



# Office of Compliance

Office of the General Counsel

## OOB BROWN BAG LUNCH SERIES OOB PROCEDURES: UPDATE & REVIEW FEBRUARY 15, 2017

### **I. Introduction**

Welcome  
Overview of OOC procedures  
Training and outreach

### **II. ADR Procedures**

Subchapter II of the Congressional Accountability Act of 1995 (“CAA”), Extension of Rights and Protections, applies several employee protection statutes to covered employees within the legislative branch. Individuals bringing claims under this subchapter (sections 201-207 of the CAA, 2 U.S.C. §§ 1311-1317) must go through the mandatory dispute resolution process outlined in Subchapter IV of the CAA, Administrative and Judicial Dispute-Resolution Procedures, and in subpart B of the Procedural Rules of the Office of Compliance (“Procedural Rules” or “PROC”), before a complaint may be filed.

#### **1) Applicable Laws**

- a) Employment discrimination – CAA section 201, 2 U.S.C. § 1311
  - i. Title VII of Civil Rights Act, ADEA, Rehabilitation Act/ADA Title I
  - ii. GINA (applies to covered employees pursuant to 42 U.S.C. § 2000ff(2)(A)(iii))
  - iii. Substantive regulations are not authorized under the CAA
- b) Family and Medical Leave Act – CAA section 202, 2 U.S.C. § 1312
  - i. Substantive regulations issued in 1996
  - ii. New regulations adopted by OOC Board in 2016 are awaiting congressional approval
- c) Fair Labor Standards Act – CAA section 203, 2 U.S.C. § 1313
  - i. Substantive regulations issued in 1996
  - ii. Regulations adopted by OOC Board in 2004 implementing exemptions from overtime pay requirements have not yet been approved by Congress
- d) Employee Polygraph Protection Act – CAA section 204, 2 U.S.C. § 1314
  - i. Substantive regulations issued in 1996
- e) Worker Adjustment and Retraining Notification (WARN) Act – CAA section 205, 2 U.S.C. § 1315

- i. Substantive regulations issued in 1996
- f) Veterans employment and reemployment – CAA section 206, 2 U.S.C. § 1316
  - i. Substantive USERRA regulations adopted by the OOC Board in 2008 have not yet been approved by Congress
  - ii. Substantive VEOA regulations issued in 2010
- g) Prohibition of intimidation or reprisal – CAA section 207, 2 U.S.C. § 1317

## 2) Counseling

- a) Sources: 2 U.S.C. § 1402, Procedural Rule 2.03
- b) *Requesting counseling* – While employees and employing offices may request confidential advice and information from the OOC at any time, a formal claim of violation of the CAA begins with a written request for counseling. The form is available on our website at <http://www.compliance.gov/forms-requests/forms-formularios/dispute-resolution-forms>. Upon receipt of the form, the OOC assigns a case number, sets up a file, and schedules a meeting with the employee.
- c) *Timing* – Counseling must be requested not later than 180 days after the alleged violation.
- d) *Counseling sessions* – During counseling, a covered employee discusses with the counselor their workplace issues and alleged bases for a claim under the CAA. The counselor discusses the applicability of the CAA to the issues presented, and explains the Office’s ADR procedures. The counselor does not provide legal services or offer an opinion on the merits of the employee’s claims.
- e) *Counseling period* – Generally the counseling period lasts 30 days. An employee may withdraw once from counseling with the right to reinstate provided the request to reinstate is in writing and filed with the OOC not later than 180 days after the date of the alleged violation (PROC 2.03(k)). The employee may also request to reduce the period of counseling, which request must be approved by the OOC Executive Director (PROC 2.03(i)).
- f) *Confidentiality* – Counseling is strictly confidential, pursuant to 2 U.S.C. § 1416. The employing office is not notified of an employee’s request for or participation in counseling, unless and until the employee decides to invoke mediation. However, the employee and the OOC may agree to waive confidentiality during counseling, to enable the counselor to contact the employing office to notify them of the allegations and attempt an informal resolution or formal settlement.
- g) *AOC/USCP employees* – When an employee of the Office of the Architect of the Capitol or the U.S. Capitol Police requests counseling, the Executive Director has discretion to recommend that the employee use the employing office’s internal procedures for addressing their concerns. If the employee chooses to do so, they must provide a waiver of confidentiality to allow the Executive Director to notify the AOC or USCP of the recommendation. See 2 U.S.C. § 1401, PROC 2.03(m) for more information.
- h) *End of counseling* – At the end of the counseling period, the OOC issues a Notice of End of Counseling that is sent with proof of delivery required. The Notice advises the

employee that they must request mediation within 15 days of receipt of the Notice, and encloses a mediation request form.

### 3) Mediation

- a) Sources: 2 U.S.C. § 1403, Procedural Rule 2.04
- b) *Requesting mediation* – If an employee chooses to pursue a claim beyond counseling, the employee must request mediation. The form is sent with the Notice of End of Counseling and is also available on our website at <http://www.compliance.gov/forms-requests/forms-formularios/dispute-resolution-forms>.
- c) *Timing* – Mediation must be requested not later than 15 days after the receipt of the Notice of End of Counseling. The 2016 amendments to the Procedural Rules allow the OOC to use the postmark as the date a mediation request is filed (PROC 1.03(a)(2)).
- d) *Mediator* – Once mediation is invoked, the Executive Director assigns a mediator to the matter. The OOC has an in-house mediator and also maintains a roster of outside mediators. The assigned mediator contacts the parties to discuss their interests in the dispute, potential areas of agreement, remedies, and scheduling.
- e) *Mediation agreement* – At the outset of mediation, the parties sign a mediation agreement acknowledging the confidentiality requirements of the CAA and agreeing to keep the information disclosed in mediation confidential. The CAA does not, however, bestow confidentiality on facts and information obtained from sources outside of the confidential proceedings (PROC 1.08(e)).
- f) *Mediation sessions* – Both the employee and representatives of the employing office must participate in the confidential mediation process. During mediation the parties have an opportunity to explore solutions to the workplace dispute and reach an agreement that meets both their needs. The parties may meet separately and/or jointly with the mediator.
- g) *Mediation period* – The mediation period cannot be less than 30 days, and may be extended by mutual agreement of the parties with the approval of the Executive Director.
- h) *Settlement* – The parties may resolve a claim by formal or informal settlement. A formal settlement agreement requires the signatures of the parties and their designated representatives before the document may be submitted to the Executive Director for approval. The settlement is not effective until it has been approved by the Executive Director. Agreements cannot be submitted to the Executive Director until the appropriate revocation periods have expired. See PROC 9.03 for more information.
- i) *AOC/USCP employees* – At any time during mediation involving an employee of the Office of the Architect of the Capitol or the U.S. Capitol Police, the Executive Director may recommend that the employee use the employing office’s grievance procedures for resolving the matter (PROC 2.04(1)).
- j) *End of mediation* – At the end of the mediation period, if the parties have not reached a settlement agreement, the OOC issues an End of Mediation Notice. The Notice advises the employee of their right to file a complaint either with the OOC or in federal court.

#### 4) Choice of Proceeding

- a) Sources: 2 U.S.C. § 1404, Procedural Rules 2.05-2.07
- b) *Time frame* – An employee may file a complaint not sooner than 30 days but not later than 90 days after the end of mediation.
- c) *Options* – An employee may choose to file either an administrative complaint with the OOC or a civil action in a United States District Court, either in the District of Columbia or in the district where the individual is employed. An employee may not file both an administrative complaint and a civil action on the same matter.
- d) *Confidentiality* – Administrative proceedings at the OOC are conducted in closed sessions and are confidential. Generally, proceedings in federal district court are matters of public record.

#### 5) Administrative Proceedings

- a) Complaint and Hearing – 2 U.S.C. § 1405, PROC 7.01-7.16
  - i. *Filing of complaint* – Upon receipt of an administrative complaint, the OOC serves the employing office and provides a certificate of official record.
  - ii. *Hearing Officer* – The Executive Director appoints a Hearing Officer to conduct the hearing and issue a decision. The OOC maintains a roster of independent Hearing Officers who are well-versed in employment law and experienced in adjudicating employment-related disputes.
  - iii. *Time frame* – A hearing must commence within 60 days after the filing of complaint. The OOC may extend the opening of the hearing an additional 30 days for good cause shown.
  - iv. *Prehearing procedures* – The Hearing Officer sets a prehearing conference and notifies the parties. Reasonable prehearing discovery may be allowed at the discretion of the Hearing Officer. The Hearing Officer may request that the parties submit prehearing conference memoranda.
  - v. *Hearing* – The hearing is conducted in a closed session and on the record. The Hearing Officer may hear witness testimony, admit documentary evidence, and entertain legal arguments. The electronic record of the hearing is the sole official record of the proceeding.
  - vi. *Authority of Hearing Officer* – Among other things, the Hearing Officer may: issue subpoenas; impose sanctions on parties or their representatives as necessary to regulate the hearing; dismiss complaints that are frivolous, fail to state a claim upon which relief may be granted, or fail to comply with applicable time limits or other requirements under the CAA or the Procedural Rules; or issue summary judgment on some or all of a complaint. Interlocutory review of a ruling by a Hearing Officer is strongly disfavored.
  - vii. *Withdrawal of complaint* – A complaint may be withdrawn at any time, subject to approval by the hearing officer, and the withdrawal may be with or without prejudice at the Hearing Officer’s discretion.

- viii. *Hearing Officer's decision* – The Hearing Officer must issue a decision within 90 days of the end of the hearing. Hearing Officer decisions are guided by judicial decisions under the relevant laws made applicable by the CAA. All proceedings and deliberations of hearing officers, including related records, shall be confidential. If there is no appeal of a decision and order of a Hearing Officer, the decision becomes a final decision of the OOC.
- b) Appeal to the Board – 2 U.S.C. § 1406, Procedural Rules 8.01-8.03
    - i. *Petition for review* – Any party aggrieved by the Hearing Officer's final decision may file a petition for review of the decision with the OOC Board of Directors not later than 30 days after the entry of the decision.
    - ii. *Appellate briefs* – Within 21 days of filing the appeal, the appellant must file a supporting brief. The appellee then has 21 days to file a responsive brief, and the appellant has 10 days after that to file a reply brief. The Executive Director determines whether to grant requests for extensions of time to file post-petition documents, enlarge page limits, or require proof of service if questioned.
    - iii. *Board decision* – After review of the record, either in its entirety or in relevant part, the Board may dismiss, affirm, reverse, modify, or remand the Hearing Officer's decision.
    - iv. *Standard of review* – The Board will set aside the Hearing Officer's decision if the Board determines that it was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c); *Katsouros v. Office of the Architect of the Capitol*, Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311 (Jan. 21, 2011). The Board's review of the legal conclusions that led to the Hearing Officer's determination is *de novo*. *Id.* It is not the Board's role to reweigh the evidence in the record or to make its own factual findings. *Johnson v. Office of the Architect of the Capitol*, No. 96-AC-25 (CV), 1998 WL 35281337 (May 22, 1998).
    - v. *Reconsideration* – Within 15 days after service of the Board's decision, a party may move for reconsideration by the Board. The decision to grant or deny reconsideration is within the sole discretion of the Board (PROC 8.02).
    - vi. *Compliance with decision* – A party required by the terms of a decision to take any action shall carry out its terms promptly, and must provide the OOC and the parties with a compliance report within 30 days (PROC 8.03).
  - c) Judicial Review – 2 U.S.C. § 1407, Procedural Rule 8.04
    - i. *Appeal to the Federal Circuit* – The decision of the OOC Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit reviews decisions of the Board to determine whether they were: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1407(d); *Britton v. Office of Compliance*, 412 F.3d 1324, 1327 (Fed. Cir.

2005). This is a “deferential standard of review,” and the possibility of drawing two inconsistent conclusions does not prevent a factual finding from being supported by substantial evidence. *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 646 (Fed. Cir. 2004).

- ii. *Petition for Enforcement* – At the direction of the Board, the OOC General Counsel may petition the Federal Circuit to enforce a final decision of the Board.

## 6) Civil Actions

- a) *Jurisdiction* – Under 2 U.S.C. § 1408 the United States District Courts have jurisdiction over civil actions commenced by covered employees who have completed counseling and medication.
- b) *District Court* – Civil actions are governed by the Federal Rules of Civil Procedure and each individual court’s rules and procedures.
- c) *Appeal* – A decision of a District Court may be appealed to the appropriate United States Circuit Court of Appeals. Such proceedings are governed by the Federal Rules of Appellate Procedure and each individual court’s rules and procedures.

## III. OSH and ADA

With respect to the OSHAct and ADA, the OGC has two primary functions. The first is to conduct biennial inspections of the Capitol Hill complex to ensure compliance with the two statutes. The second is to investigate concerns over possible violations raised by legislative branch employees or, with respect to the ADA, by members of the public. The OOC fills the role of the Department of Labor in OSHAct matters, and that of the Department of Justice regarding ADA access to public services and accommodations in the legislative branch.

The OOC’s authority and procedures for OSH matters are found in section 215 of the CAA, 2 U.S.C. § 1341, and in Subpart D of the Procedural Rules. The CAA applies the OSHAct, 29 U.S.C. §§ 651 et seq., to the legislative branch, and the OOC follows the standards found in 29 C.F.R. §§ 1910 (General Industry) and 1926 (Construction).

The OOC’s authority over the ADA public access provisions is found in section 210 of the CAA, 2 U.S.C. § 1331, and in the regulations adopted by the OOC Board on February 3, 2016, which are awaiting congressional approval. The CAA applies to the legislative branch sections 201 through 230, 302, 303, and 309 of the ADA, 42 U.S.C. §§ 12131-12150, 12182, 12183, and 12189.

### 1) Biennial OSH Inspections

- a) *Scheduling* – OSH specialists work with employing offices to schedule inspections of their facilities, with an emphasis on higher-hazard areas. The calendar of inspections is available on the OOC web site.

- b) *Opening conference* – Prior to the inspection for each employing office or jurisdiction, the OGC holds an opening conference with representatives of the employing office to discuss the timing, logistics, and other details of the upcoming inspection, and to review open issues that have carried over from previous inspections of the same facilities.
- c) *Inspection* – During the inspection, the OSH specialists examine the facilities and work spaces to determine whether the employing office is in compliance with a wide variety of safety and health standards.
  - a. OSH specialists inspect machinery, electrical systems, chemicals, means of egress, use of personal protective equipment, and numerous other aspects that may present hazards to health and safety.
  - b. OSH specialists may watch employees while they work and question them regarding their work processes.
  - c. OSH specialists review certain programs, such as hazard communication, respiratory protection, and others, to ensure that the programs are adequate and that employees are familiar with them and follow them.
  - d. Certain findings of violations can be corrected during the inspection itself, while others require additional abatement.
- d) *FMA* – OSH specialists enter their findings from each inspection into the Facilities Management database (FMA), which enables us to work with the employing offices to track abatement progress and generate reports.
- e) *Closing conference* – After the inspections conclude for each employing office or jurisdiction, the OGC holds a closing conference with representatives of the employing office to provide an overview of the findings and address any questions or concerns the employing office may have concerning the abatement of violations. The OGC also issues a Hazard Summary Report detailing the specific findings from the inspection.
- f) *Abatement* – Each employing office has 45 days from the receipt of its Hazard Summary Report to contest any of the findings from the inspection. If a finding is not contested, or if the OSH specialists review a contested finding and determine that it is proper, the employing office must abate the hazard. The employing offices provide abatement data to the OGC, and the OSH staff is available to provide technical assistance to the employing offices as needed.
- g) *Citations and Complaints* – In rare instances, the GC may decide to issue a citation pertaining to a serious violation identified during the biennial inspection. Citations must be posted in the workplace. The employing office may submit a Request for Modification of Abatement (RFMA) and the OGC will work with the employing office to ensure that the hazard is abated. If a violation is not corrected satisfactorily, the GC may issue a complaint against the employing office, which proceeds through the hearing and review process established under section 405 of the CAA.
- h) *Biennial Report* – Every two years, the OGC publishes a report presenting a summary and analysis of the findings from the most recent biennial inspection. As mandated by

the CAA, the Report is distributed to congressional leaders and to the employing offices responsible for correcting violations. It is also made available to the public.

## 2) Biennial ADA Inspections

- a) *Inspectors* – The OOC’s OSH specialists are also trained on the ADA public access requirements, and the OOC contracts with Evan Terry Associates LLC (ETA) to support the OSH specialists during certain parts of the biennial inspections.
- b) *Member offices* – While inspecting Member offices for OSH compliance, the OOC’s OSH specialists – who are trained on the ADA public access requirements – also evaluate the offices to ensure that they are accessible to members of the public with disabilities.
- c) *Public spaces* – Each Congress the OGC also inspects selected areas of the campus to ensure accessibility to members of the public with disabilities.
  - a. 113<sup>th</sup> Congress – Exterior areas surrounding the U.S. Capitol
  - b. 114<sup>th</sup> Congress – Entrances to legislative branch facilities, and accessible pathways from the entrances of the facilities to the major function areas
  - c. 115<sup>th</sup> Congress – Hearing rooms with capacity of 40+ persons, and public spaces within the Library of Congress buildings
- d) *Findings* – Barriers to access identified during the inspections are entered into the ETA barrier management software, which allows the OGC and employing offices to identify each barrier with descriptions, photographs, and geographic information system (GIS) technology to pinpoint the exact location of each barrier needing removal.
- e) *Barrier removal* – The employing offices update the OGC on their progress as barriers are removed. OGC staff members and ETA representatives may provide technical assistance as needed.
- f) *Biennial report* – Every two years, the OOC publishes a report presenting a summary and analysis of the findings from the most recent biennial inspection, including the estimated cost and time required for barrier removal. As mandated by the CAA, the Report is distributed to congressional leaders and to the employing offices responsible for removing barriers to accessibility. It is also made available to the public.

## 3) Requests for OSH Inspections

- a) *Request for Inspection* – Covered employees or their representatives, including unions, who are concerned about potential safety or health hazards in a legislative branch workplace, may submit a Request for Safety and Health Inspection using the form on the OOC web site at <http://www.compliance.gov/services/safety-health-compliance>. Individuals filing requests may ask to remain anonymous; they must provide their names and contact information to the OGC, but that information will not be shared with the employing office.
- b) *Opening conference* – The OGC notifies the appropriate employing office(s) and schedules an opening conference, during which the parties discuss the scope of the

Request, the OSH standards that are likely implicated by the Request, and the plan for the investigation.

- c) *Investigation* – Typically the investigation includes a site inspection, witness interviews, and/or a review of documents and other information provided by the employing office and the Requestor.
- d) *Report* – Upon completion of the investigation, the OGC issues a report summarizing the investigation.
  - a. If violations of OSH standards are identified, the report describes the OSH specialists’ findings and establishes action items and deadlines for abatement. The report explains what each standard requires, how the employing office was out of compliance with the standard, and what steps are necessary to abate the hazard.
  - b. If the employing office was found to be in compliance with all applicable OSH standards, the report recommends closing the case.
- e) *Abatement* – The OGC staff follows up with the Requestor and the employing office regarding abatement progress, and OSH specialists are available to provide technical assistance to the employing office if needed. Once all hazards identified during the investigation have been abated, the case is closed.
- f) *Citations and Complaints* – In rare instances, the GC may decide to issue a citation pertaining to a serious violation identified during an investigation into a Request. Citations must be posted in the workplace. The employing office may submit a Request for Modification of Abatement (RFMA) and the OGC will work with the employing office to ensure that the hazard is abated. If a violation is not corrected satisfactorily, the GC may issue a complaint against the employing office, which proceeds through the hearing and review process established under section 405 of the CAA.

#### 4) Requests for ADA Inspections

- a) *Request for Inspection* – Members of the public who encounter barriers to access to legislative branch services, programs, activities, accommodations, or facilities may file a Request for ADA Inspection using the form on the OOC web site at <http://www.compliance.gov/services/public-access-compliance>.
- b) *Opening conference* – The OGC notifies the appropriate legislative branch entity responsible for addressing the alleged barrier and schedules an opening conference, during which the parties discuss the scope of the Request, the ADA requirements that are likely implicated by the Request, and the plan for the investigation.
- c) *Investigation* – Typically the investigation includes an inspection of the alleged barrier, witness interviews, and/or a review of documents and other information provided by the employing office and the Requestor.
- d) *Mediation* – The GC may request, but not participate in, mediation between the Requestor and the appropriate legislative branch entity.
- e) *Barrier removal* – The OGC staff follows up with the Requestor and the appropriate legislative branch entity regarding abatement progress, and OSH specialists and ETA

representatives are available to provide technical assistance if needed. Once all barriers identified during the investigation have been removed, the case is closed.

- f) *Complaint* – In rare instances, if mediation is unsuccessful and the entity responsible for removing a barrier has failed to do so, the GC may issue a complaint against that entity, which proceeds through the hearing and review process established under section 405 of the CAA.

#### **IV. Labor-Management Relations**

The OOC oversees numerous aspects of collective bargaining and labor-management relations. The OOC’s authority derives from section 220 of the CAA, 2 U.S.C. § 1351, which applies chapter 71 of title 5 of the U.S. Code to the legislative branch, as well as from substantive regulations adopted by the Board and approved by Congress, which can be found on the OOC’s website at <http://www.compliance.gov/sites/default/files/wp-content/uploads/2010/05/LM.pdf>.

##### **1) Representation Proceedings**

- a) Source: Substantive regulations at part 2422
- b) *Eligibility* – Certain covered employees may form, join, or assist a labor organization, including acting as a representative, or they may refrain from such activities. Other employees, including managers, supervisors, and employees of certain offices – such as the personal staff of Members, Senators and Committees – are not eligible.
- c) *Rights and obligations* – Eligible employees have the right to engage in collective bargaining with respect to conditions of employment, and an employing office has the obligation to recognize the labor organization as the employees’ bargaining agent.
- d) Elections
  - i. *Election petition* – A labor organization may file a representation petition to represent employees for collective bargaining purposes. The petition must include a showing of interest of at least 30% of the employees in the unit. Employees already represented by a union may also petition the OOC to be represented by another union or to be unrepresented.
  - ii. *Representation hearing* – A hearing may be conducted to develop a full and complete factual record. Representation hearings are investigatory, not adversarial. There is no burden of proof, with the exception of proceedings on objections to elections, and the formal rules of evidence do not apply.
  - iii. *Appropriateness of bargaining unit* – The OOC investigates the petition, looking at the appropriateness of the bargaining unit and who should be excluded from the unit. Three criteria must be met in order for a bargaining unit to be appropriate: the unit must (1) ensure a clear and identifiable “community of interest,” (2) promote “effective dealings” with the employing office, and (3) promote “efficiency of operations” of the employing office. The OOC may determine that certain employees do not share a community of interest with the other employees and should be excluded from the unit. Managers, supervisors, confidential

employees, and employees engaged in personnel work also may not be included in a unit.

- iv. *Election agreement* – An election agreement identifies the appropriate unit and sets forth the time and place of a secret ballot election conducted by the OOC. Absent an election agreement, a pre-election hearing is held and the OOC Board will decide the appropriate bargaining unit and may decide certain other issues, such as timeliness, that may bar an election.
- v. *Results of election* – If a majority of the eligible voting employees want to be represented by the labor organization, the OOC will certify the labor organization as the employees’ exclusive representative. Once certified, the labor organization must represent the interests of all employees in the unit, regardless of whether they are a member of the union. If the majority of eligible voters do not elect the union, the OOC will issue a Certification of Results of the election.
- e) *Clarification or Amendment* – If there is a dispute over whether certain employees should be included in or excluded from a bargaining unit, an employing office or union may petition the OOC to resolve the dispute.
- f) *Consolidation* – Unions and employing offices may petition the OOC to consolidate two or more bargaining units, with or without an election, in an employing office where an exclusive representative has been certified.

## 2) **Negotiability Appeals**

- a) Source: 2 U.S.C. § 1351(c)(1), 5 U.S.C. § 7117, substantive regulations at part 2424
- b) *Choice of proceeding* – If an employing office alleges that the duty to bargain in good faith does not extend to a matter proposed by the union because it is inconsistent with law, rule, or regulation, the union may either file an unfair labor practice charge with the General Counsel (see below) or file a petition for expedited review of the negotiability issue with the OOC Board.
- c) *Petition* – If the union chooses to petition the Board for review of a negotiability issue, the petition should, among other things, set forth the proposal sought to be negotiated and the meaning attributed to the proposal.
- d) *Position statements* – Within 30 days of receipt of the petition, the employing office must file a statement of its position with the Board and serve it on the union. Within 15 days of receipt of the employing office’s position statement, the union must file a response stating its own position and serve it on the employing office.
- e) *Informal dispute resolution* – To expedite matters, the OOC may utilize informal dispute resolution to promptly resolve the matter.
- f) *Hearing (optional)* – If the matter is not resolved informally, a hearing may be held at the discretion of the Board.
- g) *Board decision* – The Board issues a written decision in which it either dismisses the petition or orders the employing office to bargain over the matter(s), and states specific reasons for its decision.

### 3) Impasse

- a) Source: 2 U.S.C. § 1351(c)(4), 5 U.S.C. § 7119, substantive regulations at part 2471
- b) *Mediation* – If the parties cannot agree on certain issues during bargaining, they may declare an impasse and seek a neutral third party to provide mediation, such as the Federal Mediation and Conciliation Service (FMCS).
- c) *Request for Board review* – If mediation does not resolve the impasse, either party may file a written request with the Executive Director to have the Board consider the matter or to request approval of a binding arbitration procedure. The written request must identify the parties, provide a description of the issues at impasse, a summary of the filing party's position, and information regarding the attempted mediation. The other party may file a reply. The Board may also undertake consideration of the matter upon the request of FMCS or the Executive Director.
- d) *Investigation* – Upon receipt of the request the Board or its designee conducts an investigation, consulting with the parties and a neutral as appropriate. Following investigation and consideration the Board may do one of the following: decline to assert jurisdiction; recommend procedures to resolve the impasse, including arbitration; or assist the parties using whatever method it considers appropriate.
- e) *Hearing* – If the Board determines that a hearing is necessary, it appoints a designee to conduct the hearing. The individual conducting the hearing may administer oaths, take testimony or depositions, receive other evidence, issue subpoenas, rule on motions, and determine all procedural matters.
- f) *Report and recommendations* – After the hearing, the designee who conducted the hearing issues a written report, which may or may not contain recommendations. If there are no recommendations, the Board takes whatever actions it may consider appropriate or necessary to resolve the impasse. If the report contains recommendations, the parties may: accept the recommendations and notify the Executive Director; reach a settlement of all unresolved issues and seek approval from the Executive Director; or submit a written statement to the Executive Director explaining why they do not accept the recommendations and have not reached a settlement of all unresolved issues.
- g) *Final Board action* – If no settlement is reached, the Board may take certain final actions, including but not limited to: directing the parties to accept a fact finder's recommendations; ordering binding arbitration; and rendering a binding decision. The Board may hold hearings or designate a representative to do so in preparation for a final action.

### 4) Unfair Labor Practices

- a) Source: 2 U.S.C. § 1351(c)(1)-(3), 5 U.S.C. § 7118, substantive regulations at part 2423
- b) Types of ULP charges

- i. *Against an employing office* – These are the most common ULP charges we receive. Allegations include failure to bargain in good faith, failure to provide information, and retaliation for protected activity, among others.
  - ii. *Against a labor organization* – These may be filed either by an employing office or by individual employees. Allegations typically include either breach of the duty of fair representation or failure to bargain in good faith.
- c) Filing of charge
  - i. *Timing* – a charge must be filed within 180 days of the alleged ULP.
  - ii. *Forms* – available at <http://www.compliance.gov/services/labor-law-compliance>
  - iii. *Informal resolution* – after a charge is docketed, but before the investigation begins, the OGC provides the parties with at least 15 days to resolve the matter amongst themselves.
- d) Investigation
  - i. *Position statements* – if attempts at informal resolution fails, the parties submit position statements to present their views of the issues.
  - ii. *Document review and witness interviews* – the OGC attorney responsible for the case may request documents or interview witnesses to determine whether an ULP occurred.
- e) Outcomes
  - i. Charge withdrawn, either voluntarily or at General Counsel’s request
  - ii. Charge dismissed as being without merit or lacking sufficient evidence
  - iii. Parties settle the matter, on their own or with OOC assistance
  - iv. General Counsel exercises prosecutorial discretion and declines to file a complaint, but issues a warning to the charged party
  - v. General Counsel files a complaint against the charged party
- f) Litigation
  - i. *Complaint* – If the GC determines that an ULP was committed and the parties are unable to settle the matter, the GC may file a complaint with the OOC Board.
  - ii. *Motions and hearing* – The OOC Board appoints a Hearing Officer with experience in the field of labor law. If the case is not dismissed or decided on summary judgment, the Hearing Officer conducts an administrative hearing at the OOC.
  - iii. *Board review* – The decision of the Hearing Officer may be appealed to the OOC Board. The Board will set aside the Hearing Officer’s decision if the Board determines that it was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c); *Katsouros v. Office of the Architect of the Capitol*, Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311 (Jan. 21, 2011). The Board’s review of the legal conclusions that led to the Hearing Officer’s determination is *de novo*. *Id.* It is not the Board’s role to reweigh the evidence in the record or to make its

own factual findings. *Johnson v. Office of the Architect of the Capitol*, No. 96-AC-25(CV), 1998 WL 35281337 (May 22, 1998).

- iv. *Judicial review* – The decision of the OOC Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit reviews decisions of the Board to determine whether they were: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1407(d); *Britton v. Office of Compliance*, 412 F.3d 1324, 1327 (Fed. Cir. 2005). This is a “deferential standard of review,” and the possibility of drawing two inconsistent conclusions does not prevent a factual finding from being supported by substantial evidence. *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 646 (Fed. Cir. 2004).

## 5) Review of Arbitration Awards

- a) Source: 2 U.S.C. § 1351(c)(1), 5 U.S.C. § 7122, substantive regulations at part 2425
- b) *Filing of exceptions* – Either party to an arbitration covered by the CAA may file exceptions to an arbitrator’s award with the OOC Board within 30 days of service of the award.
- c) *Board review* – Under section 2425.3 of the OOC’s substantive LMR regulations, the standard for the Board’s review of exceptions to an arbitration award is whether the award is deficient either (a) because it is contrary to any law, rule, or regulation, or (b) on other grounds similar to those applied by Federal courts in private sector labor-management relations. See *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police*, No. 15-ARB-01, 2015 WL 10719053 (OOC Board Dec. 23, 2015). The scope of review of an arbitrator’s interpretation of the parties’ collective bargaining agreement is very narrow, and a party arguing that an arbitrator made a mistake of fact must demonstrate that “a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator.” *Id.*
- d) *No judicial review* – Under 2 U.S.C. § 1351(c)(3), there is no judicial review of the Board’s decision.

## V. Updates to Procedural Rules

Section 303 of the CAA, 2 U.S.C. § 1383, authorizes the OOC Executive Director to adopt rules governing the procedures of the OOC. The Procedural Rules were first adopted in 1995, and were most recently amended in 2016. The chart accompanying this outline shows the substantive differences between the Procedural Rules as amended in 2016 and the previous version, which dated back to 2004. The complete text of the current Procedural Rules is available on our website at <http://www.compliance.gov/directives/procedural-rules>.