



6727-01-U

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Parts 2422, 2423, and 2429

Representation Proceedings, Unfair Labor Practice Proceedings, and Miscellaneous and General Requirements

AGENCY: Federal Labor Relations Authority

ACTION: Final rule

SUMMARY: The Federal Labor Relations Authority (the FLRA) is engaged in an initiative to make electronic filing, or "eFiling," available to parties in all cases before the FLRA. Making eFiling available to its parties is another way in which the FLRA is using technology to improve the customer-service experience. E-filing also is expected to increase efficiencies by reducing procedural filing errors and resulting processing delays.

EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION]

ADDRESSES: Written comments can be e-mailed to engagetheflra@flra.gov or sent to the Office of General Counsel, Federal Labor Relations Authority, Suite 200, 1400 K Street, N.W., Washington, DC 20424-0001. All written comments will be available for public inspection during normal business hours at the Office of General Counsel.

FOR FURTHER INFORMATION CONTACT: Dennis P. Walsh, Deputy General Counsel, (202)218-7741; or e-mail: engagetheflra@flra.gov.

SUPPLEMENTARY INFORMATION:

In the first stage of its eFiling initiative, the FLRA enabled parties to use eFiling to file requests for Federal Service Impasses Panel assistance in the resolution of negotiation impasses. *See* 77 FR 5987 (Feb. 7, 2012). The second stage of the FLRA's eFiling initiative provided

parties with an option to use the FLRA's eFiling system to electronically file 11 types of documents in cases that are filed with the FLRA's three-Member adjudicatory body, the Authority. Parties may now eFile such documents.

The third and last stage of the FLRA's eFiling initiative is the subject of this final rule. In this stage, parties will be able to use the FLRA's eFiling system to file certain documents involved in representation (part 2422) and unfair labor practice (part 2423) proceedings. This rule modifies the FLRA's existing regulations to allow for eFiling of the documents described below. The rule also clarifies some of the procedural regulations as required under the Plain Writing Act of 2010, 5 USC 301 note. In addition, the rule expressly sets forth the Authority's existing practice of requiring parties to serve Regional Directors with applications for review filed pursuant to 5 C.F.R. § 2422.31.

As the FLRA's eFiling procedures develop, the revisions set forth in this action may be evaluated and revised further.

Sectional Analyses

Sectional analyses of the amendments and revisions to part 2422, Representation Proceedings, part 2423, Unfair Labor Practice Proceedings, and part 2429, Miscellaneous and General Requirements, are as follows:

Part 2422 – Representation Proceedings

Sections 2422.1 and 2422.2

These sections are amended to be consistent with the Plain Writing Act guidelines.

Section 2422.3

This section is amended to state that petitioners may file a representation petition electronically through use of the FLRA's eFiling system on the FLRA's web site at

www.flra.gov. Paragraph (a) of this section is amended to state that a petitioner should provide a fax number and e-mail address (if known) for each entity listed.

Section 2422.4

This section is amended to be consistent with the Plain Writing Act guidelines.

Section 2422.5

Paragraph (b) of this section is amended to state that if a petitioner files a petition electronically through the use of the FLRA's eFiling system at the FLRA's web site at www.flra.gov or by facsimile transmission, then it is not necessary to file an original copy with the Region, but the petitioner assumes responsibility for the Region's receipt of the petition.

Paragraph (c) of this section is amended to state that a petition filed electronically through the use of the FLRA's eFiling system at the FLRA's web site at www.flra.gov or by facsimile transmission is deemed received and docketed by the Region on the business day the Region receives it up until midnight local time. If received after midnight local time, it is deemed received and docketed on the next business day.

Sections 2422.6 and 2422.7

These sections are amended to be consistent with the Plain Writing Act guidelines.

Section 2422.8

Paragraph (b) of this section is amended to provide for the filing of a cross-petition electronically through the use of the FLRA's eFiling system at the FLRA's web site at www.flra.gov or by facsimile transmission.

Sections 2422.9 through 2422.34

These sections are amended to be consistent with the Plain Writing Act guidelines. In addition, section 2422.31(a) is amended to set forth the Authority's existing practice of requiring parties to serve Regional Directors with applications for review.

Part 2423 – Unfair Labor Practice Proceedings

Section 2423.0.

This section is amended to state that part 2423 is applicable to any unfair labor practice cases that are pending or filed with the FLRA on or after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Sections 2423.1 through 2423.3

These sections are amended to be consistent with the Plain Writing Act guidelines.

Section 2423.4

Paragraph (a) is amended to provide for filing a charge electronically through the use of the eFiling system on the FLRA's web site at www.flra.gov or by facsimile transmission. In addition, if known, the Charging Party must indicate the facsimile numbers and email addresses for all parties and contact persons.

Section 2423.5

This section is amended to be consistent with the Plain Writing Act guidelines.

Section 2423.6

Paragraph (b) is amended to provide for the dates of filing for charges filed electronically through the use of the eFiling system on the FLRA's web site at www.flra.gov or by facsimile transmission. A charge filed by either of these methods is deemed filed on the day it is received in a Region up until midnight local time. If received after midnight it is deemed received on the next business day.

Sections 2423.7 through 2423.10

These sections are amended to be consistent with the Plain Writing Act guidelines.

Section 2423.11

Paragraph (c) is amended to provide for an option for filing an appeal of a Regional Director's decision to dismiss a charge by e-mail to ogc.appeals@flra.gov.

Paragraph (d) is amended to provide for an option for filing a request for an extension of time to file an appeal by e-mail to ogc.appeals@flra.gov.

Section 2423.12

This section is amended to be consistent with the Plain Writing Act guidelines.

Part 2429 -- Miscellaneous and General Requirements

Section 2429.24

Paragraph (f) is amended to add three documents (12 – 14) to the list of documents that a party may file alternatively by electronic means through the use of the FLRA's eFiling service: (12) petition under 5 CFR part 2422; (13) cross-petition under 5 CFR part 2422; and (14) unfair labor practice charge under 5 CFR part 2423.

Paragraph (g) is amended to add an appeal of a dismissal of an unfair labor practice charge under 5 CFR part 2423 as document that a Charging Party may file by facsimile transmission.

Executive Order 12866

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 12866.

Executive Order 13132

The FLRA is an independent regulatory agency, and as such, is not subject to the requirements of E.O. 13132.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the FLRA has determined that this rule, as amended, will not have a significant impact on a substantial number of small entities, because this rule applies only to federal agencies, federal employees, and labor organizations representing those employees.

Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq.

List of Subjects in 5 CFR Parts 2422, 2423, and 2429

Administrative practice and procedure, Government employees, Labor management relations.

■ For the reasons stated in the preamble, the FLRA amends 5 CFR Parts 2422, 2423, and 2429, as follows:

PART 2422—REPRESENTATION PROCEEDINGS

■ 1. Part 2422 is revised to read as follows:

Sec.

2422.1 What is your purpose for filing a petition?

2422.2 Who may file a petition?

2422.3 What information should you include in your petition?

2422.4 What service requirements must you meet when filing a petition?

- 2422.5 Where do you file petitions?
- 2422.6 How are parties notified of the filing of a petition?
- 2422.7 Will an activity or agency post a notice of filing of a petition?
- 2422.8 What is required to file an Intervention or Cross-petition?
- 2422.9 How is the adequacy of a showing of interest determined?
- 2422.10 How do you challenge the validity of a showing of interest?
- 2422.11 How do you challenge the status of a labor organization?
- 2422.12 What circumstances does the Region consider to determine whether your petition is timely filed?
- 2422.13 How are issues raised by your petition resolved?
- 2422.14 What is the effect of your withdrawal or the Regional Director's dismissal of a petition?
- 2422.15 Do parties have a duty to provide information and cooperate after a petition is filed?
- 2422.16 May parties enter into election agreements, and if they do not will the Regional Director direct an election?
- 2422.17 What are a notice of hearing and prehearing conference?
- 2422.18 What is the purpose of a representation hearing and what procedures are followed?
- 2422.19 When is it appropriate for a party to file a motion at a representation hearing?
- 2422.20 What rights do parties have at a hearing?
- 2422.21 What are the duties and powers of a Hearing Officer?
- 2422.22 What are objections and exceptions concerning the conduct of the hearing?
- 2422.23 What election procedures are followed?
- 2422.24 What are challenged ballots?
- 2422.25 When does the Region tally the ballots?
- 2422.26 How are objections to the election processed?

- 2422.27 How does the Region address determinative challenged ballots and objections?
- 2422.28 When is a runoff election required?
- 2422.29 How does the Region address an inconclusive election?
- 2422.30 When does a Regional Director investigate a petition, issue notices of hearings, take actions, and issue Decisions and Orders?
- 2422.31 When do you file an application for review of a Regional Director Decision and Order?
- 2422.32 When does a Regional Director issue a certification or a revocation of certification?
- 2422.33 Relief under part 2423 of this chapter.
- 2422.34 What are the parties' rights and obligations when a representation proceeding is pending?

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

§ 2422.1 What is your purpose for filing a petition?

You, the petitioner, may file a petition for the following purposes:

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

(1)(i) An election to determine whether 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 whether 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 recognition or 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 agency where a labor organization is the exclusive representative.

§ 2422.2 Who may file a petition?

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 agency or activity; or a combination of the above may file a representation petition. *But,*

(a) Only a labor organization may file a petition under § 2422.1(a)(1);

(b) Only an individual may file a petition under § 2422.1(a)(2); and

(c) Only an agency or a labor organization may file a petition under § 2422.1(b) or (c).

§ 2422.3 What information should you include in your petition?

(a) You must file a petition either in writing with your signature or electronically using the eFiling system on the FLRA's Web site at www.flra.gov. Your petition must provide the following information on a form designated by the Authority, or on a substantially similar form, or electronically using the eFiling system on the FLRA's Web site at www.flra.gov:

- (1) The name and mailing address for each agency 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, fax number and email address (if known) of the contact person for each agency 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 recognition or 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, fax number and email address (if known) of the contact person for each labor organization affected by issues raised in the petition.
- (5) Your name and mailing address, including street number, city, state and zip code, and fax number and email address. If you are a labor organization 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 title, mailing address and telephone number of the person filing the petition.

(b) *Certification of compliance with 5 U.S.C. 7111(e)*. A labor organization/petitioner complies with 5 U.S.C. 7111(e) by submitting to the agency 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 activity or agency and to the Department of Labor.

(c) *Showing of interest supporting a representation petition (defined at 5 U.S.C. 2421.16)*. When filing a petition requiring a showing of interest, you 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 must 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 What service requirements must you meet when filing a petition?

You must serve every petition, motion, brief, request, challenge, written objection, or application for review on all parties affected by issues raised in the filing. The service must include all supporting documentation, with the exceptions of a showing of interest, evidence supporting challenges to the validity of a showing of interest, and evidence supporting objections to an election. You must submit a statement of service to the Regional Director.

§ 2422.5 Where do you file petitions?

(a) *Where to file.* You must file a petition with the Regional Director for the region in which the unit or employee(s) affected by issues raised in the petition are located. If the unit(s) or employees are located in two or more regions of the Authority, you must file the petitions with the Regional Director for the region where the headquarters of the agency or activity is located.

(b) *Method of filing.* You may file a petition with the Regional Director in person or by commercial delivery, first class mail, facsimile, certified mail, or electronically through use of the eFiling system on the FLRA's web site at www.flra.gov. If you file electronically or by facsimile transmission you are not required to file an original copy of the petition with the Region. You assume responsibility for the Regional Director's receipt of a petition.

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

§ 2422.6 How are parties notified of the filing of a petition?

(a) *Notification to parties.* After you file a petition the Regional Director will notify any labor organization, agency, or activity identified as being affected by issues raised by the petition, that a petition has been filed. The Regional Director 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, agency, or activity of:

- (1) Your name (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 Regional Director in writing of their interest in the issues raised in the petition.

§ 2422.7 Will an activity or agency post a notice of filing of a petition?

(a) *Posting notice of petition.* After you file a petition, when appropriate, the Regional Director will direct the agency 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 must advise affected employees about the petition.

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

§ 2422.8 What is required to file an Intervention or Cross-petition?

(a) *Cross-petitions.* A cross-petition is a petition that involves any employees in a unit covered by a pending representation petition. If you file a cross-petition, it must be filed under the requirements of this subpart.

(b) *Intervention requests and cross-petitions.*

(1) You may file a request to intervene, along with any necessary showing of interest, with either the Regional Director or the Hearing Officer. This must be filed either in person, or by commercial delivery, first-class mail, certified mail or facsimile. You must file a request to intervene before the hearing opens, unless you show good cause for granting an extension. If no hearing is held, you must file a request to intervene before action is taken under §2422.30.

(2) You may file a cross-petition, along with any necessary showing of interest, with either the Regional Director or the Hearing Officer. This must be filed electronically through the use of the eFiling system on the FLRA's website at www.flra.gov or, in person, by commercial delivery,

first-class mail, certified mail or facsimile. Any cross-petition must be filed before the hearing opens, unless you show good cause for granting an extension. If no hearing is held, you must file a cross-petition before action is taken under § 2422.30.

(c) *Labor organization intervention requests.* Except for incumbent intervenors, a labor organization seeking to intervene must submit a statement that it has complied with 5 U.S.C. 7111(e) 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 establishing 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, before a reorganization, the recognized or 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 Regional Director with a written disclaimer of any representation interest in the claimed unit.

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

(f) *Agency or activity intervention.* An agency or activity seeking to intervene in any representation proceeding must submit evidence that one or more employees of the agency or activity may be affected by issues raised in the petition.

§ 2422.9 How is the adequacy of a showing of interest determined?

(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) *Regional Director investigation of showing of interest and Decision and Order.* The Regional Director will conduct an investigation if deemed appropriate. A Regional Director's determination 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 Authority. If the Regional Director determines that a showing of interest is inadequate, the Regional Director will issue a Decision and Order dismissing the petition, or denying a request for intervention.

§ 2422.10 How do you challenge the validity of a 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 Regional Director or any party may challenge the validity of a showing of interest.

(c) *When and where validity challenges may be filed.* Your challenges to the validity of a showing of interest must be in writing and filed with the Regional Director or the Hearing Officer before the hearing opens, unless you show good cause for granting an extension. If no

hearing is held, you must file challenges to the validity of a showing of interest before action is taken under §2422.30.

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

(e) *Regional Director investigation and Decision and Order.* The Regional Director will conduct an investigation if deemed appropriate. The Regional Director's determination that a showing of interest is valid is final and binding and is not subject to collateral attack or appeal to the Authority. If the Regional Director finds that the showing of interest is not valid, the Regional Director will issue a Decision and Order dismissing the petition or denying the request to intervene.

§ 2422.11 How do you challenge the status of a labor organization?

(a) *Basis of challenge to labor organization status.* Non-compliance with 5 U.S.C. 7103(a)(4) is the only basis on which you may challenge the status of a labor organization.

(b) *Format and time for filing a challenge.* If you file a challenge to the status of a labor organization involved in the processing of a petition you must do so in writing to the Regional Director or the Hearing Officer before the hearing opens, unless you show good cause for granting an extension. If no hearing is held, you must file challenges before action is taken under §2422.30.

§ 2422.12 What circumstances does the Region consider to determine whether your petition is timely filed?

(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 agency head review under 5 U.S.C. 7114(c) or is in effect, paragraphs (c), (d), or (e) of this section apply.

(c) *Bar during 5 U.S.C. 7114(c) agency head review.* A petition seeking an election will not be considered timely if filed during the period of agency head review under 5 U.S.C. 7114(c). This bar expires upon either the passage of thirty (30) days absent agency head action, or upon the date of any timely agency 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 before 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 on which 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 before 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 before 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) and those that automatically renew without further action by the parties, are not a bar to a petition seeking an election under this section unless a clear effective date, renewal date where applicable, duration, and termination date are ascertainable from the agreement and relevant accompanying documentation.

§ 2422.13 How are issues raised by your petition resolved?

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

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

§ 2422.14 What is the effect of your withdrawal or the Regional Director’s dismissal of a petition?

(a) *Withdrawal/dismissal less than sixty (60) days before contract expiration.* (1) If you withdraw a timely filed petition seeking an election, or the Regional Director dismisses the petition less than sixty (60) days before the existing agreement between the incumbent exclusive representative and the agency or activity expires, or any time after the agreement expires, another petition that seeks an election will not be considered timely if filed within a ninety (90) day period beginning with either:

(i) The date on which the Regional Director approves the withdrawal; or

(ii) The date on which the Regional Director dismisses the petition when the Authority does not receive an application for review; or

(iii) The date on which the Authority rules on an application for review.

(2) Other pending petitions that have been timely filed under this part will continue to be processed.

(b) *Withdrawal by petitioner.* If you submit a withdrawal request for a petition seeking an election that the Regional Director receives after the notice of hearing issues or after approval of an election agreement, whichever occurs first, you 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 on which the Regional Director approves the withdrawal.

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

§ 2422.15 Do parties have a duty to provide information and cooperate after a petition is filed?

(a) *Relevant information.* After you file a petition, all parties must, upon request of the Regional Director, provide the Regional 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 you file a petition seeking an election, the Regional Director may direct the agency or activity to provide the Regional 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 Regional Director, submitting all required and requested information, and participating in prehearing conferences and hearings.

The Regional Director may take appropriate action, including dismissal of the petition or denial of intervention, if parties fail to cooperate in the representation process.

§ 2422.16 May parties enter into election agreements, and if they do not will the Regional Director direct an election?

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

(b) *Regional 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 Regional Director 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 a hearing.* Before directing an election, the Regional Director must provide affected parties an opportunity for a hearing on non-procedural matters, and then may:

(1) Issue a Decision and Order; or

(2) If there are no questions regarding unit appropriateness, issue a Direction of Election without a Decision and Order.

(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 What are a notice of hearing and prehearing conference?

(a) *Purpose of notice of a hearing.* The Regional Director may issue a notice of hearing involving any issues raised in the petition.

(b) *Contents.* The notice of hearing will advise affected parties about the hearing. The Regional 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 Hearing Officer, 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 hearing determination.* A party may not appeal to the Authority a Regional Director's determination of whether to issue a notice of hearing.

§ 2422.18 What is the purpose of a representation hearing and what procedures are followed?

(a) *Purpose of a 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.* Hearings will be open to the public unless otherwise ordered by the Hearing Officer. There is no burden of proof, with the exception of proceedings on objections to elections under §2422.27(b). Formal rules of evidence do not apply.

(c) *Hearing officer.* The Regional Director appoints a hearing officer to conduct a hearing. Another hearing officer may be substituted for the presiding Hearing Officer at any time.

(d) *Transcript.* An official reporter will make the official transcript of the hearing. Copies of the official transcript may be examined in the appropriate Regional Office during normal working hours. Parties should contact the official hearing reporter to purchase copies of the official transcript.

§ 2422.19 When is it appropriate for a party to file a motion at a representation hearing?

(a) *Purpose of a motion.* After the Regional Director issues a Notice of Hearing in a representation proceeding, a party who seeks a ruling, an order, or relief must do so by filing or raising a motion stating the order or relief sought and the grounds in support. The Regional Director or Hearing Officer may treat challenges and other filings referenced in other sections of this subpart as a motion.

(b) *Prehearing motions.* Parties must file prehearing motions in writing with the Regional Director. Any response must be filed with the Regional Director within five (5) days after service of the motion. The Regional Director may rule on the motion or refer the motion to the Hearing Officer.

(c) *Motions made at the hearing.* During the hearing, parties may make oral motions on the record to the Hearing Officer unless required to be in writing. Responses may be oral on the record or in writing, but must be provided before the hearing closes, absent permission of the Hearing Officer. When appropriate, the Hearing Officer will rule on motions made at the hearing or referred to the Hearing Officer by the Regional Director.

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

§ 2422.20 What rights do parties have at a hearing?

(a) *Rights.* A party at a 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 Hearing Officer and copies to all other parties. Stipulations of fact between the parties may be introduced into evidence.

(c) *Oral argument.* Parties will have a reasonable period before 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 given an opportunity to file a brief with the Regional Director.

(1) A party must file an original and two (2) copies of a brief with the Regional Director within thirty (30) days from the close of the hearing.

(2) No later than five (5) days before the date the brief is due a party must file and the Regional Director must receive a written request for an extension of time to file a brief.

(3) Absent the Regional Director's permission, parties may not file a reply brief.

§ 2422.21 What are the duties and powers of the Hearing Officer?

(a) *Duties of the Hearing Officer.* The Hearing Officer receives evidence and inquires fully into the relevant and material facts concerning the matters that are the subject of the hearing. The Hearing Officer may make recommendations on the record to the Regional Director.

(b) *Powers of the Hearing Officer.* After the Regional Director assigns a case to a Hearing Officer and before the close of the hearing, the Hearing Officer may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions when appropriate.

§ 2422.22 What are objections and exceptions concerning the conduct of the hearing?

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

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

§ 2422.23 What election procedures are followed?

(a) *Regional Director conducts or supervises election.* The Regional Director will decide to either conduct or supervise the election. In supervised elections, agencies will perform all acts as specified in the Election Agreement or Direction of Election.

(b) *Notice of election.* Before the election the activity posts a notice of election, prepared by the Regional Director. The notice is posted 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 contains 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 that claims to be a copy of the official ballot and that suggests either directly or indirectly to employees that the Authority 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 are by secret ballot.

(e) *Intervenor withdraws from ballot.* When two or more labor organizations are included as choices in an election, an intervening labor organization may, before the approval of an election agreement or before the direction of an election, file a written request with the Regional Director to remove its name from the ballot. If the Regional Director does not receive the request before the approval of an election agreement or before the direction of an election, the intervening labor organization will remain on the ballot, unless the parties and the Regional Director agree otherwise. The Regional Director's decision on the request is final, and no party may file an application for review with the Authority.

(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 is not held if the incumbent provides the Regional Director with a written disclaimer of any representation interest in the unit. When there is an intervenor, an election is held if the intervening labor organization proffers a thirty percent (30%) showing of interest within the time period established by the Regional Director.

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

(h) *Observers.* Subject to the Regional Director's approval, all parties may select representatives to observe at the polling location(s).

(1) A party who wants to name observers must file a written request with specific names with the Regional Director. This must be filed at least fifteen (15) days before an election. The Regional Director may grant an extension of time to file a request for named observers for good cause where a party requests an extension or on the Regional Director's own motion. The request must name and identify the observers requested.

(2) An agency 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 Federal government.

(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) Within five (5) days after service of the request for observers, any party that objects must file an objection with the Regional Director that states the reasons.

(5) The Regional Director's ruling on requests for and objections to observers is final and binding, and parties may not file an application for review with the Authority.

§ 2422.24 What are challenged ballots?

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

(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) before the tally of ballots, the Region will impound and preserve the unresolved challenged ballot(s) until the Regional Director makes a determination, if necessary.

§ 2422.25 When does the Region tally the ballots?

(a) *Tallying the ballots.* When the election is concluded, the Regional Director will tally the ballots.

(b) *Service of the tally.* When the tally is completed, the Regional 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 How are objections to the election processed?

(a) *Filing objections to the election.* Any party may file objections to the procedural conduct of the election or to conduct that may have improperly affected the results of the election. A party must file an objection and the Regional Director must receive it 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. A party must file an original and two (2) copies of the objections.

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

§ 2422.27 How does the Region address determinative challenged ballots and objections?

(a) *Investigation.* The Regional Director investigates objections and/or determinative challenged ballots that are sufficient in number to affect the results of the election.

(b) *Burden of proof.* An objecting party bears the burden of proof on objections by a preponderance of the evidence. However, no party bears the burden of proof on challenged ballots.

(c) *Regional Director action.* After investigation, the Regional Director takes 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 under §2422.33, a Regional Director may consolidate objections and/or determinative challenged ballots with an unfair labor practice hearing. An Administrative Law Judge conducts these consolidated hearings, except the following provisions do not apply:

(1) Sections 2423.18 and 2423.19(j) of this subchapter concerning the burden of proof and settlement conferences are not applicable;

(2) The Administrative Law Judge may not recommend remedial action to be taken or notices to be posted as provided by §2423.26(a) of this subchapter.

(e) *Party exceptions filed with the Authority.* A party may file exceptions and related submissions with the Authority, and the Authority then issues a decision under part 2423 of this chapter.

§ 2422.28 When is a runoff election required?

(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 Regional Director has ruled on objections to the election and determinative challenged ballots.

(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 highest and second highest number of votes in the election.

§ 2422.29 How does the Region address an inconclusive election?

(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 Regional Director determines that there have been significant procedural irregularities.

(b) *Eligibility to vote in a rerun election.* The Region uses the latest payroll period to determine eligibility to vote in a rerun election.

(c) *Ballot.* If the Regional Director determines 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 show a majority of valid ballots has not been cast for any choice, and the Regional Director will issue a certification of results. If necessary, a runoff may be held when an original election is rerun.

§ 2422.30 When does a Regional Director investigate a petition, issue notices of hearings, take actions, and issue Decisions and Orders?

(a) *Regional Director investigation.* The Regional Director will investigate the petition and any other matter as the Regional Director deems necessary.

(b) *Regional Director notice of hearing.* The Regional Director will issue a notice of hearing to inquire into any matter about which a material issue of fact exists, and any time there is reasonable cause to believe a question exists regarding unit appropriateness.

(c) *Regional Director action.* After investigation or hearing, the Regional Director can direct an election, or approve an election agreement, or issue a Decision and Order.

(d) *Appeal of Regional Director Decision and Order.* A party may file with the Authority an application for review of a Regional Director Decision and Order.

(e) *Contents of the Record.* When there has not been a hearing all material submitted to and considered by the Regional Director during the investigation becomes a part of the record. When a hearing has been held, the transcript and all material entered into evidence, including any posthearing briefs, become a part of the record.

2422.31 When do you file an application for review of a Regional Director Decision and Order?

(a) *Filing an application for review.* A party must file an application for review with the Authority within sixty (60) days of the Regional Director's Decision and Order. The sixty (60) day time limit under 5 U.S.C. 7105(f) may not be extended or waived. The filing party must serve a copy on the Regional Director and all other parties, and must also file a statement of service with the Authority.

(b) *Contents.* An application for review must be sufficient for the Authority to rule on the application without looking at the record. However, the Authority 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 references 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 Hearing Officer or Regional Director.

(c) *Review.* The Authority may grant an application for review only 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 Regional Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error; or

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

(d) *Opposition.* A party may file with the Authority an opposition to an application for review within ten (10) days after the party is served with the application. The opposing party must serve a copy on the Regional Director and all other parties, and must also file a statement of service with the Authority.

(e) *Regional Director Decision and Order becomes the Authority's action.* A Decision and Order of a Regional Director becomes the action of the Authority when:

(1) No party files an application for review with the Authority within sixty (60) days after the date of the Regional Director's Decision and Order; or

(2) A party files a timely application for review with the Authority and the Authority does not undertake to grant review of the Regional Director's Decision and Order within sixty (60) days of the filing of the application; or

(3) The Authority denies an application for review of the Regional Director's Decision and Order.

(f) *Authority grant of review and stay.* The Authority 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 will stay any action ordered by the Regional Director unless specifically ordered by the Authority.

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

§ 2422.32 When does a Regional Director issue a certification or a revocation of certification?

(a) *Certifications.* The Regional Director issues an appropriate certification when:

(1) After an election, runoff, or rerun,

(i) No party files an objection or challenged ballots are not determinative, or

(ii) The Region decides and resolves objections and determinative challenged ballots; or

(2) The Regional Director issues a Decision and Order requiring a certification and the Decision and Order becomes the action of the Authority under §2422.31(e) or the Authority directs the issuance of a certification.

(b) *Revocations.* Without prejudice to any rights and obligations that may exist under the Statute, the Regional Director revokes a recognition or certification, as appropriate, and provides a written statement of reasons when:

(1) An incumbent exclusive representative files, during a representation proceeding, a disclaimer of any representational interest in the unit; or

(2) Due to a substantial change in the character and scope of the unit, the unit is no longer appropriate and an election is not warranted.

§ 2422.33 Relief under part 2423 of this chapter.

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 under part 2423 of this chapter: *But* related matters may be consolidated for hearing as noted in §2422.27(d) of this subpart.

§ 2422.34 What are the parties' rights and obligations when a representation proceeding is pending?

(a) *Existing recognitions, agreements, and obligations under the Statute.* When a representation proceeding is pending, parties must maintain existing recognitions, follow the terms and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the Statute.

(b) *Unit status of individual employees.* A party may take action based on its position regarding the bargaining unit status of individual employees, under 3 U.S.C. 431(d)(2), 5 U.S.C.

7103(a)(2), and 7112(b) and (c). But its actions may be challenged, reviewed, and remedied where appropriate.

PART 2423 – UNFAIR LABOR PRACTICE PROCEEDINGS

- 2. Section 2423.0 is revised to read as follows:

§ 2423.0 Applicability of this part.

This part applies to any unfair labor practice cases that are pending or filed with the FLRA on or after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION]**.

- 3. Subpart A is revised to read as follows:

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

Sec.

- 2423.1 Can a Regional Office help the parties resolve unfair labor practice disputes before a Regional Director decides whether to issue a complaint?
- 2423.2 What Alternative Dispute Resolution (ADR) services does the OGC provide?
- 2423.3 Who may file charges?
- 2423.4 What must you state in the charge and what supporting evidence and documents should you submit?
- 2423.5 [Reserved]
- 2423.6 What is the process for filing and serving copies of charges?
- 2423.7 [Reserved]
- 2423.8 How are charges investigated?
- 2423.9 How are charges amended?

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

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

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

2423.13-2423.19 [Reserved]

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

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

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

(b) *Resolving unfair labor practice disputes after filing a charge.* The General Counsel encourages the informal resolution of unfair labor practice allegations after a charge is filed and before the Regional Director makes a merit determination. A representative of the appropriate

Regional Office, as part of the investigation, may assist the parties in informally resolving their dispute.

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

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

- (1) Develop collaborative labor-management relationships;
- (2) Avoid unfair labor practice disputes; and
- (3) Informally resolve unfair labor practice disputes.

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

- (1) *Facilitation.* Assisting the parties in improving their labor-management relationship as governed by the Statute;
- (2) *Intervention.* Intervening when parties are experiencing or expect significant unfair labor practice disputes;
- (3) *Training.* Training labor organization officials and agency representatives on their rights and responsibilities under the Statute and how to avoid litigation over those rights and

responsibilities, and on using problem-solving and ADR skills, techniques, and strategies to resolve informally unfair labor practice disputes; and

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

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

§ 2423.3 Who may file charges?

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

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

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

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

(a) *What to file*. You, the Charging Party, may file a charge alleging a violation of 5 U.S.C. 7116 by providing the following information on a form designated by the General Counsel, or on a

substantially similar form, or electronically through the use of the eFiling system on the FLRA's Web site at www.flra.gov, or by facsimile transmission:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) *Submitting supporting evidence and documents and identifying potential witnesses.* When filing a charge, you must submit to the Regional Director any supporting evidence and documents, including, but not limited to, correspondence and memoranda, records, reports,

applicable collective bargaining agreement clauses, memoranda of understanding, minutes of meetings, applicable regulations, statements of position, and other documentary evidence. You also must identify potential witnesses with contact information (telephone number, email address, and facsimile number) and provide a brief synopsis of their expected testimony.

§ 2423.5 [Reserved]

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

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

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

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

Region. You assume responsibility for the Regional Director's receipt of a charge. Supporting evidence and documents must be submitted to the Regional Director in person, by commercial delivery, first class mail, certified mail, facsimile transmission, or through the FLRA's eFiling system.

(d) *Service of the charge.* You must serve a copy of the charge (without supporting evidence and documents) on the Charged Party. Where facsimile equipment is available, you may serve the charge by facsimile transmission, as paragraph (c) of this section discusses. Alternatively, you may serve the charge by electronic mail ("email"), but only if the Charged Party has agreed to be served by email. The Region routinely serves a copy of the charge on the Charged Party, but you remain responsible for serving the charge, consistent with the requirements in this paragraph.

§ 2423.7 [Reserved]

§ 2423.8 How are charges investigated?

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

(b) *Cooperation.* The purposes and policies of the Statute can best be achieved by the parties' full cooperation and their timely submission of all relevant information from all potential sources during the investigation. All persons must cooperate fully with the Regional Director in the investigation of charges. A failure to cooperate during the investigation of a charge may provide

grounds to dismiss a charge for failure to produce evidence supporting the charge. Cooperation includes any of the following actions, when deemed appropriate by the Regional Director:

- (1) Making union officials, employees, and agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation;
- (2) Producing documentary evidence pertinent to the matters under investigation;
- (3) Providing statements of position on the matters under investigation; and
- (4) Responding to an agent's communications during an investigation in a timely manner.

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

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

- (i) By delivering it to the witness in person;
- (ii) By registered or certified mail; or

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

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

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

(4) Upon the failure of any person to comply with a subpoena issued by the General Counsel, the General Counsel must determine whether to institute proceedings in the appropriate district court for the enforcement of the subpoena. Enforcement must not be sought if to do so would be inconsistent with law, including the Statute.

(d) *Confidentiality*. It is the General Counsel's policy to protect the identity of individuals who submit statements and information during the investigation, and to protect against the disclosure of documents obtained during the investigation, to ensure the General Counsel's ability to obtain

all relevant information. However, after a Regional Director issues a complaint and when necessary to prepare for a hearing, the Region may disclose the identification of witnesses, a synopsis of their expected testimony, and documents proposed to be offered into evidence at the hearing, as required by the prehearing disclosure requirements in §2423.23.

§ 2423.9 How are charges amended?

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

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

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

(1) Approve a request to withdraw a charge;

(2) Dismiss a charge;

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

(4) Issue a complaint; or

(5) Withdraw a complaint.

(b) *Request for appropriate temporary relief.* Parties may request the General Counsel to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d). The General Counsel may initiate and prosecute injunctive proceedings under 5 U.S.C. 7123(d) only upon

approval of the Authority. A determination by the General Counsel not to seek approval of the Authority to seek temporary relief is final and cannot be appealed to the Authority.

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

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

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

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

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

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

(d) *Extension of time.* The Charging Party may file a request, either in writing or by email to ogc.appeals@flra.gov, for an extension of time to file an appeal, which must be received by the General Counsel not later than five (5) days before the date the appeal is due. A Charging Party must serve a copy of the request for an extension of time on the Regional Director.

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

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

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

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

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

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

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

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

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

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

the approved informal settlement agreement, the Regional Director may institute further proceedings.

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

§§ 2423.13-2423.19 [Reserved]

PART 2429 --MISCELLANEOUS AND GENERAL REQUIREMENTS

- 4. The authority citation for part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

- 5. Section 2429.24 is amended by adding paragraphs (f)(12) through (f)(14) and revising paragraph (g) to read as follows:

§ 2429.24 Place and method of filing; acknowledgement.

* * * * *

(f) * * *

(12) Petitions under 5 CFR part 2422.

(13) Cross-petitions under 5 CFR part 2422.

(14) Charges under 5 CFR part 2423.

(g) As another alternative to the methods of filing described in paragraph (e) of this section, you may file the following documents by facsimile (“fax”), so long as fax equipment is available and your entire, individual filing does not exceed 10 pages in total length, with normal margins and font sizes. You may file only the following documents by fax under this paragraph (g):

(1) Motions;

(2) Information pertaining to prehearing disclosure, conferences, orders, or hearing dates, times, and locations;

(3) Information pertaining to subpoenas;

(4) Appeals of a dismissal of an unfair labor practice charge; and

(5) Other matters that are similar to those in paragraphs (g)(1) through (3) of this section.

Dated: June 20, 2012

Julia Akins Clark
General Counsel

[FR Doc. 2012-15462 Filed 06/22/2012 at 8:45 am; Publication Date: 06/25/2012]