AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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Ms. Jill Crumpacker, Executive Director
Office of the Executive Director
Federal Labor Relations Authority
1400 K Street, N.W., Fourth Floor
Washington, D.C. 20424-0001
FLRAExecutiveDirector@FLRA.gov

Re: Comments Concerning Revisions to Regulations regarding Unfair Labor Practice Proceedings; Federal Register, Volume 72, No. 245, 72 Fed. Reg. 72632 et seq. (December 21, 2007)

Dear Ms. Crumpacker:

The American Federation of Government Employees, AFL-CIO ("AFGE") hereby submits its comments to the Federal Labor Relations Authority ("FLRA") Office of General Counsel's ("OGC's") proposal to revise its regulations regarding its processing of Unfair Labor Practice ("ULP") cases. In particular, we object to its expressed intention to no longer assist the parties by providing Alternative Dispute Resolution Services prior to the filing of Unfair Labor Practice charges or the issuance of complaints, as it had done for almost a decade.

AFGE believes that the FLRA should rescind the proposed changes for two reasons. First, AFGE believes that the proposed changes should be rescinded as a whole because they violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, by failing to allow for adequate consideration of public comments.

Second, AFGE believes that the FLRA should rescind many of the proposed changes because they elevate the FLRA's expressed goal of "neutrality" over the mission of the agency and the purpose of the statute which it was created to enforce, are not based on any evidence -- in fact they are contradicted by all available evidence, and place unnecessary and unwarranted burdens on charging parties.

These comments will not reference or otherwise address provisions of the proposed changes for which AFGE has no comment.

I. The FLRA Should Rescind The Proposed Changes as a Whole Because They Violate the Administrative Procedure Act

AFGE believes that the FLRA should rescind the proposed changes in their entirety because they violate the notice and comment requirements of the APA. Although the Notice purports to solicit public comments, it also states that many of the proposed changes have already been made, as a result of "modifications" of the OGC's internal policies and its newly revised Settlement Policy. Federal Register, Volume 72, No. 245, 72 Fed. Reg. 72632 *et seq*. (December 21, 2007). In addition, AFGE has been informed that most, if not all, of the proposed changes have already been made through other, secret revisions to internal Manuals and internal instructions which have already been provided to agency staff. This is entirely inappropriate as it makes the changes a *fait accompli* and effectively nullifies the public comment period required by the APA. Finally, the Notice states that written public comments must be received by the FLRA no later than January 22, 2008, but also states that the proposed changes to the regulations will take effect on February 1, 2008 – only eight business days after the close of the comment period. *See* proposed Section 2423.0.

By setting the close of the comment period so close to the effective date, the FLRA has effectively eliminated any ability to seriously consider public comments to the proposed changes prior to their implementation. *See* 5 U.S.C. § 553 (b) (requiring notice) and (c) (requiring comment period, and mandating that final rules issue after consideration of public comments). AFGE believes that this violates the spirit, if not the letter, of the APA. Furthermore, AFGE believes that there can be no genuine consideration of public comments to the proposed changes when, in reality, the proposed changes have already become effective in secret, ahead of any public submission. This conclusion is further supported by the fact that the proposed changes contain no discussion of how the FLRA intends to consider any public comments that it receives.

By contrast, when the current regulations implementing the pre-complaint ADR program were issued, in 1998, the agency allowed the public over 45 days to make formal comments (August 24-October 19, 1998), while also scheduling eight public hearings around the country in order to obtain "additional input from [its] customers." Federal Register, Volume 63, No. 163, 63 Fed. Reg. 45013 *et seq*. (August 24, 1998). Even then, the agency spent over a month analyzing and reviewing the comments it had received before issuing the final regulations on November 30, 1998. Federal Register, Volume 63, No. 229, 63 Fed. Reg. 65638 *et seq*. (November 30, 1998).

Conversely, the Notice lacks even an assertion of good cause for its truncated and seemingly half-hearted attempt at compliance with the APA's notice and comment requirements. In sum, the Notice is procedurally defective. Both the Notice and the changes themselves should be rescinded, and replaced with an honest and straightforward notice which truthfully advises the public about the changes being proposed, and allows the agency enough time to thoroughly and adequately evaluate and consider any comments before proceeding to take action.

II. **The FLRA should rescind most of the proposed changes because they fail to further the mission of the Agency, elevate the FLRA's expressed goal of "neutrality" over the purpose of the statute which it was created to enforce, are not based on any evidence, and place unnecessary and unwarranted burdens on charging parties.**

The FLRA should also rescind most of the proposed changes, in particular the decision to deprive the parties of ADR services until after a charge has been filed, fully investigated, and the decision made to issue a complaint. The Agency's stated reasons for this change are to "confirm[] and enhance[] the neutrality of the OGC.", to "clarify the neutral fact-finding role of the OGC," and to "incorporate the General Counsel's Settlement Policy. . ." As such, the proposal elevates the FLRA's expressed goal of "neutrality" over the purpose of the statute which it was created to enforce. "Neutrality" is not the purpose of the Federal Labor Relations Statute, nor of the FLRA itself. Instead, it is "to [protect] the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them[, and to] facilitate[] and encourage[] the amicable settlements of disputes between employees and their employers involving conditions of employment. 5 U.S.C.§ 7101.

The proposed policy change does nothing to protect the rights of employees, to promote collective bargaining, or to facilitate or encourage the amicable settlement of disputes. Instead, it is likely to foster and prolong disputes, since it will require parties to file formal ULP charges in every case, even cases which could have been settled fairly quickly and easily using pre-dispute ADR services such as the facilitation, intervention or education services currently available under the regulation. The change will also be more costly to both the agency and its customers, the parties, and is likely to result in substantial delays in resolution of cases, since each and every charge will now have to be fully investigated, reviewed, and submitted for decision, rather than being resolved cheaply and informally at the earliest possible stage. Finally, refusing to commence ADR until after a formal complaint has been filed, investigated and is issued, is likely to result in many fewer resolutions. This is because by that time, both parties are likely to have hardened their positions, and to have taken or failed to take irrevocable action, and are generally much less willing to agree to informal resolution. In addition, by that time, the FLRA is no longer a "neutral," but instead has taken on the role of prosecutor – and is charged with enforcing the law, not with settling cases.

The Notice provides no evidence or even any argument that the proposed change will further the purpose of the Statute, that it is necessary, or that it will save money or be more efficient. By contrast, the existing regulation is based upon extensive research, including a national survey and a series of fact-finding meetings. As the FLRA explained in its 1998 Notice,

> Implementation of the proposed changes will enhance the purposes and policies of the Federal Service Labor-Management Relations Statute

(Statute) by preventing ULP disputes, resolving disputes that arise, and fully investigating and taking determinative action in disputes that are not resolved. The proposed revisions implement the FLRA's agency-wide collaboration and alternative dispute resolution initiative to assist labor and management parties in developing collaborative relationships, and to provide dispute resolution services.

* * *

In November 1997, the FLRA undertook a comprehensive Customer Service Survey. The General Counsel also has held over 30 Town Hall Meetings throughout the country, open to all parties, to discuss the manner in which the OGC: (1) prevents ULPs by assisting parties in avoiding ULP disputes and resolving those disputes which precipitate the filing of a ULP charge; and (2) investigates and takes disposition on the merits in those disputes which are not resolved. Many of the proposed revisions are driven by the discussions during those Town Hall meetings and the preliminary results of the Customer Service Survey. These proposed revisions provide parties with alternative dispute resolution (ADR) processes to avoid ULP disputes as well as to resolve any ULP disputes that materialize prior to the filing of a ULP charge and prior to issuance of a complaint.

* * *

Section 2423.2

> Since the enactment of the Statute, the OGC has assisted employees, labor organizations, and agencies in avoiding and resolving labor-management disputes and enhancing labor-management relationships as governed by the Statute. The use of a problem-solving approach and the provision of facilitation, intervention, training, and education services to the parties provide the participants in the Federal sector labor-management relations program with an alternative to adversarial litigation.
>
> The preliminary results of the Customer Service Survey reveal that improved relationships between labor and management result in the filing of fewer ULP charges. The provision of ADR services to parties promotes the purposes and policies of the Statute by: improving and enhancing parties' labor-management relationships, enabling parties to avoid ULP disputes, and assisting the parties in resolving ULP disputes among themselves.

63 Fed. Reg. 45013-14 (August 24, 1998).

Furthermore, the comments submitted on the proposed pre-complaint ADR program in 1998 were overwhelmingly positive:

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

63 Fed. Reg. 65638 (November 30, 1998).

The 2008 Notice rescinding the regulation fails to provide a shred of evidence to the contrary, nor has the Agency undertaken any new research, surveys or fact-finding efforts showing that the 1998 findings were wrong or that the ADR program has not been effective. Therefore, this proposed change is not supported by the evidence and should be rescinded.

To the contrary, to prohibit FLRA agents from facilitating informal settlement of ULP charges is petty and counterproductive. A skilled FLRA agent can assist the parties in resolving their disputes without compromising either the appearance or the fact of neutrality. Instead, the new policy will waste precious taxpayer dollars by requiring the agency and the parties to expend precious resources filing, investigating, defending against, and issuing complaints as a prerequisite to ADR settlement assistance. Only after a decision has been made to issue a complaint, when the FLRA's General Counsel is supposed to be acting as a prosecutor, on behalf of the Charging Party, is the FLRA General Counsel now willing to step in and act as a "neutral" settlement facilitator, "to avoid costly and protracted litigation." But by this time it is too late.

Indeed, the purported claim that the FLRA General Counsel must change its pre-complaint settlement/ADR policies because of "neutrality" twists the concept of neutrality inside out. When a charge is at its investigation stage, the services of the FLRA General Counsel to facilitate a settlement that is mutually acceptable to the charging party and the charged party embodies neutral activity because the FLRA General Counsel is working for a resolution that is acceptable to all sides of the dispute. By contrast, when the General Counsel has issued a complaint, the General Counsel has made a determination that the rights of the charging party under the Statute have been violated and, insofar as the charging party must have proper redress for these statutory violations, the General Counsel, in its prosecutorial role, serves as an advocate and not as a "neutral." Yet in the "through the looking glass" world of the proposed regulations, the neutral act of helping the parties in a pre-complaint setting of reaching a mutually agreeable compromise is deemed to "not be neutral" but the post-complaint actions of the FLRA General Counsel (as prosecutor and now espousing a specific position to one

party's benefit) are deemed to be the "neutral" actions. The FLRA General Counsel's premise of neutrality is misdirected.

The proposal to eliminate Section 2423.7 of the existing regulations and to eliminate General Counsel involvement in pre-complaint settlement and ADR services fails in a broader sense as well. Under the existing regulations, the General Counsel has engaged in services, such as on-site training, alternative case processing and other problem-solving approaches, that have allowed for the improvement of the labor-management relationship at individual facilities. Through past General Counsel efforts, the labor-management relationship at individual facilities has been improved and the need for any party to file future unfair labor practice charges involving such facilities has been lessened. The existing policy has thus furthered the Statute's goal of creating harmonious and working labor relations in much of the federal sector. By the proposed elimination of such services, the General Counsel undermines the purpose of the Statute and this misguided proposed policy, if adopted, will only lead to more contentious labor-management relations and to an increased filing of unfair labor practice charges.

Finally, other proposed changes place unnecessary and unwarranted burdens on charging parties, without any explanation or evidence. For example, proposed regulation § 2423.4 changes the rules to require that a charging party not just provide "a statement of the section(s) and paragraph(s) of the Federal Service Labor-Management Relations Statute alleged to have been violated," but adds the new requirement that the party explain "how those facts allegedly violate specific section(s) and paragraph(s) of the Federal Service Labor-Management Relations Statute." The Notice provides no reason for or explanation of why the change is necessary, or how it would differ from current practice. AFGE submits that such a pleading requirement is not necessary and will be misused to artificially bar the investigation of valid unfair labor practice charges.

Proposed regulation § 2423.8 adds the new provision that the FLRA may dismiss ULP charges if the charging party does not "cooperate" in the investigation of the charge. Dismissals on this basis have skyrocketed under the current administration. However, the proposed regulations provide for no sanction against a *charged party* that refuses to cooperate in the investigation of a ULP charge. Such a biased and one-sided regulation flies in the face of the FLRA's asserted goals of "neutrality," while at the same time failing to fulfill the basic statutory mandate that the FLRA protect employees and enforce the law.

Proposed regulation § 2423.12 suffers from the same fundamental flaw as the ADR changes described above, by requiring "a merit determination by the Regional Director" prior to entering into any settlement agreement, even an informal one. It is well known that that the informal resolution of legal disputes through settlement is favored by public policy, and is cheaper, easier and faster than litigation. The new regulation goes in precisely the wrong direction.

Section 2423.11(a) of the proposed regulations requires the Regional Director to disclose to the parties that the Region will issue a dismissal letter in the absence of a

withdrawal of a charge by a charging party when the Regional Director has decided to not issue a complaint but has not issued a dismissal letter. Far from displaying "neutrality," as asserted by the General Counsel, such a policy change favors the charged party. While settlement discussions between labor and management over a charge may be ongoing until the charge is either formally withdrawn or a dismissal letter issued, the General Counsel's proposed regulation clearly limits the time for settlement discussion between the charged and charging parties by requiring the Regional Director to announce a decision to not issue a complaint well in advance of either a dismissal letter or a withdrawal of the charge. Clearly, a charged party has no impetus to enter into any settlement if it knows that the Regional Director will take no action against it. In this manner, the General Counsel's proposal undermines the laudable goal of having the parties resolve their own disputes whenever possible. Additionally, the proposed change will simply result in more work for the Regional Directors. If a charging party knows that the Regional Director will tell the charged party that the Region would have issued a dismissal letter whether or not the charging party withdraws the charge, there will be no reason for the charging party to withdraw the charge. The net effect of this will be that the Regional Directors will not have the benefit of withdrawn charges and will have to issue a dismissal letter in every case in which the Regional Director decides not to issue a complaint.

AFGE also has a minor suggestion. In Section 2423.4(a) of the proposed regulations, the charging party may be required to give e-mail addresses for the charged party and the charged party's contact person. In practice, a charging party may not know any such e-mail address and, unlike other charged party information, a particular e-mail address may not be readily obtainable. AFGE therefore recommends that, in proposed sections 2423.4(a)(2) and (4), the term "e-mail address" should be amended to "e-mail address (if known)."

Finally, AFGE wishes to raise an additional concern. Over a year ago, on October 5, 2006, the FLRA General Counsel issued a memo rescinding several decades of policy and guidance memos which had been posted on the FLRA's website by the former General Counsel. She asserted at the time that the policy and guidance memos were being "reviewed" to determine if they were inaccurate or outdated. However, in over a year's time the General Counsel has issued no updated, corrected, or even any new policy and guidance memos to replace them. Instead, the Office seems to be operating in secret. Similarly, AFGE has been informed that several agency Manuals are in the process of being revised and reissued, yet the public has not been permitted to review the changes or the new Manuals. Such secrecy is a disservice both to the federal sector stakeholders who will be affected by these changes, and to the public at large, which must fund them but has no idea what its taxes are being used for.

AFGE urges the FLRA to reissue and reinstate its policies and guidance documents, to make any changes public, and to identify the evidence for or other policy reasons for any changes.

III. Conclusion

AFGE recommends that the FLRA completely rescind the proposed changes to the existing ADR program, and rescind other proposed changes as suggested herein, for the reasons discussed above.

Respectfully submitted,

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American Federation of Government
Employees, AFL-CIO