ARCHITECT OF THE CAPITOL

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May 10, 2019

Susan Tsui Grundmann
Executive Director
Office of Congressional Workplace Rights
110 Second Street S.E., Room LA-200
Washington, D.C. 20540-1999

RE: Notice of Proposed Rulemaking

Dear Ms. Grundmann:

I provide the following comments on behalf of the Architect of the Capitol (AOC) in response to the Office of Congressional Workplace Rights (OCWR) notice of proposed rulemaking concerning amendments to the Rules of Procedure pursuant to the Congressional Accountability Act (CAA) published in the Congressional Record on April 9, 2019 for your consideration:

- Section 1.02 (r). There are individuals who volunteer their time on Capitol Hill without remuneration. The definition of "unpaid staff" should explicitly address whether "volunteers" are included or excluded from the CAA protections.

- Section 1.03(a)(2) and (a)(3). These sections should explicitly state that all pages of the fax and email (including email attachments) must be received by the deadline (11:59 pm) as evidenced on the OCWR's fax machine time/date stamp or email time/date stamp as printed on the fax/email.

  Section 1.03(a)(4). Although this section states that parties are responsible for ensuring and confirming that electronic filings are transmitted and received by OCWR, section 402(c) of the CAA places the burden on the OCWR to ensure the effective tracking of all actions and proceedings. In addition, does OCWR intend to set up an automatic message received reply?

- Section 1.04(a). What does "receipt confirmed in the same format" mean? Will the OCWR set up an automatic message received reply?

- Section 1.06(d). Although the last sentence of the paragraph (d) states "The Board may make public any other decision at its discretion", the parties should be given notice and opportunity to object before the decision or portions of a decision become public if the decision is not one that falls under the first part of paragraph (d) pursuant to the CAA confidentiality provisions.

- Sections 3.25(c)(1) and 3.26(c)(1). These sections allow a Merits Hearing Officer to rule on temporary and permanent variances applications ex parte. The appointment of a hearing officer is an indication that the adversarial process has begun. There is no reason why the hearing officer should be given the opportunity to make variance decisions without notice and opportunity to be heard by all parties at this stage of the proceedings. These ex parte provisions remove due process safeguards and should therefore be stricken from the final rule.

- Section 4.03(a)(2). This section should provide more information on the scope of the Confidential Advisor's authority. The Confidential Advisor should not have unlimited discretion in assisting the Attorney representative. Allowing the Confidential Advisor to offer unlimited assistance to the representative of one party, but not the other, undermines the impartial nature of the OCWR.

- Section 4.03 (b). The Procedural Rules should identify the means by which a Confidential Advisor will offer services and the means by which a covered employee requests, accepts, or declines the services of a Confidential Advisor.

- Section 4.03 (c). The Procedural Rules should identify how OCWR would address situations in which the Confidential Advisor exceeds the scope of the listed services or provides incorrect advice to a covered employee.

- Section 4.03(d). This section attempts to establish a privilege akin to an attorney-client privilege for the communications between a Confidential Advisor and the employee before or after a claim is filed. There is no authority, legal or otherwise, for the creation of an expansive attorney-client privilege.

- Section 4.03 (d). What are specifically the "appropriate circumstances" by which a Confidential Advisor may destroy records? Who is responsible for ensuring that the Confidential Advisor adheres to appropriate standards regarding the destruction or records? Is the destruction of records consistent with section 301(m) of the CAA requiring OCWR to "establish and maintain a program for the permanent retention of its records…"?

- Section 4.05(d). This provision does not mention notice to the employing office that the claimant has filed in Federal district court. It should include language requiring the Office to notify the employing office immediately, particularly if the period for responding to the claim is 10 days in accordance with section 4.06(a).

- Section 4.07(i). This section allows the mediator to require the physical presence of a party. Since the CAA makes mediation strictly voluntary, this requirement should be removed since it violates the parties' right to decide how best to mediate/engage in the mediation strategies that the party prefers and is in conflict with the Congressional mandate of making mediation optional/voluntary.

- Section 4.07(l). This section should specify that mediators shall not be subject "…to subpoena or any other compulsory process *stemming from OCWR proceedings* with

respect to the same matter." The Procedural Rules can bind OCWR in its proceedings, but they cannot supersede subpoena requirements from other tribunals, such as U.S. District Court.

- Section 4.08(c). It is not clear from the draft rules whether the Preliminary Hearing Officer has to make his or her determination based solely on the claim form or whether the Preliminary Hearing Officer can seek additional information from the parties. It is also unclear whether the parties will have the opportunity to submit information if they wish to do so (such as a motion to dismiss). The rules should explicitly state whether the Preliminary Hearing Officer can seek or accept additional information to assist in making the preliminary determination and/or the parties will be allowed to submit additional information.

- Section 408(d). This section grants the Preliminary Hearing Officer broad discretion to permit amendments. If such an amendment occurs, the rules should allow the respondent to have an opportunity to submit a response.

- Section 4.08(e) and/or 4.08(f). One of these sections should include language clarifying that the Preliminary Hearing Officer's determination will have no precedential effect on Merit Hearing Officer's determinations under 2 U.S.C. § 1405(b) and § 5.03(a) and (b) of the Procedural Rules.

- Section 4.09(c)(1). This section should specify that Merits Hearing Officer must meet the qualifications set forth in 2 U.S.C. §1405(c)(2)(A) (requiring hearing officers to be "members of the bar of a State or the District of Columbia and retired judges of the United States courts who are experienced in adjudicating or arbitrating…matters…under this chapter"). This would also be consistent with Procedural Rules provisions that discuss qualification requirements for the appointment of Preliminary Hearing Officers.

- Section 4.09(d)(1). This section requires an answer within ten (10) days after the filing of a request for an administrative hearing. The old rules allowed for fifteen (15) days after receipt of a copy of a complaint. The new rule should keep the 15-day period for filing an answer Since there is no noted justification for shortening the response time.

- Section 4.09(d)(1). This section provides that filing a Motion to Dismiss "does not stay the time period for filing the answer". This is an unexplained change from current rules [5.01(g)]. The change conflicts with Rule 12(b) of the Federal Rules of Civil Procedure (FRCP), which requires the filing of a Motion to Dismiss before the responsive pleading (answer). In addition, the answer is stayed until 14 days after the motion to dismiss is denied or disposition of the motion is delayed until trial under FRCP Rule 12(a)(4). The parties must be able to avail themselves of the Motion to Dismiss to keep the judicial process efficient, and protect themselves from being required to address speculative claims. The OCWR should keep the existing rules regarding Motions to Dismiss, particularly since the change lacks any direct relationship to the CAA.

- Section 4.10(b). This section would remove a long-standing and valuable procedure (Motion to Dismiss) for challenging claims that have no business proceeding into the

hearing stage. It increases the chances for frivolous or unsubstantiated claims to survive into the discovery phase of the hearing, and it would be time-consuming and inefficient for the process that the CAA aimed to correct. The OCWR should not adopt this proposed change.

- Section 4.10(d). This provision should inform parties of the applicable deadlines that would accompany the refiling of a claim (i.e., 180 days after the date of the alleged violation).

- Section 5.01(b). This section should explicitly define the criteria of a proper "investigation" to increase transparency and accountability.

- Section 5.01(f). This section includes the 10-day answer requirement and the Motion to Dismiss issues discussed under section 4.09 above, and the OCWR should not adopt this proposed change.

- Section 6.01(a). This section should reflect the most current standard governing discovery in the Federal Rules of Civil Procedure which, among other things, requires discovery requests to be relevant *and proportional to the needs of the case.*

- Section 9.03(c)(4). The rule should clarify whether Treasury Account funds are available to pay for other disability-based claims (for example, a back pay award based on a finding of discrimination due to a disability).

- Section 9.04(e) and (f). We recommend a formal opinion from the Government Accountability Office as to whether such payments violate appropriations law principles.

Thank you for the opportunity to provide comments. Please feel free to contact me by telephone at (202) 329-7371 or electronic mail at jbaltimore@aoc.gov if you have any questions.

Sincerely,

Jason Baltimore
General Counsel