FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2423

Unfair Labor Practice Proceedings

AGENCY: Office of the General Counsel, Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: The General Counsel of the Federal Labor Relations Authority (FLRA) revises the regulations regarding the prevention, resolution, and investigation of unfair labor practice (ULP) disputes (part 2423, subpart A). The purpose of the revisions is to facilitate dispute resolution and to simplify, clarify, and improve the processing of ULP charges. Implementation of the changes will enhance the purposes and policies of the Federal Service Labor-Management Relations Statute (Statute) by preventing ULP disputes, resolving disputes that arise, and fully investigating and taking determinative action in disputes that are not resolved. The revisions implement the FLRA's agency-wide collaboration and alternative dispute resolution initiative to assist labor and management parties in developing collaborative relationships, and to provide dispute resolution services in ULP, representation, negotiability, impasses, and arbitration cases pending before the Office of the General Counsel, the three Authority Members, and the Federal Service Impasses Panel. The regulations are applicable to any charge pending or filed after January 1, 1999.

EFFECTIVE DATE: January 1, 1999.

FOR FURTHER INFORMATION CONTACT: David L. Feder, Deputy General Counsel, at the address listed above or by telephone at (202) 482–6680, ext. 203.

SUPPLEMENTARY INFORMATION:

Background

On August 24, 1998, the Office of the General Counsel (OGC) of the FLRA published proposed modifications to the existing rules and regulations in subpart A of part 2423 of title 5 of the Code of Federal Regulations regarding the prevention of ULPs, as well as to the meaning of terms as used in this subchapter located at part 2421, and to related miscellaneous and general requirements located at part 2429 (63 FR 45013) (August 24, 1998). These revisions are part of the FLRA's initiative to facilitate dispute resolution and to simplify, clarify, and improve the processing of ULP charges. For the sake of clarity, with respect to the substance of the revisions proposed for parts 2421 and 2429, those revisions have been incorporated, where appropriate, in subpart A of part 2423. Further, the general provision regarding dates of applicability of part 2423, which was § 2423.1, is now found prior to subpart A as § 2423.0. The respective revisions are discussed below in the section-by-section analysis.

Concurrent with issuing the proposed rule, the General Counsel invited comment on the proposed rule in one of two ways: By convening a series of meetings held in each of the seven Regional Office cities as well as the OGC Headquarters in Washington DC, and by offering the public an opportunity to submit written comments. All comments, whether expressed orally at one of the meetings, or submitted in writing, have been considered prior to publishing the final rule, although all comments are not specifically addressed below.

Sectional Analyses

Sectional analyses of the revisions to Part 2423—Unfair Labor Practice Proceedings are as follows:

Part 2423—Unfair Labor Practice Proceedings

Section 2423.0

This newly-created section incorporates and amends § 2423.1 of the current regulations. Specifically, this section is amended to clarify that Subpart A of the regulations is applicable to any charge pending or filed after January 1, 1999. The provision regarding applicability of this part to any complaint filed on or after October 1, 1997 remains unchanged.

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

Section 2423.1

Numerous commenters responded favorably to the regulatory revision. One commenter stated that the revisions merely codify and emphasize the dispute resolution efforts that Regional Office agents routinely initiate.

Two commenters suggested retaining the 15-day delay before a Regional Office begins processing a charge because the parties may wish to resolve any ULP dispute without outside intervention or might prefer to use another third party neutral to provide such services. The final regulation deletes the 15-day delay requirement because the parties are always free to communicate with each other to arrange for any assistance, either through the efforts of Regional Office staff, or through other outside assistance, prior or subsequent to filing a charge. Regional Office representatives routinely assist parties in resolving their dispute as part of the investigation. Thus, there is no need to require a 15-day delay before beginning to process a ULP charge. However, to further accommodate the interest raised by these commenters, if an outside facilitator is assisting the parties in resolving the subject matter of a pending ULP charge, the parties may jointly request that the Regional Director defer the initiation of an investigation for a reasonable period of time.

One commenter suggested adding a provision which clarifies that the statutory time limits for filing a ULP charge are not tolled during the time that the parties are attempting to resolve the dispute. This suggestion has been incorporated in the final regulation because it is necessary that parties consider the statutory time limit, which is set forth at 5 U.S.C. 7118(a)(4), in determining whether to engage in dispute resolution before a ULP charge is filed. The provision is inserted as the last sentence of paragraph (a).

Another commenter suggested that there be a presumption in favor of providing the services upon request. The OGC's public Intervention Policy currently provides criteria and principles for Regional Offices to follow in determining whether to offer these services. This Policy will be incorporated into an Unfair Labor Practice Casehandling Manual (ULP Manual) that will be issued and made public in the spring of 1999.

A minor editorial modification has been made to paragraph (b) for clarity purposes.

Section 2423.2

There was almost unanimous agreement among the commenters that the provision of Alternative Dispute Resolution (ADR) Services promotes the purposes and policies underlying the Statute. In this regard, experience has shown that by providing these services to parties: Their labor-management relationships are improved and enhanced; ULP disputes are avoided; and, the parties are better able to resolve ULP disputes among themselves. A desired by-product of the provision of ADR services has been a reduction in the filing of ULP charges. Paragraph (a) has been modified to reflect that these ADR services, delivered by the OGC, are part of the FLRA-wide Collaboration and Alternative Dispute Resolution Program.

Several commenters suggested inserting a requirement to notify the national or parent organization when an ADR service is to be provided at a local

facility, particularly where a nationwide bargaining unit is involved. Parties engaged in ADR services delivered by the OGC are free to notify their national or parent organization. However, to accommodate the interest raised by these commenters, before undertaking to provide an ADR service, Regional Office staff may inquire whether notification of the parties' national or parent organization is desired.

Another commenter recommended that the ADR process be made mandatory upon the request of one of the parties. Experience has shown that the success and/or effectiveness of the provision of ADR services depends upon the parties voluntarily requesting or agreeing to partake in the process. Paragraph (b) is clarified to state that the parties may jointly request, or agree to, the provision of an ADR service.

Section 2423.3

No comments were received concerning the proposed rule. New paragraphs (b) and (c) have been added to incorporate the definitions for ''Charging Party'' and ''Charged Party'' that were initially proposed as definitions in proposed new §§ 2421.23 and 2421.24 of part 2421.

Section 2423.4

The majority of the comments concerning the proposed rule recommended retaining the requirement that the charge state the section(s) and paragraph(s) of the Statute alleged to have been violated. These commenters stated that preserving this requirement will help charged parties to better understand the basis of the charge. Based upon comments received and discussion at the meetings, the OGC has reconsidered the proposed rule and has decided to retain the requirement which is set forth in the final rule at paragraph (a)(5).

Several comments suggested that the charge form be amended to provide space for the charging party to indicate whether it has attempted to meet with the charged party to resolve the ULP dispute before the charge was filed and to ask whether the charging party is willing to attempt to resolve the charge with or without the assistance of the Regional Office. These matters are routinely considered by the Regional Office in their initial conversations with the parties in considering whether the provision of ADR services would be beneficial in any given case. Since Regional Office staff routinely make these inquiries, and the parties may communicate with each other prior to filing a charge, there is no need to amend the charge form.

Many commenters expressed concern regarding the requirement that supporting evidence and documents be submitted with the charge. These commenters stated, for various reasons, that it is sometimes difficult to gather all of the supporting evidence at the time a charge is filed. This requirement, which is set forth at paragraph (e) is, in relevant part, the same as the regulatory requirement that has always existed. The new regulation merely explains the requirement by listing the types of supporting evidence and documents that are routinely provided by charging parties. It is necessary to submit supporting evidence with the charge so that the agent to whom an investigation is assigned is able to fully understand the basis of the charge and to prepare to talk with the parties, which is the first step in the investigation process. This regulation does not preclude parties from submitting additional evidence and information during the course of the investigation, as it becomes available. A minor edit also has been made to this paragraph for clarity purposes.

The final regulation contains a new paragraph (c) concerning Statement of Service requirements which had been proposed as the second sentence of paragraph (b). Other minor editorial clarifications have been made to the final regulation.

Section 2423.5

One comment received suggested that once the Authority revises part 2424 of the regulations concerning negotiability proceedings, the General Counsel should make a corresponding revision concerning the availability of the ULP process to resolve certain duty to bargain issues. As the matter concerning related ULP and negotiability proceedings is being addressed by the Authority in its final regulations in part 2424, there is no reason to address the matter in subpart A of part 2423. The Regions will continue to follow § 2424.5 until the effective date of a new rule promulgated by the Authority. Moreover, the deletion of any provision addressing negotiability matters from subpart A of part 2423 has no impact on the availability of the ULP process to a charging party to resolve allegations that a charged party failed to fulfill a statutory bargaining obligation and committed a ULP.

Section 2423.6

Almost all of the comments on this section were favorable and pertained to the use of facsimile transmission to file a charge. Several commenters expressed concern regarding verification of receipt of a charge filed by facsimile transmission. This concern has been addressed by clarifying in paragraph (c) that a ''charging party assumes responsibility for receipt of a charge.''

Two commenters questioned the proposed imposition of a 5-page limitation on those charges filed by facsimile transmission. One commenter inquired about the basis for the proposed limitation and another was concerned about practical problems that arise upon the imposition of a page limitation. The final regulation has been changed to contain a 2-page limitation for those charges filed by facsimile. After reviewing the proposed regulation, the OGC has concluded that in order to expedite the inception of the investigatory process, charging parties must present their factual allegations supporting the charge in a succinct and organized manner. This may be accomplished in 2 pages. The final regulation also clarifies that a charging party may not file a charge by electronic mail and that supporting evidence and documents shall be filed in person, by commercial delivery, first-class mail, or certified mail. Recognizing that at times, supporting evidence and other documents may be voluminous, the regulation provides that all such documents may not be filed by facsimile transmission. Other minor editorial revisions have been made to this section to clarify that parties are aware that a charge may now be filed by facsimile transmission.

Section 2423.7

One commenter and others who favor the use of facilitation as an effective means to resolve disputes in some circumstances nevertheless expressed concern that there are other circumstances that may require enforcement of the Statute through issuance of a formal complaint. The OGC agrees that not every dispute is an appropriate candidate for the alternative case processing procedure. Regional staff will apply criteria and principles in determining whether to offer an alternative case processing procedure, upon joint request, to the parties. These criteria and principles currently are contained in the OGC's public Intervention Policy and will be incorporated into the public ULP Manual. The intent underlying the revision of the regulations is not to accord lesser priority to the General Counsel's essential prosecutorial role in seeking enforcement of the Statute through traditional means, but rather to recognize the use of an alternative case processing procedure and other ADR techniques as tools to assist parties in resolving their dispute.

Another commenter in favor of the alternative case processing procedure suggested that the process be mandatory upon the request of one of the parties. For the reasons discussed above concerning ADR services under § 2423.2, the OGC has determined that a strictly voluntary process works best. For those reasons, paragraph (a) has been amended to clearly state that the parties must ''voluntarily'' agree to use the alternative case processing procedure.

In addition, paragraph (b) has been clarified by substituting ''shall'' for ''may'' in the last sentence. This revision is necessary to contrast the difference between the alternative case processing procedure and a traditional investigation. In the former, the regional agent facilitates a problem-solving process which does not, in any way, involve taking evidence or the parties' positions on the merits. Several commenters suggested that attempts to resolve the dispute should also occur during the investigation. This concern is specifically addressed in § 2423.1(b) concerning resolving ULP disputes after filing a charge, where it is stated that a ''representative of the appropriate Regional Office, as part of the investigation, may assist the parties in informally resolving their dispute.'' Only one other minor editorial modification has been made to this paragraph.

The comments received regarding paragraph (c) concerned the last sentence. Several individuals recommended replacing ''may'' with ''shall'' to indicate a mandatory requirement that another representative of the Regional Office will conduct an investigation in the event an alternative case processing procedure is unsuccessful. Another commenter suggested that the person who presides over the alternative case processing procedure is better situated to investigate the case, if necessary. Yet another commenter suggested that the word ''shall'' be used with the caveat that the parties be allowed to waive the requirement that the same agent who facilitated the alternative case processing procedure shall not be the same person who investigates the merits of the charge. The last recommendation has been modified and adopted because it addresses the interests of the parties, as well as those of the Regional Director.

An additional concern was raised about the potential for disclosure of information discussed during the alternative case processing procedure should the dispute not be resolved and a ULP investigation be necessary. No evidence pertaining to the alleged ULP violation will be obtained during the alternative case processing procedure. Moreover, the agent involved in working with the parties in the alternative case processing procedure will not be involved in any manner in the investigation and decision-making process of the ULP charge, unless the parties and the Regional Director agree otherwise. These safeguards ensure that the alternative case processing procedure will have no impact on the investigation, if deemed necessary.

Section 2423.8

This section of the proposed regulations generated the most comments. Many commenters who favor the proposed regulation stated that it is useful to explain what specific actions are expected of a party during an investigation.

Many other commenters expressed concern that the proposed regulation would upset the careful balance that currently exists between Regional Directors and charged parties. That is, under the regulation, commenters stated that Regional Directors will have access to all of the evidence whereas charged parties do not have access to the statements relied upon by the Regional Director unless and until after that person testifies at trial.

Other concerns raised by commenters suggest that, among other things: (1) There is no statutory authority to order Federal supervisors and managers to give sworn testimony; (2) based on a vague charge, the Regional Director will insist that a charged party provide sworn statements; (3) the General Counsel should delete the reference to cooperation in the final regulations; (4) the Regional Director should be required to disclose exculpatory evidence to the charged party representative obtained during the course of an investigation; (5) the regulation provides the Regional Director with investigatory powers that exceed the current level of discovery afforded litigants before Administrative Law Judges under § 2423.23; (6) a detailed explanation for expanding the General Counsel's investigatory authority should be given because the current procedures have worked well for 20 years; and (7) that in exchange for charged party cooperation, the Regional Offices should disclose their case file prior to a decision on the merits. It further is suggested that unlike the private sector, where there is good reason to withhold the General Counsel's evidence due to the prospect of retaliation that may befall a charging party or neutral witness, retaliation should not be an issue in the Federal sector because a Federal employee has avenues of redress before several different agencies. The following discussion addresses these concerns.

The role of a Regional Office investigator, in part, is to obtain the best possible relevant evidence for a Regional Director to be able to reach a proper disposition in each case. This is an OGC quality standard applicable to all investigations which is part of the OGC's current, public Quality of Investigations Policy, and which will be incorporated into the public ULP Manual. To this end, a regional agent must identify the questions to ask witnesses, and ask the parties to provide relevant documents from all potential sources. So that a complete record is developed, it is necessary that both the charging party and the charged party voluntarily cooperate during the investigation. None of the commenters have cited any legal authority which purportedly allows any Federal agency that has been charged with violating a Federal law, to refuse to cooperate with another Federal agency that has been charged by the Congress to initiate an investigation to determine if the alleged violation of law has occurred, and if so, to prosecute, absent settlement, the agency charged with violating the law.

Current OGC practice protects a charged party's right to represent its agents. If a Regional Director deems it necessary to take the sworn/affirmed statement of a charged party witness, whether an agency or a union witness, the current OGC practice provides that all regional agents first contact the charged party representative to arrange to take the charged party witness' statement. No regional agent is authorized to directly initiate contact with any current agency manager/supervisor or union official who is an agent of a charged party agency or union unless authorized to do so by a charged party agency or union representative. Second, anytime it is necessary to take the statement of a charged party witness, the charged party has the right to have a representative present when the statement is given. These safeguards protect the interest of a charged party to represent its agents.

If a charging party fails to cooperate in an investigation, after being afforded ample opportunity to do so, the charge will be dismissed for lack of cooperation, absent withdrawal. If a neutral entity or a charged party fails to cooperate in an investigation, after being afforded ample opportunity to do so, the final regulation provides that an investigatory subpoena may be issued and enforced.

A new paragraph (c) has been added to the final regulation to incorporate a

provision concerning investigatory subpoenas. This section is modeled after, and consistent with, the subpoena provision set forth at § 2423.28 in subpart B of part 2423, which concerns post complaint and prehearing procedures. The authority for both of these sections is derived from section 7132 of the Statute. Under section 7132, the General Counsel, the Authority Members, and the Federal Service Impasses Panel have the same authority to issue and enforce subpoenas.

Because charged parties are usually cooperative to the extent deemed necessary by the Region during an investigation, it is anticipated that only in rare situations will it be necessary for an investigatory subpoena to be issued. During the meetings, many commenters suggested that since these subpoenas will be used only on rare occasions, they should only be issued upon the approval of the General Counsel. To accommodate this interest, the final regulation provides that an investigatory subpoena will be issued only by the General Counsel, upon the recommendation of a Regional Director. Moreover, prior to the issuance of an investigatory subpoena, a charged party will be afforded ample opportunity to cooperate in the investigation before a Regional Director recommends to the General Counsel to issue an investigatory subpoena ''for the attendance and testimony of witnesses and the production of documentary or other evidence.'' Further, the Regional Directors will consider, among other things, the following factors before recommending the issuance of an investigatory subpoena: (1) Whether the evidence submitted by charging party and any neutral witnesses establishes a potential violation (if the Region has sufficient evidence for the Regional Director to decide the merits of the charge, it would not be necessary to require the charged party to produce additional evidence); (2) whether the evidence sought is relevant and material and is neither privileged, unduly repetitious nor unreasonably cumulative; (3) whether the evidence is necessary to decide a factual issue which must be resolved to determine whether or not a violation of the Statute has occurred, and that evidence is not otherwise available; (4) whether the evidence sought is not within the control of the charging party; (5) whether the evidence can be produced without an undue burden and is specific, narrowly tailored, and reasonable; and (6) the likelihood of compliance, and failing that, the prospect for successful enforcement of the subpoena. Once the General Counsel has determined to issue a subpoena, the investigative agent will once again contact the charged party representative and give the charged party one final opportunity to voluntarily cooperate with the investigation. The charged party will be informed that absent voluntary compliance, a subpoena will issue, and absent compliance with the subpoena, enforcement will be sought in an appropriate United States district court.

Thus, it is expected that the use of an investigatory subpoena will occur only in rare cases. Parties should understand that its use will be infrequent and that it is not intended either as a substitute for, or to lessen, the charging party's burden of submitting evidence to support the underlying allegations of a charge.

Consistent with § 2423.28, under paragraph (c)(2), a provision for the revocation of an investigatory subpoena has been included, although not statutorily required under section 7132. Paragraph (c)(3) contains the applicable standards for ruling on a petition to revoke a subpoena. These standards are, with minor editorial modifications, the same as those set forth at paragraph (e)(1) of § 2423.28. In addition, the regulation provides that any petition to revoke, and any ruling on the petition to revoke, shall become part of the official record if there is a hearing under subpart C of this part.

Subsection (c)(4) addresses the situation where a charged party fails to comply with a subpoena issued by the General Counsel. In this situation, the General Counsel makes the determination whether to institute proceedings in the appropriate district court for the enforcement of the subpoena.

The General Counsel's confidentiality policy reflected in paragraph (d) (previously paragraph (c) in the proposed rule), which is the same as stated in the proposed rule, has existed for many years and remains sound. Maintaining the confidentiality of individuals who submit statements and information during the course of an investigation and to protect against the disclosure of documents obtained during an investigation is essential. However, it bears noting that under the section of the Authority's revised post-complaint regulations published on July 31, 1997 (62 FR 40911), which specifically concerns new prehearing disclosure requirements (§ 2423.23), the OGC attorney is required to disclose to charged parties, among other things, the witnesses and documents on which the OGC attorney will rely to prove the General Counsel's case, should a complaint issue and, absent settlement, the case goes to hearing.

Section 2423.9

No comments were received concerning this section.

Section 2423.10

No comments were received concerning this section. Minor editorial modifications have been made to paragraphs (a), (b) and (c). One additional edit to proposed paragraph (c) has been made in the next-to-last sentence. In this regard, to be consistent with the remainder of the paragraph, the word ''will'' has been changed to ''may.''

Section 2423.11

Commenters submitted favorable responses to the proposed revisions in this section. Two commenters suggested that the charging party be required to serve a copy of an appeal of a Regional Director determination not to issue complaint on the charged party. This interest has been addressed by modifying paragraph (c) which requires the OGC to serve notice on the charged party that an appeal has been filed.

Another commenter suggested adding the standards Regional Directors use to exercise prosecutorial discretion to this section. These standards are set forth in the OGC's public Prosecutorial Discretion Policy, which will be incorporated in the public ULP Manual.

Other minor editorial modifications have been made to this section. For example, paragraphs (a) and (b) have been clarified to state that the Regional Director acts on behalf of the General Counsel when determining not to issue a complaint. Thus, a dismissal letter issued by a Regional Director, on behalf of the General Counsel, constitutes the ''written statement of reasons for not issuing a complaint'' as required by section 7118(a) of the Statute. Further, an appeal of a Regional Director's dismissal decision will only be granted on one of the specific grounds in paragraph (e). The review, therefore, is similar to the Authority's review of Regional Directors' decisions and orders in representation cases, and is not a *de novo* review. Upon an appeal, the appeal letter states the grounds listed in paragraph (e) for granting or denying the appeal.

One other suggestion concerned clarification of paragraph (g) to state that the General Counsel's decision on reconsideration is final. This suggestion has been adopted. In addition, this paragraph has been changed to state that a motion for reconsideration shall be

filed within 10 days of the date on which the General Counsel's decision is postmarked. The provisions for filing an appeal and for filing a motion for reconsideration are governed by 5 CFR 2429.22.

Section 2423.12

The only change made to this section appears in paragraph (b) which now clarifies that the Regional Director acts on behalf of the General Counsel in approving a unilateral settlement agreement.

Regulatory Flexibility Act Certification

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

Unfunded Mandates Reform Act of 1995

This final 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 final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final 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 final rule contains 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 Part 2423

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

For the reasons discussed in the preamble, the General Counsel of the Federal Labor Relations Authority revises 5 CFR part 2423 as follows:

PART 2423—UNFAIR LABOR PRACTICE PROCEEDINGS

1. The authority citation for part 2423 continues to read as follows:

Authority: 5 U.S.C. 7134.

2. Section 2423.0 and subpart A of Part 2423 are revised to read as follows:

Sec.

§ 2423.0 Applicability of this part

This part is applicable to any charge of alleged unfair labor practices pending or filed with the Authority on or after January 1, 1999, and any complaint filed on or after October 1, 1997.

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

§ 2423.1 Resolution of unfair labor practice disputes prior to a Regional Director determination whether to issue a complaint.

(a) *Resolving unfair labor practice disputes prior to filing a charge.* The purposes and policies of the Federal Service Labor-Management Relations 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 prior to filing unfair labor practice charges. If requested, or agreed to, by both parties, a representative of the Regional Office, in appropriate circumstances, may participate in these meetings to assist the parties in identifying the issues and their interests and in resolving the dispute. Attempts to resolve unfair labor practice disputes prior to 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 subsequent to the filing of a charge and prior to a determination on the merits of the charge by a Regional Director. A representative of the appropriate Regional Office, as part of the investigation, may assist the parties in informally resolving their dispute.

§ 2423.2 Alternative Dispute Resolution (ADR) services.

(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 Federal Service Labor-Management Relations Statute and by providing services which assist labor organizations and agencies, on a voluntary basis: To develop collaborative labor-management relationships; to avoid unfair labor practice disputes; and to resolve any unfair labor practice disputes informally.

(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 Federal Service Labor-Management Relations 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 Federal Service Labor-Management Relations Statute and how to avoid litigation over those rights and responsibilities, and on utilizing 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 Contents of the charge; supporting evidence and documents.

(a) *What to file.* The Charging Party may file a charge alleging a violation of 5 U.S.C. 7116 by completing a form prescribed by the General Counsel, or on a substantially similar form, that contains the following information:

(1) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charging Party;

(2) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charged Party;

(3) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charging Party's point of contact;

(4) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charged Party's point of contact;

(5) A clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of the section(s) and paragraph(s) of the Federal Service Labor-Management Relations Statute alleged to have been violated, 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 the Special Counsel for consideration or action;

(iii) Involves a negotiability issue raised by the Charging Party in a petition pending before the Authority pursuant to 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) *Declaration of truth and statement of service.* A charge shall be in writing and signed, and shall 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.

(c) *Statement of service.* A charge shall also contain a statement that the Charging Party served the charge on the Charged Party, and shall list the name, title and location of the individual served, and the method of service.

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

(e) *Submitting supporting evidence and documents and identifying potential witnesses.* When filing a charge, the Charging Party shall 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. The Charging Party also shall identify potential witnesses and shall provide a brief synopsis of their expected testimony.

§ 2423.5 [Reserved]

§ 2423.6 Filing and service of copies.

(a) *Where to file.* A Charging Party shall 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) *Filing date.* A charge is deemed filed when it is received by a Regional Director.

(c) *Method of filing.* A Charging Party may file a charge with the Regional Director in person or by commercial delivery, first-class mail, or certified mail. Notwithstanding § 2429.24(e) of this subchapter, a Charging Party also may file a charge by facsimile transmission if the charge does not exceed 2 pages. If filing by facsimile transmission, the Charging Party is not required to file an original copy of the charge with the Region. A Charging Party assumes responsibility for receipt of a charge. Supporting evidence and documents shall be submitted to the Regional Director in person, by commercial delivery, first-class mail, or certified mail, not by facsimile transmission. Charges shall not be filed by electronic mail.

(d) *Service of the charge.* The Charging Party shall serve a copy of the charge (without supporting evidence and documents) on the Charged Party. Where facsimile equipment is available, the charge may be served by facsimile transmission in accordance with paragraph (c) of this section. The Region routinely serves a copy of the charge on the Charged Party, but the Charging Party remains responsible for serving the charge in accordance with this paragraph.

§ 2423.7 Alternative case processing procedure.

(a) *Alternative case processing procedure.* The Region may utilize an alternative case processing procedure to assist the parties in resolving their unfair labor practice dispute, if the parties voluntarily agree, by facilitating a problem-solving approach, rather than initially investigating the particular facts and determining the merits of the charge.

(b) *No evidence is taken.* The purpose of the alternative case processing procedure is to resolve the underlying unfair labor practice dispute without determining the merits of the charge. The role of the agent is to assist the parties in that endeavor by facilitating a solution rather than conducting an investigation. No testimonial or documentary evidence or positions on the merits of the charge shall be gathered during the alternative case processing procedure or entered into the case file.

(c) *Investigation is not waived.* If the parties are unable to resolve the dispute, the Region conducts an investigation on the merits of the charge. The agent who is involved in the alternative case processing procedure shall not be involved in any subsequent investigation on the merits of the charge, unless the parties and the Regional Director agree otherwise.

§ 2423.8 Investigation of charges.

(a) *Investigation.* The Regional Director, on behalf of the General

Counsel, conducts such investigation of the charge as the Regional Director deems necessary. During the course of the investigation, all parties involved are afforded an opportunity to present their evidence and views to the Regional Director.

(b) *Cooperation.* The purposes and policies of the Federal Service Labor-Management Relations Statute can best be achieved by the full cooperation of all parties involved and the timely submission of all potentially relevant information from all potential sources during the course of the investigation. All persons shall cooperate fully with the Regional Director in the investigation of charges. 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; and

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

(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 shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel or training within an agency or between an agency and the Office of Personnel Management.

(1) A subpoena shall 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 shall 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 shall, within 5 days after the date of service of the subpoena upon such person, petition in writing to revoke the subpoena. A copy of any petition to revoke a subpoena shall be served on the General Counsel.

(3) The General Counsel shall 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 shall state the procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, and any ruling on the petition to revoke, shall become 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 shall determine whether to institute proceedings in the appropriate district court for the enforcement of the subpoena. Enforcement shall not be sought if to do so would be inconsistent with law, including the Federal Service Labor-Management Relations 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, as a means of ensuring the General Counsel's continuing ability to obtain all relevant information. After issuance of a complaint and in preparation for a hearing, however, identification of witnesses, a synopsis of their expected testimony and documents proposed to be offered into evidence at the hearing may be disclosed as required by the prehearing disclosure requirements in § 2423.23.

§ 2423.9 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.

§ 2423.10 Action by the Regional Director.

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

(1) Approve a request to withdraw a charge;

(2) Refuse to issue a complaint;

(3) Approve a written settlement agreement in accordance with the provisions of § 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 such appropriate temporary relief is final and shall not 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. Temporary relief may be sought if it is just and proper and the record establishes probable cause that an unfair labor practice is being committed. Temporary relief shall 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 shall inform the district court which granted temporary relief pursuant to 5 U.S.C. 7123(d) whenever an Administrative Law Judge recommends dismissal of the complaint, in whole or in part.

§ 2423.11 Determination not to issue complaint; review of action by the Regional Director.

(a) *Opportunity to withdraw a charge.* If upon the completion of an investigation under § 2423.8, the Regional Director, on behalf of the General Counsel, determines that issuance of a complaint is not warranted because 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 may, on behalf of the General Counsel, 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 not to issue

a complaint by filing an appeal with the General Counsel within 25 days after service of the Regional Director's decision. A Charging Party shall serve a copy of the appeal on the Regional Director. The Office of the General Counsel shall serve notice on the Charged Party that an appeal has been filed.

(d) *Extension of time.* The Charging Party may file a request, in writing, for an extension of time to file an appeal, which shall be received by the General Counsel not later than 5 days before the date the appeal is due. A Charging Party shall 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 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 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 refusal to issue a complaint, 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 decision of the General Counsel 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 shall be filed within 10 days after the date on which the General Counsel's final decision is postmarked. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The decision of the General Counsel on a motion for reconsideration is final.

§ 2423.12 Settlement of unfair labor practice charges after a Regional Director determination to issue a complaint but prior to issuance of a complaint.

(a) *Bilateral informal settlement agreement.* Prior to issuing a complaint, the Regional Director may afford 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 an informal settlement agreement which the Regional Director concludes effectuates the policies of the Federal Service Labor-Management Relations Statute, the agreement may be between the Charged Party and the Regional Director. The Regional Director, on behalf of the General Counsel, shall 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 in accordance with § 2423.11(c) and (d). The General Counsel shall take action on the appeal as set forth in § 2423.11(e)–(g).

§§ 2423.13–2423.19 [Reserved]

Dated: November 24, 1998.

Joseph Swerdzewski,

General Counsel, Federal Labor Relations Authority.

[FR Doc. 98–31763 Filed 11–27–98; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 318

[Docket No. 97–005–2]

Fruit From Hawaii

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are allowing abiu, atemoya, longan, rambutan, and sapodilla to be moved interstate from Hawaii if the fruit undergoes irradiation treatment at an approved facility. Treatment may be conducted either in Hawaii or in non-fruit fly supporting areas of the mainland United States. The fruit will also have to meet certain additional requirements, including packaging requirements. We are also allowing durian to be moved interstate from Hawaii if the durian is inspected and found free of certain plant pests. In addition, we are allowing certain varieties of green bananas to move interstate from Hawaii under certain conditions intended to ensure the bananas' freedom from plant pests, including fruit flies. These actions will relieve restrictions on the movement of these fruits from Hawaii while continuing to provide protection against the spread of injurious plant pests from Hawaii to other parts of the United States.

EFFECTIVE DATE: November 30, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Peter M. Grosser, Senior Staff Officer, Phytosanitary Issues Management Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236, (301) 734–6799.

SUPPLEMENTARY INFORMATION:

Background

The Hawaiian Fruits and Vegetables regulations, contained in 7 CFR 318.13 through 318.13–17 (referred to below as the regulations), govern, among other things, the interstate movement of fruits and vegetables from Hawaii. The regulations are necessary to prevent the spread of dangerous plant diseases and pests that occur in Hawaii, including the Mediterranean fruit fly (*Ceratitis capitata*), the melon fly (*Bactrocera cucurbitae*), the Oriental fruit fly (*Bactrocera dorsalis*), and the Malaysian fruit fly (*Bactrocera latifrons*). These types of fruit flies are collectively referred to in this document as ''fruit flies.''

On June 10, 1998, we published in the **Federal Register** (63 FR 31675–31678, Docket No. 97–005–1) a proposal to allow abiu (*Pouteria caimito*), atemoya (*Annona squamosa* x *A. cherimola*), longan (*Dimocarpus longan*), rambutan (*Nephelium lappaceum*), and sapodilla (*Manilkara zapota*) to be moved interstate from Hawaii if, among other things, the fruits undergo irradiation treatment in accordance with § 318.13–4f of the regulations. We also proposed to allow durian (*Durio zibethinus*) to be moved interstate from Hawaii if it is inspected and found free of plant pests. In addition, we proposed to allow green bananas (*Musa* spp.) of the cultivars ''Williams,'' ''Valery,'' and dwarf