

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL LABOR RELATIONS AUTHORITY

### 5 CFR Parts 2423 and 2429

#### Unfair Labor Practice Proceedings: Miscellaneous and General Requirements

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Notice of proposed rulemaking; notice of meeting.

**SUMMARY:** The Federal Labor Relations Authority proposes to revise portions of its regulations regarding unfair labor practice (ULP) proceedings (Part 2423) and miscellaneous and general requirements (Part 2429). The purpose of the proposed revisions is to streamline the existing regulations, facilitate dispute resolution, clarify the matters to be adjudicated, provide more flexibility to the participants in the ULP process, and simplify the filing and service requirements. Implementation of the proposed changes will enhance the ULP process, raising the level of advocacy and facilitating adjudication of ULP claims.

**DATES:** Comments must be received on or before June 30, 1997. Meetings will be held at 10:00 a.m. on June 12, 1997, in Chicago, Illinois, and at 10:00 a.m. on June 18, 1997, in Washington, D.C.

**ADDRESSES:** Mail or deliver written comments to the Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW., Washington, DC 20424-0001. The June 12, 1997 meeting will be held at the Xerox Centre, 55 West Monroe Street, Room 1610, Chicago, Illinois 60603. The June 18, 1997 meeting will be held at the Federal Labor Relations Authority's Headquarters, 607 14th St. NW., Washington, DC 20424, 2nd Floor Agenda Room.

**FOR FURTHER INFORMATION CONTACT:** *Regulatory information or registration for the Washington meeting:* Edward Bachman, Office of Case Control, at the address listed above or by telephone # (202) 482-6540. *Registration for the*

*Chicago meeting:* Peter Sutton, Chicago Regional Office, Federal Labor Relations Authority, 55 West Monroe Street, Suite 1150, Chicago, Illinois 60603, telephone # (312) 886-3465 ext. 22.

**SUPPLEMENTARY INFORMATION:** The Federal Labor Relations Authority established a Task Force to study and evaluate the policies and procedures in effect concerning the processing of a ULP complaint from the issuance of the complaint through the transfer of the case to the Authority after the issuance of a decision and recommended order of an Administrative Law Judge— §§ 2423.12-2423.31 of the current regulations. To this end, the Task Force published a **Federal Register** notice (60 FR 11057) (Mar. 1, 1995) inviting parties to submit written recommendations on ways to improve the post complaint ULP process. In addition, the Task Force convened focus groups in order to solicit and consider customers' views prior to proposing these revisions. The Task Force's review of the ULP process also included review of certain of the miscellaneous and general requirements of Part 2429.

The proposed revisions, driven for the most part by the recommendations of the Task Force and focus group participants, represent the Federal Labor Relations Authority's intent to simplify, clarify, and improve the ULP regulations as well as related miscellaneous and general regulations in Part 2429. The proposed revisions attempt to eliminate perceptions of unfairness and potential conflict of interest problems, noted by the Task Force, by moving certain post-complaint, administrative responsibilities from the Regional Director to the Office of Administrative Law Judges. Another major aspect of this revision is the division of Part 2423 into four sequential subparts: Subpart A—Filing, Investigating, Resolving and Acting on Charges— §§ 2423.2-2423.19; Subpart B—Post Complaint, Prehearing Procedures— §§ 2423.20-2423.29; Subpart C—Hearing Procedures— §§ 2423.30-2423.39; and Subpart D—Post-transmission and Exceptions to Authority Procedures— §§ 2423.40-2423.49. Other than the minor revisions to §§ 2423.9 and 2423.11 included in these proposed revisions, Subpart A, which sets forth the precomplaint procedures, will be revised at a later date. With regard to Subpart A, the

Office of the General Counsel of the Federal Labor Relations Authority has already established internal policies to improve the precomplaint process. Recent examples include the Office of the General Counsel's policies concerning Settlement, Prosecutorial Discretion, Scope of Investigation, Intervention, and Quality in ULP Investigations. Proposed revisions to Subpart A are anticipated for 1998.

In connection with the proposed revisions to Parts 2423 and 2429, two focus group meetings will be conducted. The first focus group meeting will be held on June 12, 1997, at the Xerox Centre, 55 West Monroe Street, Room 1610, Chicago, Illinois 60603, at 10:00 a.m. Persons interested in attending this first meeting on this proposed rulemaking should write or call Peter Sutton, Chicago Regional Office, Federal Labor Relations Authority, 55 West Monroe Street, Suite 1150, Chicago, Illinois 60603, telephone # (312) 886-3465 ext. 22, to confirm attendance. The second focus group meeting will be held on June 18, 1997, at the Federal Labor Relations Authority's Headquarters, 607 14th St. N.W., Washington, D.C. 20424, 2nd Floor Agenda Room, at 10:00 a.m. Persons interested in attending this second meeting on this proposed rulemaking should write or call Edward Bachman, Office of Case Control, at the address and phone number listed in the preceding section to confirm attendance.

Copies of all written comments will be available for inspection and photocopying between 8 a.m. and 5 p.m., Monday through Friday, in Suite 415 at the Office of Case Control.

Sectional analyses of the proposed amendments and revisions to Part 2423— Unfair Labor Practice Proceedings and Part 2429— Miscellaneous and General Requirements are as follows:

#### **Part 2423—Unfair Labor Practice Proceedings**

##### *Section 2423.1*

No change is made to the text; however, the section is separated from all subparts to reflect its applicability to the entire part.

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

##### *Sections 2423.2-2423.8, 2423.10*

No changes are made at this time.

*Section 2423.9*

Subsection (a)(3) is amended to incorporate changes to the settlement regulations. Subsection (a)(5) of the current regulations, which permits the Regional Director to transfer stipulations of fact to the Authority pursuant to § 2429.1, is omitted to reflect the proposed deletion and reservation of § 2429.1 from the revised regulations. Subsection (a)(6) is redesignated as subsection (a)(5).

*Section 2423.11*

This section is revised in accord with the new sequential arrangement of the ULP regulations. The general settlement policy in current subsection (a) is deleted. Revised § 2423.11 consists of the precomplaint informal settlement language contained in current subsections (b) (1) and (2). Post complaint, prehearing settlement provisions, currently in subsections (c)–(d), are revised and removed to Subpart B, at proposed § 2423.25. Similarly, the provisions currently contained in subsection (e), regarding settlements after the opening of the hearing, are revised and moved to Subpart C, proposed § 2423.31.

**Sections 2423.12–2423.19**

These sections are reserved.

**Subpart B—Post Complaint, Prehearing Procedures***Section 2423.20*

Matters related to the complaint and answer, which appear in §§ 2423.12 and 2423.13 of the current regulations, are consolidated here. A new provision in subsection (a)(5), requiring that the complaint set out the relief sought, is intended to clarify both the purpose of the complaint and the remedy to be obtained. Subsection (a)(6) regarding scheduling the date, time, and place of the hearing reflects the current practice, wherein the Regional Director sets forth in the complaint the date, time, and place of the hearing established by the Administrative Law Judge. Subsection (b) retains the 20-day answer period established in § 2423.13 of the current regulations. Subsections (c) and (d) transfer to the Administrative Law Judge certain adjudicatory responsibilities related to the complaint and answer—including receiving the pleadings, ruling on motions and amendments, and scheduling conference and hearing dates. Under the current regulations, many of these items are the responsibility of the Regional Director. Subsection (d) clarifies the authority of the Chief Administrative Law Judge to

designate judges in an efficient and expeditious manner.

*Section 2423.21*

This section incorporates and amends the current motions procedure, set out in § 2423.22 of the current regulations. Specifically, subsection (a) sets forth the general requirements of motions procedure. Subsection (b) shifts the responsibility for ruling on prehearing motions from the Regional Director to the Administrative Law Judge. This accords with the changes in responsibility made in the previous section. In addition, the time deadline for filing prehearing motions is changed from 10 days to 15 days before the hearing. This is intended to sharpen the factual and legal issues earlier in the proceedings and, as a result, clarify the matters being adjudicated. Requiring earlier party involvement also is expected to facilitate the resolution of disputes. Subsections (c) and (d) explain the filing process for post-transmission and interlocutory motions.

*Section 2423.22*

This section amends the current § 2423.15 by establishing a standard of review for motions to intervene and clarifying the extent to which intervenors may participate in the proceedings. These changes are expected to improve the Administrative Law Judge's decision-making regarding intervention, improve the Authority's ability to review rulings on intervention, and, in time, establish a uniform body of law in this area. The changes generally accord with Merit Systems Protection Board practice (5 CFR 1201.34).

*Section 2423.23*

This new section is intended to facilitate the trial process by both broadening prehearing disclosure obligations and causing this exchange of information to occur at least 21 days in advance of the hearing. The 21-day period is necessary in order to permit the parties time to properly evaluate and meet deadlines involving other prehearing matters, such as motions, subpoenas, and the pre-hearing conference. For example, the exchange of witness lists and theories of the case 21 days prior to the hearing will assist parties in making informed determinations concerning subpoena requests, which requests must be made 15 days prior to the hearing, pursuant to § 2429.7. By contrast, under the current regulations (§ 2423.14(a)), witness lists and documents are exchanged immediately before or at the start of the hearing, and case theories are often not

revealed until the hearing begins. Involving the parties in the disclosure process well in advance of the hearing should clarify the issues to be litigated and enable knowledgeable settlement discussions.

*Section 2423.24*

This new section sets forth an expanded role for the Administrative Law Judge in the prehearing process, specifically providing for the Judge's regulation of the course and scheduling of prehearing matters. Under subsection (c), the Administrative Law Judge has the discretion to issue a prehearing order. Subsection (d) renders mandatory a prehearing conference to be scheduled by the Administrative Law Judge, unless the Administrative Law Judge determines that the conference is not necessary and no party has moved for a prehearing conference. At such conferences, which may occur telephonically or in person, the parties must be prepared to discuss, narrow, and resolve the issues set forth in the complaint and answer. The matters that may be discussed at the prehearing conference are specifically set forth in the regulation. As with § 2423.23, this subsection emphasizes the discussion and resolution of issues at an earlier stage in the proceedings. Subsection (e), which grants the Administrative Law Judge authority to impose sanctions as appropriate, such as the exclusion of evidence or submissions regarding sanctions, represents a substantial change from the current regulations. Such authority accords with the regulations of both the Merit Systems Protection Board (MSPB) (5 CFR 1201.43) and Equal Employment Opportunity Commission (EEOC) (29 CFR 1614.109(c)) as well as other administrative agencies. In addition to the new provisions set forth above, this section also incorporates the current § 2423.12(c), which addresses changing the date, time, or place of hearing, as well as some of the powers of the Administrative Law Judge set forth in the current § 2423.19.

*Section 2423.25*

The provisions regarding post complaint, prehearing settlements of an informal or formal nature, that appear in the current § 2423.11, are moved to this section and appear in subsections (a), (b), and (c). A significant change to the overall settlement process is the provision for the settlement judge program in subsection (d). This program provides the parties with an Administrative Law Judge or other appropriate official to conduct negotiations for informal settlements.

The settlement official shall not be the hearing judge unless otherwise agreed to by the parties. Further, all settlement proceedings under this program are confidential. This revision implements a successful trial program that has been tested by the Authority for the past two years and closely parallels the National Labor Relations Board's settlement judge program regulations (29 CFR 102.35).

#### Section 2423.26

This is a new section that supersedes the current stipulation provision in § 2429.1. As under current stipulation practice, the parties must agree that no material issue of fact exists. Subsection (a) of the revised regulation provides that the parties may jointly move to have a case considered on stipulation. Subsection (b) of the revised regulation clarifies that stipulations of fact may be submitted to the Administrative Law Judge rather than to the Authority. If the stipulation is deemed adequate, the Judge may adjudicate the case on the basis of the stipulation. This was not expressly authorized in the current regulations. Subsection (c) alters the current procedure, by providing that the Authority has discretion to grant such motions when the Authority concludes that a decision by the Administrative Law Judge would not assist in resolution of the case.

#### Section 2423.27

This section creates a specific regulation for the filing of a motion for summary judgment. The current regulations do not provide for the filing of such motions, although the Authority has held that motions for summary judgment

serve the same purpose and have the same requirements as motions for summary judgment filed with United States District Courts pursuant to Rule 56 of the Federal Rules of Civil Procedure.

*U.S. Equal Employment Opportunity Commission*, 51 FLRA 248, 252–53 (1995) (citing *Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky*, 33 FLRA 3, 4 (1988)), *rev'd on other grounds*, No. 88–1861 (D.C. Cir. Aug. 9, 1990) (unpublished). The requirements in this section are comparable to Rule 56 of the Federal Rules of Civil Procedure, as well as summary judgment procedures of other federal agencies. Time limits are established to prevent the filing of summary judgment motions from interfering with the overall post complaint process. Also, the requirement that the motion be filed 15 days prior to the hearing is consistent

with the regulations of the EEOC (29 CFR 1614.109(e)).

#### Sections 2423.28–2423.29

These sections are reserved.

### Subpart C—Hearing Procedures

#### Section 2423.30

This section regarding the general requirements for conduct of the hearing consolidates and condenses various provisions of current §§ 2423.14, 2423.16, 2423.21, 2423.23, and 2423.24. Unnecessary language is eliminated, particularly with regard to the relevant procedures established in the Administrative Procedure Act (APA), 5 U.S.C. 554–557. Subsections (a) and (b) incorporate provisions of the current regulations regarding an open hearing and conduct of the hearing in accordance with the APA. Subsection (d) restates the current objection regulation and eliminates antiquated and unclear language in the current § 2423.21(b), that

[a]utomatic exceptions will be allowed to all adverse rulings.

Under subsection (d), as under the current regulations (§ 2423.23) objections not made before an Administrative Law Judge shall be deemed waived. Subsections (c), (e), and (f) make no substantive changes from the current regulations.

#### Section 2423.31

The current §§ 2423.17 and 2423.19 are consolidated here. As with § 2423.30, this section eliminates superfluous language from the current regulations without substantively changing the powers and duties of the Administrative Law Judge at hearing. Rather than delineating specific powers and duties, the revised regulation provides general guidance regarding the Administrative Law Judge's authority at the hearing. As in § 2423.30, the powers of the Administrative Law Judge set forth in the APA at 5 U.S.C. 556, 557, are controlling. Subsection (c) is a new provision specifying that the Administrative Law Judge may, under certain circumstances, issue bench decisions. Settlement procedures to be utilized after the start of the hearing, currently found in § 2423.11, are set forth in subsection (d). This settlement subsection retains the current practice with minor editorial changes.

#### Section 2423.32

This section retains the requirement regarding the General Counsel's burden of proof obligation, currently set forth in § 2423.18. A new provision specifies that the Respondent has the burden of

establishing any specific defenses to charges in the complaint. This is in accord with established Authority precedent. *See, e.g., Internal Revenue Service (IRS), Washington, D.C. and IRS, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 670 (1995) (Respondent is required to identify specific anti-disclosure interests to support defense that denial of information request is appropriate); *U.S. Department of Transportation, Federal Aviation Administration, New York Tracon, Westbury, New York*, 50 FLRA 338, 345 (1995) (Respondent has burden of proving elements of Privacy Act defense); *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (Respondent has burden of rebutting prima facie case of discrimination by a preponderance of the evidence).

#### Section 2423.33

This section parallels the current § 2423.25.

#### Section 2423.34

This section, which addresses matters related to the Administrative Law Judge's decision, incorporates the requirements set out in the current § 2423.26.

#### Sections 2423.35–2423.39

These sections are reserved.

### Subpart D—Post-transmission and Exceptions to Authority Procedures

#### Section 2423.40

All matters related to exceptions, cross-exceptions, and oppositions, which currently appear in §§ 2423.26, 2423.27, and 2423.28, are consolidated here. In addition, this section requires that each of these filings include a supporting brief meeting certain format requirements. These changes are intended to assist the Authority in evaluating arguments, accelerate the issuance of decisions, and improve the quality and responsiveness of the Authority's decisions. This section also increases the time that respondents have for filing oppositions.

#### Section 2423.41

Consolidated into one section are matters related to action by the Authority and compliance with decisions and orders of the Authority. These matters appear in current §§ 2423.29 and 2423.30. As with the reorganizations made elsewhere in the proposed rules, this consolidation is intended to facilitate the parties' understanding of and compliance with the regulations. This section does not make substantive changes to current regulations and practice.

*Section 2423.42*

This section simplifies current § 2423.31, which sets forth the procedures to be followed when compliance with a backpay order is at issue. Current practice is continued with one exception—backpay specifications by the Regional Director are no longer a required part of the process. Instead, if the backpay amount is in question, the Regional Director may issue a notice of hearing setting forth the issues to be resolved without specification. The Respondent is responsible for filing an answer to the notice of hearing. Thereafter, the ULP hearing procedures are to be followed, with the Administrative Law Judge ultimately determining the amount of backpay.

*Sections 2423.43–2423.49*

These sections are reserved.

**Part 2429—Miscellaneous and General Requirements***Section 2429.1*

This section is removed and reserved. The proposed § 2423.26 covers this procedure.

*Section 2429.7*

The spelling of the term “subpoena” is changed throughout this section to reflect the more commonly used and dictionary spelling of the word. Other than this spelling change, subsections (a) and (b) remain the same. Subsection (c) amends the current process wherein requests for subpoenas in ULP proceedings are filed with the Regional Director and provides instead that such subpoena requests shall be filed with the Office of Administrative Law Judges. This revision is in keeping with the goal of eliminating any perception of unfairness or conflict of interest in ULP proceedings. Subsection (e) provides that petitions to revoke a subpoena in the ULP process shall be filed with the Administrative Law Judge. A change applying to all proceedings before the Authority is that requests for subpoenas shall be granted if the issuing authority finds that the testimony or documents are material and relevant to the matters under consideration. The intent of the regulations is to establish minimal requirements for the obtaining of a subpoena. In the ULP process, such subpoenas would be issued, on sufficient showing, by the Office of Administrative Law Judges. Subsection (d) of the revised regulation also establishes that in all proceedings, requests for subpoenas made less than 15 days prior to the opening of the hearing shall be granted if sufficient

explanation is provided as to why the request was not timely filed. Subsection (e) clarifies the requirements for revocation of subpoenas and describes the presiding official's role in explaining the procedural or other ground for the ruling. Subsection (e) also establishes a procedure for the revocation of a subpoena if, on further review, the subpoena does not appear appropriate. In the ULP process, subpoena revocation determinations would be made by an Administrative Law Judge. Subsection (f) changes the Federal Labor Relations Authority official responsible for court enforcement of subpoenas in all Authority proceedings from the General Counsel to the Solicitor of the Authority.

*Section 2429.11*

This section retains current language regarding interlocutory appeals and also creates a procedure for filing and a standard for reviewing interlocutory appeals in the ULP process. This new procedure is consistent with both MSPB regulations (5 CFR 1201.91–93) and interlocutory appeals procedure under federal practice (28 U.S.C. 1292(b)).

*Section 2429.12*

This section, addressing service on parties by Authority officials in all proceedings, simplifies and facilitates service requirements in several respects. Corresponding changes are made to other sections addressing service by the parties (§§ 2429.22 and 2429.27) and filing with the Authority (§§ 2429.21 and 2429.24). Subsection (a) permits service of process by first-class rather than certified mail, although service by certified mail is still permitted. The provision permitting service by telegraph is deleted. In another change, service by facsimile is permitted for certain procedural and other matters in order to facilitate and expedite service where appropriate. However, non-procedural determinations, such as recommended decisions of the Administrative Law Judge or final decisions of the Authority, which are likely to be lengthier and not as time-sensitive, will be served by mail. Subsection (c) is revised to address the changes in subsection (a); thus, proof of service is now accomplished by certificate of the individual serving the papers. Date of service, when service is by mail, remains the same. For facsimile service, the date of service is the date of facsimile transmission.

*Section 2429.13*

This section is amended to eliminate the current provision that necessary

transportation and per diem expenses for witnesses are paid by the employing activity or agency. The revision reflects current practice in ULP proceedings.

*Section 2429.14*

The substance of subsection (a) is unchanged, although the language is simplified and clarified. Subsection (b) is revised in accordance with the changes regarding payment of witness fees explained in § 2429.13 above. Thus, witness fees, transportation, and per diem expenses are paid by the party that calls the witness to testify.

*Section 2429.21*

No change is proposed to subsection (a) concerning computation of time; however, comments are solicited concerning how it could be clarified. Subsection (b) is changed to address the date of filing when facsimile transmission is utilized and to clarify that if the filing is by commercial delivery, it shall be considered filed on the date it is received by the Authority.

*Section 2429.22*

This section is revised to permit service by facsimile transmission.

*Section 2429.24*

Subsection (e) is amended to clarify that documents may be filed by commercial delivery. The subsection also permits limited filing by facsimile transmission and parallels the change in § 2429.12(a). A 5-page limitation is placed on such filings to discourage extensive filings by facsimile that would potentially overload facsimile equipment capabilities and shift voluminous document reproduction responsibility from the parties to the Authority office involved.

*Section 2429.25*

This section is amended to clarify that where filing by facsimile transmission is permitted, one legible copy shall be a sufficient submission. The requirement that the parties file an original plus four copies of documents not served by facsimile transmission is retained. The extra copies facilitate review by the various Authority officials with whom the documents are filed.

*Section 2429.27*

Subsection (b) is amended to permit service by facsimile. Subsection (d) now reflects the date of service when service is effected by facsimile.

**List of Subjects in 5 CFR Parts 2423 and 2429**

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

For the reasons set forth in the preamble, the Federal Labor Relations Authority proposes to revise 5 CFR Part 2423 and to amend 5 CFR Part 2429 as follows:

1. Part 2423 is revised to read as follows:

#### **PART 2423—UNFAIR LABOR PRACTICE PROCEEDINGS**

Sec.

2423.1 Applicability of this part.

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

2423.2 Informal proceedings.

2423.3 Who may file charges.

2423.4 Contents of the charge; supporting evidence and documents.

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

2423.6 Filing and service of copies.

2423.7 Investigation of charges.

2423.8 Amendment of charges.

2423.9 Action by the Regional Director.

2423.10 Determination not to issue complaint; review of action by the Regional Director.

2423.11 Settlement prior to issuance of a complaint.

2423.12–2423.19 [Reserved]

##### **Subpart B—Post Complaint, Prehearing Procedures**

2423.20 Issuance and contents of the complaint; answer to the complaint; amendments; role of Office of the Administrative Law Judges.

2423.21 Motions procedure.

2423.22 Intervenors.

2423.23 Prehearing disclosure.

2423.24 Powers and duties of the Administrative Law Judge during prehearing proceedings.

2423.25 Post Complaint, Prehearing Settlements.

2423.26 Stipulations of fact submissions.

2423.27 Summary judgment motions.

2423.28–2423.29 [Reserved]

##### **Subpart C—Hearing Procedures**

2423.30 General rules.

2423.31 Powers and duties of the Administrative Law Judge at the hearing.

2423.32 Burden of proof before the Administrative Law Judge.

2423.33 Posthearing briefs.

2423.34 Decision and record.

2423.35–2423.39 [Reserved]

##### **Subpart D—Post-transmission and Exceptions to Authority Procedures**

2423.40 Exceptions; oppositions and cross-exceptions; waiver.

2423.41 Action by the Authority; compliance with Authority decisions and orders.

2423.42 Backpay proceedings.

2423.43–2423.49 [Reserved]

**Authority:** 5 U.S.C. 7134.

##### **§ 2423.1 Applicability of this part.**

This part is applicable to any charge of alleged unfair labor practices filed

with the Authority on or after January 11, 1979.

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

##### **§ 2423.2 Informal proceedings.**

(a) The purposes and policies of the Federal Service Labor-Management Relations Statute can best be achieved by the cooperative efforts of all persons covered by the program. To this end, it shall be the policy of the Authority and the General Counsel to encourage all persons alleging unfair labor practices and persons against whom such allegations are made to meet and, in good faith, attempt to resolve such matters prior to the filing of unfair labor practice charges with the Authority.

(b) In furtherance of the policy referred to in paragraph (a) of this section, and noting the six (6) month period of limitation set forth in 5 U.S.C. 7118(a)(4), it shall be the policy of the Authority and the General Counsel to encourage the informal resolution of unfair labor practice allegations subsequent to the filing of a charge and prior to the issuance of a complaint by the Regional Director.

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

##### **§ 2423.3 Who may file charges.**

An activity, agency or labor organization may be charged by any person with having engaged in or engaging in any unfair labor practice prohibited under 5 U.S.C. 7116.

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

(a) A charge alleging a violation of 5 U.S.C. 7116 shall be submitted on forms prescribed by the Authority and shall contain the following:

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

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

(3) A clear and concise statement of the facts constituting the alleged unfair labor practice, a statement of the section(s) and subsection(s) of chapter 71 of title 5 of the United States Code

alleged to have been violated, and the date and place of occurrence of the particular acts; and

(4) A statement of any other procedure invoked involving the subject matter of the charge and the results, if any, including whether the subject matter raised in the charge:

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

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

(iii) Involves a negotiability issue raised by the charging party in a petition pending before the Authority pursuant to Part 2424 of this subchapter.

(b) Such charge shall be in writing and signed and shall contain a declaration by the person signing the charge, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of that person's knowledge and belief.

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

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

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

changes in conditions of employment may only be filed under Part 2424 of this subchapter.

**§ 2423.6 Filing and service of copies.**

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

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

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

**§ 2423.7 Investigation of charges.**

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

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

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

(d) 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 voluntary submission of all potentially relevant information from all potential sources during the course of the investigation. To this end, it shall be the policy of the Authority and the General Counsel to protect the identity of individuals and the

substance of the statements and information they submit or which is obtained during the investigation as a means of assuring the Authority's and the General Counsel's continuing ability to obtain all relevant information.

**§ 2423.8 Amendment of charges.**

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

**§ 2423.9 Action by the Regional Director.**

(a) The Regional Director shall take action which may consist of the following, 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 Part 2423;
- (4) Issue a complaint; or
- (5) Withdraw a complaint.

(b) 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 will 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 for such temporary relief is final and may not be appealed to the Authority.

(c) Upon a determination to issue a complaint, whenever it is deemed advisable by the Authority to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d), the Regional Attorney or other designated agent of the Authority to whom the matter has been referred will 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. Such temporary relief will not be sought unless the record establishes probable cause that an unfair labor practice is being committed, or if such temporary relief will interfere with the ability of the agency to carry out its essential functions.

(d) Whenever temporary relief has been obtained pursuant to 5 U.S.C. 7123(d) and thereafter the Administrative Law Judge hearing the complaint, upon which the determination to seek such temporary relief was predicated, recommends dismissal of such complaint, in whole or in part, the Regional Attorney or other designated agent of the Authority

handling the case for the Authority shall inform the district court which granted the temporary relief of the possible change in circumstances arising out of the decision of the Administrative Law Judge.

**§ 2423.10 Determination not to issue complaint; review of action by the Regional Director.**

(a) 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, and in the absence of such withdrawal within a reasonable time, decline to issue a complaint.

(b) If the Regional Director determines not to issue a complaint on a charge which is not withdrawn, the Regional Director shall provide the parties with a written statement of the reasons for not issuing a complaint.

(c) The charging party may obtain a 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. The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based. A copy of the appeal shall also be filed with the Regional Director. In addition, the charging party should notify all other parties of the fact that an appeal has been taken, but any failure to give such notice shall not affect the validity of the appeal.

(d) A request for extension of time to file an appeal shall be in writing and received by the General Counsel not later than 5 days before the date the appeal is due. The charging party should notify the Regional Director and all other parties that it has requested an extension of time in which to file an appeal, but any failure to give such notice shall not affect the validity of its request for an extension of time to file an appeal.

(e) The General Counsel may sustain the Regional Director's refusal to issue or re-issue a complaint, stating the grounds of affirmance, or may direct the Regional Director to take further action. The General Counsel's decision shall be served on all the parties. The decision of the General Counsel shall be final.

**§ 2423.11 Settlement prior to issuance of a complaint.**

(a) Prior to the issuance of any complaint or the taking of other formal action, the Regional Director will afford the Charging Party and the Respondent

a reasonable period of time in which to enter into an informal settlement agreement to be approved by the Regional Director. Upon approval by the Regional Director and compliance with the terms of the informal settlement agreement, no further action shall be taken in the case. If the Respondent fails to perform its obligations under the informal settlement agreement, the Regional Director may determine to institute further proceedings.

(b) In the event that the Charging Party fails or refuses to become a party to an informal settlement agreement offered by the Respondent, if the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the Regional Director shall enter into the agreement with the Respondent and shall decline to issue a complaint. The Charging Party may obtain a review of the Regional Director's action by filing an appeal with the General Counsel in accordance with § 2423.10(c). The General Counsel shall take action on such appeal as set forth in § 2423.10(e).

#### §§ 2423.12–2423.19 [Reserved]

#### Subpart B—Post Complaint, Prehearing Procedures

##### § 2423.20 Issuance and contents of the complaint; answer to the complaint; amendments; role of Office of Administrative Law Judges.

(a) *Complaint.* Whenever formal proceedings are deemed necessary, the Regional Director shall file and serve, in accordance with § 2429.12 of this Subchapter, a complaint with the Office of Administrative Law Judges. The decision to issue a complaint shall not be subject to review. Any complaint may be withdrawn by the Regional Director prior to the hearing. The complaint shall set forth:

- (1) Notice of the charge;
- (2) The basis for jurisdiction;
- (3) The facts alleged to constitute an unfair labor practice;
- (4) The particular sections of 5 U.S.C., chapter 71 and the rules and regulations involved;
- (5) The relief sought;
- (6) Notice of the date, time, and place that a hearing will take place before an Administrative Law Judge; and
- (7) A brief statement explaining the nature of the hearing.

(b) *Answer.* Within 20 days after the date of service of the complaint, the Respondent shall file and serve, in accordance with Part 2429 of this Subchapter, an answer with the Office of Administrative Law Judges. The answer shall admit, deny, or explain

each allegation of the complaint. If the Respondent has no knowledge of an allegation or insufficient information as to its truthfulness, the answer shall so state. Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission. Motions to extend the filing deadline shall be filed in accordance with § 2423.21.

(c) *Amendments.* The Regional Director may amend the complaint at any time before the answer is filed. The Respondent then has 20 days from the date of service of the amended complaint to file an answer with the Office of Administrative Law Judges. The answer may be amended by the Respondent within 20 days after the answer is filed. Thereafter, any requests to amend the complaint or answer must be made by motion to the Office of Administrative Law Judges.

(d) *Office of Administrative Law Judges.* Pleadings, motions, conferences, hearings, and other matters throughout as specified in Subparts B, C, and D shall be administered by the Office of Administrative Law Judges. The Chief Administrative Law Judge, or any Administrative Law Judge designated by the Chief Administrative Law Judge, shall administer any matters properly submitted to the Office of Administrative Law Judges. Throughout subparts B, C, and D of this part, "Administrative Law Judge" refers to the Chief Administrative Law Judge or his or her designee.

##### § 2423.21 Motions procedure.

(a) *General requirements.* All motions, except those made during a prehearing conference or hearing, shall be in writing. Motions for an extension of time, postponement of a hearing, or any other procedural ruling shall include a statement of the position of the other parties on the motion. All written motions and responses shall satisfy the filing and service requirements of part 2429 of this subchapter.

(b) *Motions made to the Administrative Law Judge.* Prehearing motions and motions made at the hearing shall be filed with the Administrative Law Judge. Unless otherwise specified in Subparts B or C of this part, or otherwise directed or approved by the Administrative Law Judge, prehearing motions shall be filed at least 15 days prior to the hearing, and responses to both prehearing motions and motions made at the hearing shall be filed within 5 days after the date of service of the motion. Posthearing motions shall be filed within 15 days after the date the hearing closes, and responses shall be filed within 5 days

after the date of service of the motion. Motions to correct the transcript shall be filed with the Administrative Law Judge.

(c) *Post-transmission motions.* After the case has been transmitted to the Authority, motions shall be filed with the Authority.

(d) *Interlocutory appeals.* Motions for an interlocutory appeal of any ruling and responses shall be filed in accordance with this section and § 2429.11 of this subchapter.

##### § 2423.22 Intervenors.

Motions for permission to intervene and responses shall be filed in accordance with § 2423.21. Such motions shall be granted upon a showing that the outcome of the proceeding is likely to directly affect the movant's rights or duties. Intervenors may participate only: on the issues determined by the Administrative Law Judge to affect them; and to the extent permitted by the Judge. Denial of such motions may be appealed pursuant to § 2423.21(d).

##### § 2423.23 Prehearing disclosure.

Unless otherwise directed or approved by the Judge, the parties shall exchange the following items at least 21 days prior to the hearing:

(a) Proposed witness lists, including a brief synopsis of the expected testimony of each witness;

(b) Copies of documents, with an index, to be offered into evidence; and

(c) A brief statement of the theory of the case, including any and all defenses to the charges, and citations to any precedent relied upon.

##### § 2423.24 Powers and duties of the Administrative Law Judge during prehearing proceedings.

(a) *Prehearing procedures.* The Administrative Law Judge shall regulate the course and scheduling of prehearing matters, including prehearing orders, conferences, disclosure, motions, and subpoena requests.

(b) *Changing date, time, or place of hearing.* After issuance of the complaint or any prehearing order, the Administrative Law Judge may, upon his or her own motion or proper cause shown by any party through the motions procedure in § 2423.21, change the date, time, or place of the hearing.

(c) *Prehearing order.* (1) The Administrative Law Judge may issue a prehearing order confirming or changing:

(i) The date, time, or place of the hearing;

(ii) The schedule for prehearing disclosure of witness lists and

documents intended to be offered into evidence at the hearing;

(iii) The date for submission of procedural and substantive motions;

(iv) The date, time, and place of the prehearing conference; and

(v) Any other matter pertaining to prehearing or hearing procedures.

(2) The prehearing order shall be served in accordance with § 2429.12 of this Subchapter.

(d) *Prehearing conferences.* The Administrative Law Judge shall conduct one or more prehearing conferences, either by telephone or in person, at least 7 days prior to the hearing date, unless the Administrative Law Judge determines that a prehearing conference would serve no purpose and no party has moved for a prehearing conference in accordance with § 2423.21. If a prehearing conference is held, all parties must participate and be prepared to discuss, narrow, and resolve the issues set forth in the complaint and answer. The Administrative Law Judge may either prepare and file for the record a written summary of actions taken at the conference or direct a party to do so. Summaries of the conference shall be served on all parties in accordance with § 2429.12 of this Subchapter. The following matters may also be considered at the prehearing conference:

(1) Settlement of the case, either by the Judge conducting the prehearing conference or pursuant to § 2423.25;

(2) Admissions of fact, disclosure of contents and authenticity of documents, and stipulations of fact;

(3) Objections to the introduction of evidence at the hearing, including oral or written testimony, documents, papers, exhibits, or other submissions proposed by a party;

(4) Subpoena requests;

(5) Any matters subject to official notice;

(6) Outstanding motions; or

(7) Any other matter that may expedite the hearing or aid in the disposition of the case.

(e) *Sanctions.* The Administrative Law Judge may impose sanctions upon the parties as necessary and appropriate under the circumstances. Such authority includes, but is not limited to, the power to:

(1) Prohibit a party who fails to comply with any requirement of Subpart B or C of this part from, as appropriate, introducing evidence, calling witnesses, or raising objections to the introduction of evidence or testimony of witnesses at the hearing.

(2) Refuse to consider any submission that is not filed in compliance with Subparts B or C of this part.

#### § 2423.25 Post Complaint, Prehearing Settlements.

(a) *Informal and formal settlements.* Post complaint settlements may be either informal or formal.

(1) Informal settlement agreements provide for withdrawal of the complaint by the Regional Director and are not subject to approval by or an order of the Authority. If the Respondent fails to perform its obligations under the informal settlement agreement, the Regional Director may re-institute formal proceedings consistent with this Subpart.

(2) Formal settlement agreements are subject to approval by the Authority, and include the parties' agreement to waive their right to a hearing and acknowledgment that the Authority may issue an order requiring the Respondent to take action appropriate to the terms of the settlement. The formal settlement agreement shall also contain the Respondent's consent to the Authority's application for the entry of a decree by an appropriate federal court enforcing the Authority's order.

(b) *Informal settlement procedure.* If the Charging Party and the Respondent enter into an informal settlement agreement that is accepted by the Regional Director, the Regional Director shall withdraw the complaint and approve the informal settlement agreement. If the Charging Party fails or refuses to become a party to an informal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the Regional Director shall enter into the agreement with the Respondent and shall withdraw the complaint. The Charging Party then may obtain a review of the Regional Director's action by filing an appeal with the General Counsel as provided in subpart A of this part.

(c) *Formal settlement procedure.* If the Charging Party and the Respondent enter into a formal settlement agreement that is accepted by the Regional Director, the Regional Director shall withdraw the complaint upon approval of the formal settlement agreement by the Authority. If the Charging Party fails or refuses to become a party to a formal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the agreement shall be between the Respondent and the Regional Director. The formal settlement agreement together with the Charging Party's objections, if any, shall be

submitted to the Authority for approval. The Authority may approve a formal settlement agreement upon a sufficient showing that it will effectuate the policies of the Federal Service Labor-Management Relations Statute.

(d) *Settlement judge program.* The Administrative Law Judge, on his or her own motion, or upon the request of any party, may assign a judge or other appropriate official, who shall be other than the hearing judge unless otherwise mutually agreed to by the parties, to conduct negotiations for informal settlements.

(1) The settlement official shall convene and preside over settlement conferences by telephone or in person.

(2) The settlement official may require that the representative for each party be present at settlement conferences and that the parties or agents with full settlement authority be present or available by telephone.

(3) All discussions between the parties and the settlement official shall be confidential. The settlement official shall not discuss any aspect of the case with the hearing judge, and no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement official shall be admissible in any proceeding before the Administrative Law Judge or Authority, except by stipulation of the parties.

#### § 2423.26 Stipulations of fact submissions.

(a) *General.* In any unfair labor practice case under this Subchapter, upon agreement of all parties that no material issue of fact exists, the parties may jointly submit a motion to the Administrative Law Judge or Authority requesting consideration of the matter based upon stipulations of fact.

(b) *Stipulations to the Administrative Law Judge.* Where the stipulation adequately addresses the appropriate material facts, the Administrative Law Judge may grant the motion and decide the case through stipulation.

(c) *Stipulations to the Authority.* Where the stipulation adequately addresses the appropriate material facts and a decision by the Administrative Law Judge would not assist in the resolution of the case, the Authority may grant the motion and decide the case through stipulation.

#### § 2423.27 Summary judgment motions.

(a) Any party may move, no later than 15 days prior to the scheduled hearing, for a summary judgment in its favor upon any of the issues pleaded. The motion shall demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a

judgment as a matter of law. Such motions shall be supported by documents, affidavits, applicable precedent, or other appropriate materials.

(b) Responses must be filed within 10 days after the date of service of the motion. Responses may not rest upon mere allegations or denials but must show, by documents, affidavits, applicable precedent, or other appropriate materials, that there is a genuine issue to be determined at the hearing.

(c) If all issues are decided by summary judgment, no hearing will be held and the Administrative Law Judge shall prepare a decision in accordance with § 2423.34. If summary judgment is denied, or if partial summary judgment is granted, the Administrative Law Judge shall issue an opinion and order, subject to interlocutory appeal as provided in § 2429.11 of this subchapter, and the hearing shall proceed as necessary.

#### §§ 2423.28–2423.29 [Reserved]

### Subpart C—Hearing Procedures

#### § 2423.30 General rules.

(a) *Open hearing.* The hearing shall be open to the public unless otherwise ordered by the Administrative Law Judge.

(b) *Administrative Procedure Act.* The hearing shall, to the extent practicable, be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 554–557.

(c) *Rights of parties.* A party shall have the right to appear at any hearing in person, by counsel, or by other representative; to examine and cross-examine witnesses; to introduce into the record documentary or other relevant evidence; and to submit rebuttal evidence, except that the participation of any party shall be limited to the extent prescribed by the Administrative Law Judge.

(d) *Objections.* Objections are oral or written complaints concerning the conduct of a hearing. Any objection not raised to the Administrative Law Judge shall be deemed waived.

(e) *Oral argument.* Any party shall be entitled, upon request, to a reasonable period prior to the close of the hearing for oral argument, which shall be included in the official transcript of the hearing.

(f) *Official transcript.* An official reporter shall make the only official transcript of such proceedings. Copies of the transcript may be examined in the appropriate Regional Office during normal working hours. Parties desiring

a copy of the transcript shall make arrangements for a copy with the official hearing reporter.

#### § 2423.31 Powers and duties of the Administrative Law Judge at the hearing.

(a) *Conduct of hearing.* The Administrative Law Judge shall conduct the hearing in a fair, impartial, and judicial manner, taking action as needed to avoid unnecessary delay and maintain order during the proceedings. The Administrative Law Judge may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions and taking official notice of material facts when appropriate. No provision of these regulations shall be construed to limit the powers of the Administrative Law Judge provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.

(b) *Evidence.* The Administrative Law Judge shall receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the hearing. The Administrative Law Judge may exclude any evidence which is immaterial, irrelevant, unduly repetitious, or customarily privileged. Rules of evidence shall not be strictly followed.

(c) *Bench decisions.* The Administrative Law Judge may, upon mutual agreement of and motion by the parties, issue a decision orally at the close of the hearing when the nature of the case and the public interest warrant. If the motion is granted, the parties waive their right to file posthearing briefs and exceptions to the Authority. If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties in accordance with § 2429.12 of this subchapter. Irrespective of the date such copy is served, the issuance date of the decision shall be the date the certified record, as corrected, and any Order, is served.

(d) *Settlements after the opening of the hearing.* As set forth in § 2423.25(a), settlements may be either informal or formal.

(1) *Informal settlement procedure: Judge's approval of withdrawal.* If the Charging Party and the Respondent enter into an informal settlement agreement that is accepted by the Regional Director, the Regional Director may request the Administrative Law Judge for permission to withdraw the complaint and, having been granted such permission, shall withdraw the complaint and approve the informal settlement between the Charging Party and Respondent. If the Charging Party fails or refuses to become a party to an

informal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the Regional Director shall enter into the agreement with the Respondent and shall, if granted permission by the Administrative Law Judge, withdraw the complaint. The Charging Party then may obtain a review of the Regional Director's decision as provided in subpart A of this part.

(2) *Formal settlement procedure: Judge's approval of settlement.* If the Charging Party and the Respondent enter into a formal settlement agreement that is accepted by the Regional Director, the Regional Director may request the Administrative Law Judge to approve such formal settlement agreement, and upon such approval, to transmit the agreement to the Authority for approval. If the Charging Party fails or refuses to become a party to a formal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the agreement shall be between the Respondent and the Regional Director. After the Charging Party is given an opportunity to state on the record or in writing the reasons for opposing the formal settlement, the Regional Director may request the Administrative Law Judge to approve such formal settlement agreement, and upon such approval, to transmit the agreement to the Authority for approval.

#### § 2423.32 Burden of proof before the Administrative Law Judge.

The General Counsel shall present the evidence in support of the complaint and have the burden of proving the allegations of the complaint by a preponderance of the evidence. The Respondent shall have the burden of establishing any specific defenses that it raises to the charges in the complaint.

#### § 2423.33 Posthearing briefs.

Posthearing briefs may be filed with the Administrative Law Judge within a time period set by the Judge, not to exceed 30 days from the close of the hearing, unless otherwise directed by the judge, and shall satisfy the filing and service requirements of part 2429 of this subchapter. Reply briefs shall not be filed absent permission of the Judge. Motions to extend the filing deadline or for permission to file a reply brief shall be filed in accordance with § 2423.21.

**§ 2423.34 Decision and record.**

(a) Except when bench decisions are issued pursuant to § 2423.31(c), the Administrative Law Judge shall prepare a written decision expeditiously in every case. All written decisions shall be served in accordance with § 2429.12 of this subchapter. The decision shall set forth:

- (1) A statement of the issues;
- (2) Relevant findings of fact;
- (3) Conclusions of law and reasons therefor;
- (4) Credibility determinations as necessary; and
- (5) A recommended disposition or order.

(b) The Judge shall transmit the decision and record to the Authority. The record shall include the charge, complaint, service sheet, answer, motions, rulings, orders, stipulations, objections, depositions, interrogatories, exhibits, documentary evidence, official transcript of the hearing, briefs, and any other filings or submissions made by the parties.

**§§ 2423.35–2423.39 [Reserved]****Subpart D—Post-transmission and Exceptions to Authority Procedures****§ 2423.40 Exceptions; oppositions and cross-exceptions; waiver.**

(a) *Exceptions.* Exceptions may be filed with the Authority within 25 days after the date of service of the Judge's decision. Exceptions and supporting briefs shall satisfy the filing and service requirements of part 2429 of this subchapter.

(1) Exceptions shall state: the specific findings, conclusions, determinations, rulings, or recommendations being challenged; the grounds relied upon; and the relief sought.

(2) Exceptions shall include a supporting brief. The brief shall set forth in this order: all relevant facts; the issues to be addressed; and a separate argument for each issue. Statements of fact shall include specific citations to the record, and arguments shall be supported by specific citations to legal authority. Attachments to briefs shall be separately paginated and indexed as necessary. Briefs containing 20 or more pages shall include a table of contents and a table of legal authorities cited.

(b) *Oppositions and cross-exceptions.* Unless otherwise directed or approved by the Authority, oppositions to exceptions and/or cross-exceptions may be filed with the Authority within 20 days after the date of service of the exceptions. Oppositions shall state the specific exceptions being opposed. Oppositions and cross-exceptions shall

be subject to the same requirements as exceptions set out in paragraph (a) of this section.

(c) *Waiver.* Any exception not specifically urged shall be deemed to have been waived.

**§ 2423.41 Action by the Authority; compliance with Authority decisions and orders.**

(a) In the absence of the filing of exceptions within the time limits established in § 2423.40, the findings, conclusions, and recommendations in the decision of the Administrative Law Judge shall, without precedential significance, become the findings, conclusions, decision and order of the Authority, and all objections and exceptions to the rulings and decision of the Administrative Law Judge shall be deemed waived for all purposes. Failure to comply with any filing requirement established in § 2423.40 may result in the information furnished being disregarded.

(b) Whenever exceptions are filed in accordance with § 2423.40, the Authority shall issue a decision affirming or reversing, in whole or in part, the decision of the Administrative Law Judge or disposing of the matter as is otherwise deemed appropriate.

(c) Upon finding a violation, the Authority shall, in accordance with 5 U.S.C. 7118(a)(7), issue an order directing the violator, as appropriate, to cease and desist from any unfair labor practice, or to take any other action to effectuate the purposes of the Federal Service Labor-Management Relations Statute.

(d) Upon finding no violation, the Authority shall dismiss the complaint.

(e) After the Authority issues an order, the Respondent shall, within the time specified in the order, provide to the appropriate Regional Director a report regarding what compliance actions have been taken. Upon determining that the Respondent has not complied with the Authority's order, the Regional Director shall refer the case to the Authority for enforcement or take other appropriate action.

**§ 2423.42 Backpay proceedings.**

After the entry of an Authority order directing payment of backpay, or the entry of a court decree enforcing such order, if it appears to the Regional Director that a controversy exists between the Authority and a Respondent regarding backpay that cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a notice of hearing before an Administrative Law

Judge to determine the backpay amount. The notice of hearing shall set forth the specific backpay issues to be resolved. The Respondent shall, within 20 days after the service of a notice of hearing, file an answer in accordance with § 2423.20. After the issuance of a notice of hearing, the procedures provided in subparts B, C, and D of this part shall be followed as applicable.

**§§ 2423.43–2423.49 [Reserved]****PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS**

2. The authority citation for Part 2429 continues to read as follows:

**Authority:** 5 U.S.C. 7134.

3. Section 2429.1 is removed and reserved, and reads as follows:

**§ 2429.1 [Removed and reserved]**

4. Section 2429.7 is amended by revising the heading, removing the word "subpena" and substituting "subpoena" throughout the section and by revising paragraphs (c) through (f) to read as follows:

**§ 2429.7 Subpoenas.**

\* \* \* \* \*

(c) A request for a subpoena by any person, as defined in 5 U.S.C. 7103(a)(1), shall be in writing and filed with the Regional Director, in proceedings arising under part 2422 of this Subchapter, with the Office of Administrative Law Judges in proceedings arising under subparts B and C of part 2423 of this subchapter, or with the Authority, in proceedings arising under parts 2424 and 2425 of this subchapter, not less than 15 days prior to the opening of a hearing, or with the appropriate presiding official(s) during the hearing.

(d) All requests shall name and identify the witnesses or documents sought and state the reasons therefor. The Authority, General Counsel, Office of Administrative Law Judges, Regional Director, Hearing Officer, or any other employee of the Authority designated by the Authority, as appropriate, shall grant timely requests upon the determination that the testimony or documents appear to be material and relevant to the matters under investigation and the request describes with sufficient particularity the documents sought. Requests for subpoenas made less than 15 days prior to the opening of the hearing shall be granted on sufficient explanation of why the request was not timely filed. Service of an approved subpoena is the responsibility of the party on whose behalf the subpoena was issued. The

subpoena shall show on its face the name and address of the party on whose behalf the subpoena was issued.

(e)(1) 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 party on whose behalf the subpoena was issued. Such petition to revoke, if made prior to the hearing, and a written statement of service, shall be filed with the Regional Director in proceedings arising under part 2422 of this subchapter, with the Administrative Law Judge in proceedings arising under part 2423 of this subchapter, and with the Authority, in proceedings arising under parts 2424 and 2425 of this subchapter for ruling. A petition to revoke a subpoena filed during the hearing, and a written statement of service, shall be filed with the appropriate presiding official(s).

(2) The Authority, General Counsel, Administrative Law Judge, Regional Director, Hearing Officer, or any other employee of the Authority designated by the Authority, as appropriate, shall revoke the subpoena if, on further review, the person 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 Authority, General Counsel, Administrative Law Judge, Regional Director, Hearing Officer, or any other employee of the Authority designated by the Authority, as appropriate, shall state the procedural or other ground for the ruling on the petition to revoke. The petition to revoke, any answer thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(f) Upon the failure of any person to comply with a subpoena issued and upon the request of the party on whose behalf the subpoena was issued, the Solicitor of the Authority shall institute proceedings on behalf of such party in the appropriate district court for the enforcement thereof, unless to do so would be inconsistent with law and the Federal Service Labor-Management Relations Statute.

5. Section 2429.11 is revised to read as follows:

**§ 2429.11 Interlocutory Appeals.**

(a) Except as set forth in paragraphs (b), (c), and (d), of this section, the Authority and the General Counsel ordinarily will not consider interlocutory appeals.

(b) In an unfair labor practice proceeding under Part 2423 of this Subchapter, motions for an interlocutory appeal shall be filed in writing with the Administrative Law Judge within 5 days after the date of the contested ruling. The motion shall state why interlocutory review is appropriate, and why the Authority should modify or reverse the contested ruling.

(c) The Judge shall grant the motion and certify the contested ruling to the Authority if:

(1) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and

(2) Immediate review will materially advance completion of the proceeding, or the denial of immediate review will cause undue harm to a party or the public.

(d) If the motion is granted, the Judge or Authority may stay the hearing during the pendency of the appeal. If the motion is denied, exceptions to the contested ruling may be filed in accordance with § 2423.40 of this Subchapter after the Judge issues a decision and recommended order in the case.

6. Section 2429.12 is amended by revising paragraphs (a) and (c) to read as follows:

**§ 2429.12 Service of process and papers by the Authority.**

(a) *Methods of service.* Notices of hearings, decisions and orders of Regional Directors, decisions and recommended orders of Administrative Law Judges, decisions of the Authority, complaints, written rulings on motions, and all other papers required by this Subchapter to be issued by the Authority, the General Counsel, Regional Directors, Hearing Officers, and Administrative Law Judges, shall be served personally, by first-class mail, or by certified mail. Provided, however: Where facsimile equipment is available, rulings on motions; information pertaining to prehearing disclosure, conferences, orders, or hearing dates, times, and locations; information pertaining to § 2429.7; and other similar matters may be served by facsimile transmission.

(c) *Proof of service.* Proof of service shall be verified by certificate of the individual serving the papers describing the manner of such service. When

service is by mail, the date of service shall be the day when the matter served is deposited in the United States mail. When service is by facsimile, the date of service shall be the date the facsimile transmission is transmitted and, when necessary, verified by a dated facsimile record of transmission.

7. Section 2429.13 is revised to read as follows:

**§ 2429.13 Official time for witnesses.**

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

8. Section 2429.14 is revised to read as follows:

**§ 2429.14 Witness fees.**

(a) Witnesses, whether appearing voluntarily or pursuant to a subpoena, shall be paid the fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States. However, any witness who is employed by the Federal Government shall not be entitled to receive witness fees.

(b) Witness fees, as appropriate, as well as transportation and per diem expenses for a witness shall be paid by the party that calls the witness to testify.

9. Section 2429.21 is amended by revising paragraph (b) to read as follows:

**§ 2429.21 Computation of time for filing papers.**

\* \* \* \* \*

(b) Except when filing an unfair labor practice charge pursuant to part 2423 of this subchapter, a representation petition pursuant to part 2422 of this subchapter, and a request for an extension of time pursuant to § 2429.23(a) of this part, when this Subchapter requires the filing of any paper with the Authority, the General Counsel, a Regional Director, or an Administrative Law Judge, the date of filing shall be determined by the date of mailing indicated by the postmark date or the date a facsimile is transmitted. If no postmark date is evident on the mailing, it shall be presumed to have

been mailed 5 days prior to receipt. If the date of facsimile transmission is unclear, the date of transmission shall be the date the facsimile transmission is received. If the filing is by personal or commercial delivery, it shall be considered filed on the date it is received by the Authority or the officer or agent designated to receive such materials.

\* \* \* \* \*

10. Section 2429.22 is revised to read as follows:

**§ 2429.22 Additional time after service by mail or facsimile.**

Except as to the filing of an application for review of a Regional Director's Decision and Order under § 2422.31 of this subchapter, whenever a party has the right or is required to do some act pursuant to this Subchapter within a prescribed period after service of a notice or other paper upon such party, and the notice or paper is served on such party by mail or by facsimile transmission, 5 days shall be added to the prescribed period: Provided, however, that 5 days shall not be added in any instance where an extension of time has been granted.

11. Section 2429.24 is amended by revising paragraph (e) to read as follows:

**§ 2429.24 Place and method of filing; acknowledgment.**

\* \* \* \* \*

(e) All documents filed pursuant to this section shall be filed in person, by commercial delivery, by first-class mail, or by certified mail. Provided, however, that where facsimile equipment is available, motions; information pertaining to prehearing disclosure, conferences, orders, or hearing dates, times, and locations; information pertaining to § 2429.7; and other similar matters may be filed by facsimile transmission, provided that the document filed does not exceed 5 pages in total length.

\* \* \* \* \*

12. Section 2429.25 is revised to read as follows:

**§ 2429.25 Number of copies and paper size.**

Unless otherwise provided by the Authority or the General Counsel, or their designated representatives, as appropriate, or under this Subchapter, and with the exception of any prescribed forms, any document or paper filed with the Authority, General Counsel, Administrative Law Judge, Regional Director, or Hearing Officer, as appropriate, under this Subchapter, together with any enclosure filed therewith, shall be submitted on 8½ ×

11 inch size paper in an original and four (4) legible copies. Where facsimile filing is permitted pursuant to § 2924.24(e), one (1) legible copy, capable of reproduction, shall be sufficient. A clean copy capable of being used as an original for purposes such as further reproduction may be substituted for the original.

13. Section 2429.27 is amended by revising paragraphs (b) and (d) to read as follows:

**§ 2429.27 Service; statement of service.**

\* \* \* \* \*

(b) Service of any document or paper under this Subchapter, by any party, including documents and papers served by one party on another, shall be accomplished by certified mail, first-class mail, or in person. Where facsimile equipment is available, service by facsimile of documents described in § 2429.24(e) is permissible.

\* \* \* \* \*

(d) The date of service or date served shall be the day when the matter served is deposited in the U.S. mail, delivered in person, or, in the case of facsimile transmissions, the date of transmission.

Dated: May 20, 1997.

**Solly Thomas,**

*Executive Director, Federal Labor Relations Authority.*

[FR Doc. 97-13661 Filed 5-22-97; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 71**

[Docket No. 96-ASW-08]

**Proposed Revision of Class E  
Airspace; Carlisle, AR**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** This action withdraws a Notice of Proposed Rulemaking (NPRM) that proposed to revise the Class E airspace at Carlisle, AR. The proposal was to revise the controlled airspace extending upward from 700 feet above the ground (AGL) needed to contain aircraft executing a Global Positioning System (GPS) standard instrument approach procedure (SIAP) to Runway (RWY) 09 at Carlisle Municipal Airport. The NPRM was published with errors in the description of the airspace required to provide adequate controlled airspace for aircraft executing this approach. Therefore, the proposal is withdrawn.

**FOR FURTHER INFORMATION CONTACT:** Donald J. Day, Airspace Branch, Federal Aviation Administration, Southwest Region, Fort Worth, TX 76193-0530; telephone: (817) 222-5593.

**SUPPLEMENTARY INFORMATION:** On June 18, 1996, an NPRM was published in the **Federal Register** (61 FR 30842) to revise the Class E airspace at Carlisle, AR. The intended effect of the proposal was to provide adequate Class E airspace to contain aircraft executing the GPS SIAP to RWY 09 at Carlisle Municipal Airport, Carlisle, AR. After publication of the NPRM, errors were found in the description of the proposed airspace. Accordingly, the proposed rule is withdrawn.

**List of Subjects in 14 CFR Part 71**

Airspace, Navigation (air).

**Withdrawal of Proposed Rule**

Accordingly, pursuant to the authority delegated to me, Airspace Docket No. 96-ASW-08, as published in the **Federal Register** on June 18, 1996 (61 FR 30842), is withdrawn.

**Authority:** 49 U.S.C. 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

Issued in Fort Worth, TX on May 12, 1997.

**Albert L. Viselli,**

*Manager, Air Traffic Division, Southwest Region.*

[FR Doc. 97-13567 Filed 5-22-97; 8:45 am]

BILLING CODE 4910-13-M

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 71**

[Airspace Docket No. 97-AEA-24]

**Proposed Amendment to Class E  
Airspace; Lewisburg, WV**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to amend the Class E airspace area at Lewisburg, WV. The development of new Standard Instrument Approach Procedures (SIAP) at the Greenbrier Valley Airport based on the Global Positioning System (GPS) and VHF Omnidirectional Radio Range (VOR) has made this proposal necessary. Additional controlled airspace extending upward from 700 feet above the surface (AGL) is needed to accommodate these SIAPs and for instrument flight rules (IFR) operations at the airport.