitol; the Office of the Attending Physician; the Office of Compliance; or the Office of Technology Assessment; or

(2) Whose employment in an employing office has ceased because of any unfair labor practice under section 7116 of title 5 of the United States Code, as applied by the CAA, and who has not obtained any other regular and substantially equivalent employment as determined under regulations prescribed by the Board, but does not include—

(i) An alien or noncitizen of the United States who occupies a position outside of the United States;

(ii) A member of the uniformed services;

(iii) A supervisor or a management official or;

(iv) Any person who participates in a strike in violation of section 7311 of title 5 of the United States Code, as applied by the CAA.

(3) For the purpose of determining the adequacy of a showing of interest or eligibility for consultation rights, except as required by law, applicants for employment and former employees are not considered employees.

(c) The term "employing" office means—

(1) The personal office of a Member of the House of Representatives or of 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.

(d) The term "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an employing office concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or disability;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by an employing office; or

(4) An organization which participates in the conduct or a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

(e) The term "dues" means dues, fees, and assessments.

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

(g) The term "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of chapter 71 of title 5 of the United States Code, as applied by the CAA.

(h) The term "grievance" means any complaint—

(1) By any employee concerning any matter relating to the employment of the employee;

(2) By any labor organization concerning any matter relating to the employment of any employee; or

(3) By any employee, labor organization, or employing office concerning—

(i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

(i) The term "supervisor" means an individual employed by an employing office having authority in the interest of the employing office to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority.

(j) The term "management official" means an individual employed by an employing office in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the employing office.

(k) The term "collective bargaining" means the performance of the mutual obligation of the representative of an employing office and the exclusive representative of employees in an appropriate unit in the employing office to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

(l) The term "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

(m) The term "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(1) Relating to political activities prohibited under subchapter III of chapter 73 of title 5 of the United States Code, as applied by the CAA;

(2) Relating to the classification of any position; or

(3) To the extent such matters are specifically provided for by Federal statute.

(n) The term "professional employee" means—

(1) An employee engaged in the performance of work—

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) Requiring the consistent exercise of discretion and judgment in its performance;

(iii) Which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) Which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(2) An employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (1)(i) of this paragraph and is performing related work under appropriate direction and guidance to qualify the employee as a professional employee described in subparagraph (1) of this paragraph.

(o) The term "exclusive representative" means any labor organization which is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of title 5 of the United States Code, as applied by the CAA.

(p) The term "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment.

(q) The term "United States" means the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin

Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

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

(s) The term "Assistant Secretary" means the Assistant Secretary of Labor for Labor-Management Relations.

§2421.4 National consultation rights; consultation rights on Government-wide rules or regulations; exclusive recognition; unfair labor practices.

(a)(1) The term "national consultation rights" means that a labor organization that is the exclusive representative of a substantial number of employees of the employing office, as determined in accordance with criteria prescribed by the Board, shall—

(i) Be informed of any substantive change in conditions of employment proposed by the employing office; and

(ii) Be permitted reasonable time to present its views and recommendations regarding the changes.

(2) National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Board. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Board.

(b)(1) The term "consultation rights on Government-wide rules or regulations" means that a labor organization which is the exclusive representative of a substantial number of employees of an employing office determined in accordance with criteria prescribed by the Board, shall be granted consultation rights by the employing office with respect to any Government-wide rule or regulation issued by the employing office effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Board. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Board.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(i) Be informed of any substantive change in conditions of employment proposed by the employing office; and

(ii) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an employing office by any labor organization—

(i) The employing office shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(ii) The employing office shall provide the labor organization a written statement of the reasons for taking the final action.

(c) The term "exclusive recognition" means that a labor organization has been selected as the sole representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in an election.

(d) The term "unfair labor practices" means—

(1) Any of the following actions taken by an employing office—

(i) Interfering with, restraining, or coercing any employee in the exercise by the employee of any right under chapter 71, as applied by the CAA;

(ii) Encouraging or discouraging membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other condition of employment;

(iii) Sponsoring, controlling, or otherwise assisting any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(iv) Disciplining or otherwise discriminating against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under chapter 71, as applied by the CAA;

(v) Refusing to consult or negotiate in good faith with a labor organization as required by chapter 71, as applied by the CAA;

(vi) Failing or refusing to cooperate in impasse procedures and impasse decisions as required by chapter 71, as applied by the CAA;

(vii) Enforcing any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(viii) Otherwise failing or refusing to comply with any provision of chapter 71, as applied by the CAA;

(2) Any of the following actions taken by a labor organization—

(i) Interfering with, restraining, or coercing any employee in the exercise by the employee of any right under this chapter;

(ii) Causing or attempting to cause an employing office to discriminate against any employee in the exercise by the employee of any right under this chapter;

(iii) Coercing, disciplining, fining, or attempting to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(iv) Discriminating against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or disability;

(v) Refusing to consult or negotiate in good faith with an employing office as required by chapter 71, as applied by the CAA;

(vi) Failing or refusing to cooperate in impasse procedures and impasse decisions as required by chapter 71, as applied by the CAA;

(vii)(A) Calling, or participating in, a strike, work stoppage, or slowdown, or picketing of an employing office in a labor-management dispute if such picketing interferes with an employing office's operations; or

(B) Condoning any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(viii) Otherwise failing or refusing to comply with any provision of chapter 71, as applied by the CAA;

(3) Denial of membership by an exclusive representative to any employee in the appropriate unit represented by such exclusive representative except for failure—

(i) To meet reasonable occupational standards uniformly required for admission, or

(ii) To tender dues uniformly required as a condition of acquiring and retaining membership.

§2421.5 Activity.

The term "activity" means any facility, organizational entity, or geographical subdivision or combination thereof, of any employing office.

§2421.6 Primary national subdivision.

"Primary national subdivision" of an employing office means a first-level organiza-

tional segment which has functions national in scope that are implemented in field activities.

§2421.7 Executive Director.

"Executive Director" means the Executive Director of the Office of Compliance.

§2421.8 Hearing Officer.

The term "Hearing Officer" means any individual designated by the Executive Director to preside over a hearing conducted pursuant to section 405 of the CAA on matters within the Office's jurisdiction, including a hearing arising in cases under 5 U.S.C. 7116, as applied by the CAA, and any other such matters as may be assigned.

§2421.9 Party.

The term "party" means:

(a) Any labor organization, employing office or employing activity or individual filing a charge, petition, or request;

(b) Any labor organization or employing office or activity

(1) Named as

(i) A charged party in a charge,

(ii) A respondent in a complaint, or

(iii) An employing office or activity or an incumbent labor organization in a petition;

(2) Whose intervention in a proceeding has been permitted or directed by the Board; or

(3) Who participated as a party

(i) In a matter that was decided by an employing office head under 5 U.S.C. 7117, as applied by the CAA, or

(ii) In a matter where the award of an arbitrator was issued; and

(c) The General Counsel, or the General Counsel's designated representative, in appropriate proceedings.

§2421.10 Intervenor.

The term "intervenor" means a party in a proceeding whose intervention has been permitted or directed by the Board, its agents or representatives.

§2421.11 Certification.

The term "certification" means the determination by the Board, its agents or representatives, of the results of an election, or the results of a petition to consolidate existing exclusively recognized units.

§2421.12 Appropriate unit.

The term "appropriate unit" means that grouping of employees found to be appropriate for purposes of exclusive recognition under 5 U.S.C. 7111, as applied by the CAA, and for purposes of allotments to representatives under 5 U.S.C. 7115(c), as applied by the CAA, and consistent with the provisions of 5 U.S.C. 7112, as applied by the CAA.

§2421.13 Secret ballot.

The term "secret ballot" means the expression by ballot, voting machine or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed, except in that instance in which any determinative challenged ballot is opened.

§2421.14 Showing of interest.

The term "showing of interest" means evidence of membership in a labor organization; employees' signed and dated authorization cards or petitions authorizing a labor organization to represent them for purposes of exclusive recognition; allotment of dues forms executed by an employee and the labor organization's authorized official; current dues records; an existing or recently expired agreement; current certification; employees' signed and dated petitions or cards indicating that they no longer desire to be represented for the purposes of exclusive recognition by the currently certified labor or-

ganization; employees' signed and dated petitions or cards indicating a desire that an election be held on a proposed consolidation of units; or other evidence approved by the Board.

§2421.15 Regular and substantially equivalent employment.

The term "regular and substantially equivalent employment" means employment that entails substantially the same amount of work, rate of pay, hours, working conditions, location of work, kind of work, and seniority rights, if any, of an employee prior to the cessation of employment in an employing office because of any unfair labor practice under 5 U.S.C. 7116, as applied by the CAA.

§2421.16 Petitioner.

Petitioner means the party filing a petition under Part 2422 of this Subchapter.

§2421.17 Eligibility period.

The term "eligibility period" means the payroll period during which an employee must be in an employment status with an employing office or activity in order to be eligible to vote in a representation election under Part 2422 of this Subchapter.

§2421.18 Election agreement.

The term "election agreement" means an agreement under Part 2422 of this Subchapter signed by all the parties, and approved by the Board, the Executive Director, or any other individual designated by the Board, concerning the details and procedures of a representation election in an appropriate unit.

§2421.19 Affected by issues raised.

The phrase "affected by issues raised", as used in Part 2422, should be construed broadly to include parties and other labor organizations, or employing offices or activities that have a connection to employees affected by, or questions presented in, a proceeding.

§2421.20 Determinative challenged ballots.

"Determinative challenged ballots" are challenges that are unresolved prior to the tally and sufficient in number after the tally to affect the results of the election.

PART 2422—REPRESENTATION PROCEEDINGS

Sec.

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§2422.1 Purposes of a petition.

A petition may be filed for the following purposes:

(a) *Elections or Eligibility for dues allotment.* To request:

(1) (i) An election to determine if employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative; and/or

(ii) A determination of eligibility for dues allotment in an appropriate unit without an exclusive representative; or

(2) An election to determine if employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative.

(3) Petitions under this subsection must be accompanied by an appropriate showing of interest.

(b) *Clarification or Amendment.* To clarify, and/or amend:

(1) A certification then in effect; and/or

(2) Any other matter relating to representation.

(c) *Consolidation.* To consolidate two or more units, with or without an election, in an employing office and for which a labor organization is the exclusive representative.

§2422.2 Standing to file a petition.

A representation petition may be filed by: an individual; a labor organization; two or more labor organizations acting as a joint-petitioner; an individual acting on behalf of any employee(s); an employing office or activity; or a combination of the above: *provided, however*, that (a) only a labor organization has standing to file a petition pursuant to section 2422.1(a)(1); (b) only an individual has standing to file a petition pursuant to section 2422.1(a)(2); and (c) only an employing office or a labor organization may file a petition pursuant to section 2422.1(b) or (c).

§2422.3 Contents of a petition.

(a) *What to file.* A petition must be filed on a form prescribed by the Board and contain the following information:

(1) The name and mailing address for each employing office or activity affected by issues raised in the petition, including street number, city, state and zip code.

(2) The name, mailing address and work telephone number of the contact person for each employing office or activity affected by issues raised in the petition.

(3) The name and mailing address for each labor organization affected by issues raised in the petition, including street number, city, state and zip code. If a labor organization is affiliated with a national organization, the local designation and the national affiliation should both be included. If a labor organization is an exclusive representative of any of the employees affected by issues raised in the petition, the date of the certification and the date any collective bargaining agreement covering the unit will expire or when the most recent agreement did expire should be included, if known.

(4) The name, mailing address and work telephone number of the contact person for

each labor organization affected by issues raised in the petition.

(5) The name and mailing address for the petitioner, including street number, city, state and zip code. If a labor organization petitioner is affiliated with a national organization, the local designation and the national affiliation should both be included.

(6) A description of the unit(s) affected by issues raised in the petition. The description should generally indicate the geographic locations and the classifications of the employees included (or sought to be included) in, and excluded (or sought to be excluded) from, the unit.

(7) The approximate number of employees in the unit(s) affected by issues raised in the petition.

(8) A clear and concise statement of the issues raised by the petition and the results the petitioner seeks.

(9) A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that the contents of the petition are true and correct to the best of the person's knowledge and belief.

(10) The signature, title, mailing address and telephone number of the person filing the petition.

(b) *Compliance with 5 U.S.C. 7111(e), as applied by the CAA.* A labor organization/petitioner complies with 5 U.S.C. 7111(e), as applied by the CAA, by submitting to the employing office or activity and to the Department of Labor a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives. By signing the petition form, the labor organization/petitioner certifies that it has submitted these documents to the employing activity or office and to the Department of Labor.

(c) *Showing of interest supporting a representation petition.* When filing a petition requiring a showing of interest, the petitioner must:

(1) So indicate on the petition form;

(2) Submit with the petition a showing of interest of not less than thirty percent (30%) of the employees in the unit involved in the petition; and

(3) Include an alphabetical list of the names constituting the showing of interest.

(d) *Petition seeking dues allotment.* When there is no exclusive representative, a petition seeking certification for dues allotment shall be accompanied by a showing of membership in the petitioner of not less than ten percent (10%) of the employees in the unit claimed to be appropriate. An alphabetical list of names constituting the showing of membership must be submitted.

§2422.4 Service requirements.

Every petition, motion, brief, request, challenge, written objection, or application for review shall be served on all parties affected by issues raised in the filing. The service shall include all documentation in support thereof, with the exception of a showing of interest, evidence supporting challenges to the validity of a showing of interest, and evidence supporting objections to an election. The filer must submit a written statement of service to the Executive Director.

§2422.5 Filing petitions.

(a) *Where to file.* Petitions must be filed with the Executive Director.

(b) *Number of copies.* An original and two (2) copies of the petition and the accompanying material must be filed with the Executive Director.

(c) *Date of filing.* A petition is filed when it is received by the Executive Director.

§2422.6 Notification of filing.

(a) *Notification to parties.* After a petition is filed, the Executive Director, on behalf of the Board, will notify any labor organiza-

tion, employing office or employing activity that the parties have identified as being affected by issues raised by the petition, that a petition has been filed with the Office. The Executive Director, on behalf of the Board, will also make reasonable efforts to identify and notify any other party affected by the issues raised by the petition.

(b) *Contents of the notification.* The notification will inform the labor organization, employing office or employing activity of:

(1) The name of the petitioner;

(2) The description of the unit(s) or employees affected by issues raised in the petition; and,

(3) A statement that all affected parties should advise the Executive Director in writing of their interest in the issues raised in the petition.

§2422.7 Posting notice of filing of a petition.

(a) *Posting notice of petition.* When appropriate, the Executive Director, on behalf of the Board, after the filing of a representation petition, will direct the employing office or activity to post copies of a notice to all employees in places where notices are normally posted for the employees affected by issues raised in the petition and/or distribute copies of a notice in a manner by which notices are normally distributed.

(b) *Contents of notice.* The notice shall advise affected employees about the petition.

(c) *Duration of notice.* The notice should be conspicuously posted for a period of ten (10) days and not be altered, defaced, or covered by other material.

§2422.8 Intervention and cross-petitions.

(a) *Cross-petitions.* A cross-petition is a petition which involves any employees in a unit covered by a pending representation petition. Cross-petitions must be filed in accordance with this subpart.

(b) *Intervention requests and cross-petitions.* A request to intervene and a cross-petition, accompanied by any necessary showing of interest, must be submitted in writing and filed with the Executive Director before the pre-election investigatory hearing opens, unless good cause is shown for granting an extension. If no pre-election investigatory hearing is held, a request to intervene and a cross-petition must be filed prior to action being taken pursuant to §2422.30.

(c) *Labor organization intervention requests.* Except for incumbent intervenors, a labor organization seeking to intervene shall submit a statement that it has complied with 5 U.S.C. 7111(e), as applied by the CAA, and one of the following:

(1) A showing of interest of ten percent (10%) or more of the employees in the unit covered by a petition seeking an election, with an alphabetical list of the names of the employees constituting the showing of interest; or

(2) A current or recently expired collective bargaining agreement covering any of the employees in the unit affected by issues raised in the petition; or

(3) Evidence that it is or was, prior to a reorganization, the certified exclusive representative of any of the employees affected by issues raised in the petition.

(d) *Incumbent.* An incumbent exclusive representative, without regard to the requirements of paragraph (c) of this section, will be considered a party in any representation proceeding raising issues that affect employees the incumbent represents, unless it serves the Board, through the Executive Director, with a written disclaimer of any representation interest in the claimed unit.

(e) *Employing office.* An employing office or activity will be considered a party if any of its employees are affected by issues raised in the petition.

(f) *Employing office or activity intervention.* An employing office or activity seeking to

intervene in any representation proceeding must submit evidence that one or more employees of the employing office or activity may be affected by issues raised in the petition.

§2422.9 Adequacy of showing of interest.

(a) *Adequacy.* Adequacy of a showing of interest refers to the percentage of employees in the unit involved as required by §§2422.3 (c) and (d) and 2422.8(c)(1).

(b) *Executive Director investigation and action.* The Executive Director, on behalf of the Board, will conduct such investigation as deemed appropriate. The Executive Director's determination, on behalf of the Board, that the showing of interest is adequate is final and binding and not subject to collateral attack at a representation hearing or on appeal to the Board. If the Executive Director determines, on behalf of the Board, that a showing of interest is inadequate, the Executive Director will dismiss the petition, or deny a request for intervention.

§2422.10 Validity of showing of interest.

(a) *Validity.* Validity questions are raised by challenges to a showing of interest on grounds other than adequacy.

(b) *Validity challenge.* The Executive Director or any party may challenge the validity of a showing of interest.

(c) *When and where validity challenges may be filed.* Party challenges to the validity of a showing of interest must be in writing and filed with the Executive Director before the pre-election investigatory hearing opens, unless good cause is shown for granting an extension. If no pre-election investigatory hearing is held, challenges to the validity of a showing of interest must be filed prior to action being taken pursuant to §2422.30.

(d) *Contents of validity challenges.* Challenges to the validity of a showing of interest must be supported with evidence.

(e) *Executive Director investigation and action.* The Executive Director, on behalf of the Board, will conduct such investigation as deemed appropriate. The Executive Director's determination, on behalf of the Board, that a showing of interest is valid is final and binding and is not subject to collateral attack or appeal to the Board. If the Executive Director finds, on behalf of the Board, that the showing of interest is not valid, the Executive Director will dismiss the petition or deny the request to intervene.

§2422.11 Challenge to the status of a labor organization.

(a) *Basis of challenge to labor organization status.* The only basis on which a challenge to the status of a labor organization may be made is compliance with 5 U.S.C. 7103(a)(4), as applied by the CAA.

(b) *Format and time for filing a challenge.* Any party filing a challenge to the status of a labor organization involved in the processing of a petition must do so in writing to the Executive Director before the pre-election investigatory hearing opens, unless good cause is shown for granting an extension. If no hearing is held, challenges must be filed prior to action being taken pursuant to §2422.30.

§2422.12 Timeliness of petitions seeking an election.

(a) *Election bar.* Where there is no certified exclusive representative, a petition seeking an election will not be considered timely if filed within twelve (12) months of a valid election involving the same unit or a subdivision of the same unit.

(b) *Certification bar.* Where there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months after the certification of the exclusive representative of the employees in an

appropriate unit. If a collective bargaining agreement covering the claimed unit is pending employing office head review under 5 U.S.C. 7114(c), as applied by the CAA, or is in effect, paragraphs (c), (d), or (e) of this section apply.

(c) *Bar during employing office head review.* A petition seeking an election will not be considered timely if filed during the period of employing office head review under 5 U.S.C. 7114(c), as applied by the CAA. This bar expires upon either the passage of thirty (30) days absent employing office head action, or upon the date of any timely employing office head action.

(d) *Contract bar where the contract is for three (3) years or less.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the agreement.

(e) *Contract bar where the contract is for more than three (3) years.* Where a collective bargaining agreement is in effect covering the claimed unit and has a term of more than three (3) years from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the initial three (3) year period, and any time after the expiration of the initial three (3) year period.

(f) *Unusual circumstances.* A petition seeking an election or a determination relating to representation matters may be filed at any time when unusual circumstances exist that substantially affect the unit or majority representation.

(g) *Premature extension.* Where a collective bargaining agreement with a term of three (3) years or less has been extended prior to sixty (60) days before its expiration date, the extension will not serve as a basis for dismissal of a petition seeking an election filed in accordance with this section.

(h) *Contract requirements.* Collective bargaining agreements, including agreements that go into effect under 5 U.S.C. 7114(c), as applied by the CAA, and those that automatically renew without further action by the parties, do not constitute a bar to a petition seeking an election under this section unless a clear and unambiguous effective date, renewal date where applicable, duration, and termination date are ascertainable from the agreement and relevant accompanying documentation.

§2422.13 Resolution of issues raised by a petition.

(a) *Meetings prior to filing a representation petition.* All parties affected by the representation issues that may be raised in a petition are encouraged to meet prior to the filing of the petition to discuss their interests and narrow and resolve the issues. If requested by all parties a representative of the Office will participate in these meetings.

(b) *Meetings to narrow and resolve the issues after the petition is filed.* After a petition is filed, the Executive Director may require all affected parties to meet to narrow and resolve the issues raised in the petition.

§2422.14 Effect of withdrawal/dismissal.

(a) *Withdrawal/dismissal less than sixty (60) days before contract expiration.* When a petition seeking an election that has been timely filed is withdrawn by the petitioner or dismissed by the Executive Director or the Board less than sixty (60) days prior to the expiration of an existing agreement between the incumbent exclusive representative and the employing office or activity or any time

after the expiration of the agreement, another petition seeking an election will not be considered timely if filed within a ninety (90) day period from either:

(1) The date the withdrawal is approved; or
(2) The date the petition is dismissed by the Executive Director when no application for review is filed with the Board; or

(3) The date the Board rules on an application for review; or

(4) The date the Board issues a Decision and Order dismissing the petition.

Other pending petitions that have been timely filed under this Part will continue to be processed.

(b) *Withdrawal by petitioner.* A petitioner who submits a withdrawal request for a petition seeking an election that is received by the Executive Director after the notice of pre-election investigatory hearing issues or after approval of an election agreement, whichever occurs first, will be barred from filing another petition seeking an election for the same unit or any subdivision of the unit for six (6) months from the date of the approval of the withdrawal by the Executive Director.

(c) *Withdrawal by incumbent.* When an election is not held because the incumbent disclaims any representation interest in a unit, a petition by the incumbent seeking an election involving the same unit or a subdivision of the same unit will not be considered timely if filed within six (6) months of cancellation of the election.

§2422.15 Duty to furnish information and cooperate.

(a) *Relevant information.* After a petition is filed, all parties must, upon request of the Executive Director, furnish the Executive Director and serve all parties affected by issues raised in the petition with information concerning parties, issues, and agreements raised in or affected by the petition.

(b) *Inclusions and exclusions.* After a petition seeking an election is filed, the Executive Director, on behalf of the Board, may direct the employing office or activity to furnish the Executive Director and all parties affected by issues raised in the petition with a current alphabetized list of employees and job classifications included in and/or excluded from the existing or claimed unit affected by issues raised in the petition.

(c) *Cooperation.* All parties are required to cooperate in every aspect of the representation process. This obligation includes cooperating fully with the Executive Director, submitting all required and requested information, and participating in prehearing conferences and pre-election investigatory hearings. The failure to cooperate in the representation process may result in the Executive Director or the Board taking appropriate action, including dismissal of the petition or denial of intervention.

§2422.16 Election agreements or directed elections.

(a) *Election agreements.* Parties are encouraged to enter into election agreements.

(b) *Executive Director directed election.* If the parties are unable to agree on procedural matters, specifically, the eligibility period, method of election, dates, hours, or locations of the election, the Executive Director, on behalf of the Board, will decide election procedures and issue a Direction of Election, without prejudice to the rights of a party to file objections to the procedural conduct of the election.

(c) *Opportunity for an investigatory hearing.* Before directing an election, the Executive Director shall provide affected parties an opportunity for a pre-election investigatory hearing on other than procedural matters.

(d) *Challenges or objections to a directed election.* A Direction of Election issued under

this section will be issued without prejudice to the right of a party to file a challenge to the eligibility of any person participating in the election and/or objections to the election.

§2422.17 Notice of pre-election investigatory hearing and prehearing conference.

(a) *Purpose of notice of an investigatory hearing.* The Executive Director, on behalf of the Board, may issue a notice of pre-election investigatory hearing involving any issues raised in the petition.

(b) *Contents.* The notice of hearing will advise affected parties about the pre-election investigatory hearing. The Executive Director will also notify affected parties of the issues raised in the petition and establish a date for the prehearing conference.

(c) *Prehearing conference.* A prehearing conference will be conducted by the Executive Director or her designee, either by meeting or teleconference. All parties must participate in a prehearing conference and be prepared to fully discuss, narrow and resolve the issues set forth in the notification of the prehearing conference.

(d) *No interlocutory appeal of investigatory hearing determination.* The Executive Director's determination of whether to issue a notice of pre-election investigatory hearing is not appealable to the Board.

§2422.18 Pre-election investigatory hearing procedures.

(a) *Purpose of a pre-election investigatory hearing.* Representation hearings are considered investigatory and not adversarial. The purpose of the hearing is to develop a full and complete record of relevant and material facts.

(b) *Conduct of hearing.* Pre-election investigatory hearings will be open to the public unless otherwise ordered by the Executive Director or her designee. There is no burden of proof, with the exception of proceedings on objections to elections as provided for in §2422.27(b). Formal rules of evidence do not apply.

(c) *Pre-election investigatory hearing.* Pre-election investigatory hearings will be conducted by the Executive Director or her designee.

(d) *Production of evidence.* Parties have the obligation to produce existing documents and witnesses for the investigatory hearing in accordance with the instructions of the Executive Director or her designee. If a party willfully fails to comply with such instructions, the Board may draw an inference adverse to that party on the issue related to the evidence sought.

(e) *Transcript.* An official reporter will make the official transcript of the pre-election investigatory hearing. Copies of the official transcript may be examined in the Office during normal working hours. Requests by parties to purchase copies of the official transcript should be made to the official hearing reporter.

§2422.19 Motions.

(a) *Purpose of a motion.* Subsequent to the issuance of a notice of pre-election investigatory hearing in a representation proceeding, a party seeking a ruling, an order, or relief must do so by filing or raising a motion stating the order or relief sought and the grounds therefor. Challenges and other filings referenced in other sections of this subpart may, in the discretion of the Executive Director or her designee, be treated as a motion.

(b) *Prehearing motions.* Prehearing motions must be filed in writing with the Executive Director. Any response must be filed with the Executive Director within five (5) days after service of the motion. The Executive Director shall rule on the motion.

(c) *Motions made at the investigatory hearing.* During the pre-election investigatory hearing, motions will be made to the Executive Director or her designee, and may be oral on the record, unless otherwise required in this subpart to be in writing. Responses may be oral on the record or in writing, but, absent permission of the Executive Director or her designee, must be provided before the hearing closes. The Executive Director or her designee will rule on motions made at the hearing.

(d) *Posthearing motions.* Motions made after the hearing closes must be filed in writing with the Board. Any response to a posthearing motion must be filed with the Board within five (5) days after service of the motion.

§2422.20 Rights of parties at a pre-election investigatory hearing.

(a) *Rights.* A party at a pre-election investigatory hearing will have the right:

- (1) To appear in person or by a representative;
- (2) To examine and cross-examine witnesses; and
- (3) To introduce into the record relevant evidence.

(b) *Documentary evidence and stipulations.* Parties must submit two (2) copies of documentary evidence to the Executive Director or her designee and copies to all other parties. Stipulations of fact between/among the parties may be introduced into evidence.

(c) *Oral argument.* Parties will be entitled to a reasonable period prior to the close of the hearing for oral argument. Presentation of a closing oral argument does not preclude a party from filing a brief under paragraph (d) of this section.

(d) *Briefs.* A party will be afforded an opportunity to file a brief with the Board.

(1) An original and two (2) copies of a brief must be filed with the Board within thirty (30) days from the close of the hearing.

(2) A written request for an extension of time to file a brief must be filed with and received by the Board no later than five (5) days before the date the brief is due.

(3) No reply brief may be filed without permission of the Board.

§2422.21 Duties and powers of the Executive Director in the conduct of the pre-election investigatory hearing.

(a) *Duties.* The Executive Director or her designee, on behalf of the Board, will receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the investigatory hearing, and may make recommendations on the record to the Board.

(b) *Powers.* During the period a case is assigned to the Executive Director or her designee for pre-election investigatory hearing and prior to the close of the hearing, the Executive Director or her designee may take any action necessary to schedule, conduct, continue, control, and regulate the pre-election investigatory hearing, including ruling on motions when appropriate.

§2422.22 Objections to the conduct of the pre-election investigatory hearing.

(a) *Objections.* Objections are oral or written complaints concerning the conduct of a pre-election investigatory hearing.

(b) *Exceptions to rulings.* There are automatic exceptions to all adverse rulings.

§2422.23 Election procedures.

(a) *Executive Director conducts or supervises election.* The Executive Director, on behalf of the Board, will decide to conduct or supervise the election. In supervised elections, employing offices or activities will perform all acts as specified in the Election Agreement or Direction of Election.

(b) *Notice of election.* Prior to the election a notice of election, prepared by the Executive

Director, will be posted by the employing office or activity in places where notices to employees are customarily posted and/or distributed in a manner by which notices are normally distributed. The notice of election will contain the details and procedures of the election, including the appropriate unit, the eligibility period, the date(s), hour(s) and location(s) of the election, a sample ballot, and the effect of the vote.

(c) *Sample ballot.* The reproduction of any document purporting to be a copy of the official ballot that suggests either directly or indirectly to employees that the Board endorses a particular choice in the election may constitute grounds for setting aside an election if objections are filed under §2422.26.

(d) *Secret ballot.* All elections will be by secret ballot.

(e) *Intervenor withdrawal from ballot.* When two or more labor organizations are included as choices in an election, an intervening labor organization may, prior to the approval of an election agreement or before the direction of an election, file a written request with the Executive Director to remove its name from the ballot. If the request is not received prior to the approval of an election agreement or before the direction of an election, unless the parties and the Executive Director, on behalf of the Board, agree otherwise, the intervening labor organization will remain on the ballot. The Executive Director's decision on the request is final and not subject to the filing of an application for review with the Board.

(f) *Incumbent withdrawal from ballot in an election to decertify an incumbent representative.* When there is no intervening labor organization, an election to decertify an incumbent exclusive representative will not be held if the incumbent provides the Executive Director with a written disclaimer of any representation interest in the unit. When there is an intervenor, an election will be held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Executive Director.

(g) *Petitioner withdraws from ballot in an election.* When there is no intervening labor organization, an election will not be held if the petitioner provides the Executive Director with a written request to withdraw the petition. When there is an intervenor, an election will be held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Executive Director.

(h) *Observers.* All parties are entitled to representation at the polling location(s) by observers of their own selection subject to the Executive Director's approval.

(1) Parties desiring to name observers must file in writing with the Executive Director a request for specifically named observers at least fifteen (15) days prior to an election. The Executive Director may grant an extension of time for filing a request for specifically named observers for good cause where a party requests such an extension or on the Executive Director's own motion. The request must name and identify the observers requested.

(2) An employing office or activity may use as its observers any employees who are not eligible to vote in the election, except:

- (i) Supervisors or management officials;
- (ii) Employees who have any official connection with any of the labor organizations involved; or
- (iii) Non-employees of the legislative branch.

(3) A labor organization may use as its observers any employees eligible to vote in the election, except:

- (i) Employees on leave without pay status who are working for the labor organization involved; or

(ii) Employees who hold an elected office in the union.

(4) Objections to a request for specific observers must be filed with the Executive Director stating the reasons in support within five (5) days after service of the request.

(5) The Executive Director's ruling on requests for and objections to observers is final and binding and is not subject to the filing of an application for review with the Board.

§2422.24 Challenged ballots.

(a) *Filing challenges.* A party or the Executive Director may, for good cause, challenge the eligibility of any person to participate in the election prior to the employee voting.

(b) *Challenged ballot procedure.* An individual whose eligibility to vote is in dispute will be given the opportunity to vote a challenged ballot. If the parties and the Region are unable to resolve the challenged ballot(s) prior to the tally of ballots, the unresolved challenged ballot(s) will be impounded and preserved until a determination can be made, if necessary, by the Executive Director or the Board.

§2422.25 Tally of ballots.

(a) *Tallying the ballots.* When the election is concluded, the Executive Director or her designee will tally the ballots.

(b) *Service of the tally.* When the tally is completed, the Executive Director will serve the tally of ballots on the parties in accordance with the election agreement or direction of election.

(c) *Valid ballots cast.* Representation will be determined by the majority of the valid ballots cast.

§2422.26 Objections to the election.

(a) *Filing objections to the election.* Objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election may be filed by any party. Objections must be filed and received by the Executive Director within five (5) days after the tally of ballots has been served. Any objections must be timely regardless of whether the challenged ballots are sufficient in number to affect the results of the election. The objections must be supported by clear and concise reasons. An original and two (2) copies of the objections must be received by the Executive Director.

(b) *Supporting evidence.* The objecting party must file with the Executive Director evidence, including signed statements, documents and other materials supporting the objections within ten (10) days after the objections are filed.

§2422.27 Determinative challenged ballots and objections.

(a) *Investigation.* The Executive Director, on behalf of the Board, will investigate objections and/or determinative challenged ballots that are sufficient in number to affect the results of the election.

(b) *Burden of proof.* A party filing objections to the election bears the burden of proof by a preponderance of the evidence concerning those objections. However, no party bears the burden of proof on challenged ballots.

(c) *Executive Director action.* After investigation, the Executive Director will take appropriate action consistent with §2422.30.

(d) *Consolidated hearing on objections and/or determinative challenged ballots and an unfair labor practice hearing.* When appropriate, and in accordance with §2422.33, objections and/or determinative challenged ballots may be consolidated with an unfair labor practice hearing. Such consolidated hearings will be conducted by a Hearing Officer. Exceptions and related submissions must be filed with the Board and the Board will issue a decision in accordance with Part 2423 of this chapter and section 406 of the CAA, except for the following:

(1) Section 2423.18 of this Subchapter concerning the burden of proof is not applicable;

(2) The Hearing Officer may not recommend remedial action to be taken or notices to be posted; and,

(3) References to "charge" and "complaint" in Part 2423 of this chapter will be omitted.

§2422.28 Runoff elections.

(a) *When a runoff may be held.* A runoff election is required in an election involving at least three (3) choices, one of which is "no union" or "neither," when no choice receives a majority of the valid ballots cast. However, a runoff may not be held until the objections to the election and determinative challenged ballots have been resolved.

(b) *Eligibility.* Employees who were eligible to vote in the original election and who are also eligible on the date of the runoff election may vote in the runoff election.

(c) *Ballot.* The ballot in the runoff election will provide for a selection between the two choices receiving the largest and second largest number of votes in the election.

§2422.29 Inconclusive elections.

(a) *Inconclusive elections.* An inconclusive election is one where challenged ballots are not sufficient to affect the outcome of the election and one of the following occurs:

(1) The ballot provides for at least three (3) choices, one of which is "no union" or "neither" and the votes are equally divided; or

(2) The ballot provides for at least three (3) choices, the choice receiving the highest number of votes does not receive a majority, and at least two other choices receive the next highest and same number of votes; or

(3) When a runoff ballot provides for a choice between two labor organizations and results in the votes being equally divided; or

(4) When the Board determines that there have been significant procedural irregularities.

(b) *Eligibility to vote in a rerun election.* A current payroll period will be used to determine eligibility to vote in a rerun election.

(c) *Ballot.* If a determination is made that the election is inconclusive, the election will be rerun with all the choices that appeared on the original ballot.

(d) *Number of reruns.* There will be only one rerun of an inconclusive election. If the rerun results in another inconclusive election, the tally of ballots will indicate a majority of valid ballots has not been cast for any choice and a certification of results will be issued. If necessary, a runoff may be held when an original election is rerun.

§2422.30 Executive Director investigations, notices of pre-election investigatory hearings, and actions; Board Decisions and Orders.

(a) *Executive Director investigation.* The Executive Director, on behalf of the Board, will make such investigation of the petition and any other matter as the Executive Director deems necessary.

(b) *Executive Director notice of pre-election investigatory hearing.* On behalf of the Board, the Executive Director will issue a notice of pre-election investigatory hearing to inquire into any matter about which a material issue of fact exists, where there is an issue as to whether a question concerning representation exists, and any time there is reasonable cause to believe a question exists regarding unit appropriateness.

(c) *Executive Director action.* After investigation and/or hearing, when a pre-election investigatory hearing has been ordered, the Executive Director may, on behalf of the Board, approve an election agreement, dismiss a petition or deny intervention where there is an inadequate or invalid showing of interest, or dismiss a petition where there is an undisputed bar to further processing of the petition under law, rule or regulation.

(d) *Appeal of Executive Director action.* A party may file with the Board an application for review of an Executive Director action taken pursuant to section (c) above.

(e) *Contents of the Record.* When no pre-election investigatory hearing has been conducted all material submitted to and considered by the Executive Director during the investigation becomes a part of the record. When a pre-election investigatory hearing has been conducted, the transcript and all material entered into evidence, including any posthearing briefs, become a part of the record.

(f) *Transfer of record to Board; Board Decisions and Orders.* In cases that are submitted to the Board for decision in the first instance, the Board shall decide the issues presented based upon the record developed by the Executive Director, including the transcript of the pre-election investigatory hearing, if any, documents admitted into the record and briefs and other approved submissions from the parties. The Board may direct that a secret ballot election be held, issue an order dismissing the petition, or make such other disposition of the matter as it deems appropriate.

§2422.31 Application for review of an Executive Director action.

(a) *Filing an application for review.* A party must file an application for review with the Board within sixty (60) days of the Executive Director's action. The sixty (60) day time limit provided for in 5 U.S.C. 7105(f), as applied by the CAA, may not be extended or waived.

(b) *Contents.* An application for review must be sufficient to enable the Board to rule on the application without recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the application. An application must specify the matters and rulings to which exception(s) is taken, include a summary of evidence relating to any issue raised in the application, and make specific reference to page citations in the transcript if a hearing was held. An application may not raise any issue or rely on any facts not timely presented to the Executive Director.

(c) *Review.* The Board may, in its discretion, grant an application for review when the application demonstrates that review is warranted on one or more of the following grounds:

(1) The decision raises an issue for which there is an absence of precedent;

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Executive Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error;

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

(d) *Opposition.* A party may file with the Board an opposition to an application for review within ten (10) days after the party is served with the application. A copy must be served on the Executive Director and all other parties and a statement of service must be filed with the Board.

(e) *Executive Director action becomes the Board's action.* An action of the Executive Director becomes the action of the Board when:

(1) No application for review is filed with the Board within sixty (60) days after the date of the Executive Director's action; or

(2) A timely application for review is filed with the Board and the Board does not undertake to grant review of the Executive Director's action within sixty (60) days of the filing of the application; or

(3) The Board denies an application for review of the Executive Director's action.

(f) *Board grant of review and stay.* The Board may rule on the issue(s) in an application for review in its order granting the application for review. Neither filing nor granting an application for review shall stay any action ordered by the Executive Director unless specifically ordered by the Board.

(g) *Briefs if review is granted.* If the Board does not rule on the issue(s) in the application for review in its order granting review, the Board may, in its discretion, afford the parties an opportunity to file briefs. The briefs will be limited to the issue(s) referenced in the Board's order granting review.

§2422.32 Certifications and revocations.

(a) *Certifications.* The Executive Director, on behalf of the Board, will issue an appropriate certification when:

(1) After an election, runoff, or rerun,
(i) No objections are filed or challenged ballots are not determinative, or

(ii) Objections and determinative challenged ballots are decided and resolved; or

(2) The Executive Director takes an action requiring a certification and that action becomes the action of the Board under §2422.31(e) or the Board otherwise directs the issuance of a certification.

(b) *Revocations.* Without prejudice to any rights and obligations which may exist under the CAA, the Executive Director, on behalf of the Board, will revoke a recognition or certification, as appropriate, and provide a written statement of reasons when an incumbent exclusive representative files, during a representation proceeding, a disclaimer of any representational interest in the unit.

§2422.33 Relief obtainable under Part 2423.

Remedial relief that was or could have been obtained as a result of a motion, objection, or challenge filed or raised under this subpart, may not be the basis for similar relief if filed or raised as an unfair labor practice under Part 2423 of this Chapter: *provided, however*, that related matters may be consolidated for hearing as noted in §2422.27(d) of this subpart.

§2422.34 Rights and obligations during the pendency of representation proceedings.

(a) *Existing recognitions, agreements, and obligations under the CAA.* During the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the CAA.

(b) *Unit status of individual employees.* Notwithstanding paragraph (a) of this section and except as otherwise prohibited by law, a party may take action based on its position regarding the bargaining unit status of individual employees, pursuant to 5 U.S.C. 7103(a)(2), 7112 (b) and (c), as applied by the CAA: *provided, however*, that its actions may be challenged, reviewed, and remedied where appropriate.

PART 2423 UNFAIR LABOR PRACTICE PROCEEDINGS

Sec.

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§2423.1 Applicability of this part.

This part is applicable to any charge of alleged unfair labor practices occurring on or after October 1, 1996.

§2423.2 Informal proceedings.

(a) The purposes and policies of chapter 71, as applied by the CAA, can best be achieved by the cooperative efforts of all persons covered by the program. To this end, it shall be the policy of the Board and the General Counsel to encourage all persons alleging unfair labor practices and persons against whom such allegations are made to meet and, in good faith, attempt to resolve such matters prior to the filing of unfair labor practice charges.

(b) In furtherance of the policy referred to in paragraph (a) of this section, and noting the 180 day period of limitation set forth in section 220(c)(2) of the CAA, it shall be the policy of the Board and the General Counsel to encourage the informal resolution of unfair labor practice allegations subsequent to the filing of a charge and prior to the filing of a complaint by the General Counsel.

(c) In order to afford the parties an opportunity to implement the policy referred to in paragraphs (a) and (b) of this section, the investigation of an unfair labor practice charge by the General Counsel will normally not commence until the parties have been afforded a reasonable amount of time, not to exceed fifteen (15) days from the filing of the charge, during which period the parties are urged to attempt to informally resolve the unfair labor practice allegation.

§2423.3 Who may file charges.

An employing office, employing activity, or labor organization may be charged by any person with having engaged in or engaging in any unfair labor practice prohibited under 5 U.S.C. 7116, as applied by the CAA.

§2423.4 Contents of the charge; supporting evidence and documents.

(a) A charge alleging a violation of 5 U.S.C. 7116, as applied by the CAA, shall be submitted on forms prescribed by the General Counsel and shall contain the following:

(1) The name, address and telephone number of the person(s) making the charge;

(2) The name, address and telephone number of the employing office or activity, or labor organization against whom the charge is made;

(3) A clear and concise statement of the facts constituting the alleged unfair labor practice, a statement of the section(s) and subsection(s) of chapter 71 of title 5 of the United States Code made applicable by the CAA alleged to have been violated, and the date and place of occurrence of the particular acts; and

(4) A statement of any other procedure invoked involving the subject matter of the

charge and the results, if any, including whether the subject matter raised in the charge (i) has been raised previously in a grievance procedure; (ii) has been referred to the Board under Part 2471 of these regulations, or the Federal Mediation and Conciliation Service, or (iii) involves a negotiability issue raised by the charging party in a petition pending before the Board pursuant to Part 2424 of this subchapter.

(b) Such charge shall be in writing and signed and shall contain a declaration by the person 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 person's knowledge and belief.

(c) When filing a charge, the charging party shall submit to the General Counsel any supporting evidence and documents.

§2423.5 Selection of the unfair labor practice procedure or the negotiability procedure.

Where a labor organization files an unfair labor practice charge pursuant to this part which involves a negotiability issue, and the labor organization also files pursuant to part 2424 of this subchapter a petition for review of the same negotiability issue, the Board and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended. Such selection must be made regardless of whether the unfair labor practice charge or the petition for review of a negotiability issue is filed first. Notification of this selection must be made in writing at the time that both procedures have been invoked, and must be served on the Board, the General Counsel and all parties to both the unfair labor practice case and the negotiability case. Cases which solely involve an employing office's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed under part 2424 of this subchapter.

§2423.6 Filing and service of copies.

(a) An original and four (4) copies of the charge together with one copy for each additional charged party named shall be filed with the General Counsel.

(b) Upon the filing of a charge, the charging party shall be responsible for the service of a copy of the charge (without the supporting evidence and documents) upon the person(s) against whom the charge is made, and for filing a written statement of such service with the General Counsel. The General Counsel will, as a matter of course, cause a copy of such charge to be served on the person(s) against whom the charge is made, but shall not be deemed to assume responsibility for such service.

(c) A charge will be deemed to be filed when it is received by the General Counsel in accordance with the requirements in paragraph (a) of this section.

§2423.7 Investigation of charges.

(a) The General Counsel shall conduct such investigation of the charge as the General Counsel deems necessary. Consistent with the policy set forth in §2423.2, the investigation will normally not commence until the parties have been afforded a reasonable amount of time, not to exceed fifteen (15) days from the filing of the charge, to informally resolve the unfair labor practice allegation.

(b) During the course of the investigation all parties involved will have an opportunity to present their evidence and views to the General Counsel.

(c) In connection with the investigation of charges, all persons are expected to cooperate fully with the General Counsel.

(d) The purposes and policies of chapter 71, as applied by the CAA, can best be achieved by the full cooperation of all parties involved and the voluntary submission of all potentially relevant information from all potential sources during the course of the investigation. To this end, it shall be the policy of the Board and the General Counsel to protect the identity of individuals and the substance of the statements and information they submit or which is obtained during the investigation as a means of assuring the Board's and the General Counsel's continuing ability to obtain all relevant information.

§2423.8 Amendment of charges.

Prior to the issuance of a complaint, the charging party may amend the charge in accordance with the requirements set forth in §2423.6.

§2423.9 Action by the General Counsel.

(a) The General Counsel shall take action which may consist of the following, as appropriate:

- (1) Approve a request to withdraw a charge;
- (2) Refuse to file a complaint;
- (3) Approve a written settlement and recommend that the Executive Director approve a written settlement agreement in accordance with the provisions of section 414 of the CAA;
- (4) File a complaint;
- (5) Upon agreement of all parties, transfer to the Board for decision, after filing of a complaint, a stipulation of facts in accordance with the provisions of §2429.1(a) of this subchapter; or
- (6) Withdraw a complaint.

§2423.10 Determination not to file complaint.

(a) If the General Counsel 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 General Counsel may request the charging party to withdraw the charge, and in the absence of such withdrawal within a reasonable time, decline to file a complaint.

(b) The charging party may not obtain a review of the General Counsel's decision not to file a complaint.

§2423.11 Settlement or adjustment of issues.

(a) At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity to submit to the Executive Director or General Counsel, as appropriate, for consideration, all facts and arguments concerning offers of settlement, or proposals of adjustment.

Precomplaint settlements

(b) (1) Prior to the filing of any complaint or the taking of other formal action, the General Counsel will afford the charging party and the respondent a reasonable period of time in which to enter into a settlement agreement to be submitted to and approved by the General Counsel and the Executive Director. Upon approval by the General Counsel and Executive Director and compliance with the terms of the settlement agreement, no further action shall be taken in the case. If the respondent fails to perform its obligations under the settlement agreement, the General Counsel may determine to institute further proceedings.

(2) In the event that the charging party fails or refuses to become a party to a settlement agreement offered by the respondent, if the General Counsel concludes that the offered settlement will effectuate the policies

of chapter 71, as applied by the CAA, the agreement shall be between the respondent and the General Counsel and the latter shall decline to file a complaint.

Post complaint settlement policy

(c) Consistent with the policy reflected in paragraph (a) of this section, even after the filing of a complaint, the Board favors the settlement of issues. Such settlements may be accomplished as provided in paragraph (b) of this section. The parties may, as part of the settlement, agree to waive their right to a hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily such a settlement agreement will also contain the respondent's consent to the Board's application for the entry of a decree by the United States Court of Appeals for the Federal Circuit enforcing the Board's order.

Post complaint prehearing settlements

(d) (1) If, after the filing of a complaint, the charging party and the respondent enter into a settlement agreement, and such agreement is accepted by the General Counsel, the settlement agreement shall be submitted to the Executive Director for approval.

(2) If, after the filing of a complaint, the charging party fails or refuses to become a party to a settlement agreement offered by the respondent, and the General Counsel concludes that the offered settlement will effectuate the policies of chapter 71, as applied by the CAA, the agreement shall be between the respondent and the General Counsel. The charging party will be so informed and provided a brief written statement by the General Counsel of the reasons therefor. The settlement agreement together with the charging party's objections, if any, and the General Counsel's written statements, shall be submitted to the Executive Director for approval. The Executive Director may approve or disapprove any settlement agreement.

(3) After the filing of a complaint, if the General Counsel concludes that it will effectuate the policies of chapter 71, as applied by the CAA, the General Counsel may withdraw the complaint.

Settlements after the opening of the hearing

(e) (1) After filing of a complaint and after opening of the hearing, if the General Counsel concludes that it will effectuate the policies of chapter 71, as applied by the CAA, the General Counsel may request the Hearing Officer for permission to withdraw the complaint and, having been granted such permission to withdraw the complaint, may approve a settlement and recommend that the Executive Director approve the settlement pursuant to paragraph (b) of this section.

(2) If, after filing of a complaint and after opening of the hearing, the parties enter into a settlement agreement that contains the respondent's consent to the Board's application for the entry of a decree by the United States Court of Appeals for the Federal Circuit enforcing the Board's order, the General Counsel may request the Hearing Officer and the Executive Director to approve such settlement agreement, and upon such approval, to transmit the agreement to the Board for approval.

(3) If the charging party fails or refuses to become a party to a settlement agreement, offered by the respondent, that contains the respondent's consent to the Board's application for the entry of a decree by the United States Court of Appeals for the Federal Circuit enforcing the Board's order, and the General Counsel concludes that the offered settlement will effectuate the policies of chapter 71, as applied to the CAA, the agreement shall be between the respondent and the General Counsel. After the charging

party is given an opportunity to state on the record or in writing the reasons for opposing the settlement, the General Counsel may request the Hearing Officer and the Executive Director to approve such settlement agreement, and upon such approval, to transmit the agreement to the Board for approval. The Board may approve or disapprove any such settlement agreement or return the case to the Hearing Officer for other appropriate action.

§2423.12 Filing and contents of the complaint.

(a) After a charge is filed, if it appears to the General Counsel that formal proceedings in respect thereto should be instituted, the General Counsel shall file a formal complaint: provided, however, that a determination by the General Counsel to file a complaint shall not be subject to review.

(b) The complaint shall include:

- (1) Notice of the charge;
 - (2) Any information required pursuant to the Procedural Rules of the Office.
- (c) Any such complaint may be withdrawn before the hearing by the General Counsel.

§2423.13 Answer to the complaint.

A respondent shall file an answer to a complaint in accordance with the requirements of the Procedural Rules of the Office.

§2423.14 Prehearing disclosure; conduct of hearing.

The procedures for prehearing discovery and the conduct of the hearing are set forth in the Procedural Rules of the Office.

§2423.15 Intervention.

Any person involved and desiring to intervene in any proceeding pursuant to this part shall file a motion in accordance with the procedures set forth in the Procedural Rules of the Office. The motion shall state the grounds upon which such person claims involvement.

§2423.16 [Reserved]

§2423.17 [Reserved]

§2423.18 Burden of proof before the Hearing Officer.

The General Counsel shall have the responsibility of presenting the evidence in support of the complaint and shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.

2423.19 Duties and powers of the Hearing Officer.

It shall be the duty of the Hearing Officer to inquire fully into the facts as they relate to the matter before such Hearing Officer, subject to the rules and regulations of the Office and the Board.

§2423.20 [Reserved]

§2423.21 [Reserved]

§2423.22 [Reserved]

§2423.23 [Reserved]

§2423.24 [Reserved]

§2423.25 [Reserved]

§2423.26 Hearing Officer decisions; entry in records of the Office.

In accordance with the Procedural Rules of the Office, the Hearing Officer shall issue a written decision and that decision will be entered into the records of the Office.

§2423.27 Appeal to the Board.

An aggrieved party may seek review of a decision and order of the Hearing Officer in accordance with the Procedural Rules of the Office.

§2423.28 [Reserved]

§2423.29 Action by the Board.

(a) If an appeal is filed, the Board shall review the decision of the Hearing Officer in accordance with section 406 of the CAA, and the Procedural Rules of the Office.

(b) Upon finding a violation, the Board shall issue an order:

(1) To cease and desist from any such unfair labor practice in which the employing office or labor organization is engaged;

(2) Requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Board and requiring that the agreement, as amended, be given retroactive effect;

(3) Requiring reinstatement of an employee with backpay in accordance with 5 U.S.C. 5596; or

(4) Including any combination of the actions described in paragraphs (1) through (3) of this paragraph (b), or such other action as will carry out the purpose of the chapter 71, as applied by the CAA.

(c) Upon finding no violation, the Board shall dismiss the complaint.

§ 2423.30 Compliance with decisions and orders of the Board.

When remedial action is ordered, the respondent shall report to the Office within a specified period that the required remedial action has been effected. When the General Counsel or the Executive Director finds that the required remedial action has not been effected, the General Counsel or the Executive Director shall take such action as may be appropriate, including referral to the Board for enforcement.

§ 2423.31 Backpay proceedings.

After the entry of a Board order directing payment of backpay, or the entry of a court decree enforcing such order, if it appears to the General Counsel that a controversy exists which cannot be resolved without a formal proceeding, the General Counsel may issue and serve on all parties a backpay specification accompanied by a request for hearing or a request for hearing without a specification. Upon receipt of the request for hearing, the Executive Director will appoint an independent Hearing Officer. The respondent shall, within twenty (20) days after the service of a backpay specification, file an answer thereto in accordance with the Office's Procedural Rules. No answer need be filed by the respondent to a notice of hearing issued without a specification. After the issuance of a notice of hearing, with or without a backpay specification, the hearing procedures provided in the Procedural Rules of the Office shall be followed insofar as applicable.

PART 2424—EXPEDITED REVIEW OF
NEGOTIABILITY ISSUES

Subpart A—Instituting an Appeal

Sec.

2424.1 Conditions governing review.

2424.2 Who may file a petition.

2424.3 Time limits for filing.

2424.4 Content of petition; service.

2424.5 Selection of the unfair labor practice procedure or the negotiability procedure.

2424.6 Position of the employing office; time limits for filing; service.

2424.7 Response of the exclusive representative; time limits for filing; service.

2424.8 Additional submissions to the Board.

2424.9 Hearing.

2424.10 Board decision and order; compliance.

Subpart B—Criteria for Determining Compelling Need for Employing Office Rules and Regulations

2424.11 Illustrative criteria.

Subpart A—Instituting an Appeal

§ 2424.1 Conditions governing review.

The Board will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117 (b) and (c), as applied by the CAA, namely: If an employing office involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as pro-

posed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Board when—

(a) It disagrees with the employing office's allegation that the matter as proposed to be bargained is inconsistent with any Federal law or any Government-wide rule or regulation; or

(b) It alleges, with regard to any employing office rule or regulation asserted by the employing office as a bar to negotiations on the matter, as proposed, that:

(1) The rule or regulation violates applicable law, or rule or regulation of appropriate authority outside the employing office;

(2) The rule or regulation was not issued by the employing office or by any primary national subdivision of the employing office, or otherwise is not applicable to bar negotiations with the exclusive representative, under 5 U.S.C. 7117(a)(3), as applied by the CAA; or

(3) No compelling need exists for the rule or regulation to bar negotiations on the matter, as proposed, because the rule or regulation does not meet the criteria established in subpart B of this part.

§ 2424.2 Who may file a petition.

A petition for review of a negotiability issue may be filed by an exclusive representative which is a party to the negotiations.

§ 2424.3 Time limits for filing.

The time limit for filing a petition for review is fifteen (15) days after the date the employing office's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the exclusive representative. The exclusive representative shall request such allegation in writing and the employing office shall make the allegation in writing and serve a copy on the exclusive representative: *provided, however*, that review of a negotiability issue may be requested by an exclusive representative under this subpart without a prior written allegation by the employing office if the employing office has not served such allegation upon the exclusive representative within ten (10) days after the date of the receipt by any employing office bargaining representative at the negotiations of a written request for such allegation.

§ 2424.4 Content of petition; service.

(a) A petition for review shall be dated and shall contain the following:

(1) A statement setting forth the express language of the proposal sought to be negotiated as submitted to the employing office;

(2) An explicit statement of the meaning attributed to the proposal by the exclusive representative including:

(i) Explanation of terms of art, acronyms, technical language, or any other aspect of the language of the proposal which is not in common usage; and

(ii) Where the proposal is concerned with a particular work situation, or other particular circumstances, a description of the situation or circumstances which will enable the Board to understand the context in which the proposal is intended to apply;

(3) A copy of all pertinent material, including the employing office's allegation in writing that the matter, as proposed, is not within the duty to bargain in good faith, and other relevant documentary material; and

(4) Notification by the petitioning labor organization whether the negotiability issue is also involved in an unfair labor practice charge filed by such labor organization under part 2423 of this subchapter and pending before the General Counsel.

(b) A copy of the petition including all attachments thereto shall be served on the em-

ploying office head and on the principal employing office bargaining representative at the negotiations.

(c)(1) Filing an incomplete petition for review will result in the exclusive representative being asked to provide the missing or incomplete information. Noncompliance with a request to complete the record may result in dismissal of the petition.

(2) The processing priority accorded to an incomplete petition, relative to other pending negotiability appeals, will be based upon the date when the petition is completed—not the date it was originally filed.

§ 2424.5 Selection of the unfair labor practice procedure or the negotiability procedure.

Where a labor organization files an unfair labor practice charge pursuant to part 2423 of this subchapter which involves a negotiability issue, and the labor organization also files pursuant to this part a petition for review of the same negotiability issue, the Board and the General Counsel ordinarily will not process the unfair labor practice charge and the petition for review simultaneously. Under such circumstances, the labor organization must select under which procedure to proceed. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended. Such selection must be made regardless of whether the unfair labor practice charge or the petition for review of a negotiability issue is filed first. Notification of this selection must be made in writing at the time that both procedures have been invoked, and must be served on the Board, the General Counsel and all parties to both the unfair labor practice case and the negotiability case. Cases which solely involve an employing office's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed under this part.

§ 2424.6 Position of the employing office; time limits for filing; service.

(a) Within thirty (30) days after the date of the receipt by the head of an employing office of a copy of a petition for review of a negotiability issue the employing office shall file a statement—

(1) Withdrawing the allegation that the duty to bargain in good faith does not extend to the matter proposed to be negotiated; or

(2) Setting forth in full its position on any matters relevant to the petition which it wishes the Board to consider in reaching its decision, including a full and detailed statement of its reasons supporting the allegation. The statement shall cite the section of any law, rule or regulation relied upon as a basis for the allegation and shall contain a copy of any internal employing office rule or regulation so relied upon. The statement shall include:

(i) Explanation of the meaning the employing office attributes to the proposal as a whole, including any terms of art, acronyms, technical language or any other aspect of the language of the proposal which is not in common usage; and

(ii) Description of a particular work situation, or other particular circumstance the employing office views the proposal to concern, which will enable the Board to understand the context in which the proposal is considered to apply by the employing office.

(b) A copy of the employing office's statement of position, including all attachments thereto shall be served on the exclusive representative.

§ 2424.7 Response of the exclusive representative; time limits for filing; service.

(a) Within fifteen (15) days after the date of the receipt by an exclusive representative of

a copy of an employing office's statement of position the exclusive representative shall file a full and detailed response stating its position and reasons for:

(1) Disagreeing with the employing office's allegation that the matter, as proposed to be negotiated, is inconsistent with any Federal law or Government-wide rule or regulation; or

(2) Alleging that the employing office's rules or regulations violate applicable law, or rule or regulation or appropriate authority outside the employing office; that the rules or regulations were not issued by the employing office or by any primary national subdivision of the employing office, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3), as applied by the CAA; or that no compelling need exists for the rules or regulations to bar negotiations.

(b) The response shall cite the particular section of any law, rule or regulation alleged to be violated by the employing office's rules or regulations; or shall explain the grounds for contending the employing office rules or regulations are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3), as applied by the CAA, or fail to meet the criteria established in subpart B of this part, or were not issued at the employing office headquarters level or at the level of a primary national subdivision.

(c) A copy of the response of the exclusive representative including all attachments thereto shall be served on the employing office head and on the employing office's representative of record in the proceeding before the Board.

§ 2424.8 Additional submissions to the Board.

The Board will not consider any submission filed by any party, whether supplemental or responsive in nature, other than those authorized under § 2424.2 through 2424.7 unless such submission is requested by the Board; or unless, upon written request by any party, a copy of which is served on all other parties, the Board in its discretion grants permission to file such submission.

§ 2424.9 Hearing.

A hearing may be held, in the discretion of the Board, before a determination is made under 5 U.S.C. 7117(b) or (c), as applied by the CAA. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

§ 2424.10 Board decision and order; compliance.

(a) Subject to the requirements of this subpart the Board shall expedite proceedings under this part to the extent practicable and shall issue to the exclusive representative and to the employing office a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(b) If the Board finds that the duty to bargain extends to the matter proposed to be bargained, the decision of the Board shall include an order that the employing office shall upon request (or as otherwise agreed to by the parties) bargain concerning such matter. If the Board finds that the duty to bargain does not extend to the matter proposed to be negotiated, the Board shall so state and issue an order dismissing the petition for review of the negotiability issue. If the Board finds that the duty to bargain extends to the matter proposed to be bargained only at the election of the employing office, the Board shall so state and issue an order dismissing the petition for review of the negotiability issue.

(c) When an order is issued as provided in paragraph (b) of this section, the employing office or exclusive representative shall report to the Executive Director within a specified period failure to comply with an order that the employing office shall upon request

(or as otherwise agreed to by the parties) bargain concerning the disputed matter.

Subpart B—Criteria for Determining Compelling Need for Employing Office Rules and Regulations

§ 2424.11 Illustrative criteria.

A compelling need exists for an employing office rule or regulation concerning any condition of employment when the employing office demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the employing office or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the employing office or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

PART 2425—REVIEW OF ARBITRATION AWARDS

Sec.

2425.1 Who may file an exception; time limits for filing; opposition; service.

2425.2 Content of exception.

2425.3 Grounds for review.

2425.4 Board decision.

§ 2425.1 Who may file an exception; time limits for filing; opposition; service.

(a) Either party to arbitration under the provisions of chapter 71 of title 5 of the United States Code, as applied by the CAA, may file an exception to an arbitrator's award rendered pursuant to the arbitration.

(b) The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date the award is served on the filing party.

(c) An opposition to the exception may be filed by a party within thirty (30) days after the date of service of the exception.

(d) A copy of the exception and any opposition shall be served on the other party.

§ 2425.2 Content of exception.

An exception must be a dated, self-contained document which sets forth in full:

(a) A statement of the grounds on which review is requested;

(b) Evidence or rulings bearing on the issues before the Board;

(c) Arguments in support of the stated grounds, together with specific reference to the pertinent documents and citations of authorities; and

(d) A legible copy of the award of the arbitrator and legible copies of other pertinent documents; and

(e) The name and address of the arbitrator.

§ 2425.3 Grounds for review.

The Board will review an arbitrator's award to which an exception has been filed to determine if the award is deficient—

(a) Because it is contrary to any law, rule or regulation; or

(b) On other grounds similar to those applied by Federal courts in private sector labor-management relations.

§ 2425.4 Board decision.

The Board shall issue its decision and order taking such action and making such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

PART 2426—NATIONAL CONSULTATION RIGHTS AND CONSULTATION RIGHTS ON GOVERNMENT-WIDE RULES OR REGULATIONS

Subpart A—National Consultation Rights

Sec.

2426.1 Requesting; granting; criteria.

2426.2 Requests; petition and procedures for determination of eligibility for national consultation rights.

2426.3 Obligation to consult.

Subpart B—Consultation Rights on Government-wide Rules or Regulations

2426.11 Requesting; granting; criteria.

2426.12 Requests; petition and procedures for determination of eligibility for consultation rights on Government-wide rules or regulations.

2426.13 Obligation to consult.

Subpart A—National Consultation Rights

§ 2426.1 Requesting; granting; criteria.

(a) An employing office shall accord national consultation rights to a labor organization that:

(1) Requests national consultation rights at the employing office level; and

(2) Holds exclusive recognition for ten percent (10%) or more of the total number of personnel employed by the employing office.

(b) An employing office's primary national subdivision which has authority to formulate conditions of employment shall accord national consultation rights to a labor organization that:

(1) Requests national consultation rights at the primary national subdivision level; and

(2) Holds exclusive recognition for ten percent (10%) or more of the total number of personnel employed by the primary national subdivision.

(c) In determining whether a labor organization meets the requirements as prescribed in paragraphs (a)(2) and (b)(2) of this section, the following will not be counted:

(1) At the employing office level, employees represented by the labor organization under national exclusive recognition granted at the employing office level.

(2) At the primary national subdivision level, employees represented by the labor organization under national exclusive recognition granted at the agency level or at that primary national subdivision level.

(d) An employing office or a primary national subdivision of an employing office shall not grant national consultation rights to any labor organization that does not meet the criteria prescribed in paragraphs (a), (b) and (c) of this section.

2426.2 Requests; petition and procedures for determination of eligibility for national consultation rights.

(a) Requests by labor organizations for national consultation rights shall be submitted in writing to the headquarters of the employing office or the employing office's primary national subdivision, as appropriate, which headquarters shall have fifteen (15) days from the date of service of such request to respond thereto in writing.

(b) Issues relating to a labor organization's eligibility for, or continuation of, national consultation rights shall be referred to the Board for determination as follows:

(1) A petition for determination of the eligibility of a labor organization for national consultation rights under criteria set forth in § 2426.1 may be filed by a labor organization.

(2) A petition for determination of eligibility for national consultation rights shall be submitted on a form prescribed by the Board and shall set forth the following information:

(i) Name and affiliation, if any, of the petitioner and its address and telephone number;

(ii) A statement that the petitioner has submitted to the employing office or the primary national subdivision and to the Assistant Secretary a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives;

(iii) A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of such person's knowledge and belief;

(iv) The signature of the petitioner's representative, including such person's title and telephone number;

(v) The name, address, and telephone number of the employing office or primary national subdivision in which the petitioner seeks to obtain or retain national consultation rights, and the persons to contact and their titles, if known;

(vi) A showing that petitioner holds adequate exclusive recognition as required by §2426.1; and

(vii) A statement as appropriate:

(A) That such showing has been made to and rejected by the employing office or primary national subdivision, together with a statement of the reasons for rejection, if any, offered by that employing office or primary national subdivision;

(B) That the employing office or primary national subdivision has served notice of its intent to terminate existing national consultation rights, together with a statement of the reasons for termination; or

(C) That the employing office or primary national subdivision has failed to respond in writing to a request for national consultation rights made under §2426.2(a) within fifteen (15) days after the date the request is served on the employing office or primary national subdivision.

(3) The following regulations govern petitions filed under this section:

(i) A petition for determination of eligibility for national consultation rights shall be filed with the Executive Director.

(ii) An original and four (4) copies of a petition shall be filed, together with a statement of any other relevant facts and of all correspondence.

(iii) Copies of the petition together with the attachments referred to in paragraph (b)(3)(ii) of this section shall be served by the petitioner on all known interested parties, and a written statement of such service shall be filed with the Executive Director.

(iv) A petition shall be filed within thirty (30) days after the service of written notice by the employing office or primary national subdivision of its refusal to accord national consultation rights pursuant to a request under §2426.2(a) or its intention to terminate existing national consultation rights. If an employing office or primary national subdivision fails to respond in writing to a request for national consultation rights made under §2426.2(a) within fifteen (15) days after the date the request is served on the employing office or primary national subdivision, a petition shall be filed within thirty (30) days after the expiration of such fifteen (15) day period.

(v) If an employing office or primary national subdivision wishes to terminate national consultation rights, notice of its intention to do so shall include a statement of its reasons and shall be served not less than thirty (30) days prior to the intended termination date. A labor organization, after receiving such notice, may file a petition within the time period prescribed herein, and thereby cause to be stayed further action by the employing office or primary national subdivision pending disposition of the petition. If no petition has been filed within the provided time period, an employing office or primary national subdivision may terminate national consultation rights.

(vi) Within fifteen (15) days after the receipt of a copy of the petition, the employing office or primary national subdivision shall file a response thereto with the Executive Director raising any matter which is relevant to the petition.

(vii) The Executive Director, on behalf of the Board, shall make such investigations as the Executive Director deems necessary and thereafter shall issue and serve on the parties a determination with respect to the eligibility for national consultation rights which shall be final: *provided, however*, that an application for review of the Executive Director's determination may be filed with the Board in accordance with the procedure set forth in §2422.31 of this subchapter. A determination by the Executive Director to issue a notice of hearing shall not be subject to the filing of an application for review. On behalf of the Board, the Executive Director, if appropriate, may cause a notice of hearing to be issued to all interested parties where substantial factual issues exist warranting an investigatory hearing. Investigatory hearings shall be conducted by the Executive Director or her designee in accordance with §2422.17 through 2422.22 of this subchapter and after the close of the investigatory hearing a Decision and Order shall be issued by the Board in accordance with §2422.30 of this subchapter.

§2426.3 Obligation to consult.

(a) When a labor organization has been accorded national consultation rights, the employing office or the primary national subdivision which has granted those rights shall, through appropriate officials, furnish designated representatives of the labor organization:

(1) Reasonable notice of any proposed substantive change in conditions of employment; and

(2) Reasonable time to present its views and recommendations regarding the change.

(b) If a labor organization presents any views or recommendations regarding any proposed substantive change in conditions of employment to an employing office or a primary national subdivision, that employing office or primary national subdivision shall:

(1) Consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(2) Provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this subpart shall be construed to limit the right of any employing office or exclusive representative to engage in collective bargaining.

Subpart B—Consultation Rights on Government-wide Rules or Regulations

§2426.11 Requesting; granting; criteria.

(a) An employing office shall accord consultation rights on Government-wide rules or regulations to a labor organization that:

(1) Requests consultation rights on Government-wide rules or regulations from an employing office; and

(2) Holds exclusive recognition for 350 or more covered employees within the legislative branch.

(b) An employing office shall not grant consultation rights on Government-wide rules or regulations to any labor organization that does not meet the criteria prescribed in paragraph (a) of this section.

§2426.12 Requests; petition and procedures for determination of eligibility for consultation rights on Government-wide rules or regulations.

(a) Requests by labor organizations for consultation rights on Government-wide rules or regulations shall be submitted in writing to the headquarters of the employing office, which headquarters shall have fifteen (15) days from the date of service of such request to respond thereto in writing.

(b) Issues relating to a labor organization's eligibility for, or continuation of, consulta-

tion rights on Government-wide rules or regulations shall be referred to the Board for determination as follows:

(1) A petition for determination of the eligibility of a labor organization for consultation rights under criteria set forth in §2426.11 may be filed by a labor organization.

(2) A petition for determination of eligibility for consultation rights shall be submitted on a form prescribed by the Board and shall set forth the following information:

(i) Name and affiliation, if any, of the petitioner and its address and telephone number;

(ii) A statement that the petitioner has submitted to the employing office and to the Assistant Secretary a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives;

(iii) A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of such person's knowledge and belief;

(iv) The signature of the petitioner's representative, including such person's title and telephone number;

(v) The name, address, and telephone number of the employing office in which the petitioner seeks to obtain or retain consultation rights on Government-wide rules or regulations, and the persons to contact and their titles, if known;

(vi) A showing that petitioner meets the criteria as required by §2426.11; and

(vii) A statement, as appropriate:

(A) That such showing has been made to and rejected by the employing office, together with a statement of the reasons for rejection, if any, offered by that employing office;

(B) That the employing office has served notice of its intent to terminate existing consultation rights on Government-wide rules or regulations, together with a statement of the reasons for termination; or

(C) That the employing office has failed to respond in writing to a request for consultation rights on Government-wide rules or regulations made under §2426.12(a) within fifteen (15) days after the date the request is served on the employing office.

(3) The following regulations govern petitions filed under this section:

(i) A petition for determination of eligibility for consultation rights on Government-wide rules or regulations shall be filed with the Executive Director.

(ii) An original and four (4) copies of a petition shall be filed, together with a statement of any other relevant facts and of all correspondence.

(iii) Copies of the petition together with the attachments referred to in paragraph (b)(3)(ii) of this section shall be served by the petitioner on the employing office, and a written statement of such service shall be filed with the Executive Director.

(iv) A petition shall be filed within thirty (30) days after the service of written notice by the employing office of its refusal to accord consultation rights on Government-wide rules or regulations pursuant to a request under §2426.12(a) or its intention to terminate such existing consultation rights. If an employing office fails to respond in writing to a request for consultation rights on Government-wide rules or regulations made under §2426.12(a) within fifteen (15) days after the date the request is served on the employing office, a petition shall be filed within thirty (30) days after the expiration of such fifteen (15) day period.

(v) If an employing office wishes to terminate consultation rights on Government-wide rules or regulations, notice of its intention to do so shall be served not less than

thirty (30) days prior to the intended termination date. A labor organization, after receiving such notice, may file a petition within the time period prescribed herein, and thereby cause to be stayed further action by the employing office pending disposition of the petition. If no petition has been filed within the provided time period, an employing office may terminate such consultation rights.

(vi) Within fifteen (15) days after the receipt of a copy of the petition, the employing office shall file a response thereto with the Executive Director raising any matter which is relevant to the petition.

(vii) The Executive Director, on behalf of the Board, shall make such investigation as the Executive Director deems necessary and thereafter shall issue and serve on the parties a determination with respect to the eligibility for consultation rights which shall be final: *Provided, however*, that an application for review of the Executive Director's determination may be filed with the Board in accordance with the procedure set forth in §2422.31 of this subchapter. A determination by the Executive Director to issue a notice of investigatory hearing shall not be subject to the filing of an application for review. On behalf of the Board, the Executive Director, if appropriate, may cause a notice of investigatory hearing to be issued where substantial factual issues exist warranting a hearing. Investigatory hearings shall be conducted by the Executive Director or her designee in accordance with §2422.17 through §2422.22 of this chapter and after the close of the investigatory hearing a Decision and Order shall be issued by the Board in accordance with §2422.30 of this subchapter.

§2426.13 *Obligation to consult.*

(a) When a labor organization has been accorded consultation rights on Government-wide rules or regulations, the employing office which has granted those rights shall, through appropriate officials, furnish designated representatives of the labor organization:

(1) Reasonable notice of any proposed Government-wide rule or regulation issued by the employing office affecting any substantive change in any condition of employment; and

(2) Reasonable time to present its views and recommendations regarding the change.

(b) If a labor organization presents any views or recommendations regarding any proposed substantive change in any condition of employment to an employing office, that employing office shall:

(1) Consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(2) Provide the labor organization a written statement of the reasons for taking the final action.

PART 2427—GENERAL STATEMENTS OF POLICY OR GUIDANCE

Sec.

2427.1 Scope.

2427.2 Requests for general statements of policy or guidance.

2427.3 Content of request.

2427.4 Submissions from interested parties.

2427.5 Standards governing issuance of general statements of policy or guidance.

§2427.1 *Scope.*

This part sets forth procedures under which requests may be submitted to the Board seeking the issuance of general statements of policy or guidance under 5 U.S.C. 7105(a)(1), as applied by the CAA.

§2427.2 *Requests for general statements of policy or guidance.*

(a) The head of an employing office (or designee), the national president of a labor or-

ganization (or designee), or the president of a labor organization not affiliated with a national organization (or designee) may separately or jointly ask the Board for a general statement of policy or guidance. The head of any lawful association not qualified as a labor organization may also ask the Board for such a statement provided the request is not in conflict with the provisions of chapter 71 of title 5 of the United States Code, as applied by the CAA, or other law.

(b) The Board ordinarily will not consider a request related to any matter pending before the Board or General Counsel.

§2427.3 *Content of request.*

(a) A request for a general statement of policy or guidance shall be in writing and must contain:

(1) A concise statement of the question with respect to which a general statement of policy or guidance is requested together with background information necessary to an understanding of the question;

(2) A statement of the standards under §2427.5 upon which the request is based;

(3) A full and detailed statement of the position or positions of the requesting party or parties;

(4) Identification of any cases or other proceedings known to bear on the question which are pending under the CAA; and

(5) Identification of other known interested parties.

(b) A copy of each document also shall be served on all known interested parties, including the General Counsel, where appropriate.

§2427.4 *Submissions from interested parties.*

Prior to issuance of a general statement of policy or guidance the Board, as it deems appropriate, will afford an opportunity to interested parties to express their views orally or in writing.

§2427.5 *Standards governing issuance of general statements of policy or guidance.*

In deciding whether to issue a general statement of policy or guidance, the Board shall consider:

(a) Whether the question presented can more appropriately be resolved by other means;

(b) Where other means are available, whether a Board statement would prevent the proliferation of cases involving the same or similar question;

(c) Whether the resolution of the question presented would have general applicability under chapter 71, as applied by the CAA;

(d) Whether the question currently confronts parties in the context of a labor-management relationship;

(e) Whether the question is presented jointly by the parties involved; and

(f) Whether the issuance by the Board of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the legislative branch and would otherwise promote the purposes of chapter 71, as applied by the CAA.

PART 2428—ENFORCEMENT OF ASSISTANT SECRETARY STANDARDS OF CONDUCT DECISIONS AND ORDERS

Sec.

2428.1 Scope.

2428.2 Petitions for enforcement.

2428.3 Board decision.

§2428.1 *Scope.*

This part sets forth procedures under which the Board, pursuant to 5 U.S.C. 7105(a)(2)(I), as applied by the CAA, will enforce decisions and orders of the Assistant Secretary in standards of conduct matters arising under 5 U.S.C. 7120, as applied by the CAA.

§2428.2 *Petitions for enforcement.*

(a) The Assistant Secretary may petition the Board to enforce any Assistant Secretary decision and order in a standards of conduct case arising under 5 U.S.C. 7120, as applied by the CAA. The Assistant Secretary shall transfer to the Board the record in the case, including a copy of the transcript if any, exhibits, briefs, and other documents filed with the Assistant Secretary. A copy of the petition for enforcement shall be served on the labor organization against which such order applies.

(b) An opposition to Board enforcement of any such Assistant Secretary decision and order may be filed by the labor organization against which such order applies twenty (20) days from the date of service of the petition, unless the Board, upon good cause shown by the Assistant Secretary, sets a shorter time for filing such opposition. A copy of the opposition to enforcement shall be served on the Assistant Secretary.

§2428.3 *Board decision.*

The Board shall issue its decision on the case enforcing, enforcing as modified, or refusing to enforce, the decision and order of the Assistant Secretary.

PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS

Subpart A—Miscellaneous

Sec.

2429.1 Transfer of cases to the Board.

2429.2 [Reserved]

2429.3 Transfer of record.

2429.4 Referral of policy questions to the Board.

2429.5 Matters not previously presented; official notice.

2429.6 Oral argument.

2429.7 [Reserved]

2429.8 [Reserved]

2429.9 [Reserved]

2429.10 Advisory opinions.

2429.11 [Reserved]

2429.12 [Reserved]

2429.13 Official time.

2429.14 Witness fees.

2429.15 Board requests for advisory opinions.

2429.16 General remedial authority.

2429.17 [Reserved]

2429.18 [Reserved]

Subpart B—General Requirements

2429.21 [Reserved]

2429.22 [Reserved]

2429.23 Extension; waiver.

2429.24 [Reserved]

2429.25 [Reserved]

2429.26 [Reserved]

2429.27 [Reserved]

2429.28 Petitions for amendment of regulations.

Subpart A—Miscellaneous

§2429.1 *Transfer of cases to the Board.*

In any unfair labor practice case under part 2423 of this subchapter in which, after the filing of a complaint, the parties stipulate that no material issue of fact exists, the Executive Director may, upon agreement of all parties, transfer the case to the Board; and the Board may decide the case on the basis of the formal documents alone. Briefs in the case must be filed with the Board within thirty (30) days from the date of the Executive Director's order transferring the case to the Board. The Board may also remand any such case to the Executive Director for further processing. Orders of transfer and remand shall be served on all parties.

§2429.2 [Reserved]

§2429.3 *Transfer of record.*

In any case under part 2425 of this subchapter, upon request by the Board, the parties jointly shall transfer the record in the

case, including a copy of the transcript, if any, exhibits, briefs and other documents filed with the arbitrator, to the Board.

§2429.4 Referral of policy questions to the Board.

Notwithstanding the procedures set forth in this subchapter, the General Counsel, or the Assistant Secretary, may refer for review and decision or general ruling by the Board any case involving a major policy issue that arises in a proceeding before any of them. Any such referral shall be in writing and a copy of such referral shall be served on all parties to the proceeding. Before decision or general ruling, the Board shall obtain the views of the parties and other interested persons, orally or in writing, as it deems necessary and appropriate. The Board may decline a referral.

§2429.5 Matters not previously presented; official notice.

The Board will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Executive Director, Hearing Officer, or arbitrator. The Board may, however, take official notice of such matters as would be proper.

§2429.6 Oral argument.

The Board or the General Counsel, in their discretion, may request or permit oral argument in any matter arising under this subchapter under such circumstances and conditions as they deem appropriate.

§2429.7 [Reserved]

§2429.8 [Reserved]

§2429.9 [Reserved]

§2429.10 Advisory opinions.

The Board and the General Counsel will not issue advisory opinions.

§2429.11 [Reserved]

§2429.12 [Reserved]

§2429.13 Official time.

If the participation of any employee in any phase of any proceeding before the Board under section 220 of the CAA, including the investigation of unfair labor practice charges and representation petitions and the participation in hearings and representation elections, is deemed necessary by the Board, the Executive Director, the General Counsel, any Hearing Officer, or other agent of the Board designated by the Board, such employee shall be granted official time for such participation, including necessary travel time, as occurs during the employee's regular work hours and when the employee would otherwise be in a work or paid leave status.

§2429.14 Witness fees.

(a) Witnesses (whether appearing voluntarily, or under a subpoena) shall be paid the fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States: *Provided*, that any witness who is employed by the Federal Government shall not be entitled to receive witness fees in addition to compensation received pursuant to §2429.13.

(b) Witness fees and mileage allowances shall be paid by the party at whose instance the witnesses appear, except when the witness receives compensation pursuant to §2429.13.

§2429.15 Board requests for advisory opinions.

(a) Whenever the Board, pursuant to 5 U.S.C. 7105(i), as applied by the CAA, requests an advisory opinion from the Director of the Office of Personnel Management concerning the proper interpretation of rules, regulations, or policy directives issued by that Office in connection with any matter before the Board, a copy of such request, and any response thereto, shall be served upon the parties in the matter.

(b) The parties shall have fifteen (15) days from the date of service of a copy of the re-

sponse of the Office of Personnel Management to file with the Board comments on that response which the parties wish the Board to consider before reaching a decision in the matter. Such comments shall be in writing and copies shall be served upon the other parties in the matter and upon the Office of Personnel Management.

§2429.16 General remedial authority.

The Board shall take any actions which are necessary and appropriate to administer effectively the provisions of chapter 71 of title 5 of the United States Code, as applied by the CAA.

§2429.17 [Reserved]

§2429.18 [Reserved]

Subpart B—General Requirements

§2429.21 [Reserved]

§2429.22 [Reserved]

§2429.23 Extension; waiver.

(a) Except as provided in paragraph (d) of this section, the Board or General Counsel, or their designated representatives, as appropriate, may extend any time limit provided in this subchapter for good cause shown, and shall notify the parties of any such extension. Requests for extensions of time shall be in writing and received by the appropriate official not later than five (5) days before the established time limit for filing, shall state the position of the other parties on the request for extension, and shall be served on the other parties.

(b) Except as provided in paragraph (d) of this section, the Board or General Counsel, or their designated representatives, as appropriate, may waive any expired time limit in this subchapter in extraordinary circumstances. Request for a waiver of time limits shall state the position of the other parties and shall be served on the other parties.

(c) The time limits established in this subchapter may not be extended or waived in any manner other than that described in this subchapter.

(d) Time limits established in 5 U.S.C. 7105(f), 7117(c)(2) and 7122(b), as applied by the CAA, may not be extended or waived under this section.

§2429.24 [Reserved]

§2429.25 [Reserved]

§2429.26 [Reserved]

§2429.27 [Reserved]

§2429.28 Petitions for amendment of regulations.

Any interested person may petition the Board in writing for amendments to any portion of these regulations. Such petition shall identify the portion of the regulations involved and provide the specific language of the proposed amendment together with a statement of grounds in support of such petition.

SUBCHAPTER D—IMPASSES

PART 2470—GENERAL

Subpart A Purpose

Sec.

2470.1 Purpose.

Subpart B—Definitions

2470.2 Definitions.

Subpart A—Purpose

§2470.1 Purpose.

The regulations contained in this subchapter are intended to implement the provisions of section 7119 of title 5 of the United States Code, as applied by the CAA. They prescribe procedures and methods which the Board may utilize in the resolution of negotiation impasses when voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve the disputes.

Subpart B—Definitions

§2470.2 Definitions.

(a) The terms *Executive Director*, *employing office*, *labor organization*, and *conditions of employment* as used herein shall have the meaning set forth in Part 2421 of these rules.

(b) The terms *designated representative* or *designee* of the Board means a Board member, a staff member, or other individual designated by the Board to act on its behalf.

(c) The term *hearing* means a factfinding hearing, arbitration hearing, or any other hearing procedure deemed necessary to accomplish the purposes of 5 U.S.C. 7119, as applied by the CAA.

(d) The term *impasse* means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

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

(f) The term *party* means the agency or the labor organization participating in the negotiation of conditions of employment.

(g) The term *voluntary arrangements* means any method adopted by the parties for the purpose of assisting them in their resolution of a negotiation dispute which is not inconsistent with the provisions of 5 U.S.C. 7119, as applied by the CAA.

PART 2471—PROCEDURES OF THE BOARD IN IMPASSE PROCEEDINGS

Sec.

2471.1 Request for Board consideration; request for Board approval of binding arbitration.

2471.2 Request form.

2471.3 Content of request.

2471.4 Where to file.

2471.5 Copies and service.

2471.6 Investigation of request; Board recommendation and assistance; approval of binding arbitration.

2471.7 Preliminary hearing procedures.

2471.8 Conduct of hearing and prehearing conference.

2471.9 Report and recommendations.

2471.10 Duties of each party following receipt of recommendations.

2471.11 Final action by the Board.

2471.12 Inconsistent labor agreement provisions.

§2471.1 Request for Board consideration; request for Board approval of binding arbitration.

If voluntary arrangements, including the services of the Federal Mediation and Conciliation Services or any other third-party mediation, fail to resolve a negotiation impasse:

(a) Either party, or the parties jointly, may request the Board to consider the matter by filing a request as hereinafter provided; or the Board may, pursuant to 5 U.S.C. 7119(c)(1), as applied by the CAA, undertake consideration of the matter upon request of (i) the Federal Mediation and Conciliation Service, or (ii) the Executive Director; or

(b) The parties may jointly request the Board to approve any procedure, which they have agreed to adopt, for binding arbitration of the negotiation impasse by filing a request as hereinafter provided.

§2471.2 Request form.

A form has been prepared for use by the parties in filing a request with the Board for consideration of an impasse or approval of a binding arbitration procedure. Copies are available from the Executive Director, Office of Compliance.

§2471.3 Content of request.

(a) A request from a party or parties to the Board for consideration of an impasse must

be in writing and include the following information:

- (1) Identification of the parties and individuals authorized to act on their behalf;
- (2) Statement of issues at impasse and the summary positions of the initiating party or parties with respect to those issues; and
- (3) Number, length, and dates of negotiation and mediation sessions held, including the nature and extent of all other voluntary arrangements utilized.

(b) A request for approval of a binding arbitration procedure must be in writing, jointly filed by the parties, and include the following information about the pending impasse:

- (1) Identification of the parties and individuals authorized to act on their behalf;
- (2) Brief description of the impasse including the issues to be submitted to the arbitrator;
- (3) Number, length, and dates of negotiation and mediation sessions held, including the nature and extent of all other voluntary arrangements utilized;

(4) Statement that the proposals to be submitted to the arbitrator contain no questions concerning the duty to bargain; and

(5) Statement of the arbitration procedures to be used, including the type of arbitration, the method of selecting the arbitrator, and the arrangement for paying for the proceedings or, in the alternative, those provisions of the parties' labor agreement which contain this information.

§2471.4 Where to file.

Requests to the Board provided for in this part, and inquiries or correspondence on the status of impasses or other related matters, should be addressed to the Executive Director, Office of Compliance.

§2471.5 Copies and service.

(a) Any party submitting a request for Board consideration of an impasse or a request for approval of a binding arbitration procedure shall file an original and one copy with the Board and shall serve a copy of such request upon all counsel of record or other designated representative(s) of parties, upon parties not so represented, and upon any mediation service which may have been utilized. When the Board acts on a request from the Federal Mediation and Conciliation Service or acts on a request from the Executive Director, it will notify the parties to the dispute, their counsel of record or designated representatives, if any, and any mediation service which may have been utilized. A clean copy capable of being used as an original for purposes such as further reproduction may be submitted for the original. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party.

(b) A party submitting a response to or other document in connection with a request for Board consideration of an impasse or a request for approval of a binding arbitration procedure shall file an original and one copy with the Board and shall serve a copy of the document upon all counsel of record or other designated representative(s) of parties, or upon parties not so represented. A clean copy capable of being used as an original for purposes such as further reproduction may be submitted for the original. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party.

(c) A signed and dated statement of service shall accompany each document submitted to the Board. The statement of service shall include the names of the parties and persons served, their addresses, the date of service, the nature of the document served, and the manner in which service was made.

(d) The date of service or date served shall be the day when the matter served is depos-

ited in the U.S. mail or is delivered in person.

(e) Unless otherwise provided by the Board or its designated representatives, any document or paper filed with the Board under these rules, together with any enclosure filed therewith, shall be submitted on 8½11-inch size paper.

§2471.6 Investigation of request; Board recommendation and assistance; approval of binding arbitration.

(a) Upon receipt of a request for consideration of an impasse, the Board or its designee will promptly conduct an investigation, consulting when necessary with the parties and with any mediation service utilized. After due consideration, the Board shall either:

(1) Decline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction, in whole or in part, and so advise the parties in writing, stating its reasons; or

(2) Recommend to the parties procedures, including but not limited to arbitration, for the resolution of the impasse and/or assist them in resolving the impasse through whatever methods and procedures the Board considers appropriate.

(b) Upon receipt of a request for approval of a binding arbitration procedure, the Board or its designee will promptly conduct an investigation, consulting when necessary with the parties and with any mediation service utilized. After due consideration, the Board shall either approve or disapprove the request; *provided, however*, that when the request is made pursuant to an agreed-upon procedure for arbitration contained in an applicable, previously negotiated agreement, the Board may use an expedited procedure and promptly approve or disapprove the request, normally within five (5) workdays.

§2471.7 Preliminary hearing procedures.

When the Board determines that a hearing is necessary under §2471.6, it will:

(a) Appoint one or more of its designees to conduct such hearing; and

(b) Issue and serve upon each of the parties a notice of hearing and a notice of prehearing conference, if any. The notice will state: (1) The names of the parties to the dispute; (2) the date, time, place, type, and purpose of the hearing; (3) the date, time, place, and purpose of the prehearing conference, if any; (4) the name of the designated representatives appointed by the Board; (5) the issues to be resolved; and (6) the method, if any, by which the hearing shall be recorded.

§2471.8 Conduct of hearing and prehearing conference.

(a) A designated representative of the Board, when so appointed to conduct a hearing, shall have the authority on behalf of the Board to:

(1) Administer oaths, take the testimony or deposition of any person under oath, receive other evidence, and issue subpoenas;

(2) Conduct the hearing in open, or in closed session at the discretion of the designated representative for good cause shown;

(3) Rule on motions and requests for appearance of witnesses and the production of records;

(4) Designate the date on which posthearing briefs, if any, shall be submitted;

(5) Determine all procedural matters concerning the hearing, including the length of sessions, conduct of persons in attendance, recesses, continuances, and adjournments; and take any other appropriate procedural action which, in the judgment of the designated representative, will promote the purpose and objectives of the hearing.

(b) A prehearing conference may be conducted by the designated representative of the Board in order to:

(1) Inform the parties of the purpose of the hearing and the procedures under which it will take place;

(2) Explore the possibilities of obtaining stipulations of fact;

(3) Clarify the positions of the parties with respect to the issues to be heard; and

(4) Discuss any other relevant matters which will assist the parties in the resolution of the dispute.

§2471.9 Report and recommendations.

(a) When a report is issued after a hearing conducted pursuant to §§2471.7 and 2471.8, it normally shall be in writing and, when authorized by the Board, shall contain recommendations.

(b) A report of the designated representative containing recommendations shall be submitted to the parties, with two (2) copies to the Executive Director, within a period normally not to exceed thirty (30) calendar days after receipt of the transcript or briefs, if any.

(c) A report of the designated representative not containing recommendations shall be submitted to the Board with a copy to each party within a period normally not to exceed thirty (30) calendar days after receipt of the transcript or briefs, if any. The Board shall then take whatever action it may consider appropriate or necessary to resolve the impasse.

§2471.10 Duties of each party following receipt of recommendations.

(a) Within thirty (30) calendar days after receipt of a report containing recommendations of the Board or its designated representative, each party shall, after conferring with the other, either:

(1) Accept the recommendations and so notify the Executive Director; or

(2) Reach a settlement of all unresolved issues and submit a written settlement statement to the Executive Director; or

(3) Submit a written statement to the Executive Director setting forth the reasons for not accepting the recommendations and for not reaching a settlement of all unresolved issues.

(b) A reasonable extension of time may be authorized by the Executive Director for good cause shown when requested in writing by either party prior to the expiration of the time limits.

§2471.11 Final action by the Board.

(a) If the parties do not arrive at a settlement as a result of or during actions taken under §§2471.6(a)(2), 2471.7, 2471.8, 2471.9, and 2471.10, the Board may take whatever action is necessary and not inconsistent with 5 U.S.C. chapter 71, as applied by the CAA, to resolve the impasse, including but not limited to, methods and procedures which the Board considers appropriate, such as directing the parties to accept a factfinder's recommendations, ordering binding arbitration conducted according to whatever procedure the Board deems suitable, and rendering a binding decision.

(b) In preparation for taking such final action, the Board may hold hearings, administer oaths, and take the testimony or deposition of any person under oath, or it may appoint or designate one or more individuals pursuant to 5 U.S.C. 7119(c)(4), as applied by the CAA, to exercise such authority on its behalf.

(c) When the exercise of authority under this section requires the holding of a hearing, the procedure contained in §2471.8 shall apply.

(d) Notice of any final action of the Board shall be promptly served upon the parties,

and the action shall be binding on such parties during the term of the agreement, unless they agree otherwise.

§2471.12 Inconsistent labor agreement provisions.

Any provisions of the parties' labor agreements relating to impasse resolution which are inconsistent with the provisions of either 5 U.S.C. 7119, as applied by the CAA, or the procedures of the Board shall be deemed to be superseded.

EXECUTIVE COMMUNICATIONS, ETC.

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

4071. A letter from the Administrator, Farm Service Agency, transmitting the Agency's final rule—Final Rule: Implementation of the Farm Program Provisions of the 1996 Farm Bill (RIN: 0561-AE81) received July 11, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4072. A letter from the Secretary of Agriculture, transmitting recommendations concerning the steps necessary to achieve interstate shipment of meat inspected under a State meat inspection program developed and administered under Section 301 of the Federal Meat Inspection Act (21 U.S.C. 661); and poultry inspected under a State poultry product inspection program developed and administered under section 5 of the Poultry Products Inspection Act (21 U.S.C. 454), pursuant to Public Law 104-127, section 918(b) (110 Stat. 1190); to the Committee on Agriculture.

4073. A letter from the Secretary of Agriculture, transmitting the Service's final rule—Deletion of Part 16—Limitation on Imports of Meat, from Title 7 of the Code of Federal Regulation (Foreign Agricultural Service) (RIN: 0551-AA45) received July 11, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Agriculture.

4074. A communication from the President of the United States, transmitting amendments to the fiscal year 1997 appropriations requests for the Departments of Housing and Urban Development, Justice, and Veterans Affairs, and the National Bankruptcy Review Commission, pursuant to 31 U.S.C. 1107 (H. Doc. No. 104-244); to the Committee on Appropriations and ordered to be printed.

4075. A letter from the Acting Director, the Office of Management and Budget, transmitting the cumulative report on rescissions and deferrals of budget authority as of July 1, 1996, pursuant to 2 U.S.C. 685(e) (H. Doc. 104-243); to the Committee on Appropriations and ordered to be printed.

4076. A letter from the Secretary of Defense transmitting the Secretary's certification that the current Future Years Defense Program [FYDP] fully funds the support costs associated with the M1A2 multiyear program through the period covered by the FYDP, pursuant to 10 U.S.C. 2306b(i)(1)(A); to the Committee on National Security.

4077. A letter from the Director, Defense Procurement, Department of Defense, transmitting the Department's final rule—Defense Federal Acquisition Regulation Supplement; Individual Compensation (DFARS Case 96-D314) received July 9, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on National Security.

4078. A letter from the Secretary of Housing and Urban Development transmitting notification that is estimated that the limitation of the Government National Mortgage

Association's [Ginnie Mae's] authority to make commitments for a fiscal year will be reached before the end of that fiscal year, pursuant to 12 U.S.C. 1721 note; to the Committee on Banking and Financial Services.

4079. A letter from the Assistant Secretary for Legislative Affairs and Public Liaison, Department of the Treasury, transmitting the Department's third semiannual report to Congress, as required by section 403 of the Mexican Debt Disclosure Act of 1995, and the June monthly report to Congress, as required by section 404 of the same act, pursuant to Public Law 104-6, section 404(a) (109 Stat. 90); to the Committee on Banking and Financial Services.

4080. A letter from the General Counsel, Federal Emergency Management Agency, transmitting a draft of proposed legislation to amend the National Flood Insurance Act of 1968 to extend the act, authorize appropriations, and for other purposes, pursuant to 31 U.S.C. 1110; to the Committee on Banking and Financial Services.

4081. A letter from the Acting Executive Director, Resolution Trust Corporation, transmitting the Corporation's annual management report, July 8, 1996, pursuant to 31 U.S.C. 9106; to the Committee on Banking and Financial Services.

4082. A letter from the Acting Director, Office of Management and Budget, transmitting OMB's estimate of the amount of change in outlays or receipts, as the case may be, in each fiscal year through fiscal year 2002 resulting from passage of H.R. 3525, pursuant to Public Law 101-508, Section 13101(a) (104 Stat. 1388-582); to the Committee on the Budget.

4083. A letter from the Assistant General Counsel for Regulations, Department of Education, transmitting the Department's report on the notice of final funding priority for school-to-work urban rural opportunities grants using fiscal year 1995 funds, pursuant to 5 U.S.C. 801(a)(1)(B); to the Committee on Economic and Educational Opportunities.

4084. A letter from the Assistant Secretary of Labor for Mine Safety and Health, Department of Labor, transmitting the Department's final rule—Safety Standards for Explosives at Metal and Nonmetal Mines (RIN: 1219-AA84) received July 8, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Economic and Educational Opportunities.

4085. A letter from the Assistant Secretary for Employment and Training, Department of Labor, transmitting the Department's final rule—Attestations by Employers Using Alien Crewmembers for Longshore Work in U.S. Ports (RIN: 1205-AB03) received July 9, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the committee on Economic and Educational Opportunities.

4086. A letter from the Acting Deputy Executive Director, Pension Benefit Guaranty Corporation, transmitting the Corporation's final rule—Reorganization, Renumbering, and Reinvention of Regulations; Correction (RIN: 1212-AA75) received July 10, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Economic and Educational Opportunities.

4087. A letter from the Deputy Executive Director and Chief Operating Officer, Pension Benefit Guaranty Corporation, transmitting the Corporation's final rule—Allocation of Assets in Single-Employer Plans; Interest Rate for Valuing Benefits (29 CFR Part 4044) received July 10, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Economic and Educational Opportunities.

4088. A letter from the Director, Budget, Management and Information and Chief Information Officer, Department of Commerce, transmitting the Department's final rule—Removal of CFR Chapter (RIN: 0644-XX01) received July 8, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Commerce.

4089. A letter from the Acting Assistant Secretary for Legislative Affairs, Department of State, transmitting notification of a proposed license for the export of defense articles or defense services sold commercially to Spain (Transmittal No. DRC-35-96), pursuant to 22 U.S.C. 2776(c); to the Committee on International Relations.

4090. A letter from the Director, Office of Congressional Affairs, Nuclear Regulatory Commission, transmitting the Commission's final rule—Export of Nuclear Equipment and Materials (RIN: 3150-AF51) received July 8, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on International Relations.

4091. A letter from the Under Secretary for Domestic Finance, Department of the Treasury, transmitting a report concerning the operations and status of the civil service retirement and disability fund [CSRDF] and the Government Securities Investment fund (G-Fund) of the Federal Employees Retirement System during the debt issuance suspension period between November 15, 1995 and March 29, 1996, pursuant to 5 U.S.C. 8348(l)(1) and 5 U.S.C. 8438(h)(1); to the Committee on Government Reform and Oversight.

4092. A letter from the District of Columbia Auditor, transmitting a copy of a report entitled, "Performance Review of Contract Appeals Process," pursuant to D.C. Code, section 47-117(d); to the Committee on Government Reform and Oversight.

4093. A letter from the Deputy Director, Office of Personnel Management, transmitting the Office's final rule—Prevailing Rate Systems; Redefinition of Anchorage, AK, Non-appropriated Fund Wage Area (RIN: 3206-AH54) received July 10, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Government Reform and Oversight.

4094. A letter from the Director, Office of Personnel Management, transmitting the Office's final rule—Political Activities of Federal Employees (RIN: 3206-AH33) received July 9, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Government Reform and Oversight.

4095. A letter from the Secretary of Commerce, transmitting the program development plan for the Antarctic Living Marine Resources Convention Act of 1984, pursuant to 16 U.S.C. 2431 and so forth; to the Committee on Resources.

4096. A letter from the Deputy Associate Director for Compliance, Department of the Interior, transmitting notification of proposed refunds of excess royalty payments in OCS areas, pursuant to 43 U.S.C. 1339(b); to the Committee on Resources.

4097. A letter from the Assistant Secretary, Land and Minerals Management, Department of the Interior, transmitting the Department's final rule—Use and Occupancy Under the Mining Laws (RIN: 1004-AC39) received July 10, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Resources.

4098. A letter from the Assistant Secretary for Policy, Management and Budget, Department of the Interior, transmitting the Department's final rule—Department of the Interior Acquisition Regulation; Foreign Construction Materials (RIN: 1090-AA55) received July 8, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Resources.

4099. A letter from the Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service, transmitting the Service's final rule—Atlantic Swordfish Fishery; Drift Gillnet Closure (I.D. 062796B) received July 10, 1996, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Resources.

4100. A letter from the Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service, transmitting the Service's final rule—Pacific