Rules and Regulations

Federal Register
Vol. 73, No. 33
Tuesday, February 19, 2008

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2423

Unfair Labor Practice Proceedings

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

ACTION: Final rule.

SUMMARY: The General Counsel of the Federal Labor Relations Authority (FLRA) revises portions of its regulations regarding unfair labor practice (ULP) proceedings (Part 2423, subpart A). The purpose of the revisions is to clarify the Office of the General Counsel's (OGC) role during the investigatory stage of processing ULP charges consistent with the policies of the General Counsel, and to clarify certain administrative matters relating to the filing and investigation of ULP charges. Implementation of the final rule confirms and enhances the neutrality of the OGC before a ULP merit determination is made and returns the OGC to its core mission.

DATES: *Effective Date:* February 19, 2008.

FOR FURTHER INFORMATION CONTACT: Jill Crumpacker, Executive Director, at (202) 218–7945, *FLRAexecutivedirector@flra.gov.*

SUPPLEMENTARY INFORMATION: On December 21, 2007, the OGC of the FLRA published proposed modifications to the existing rules and regulations in subpart A of title 5 of the Code of Federal Regulations regarding the processing and investigation of ULP charges (72 FR 72632) (December 21, 2007). The revisions clarify the neutral fact-finding role of the OGC in the investigation of ULP charges. The revisions encourage parties involved in a ULP dispute to work collaboratively to resolve the dispute, and consistent with the General Counsel's Settlement policy, clarify that the OGC will not be involved in any way in resolving parties' disputes until after a determination has been made that a charge is meritorious. At that time, the OGC will strongly encourage the use of Alternative Dispute Resolution (ADR) to work to resolve parties' ULP disputes and to avoid protracted litigation of ULP complaints. Should those efforts fail, the OGC will aggressively litigate any ULP complaint.

In the Notice of Proposed Rulemaking published in the **Federal Register**, the OGC solicited public comment on the proposed rule for a period of more than 30 days. All comments have been carefully considered prior to publishing the final rule, although all comments are not specifically addressed below.

Sectional Analyses

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

Part 2423—Unfair Labor Practice Proceedings

Section 2423.0

This section is amended to provide that this part is applicable to any charge of an alleged ULP pending or filed with the Authority on or after February 19, 2008. The provision regarding applicability of this part to any complaint is deleted.

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

Section 2423.1

A majority of the comments received concern sections 2423.1, 2423.2, 2423.7, and 2423.12 of the proposed rule and the role of the OGC in the resolution of ULP disputes prior to and after the filing of a charge and up until a merit determination is made by a Regional Director.

Nearly all commenters stated that parties to a ULP dispute are best served by the resolution of their dispute at the earliest practicable opportunity, and that resolving ULP disputes early effectuates the purposes and policies of the Federal Service Labor-Management Relations Statute (Statute). Two commenters responded favorably to the regulatory revision. One commenter asserted that the rule change will result in more thorough investigations and, therefore, a better understanding of the parties' positions prior to attempting to use ADR processes. The commenter stated that this will result in better discussions when parties are initially contacted regarding settlement by the OGC after a decision to issue complaint has been made. Numerous commenters objected to limiting the OGC involvement in the resolution of ULP disputes until only after a decision is made that the issuance of a ULP complaint is warranted.

As set forth in the Statute, the General Counsel's role is to ''investigate alleged unfair labor practices'' under the Statute, ''file and prosecute complaints'' under the Statute, and ''exercise such other powers of the Authority as the Authority may prescribe.'' 5 U.S.C. 7104(f)(2). Consistent with this statutory mandate, with respect to alleged ULPs, the OGC has an investigatory role and a prosecutorial role in the enforcement of the Statute. This mandate governs the policy of the OGC in the processing of ULPs. Consistent with this mandate, the OGC's role should be focused on its core investigatory and prosecutorial responsibilities. That role should not, contrary to the suggestion of some commenters, be to bring about a ''win-win'' resolution during the processing of every ULP dispute regardless of whether the allegations are meritorious.

Although the OGC has an investigatory and prosecutorial role under the Statute, consistent with the comments set forth above, the OGC recognizes the value in parties resolving their own labor-management disputes at the earliest stages. As stated in the final rule, parties are encouraged to meet and resolve ULP disputes prior to and even after filing ULP charges. Contrary to some of the commenters' assertions, the final rule does not prohibit the use of ADR prior to a merit determination; the final rule encourages the use of ADR by parties who are always free to resolve their dispute on their own or with the assistance of a third party. Nothing in the final rule prohibits or impedes the ability of parties to enter into a settlement prior to filing or during the processing of a ULP charge. Further, nothing prohibits or impedes parties from including requirements in their collective bargaining agreements that would mandate parties to make attempts to resolve their disputes prior to filing ULP charges—i.e., a negotiated pre-filing requirement. As stated in the final rule, and as noted by many of the

commenters, the purposes and policies of the Statute can best be achieved by parties to a ULP dispute working collaboratively.

A few commenters asserted that OGC involvement in facilitating ULP disputes prior to and during the investigation of a ULP charge greatly assists parties in resolving their disputes. To the extent that the involvement of a third-party enhances the ability of parties to resolve their dispute, there are a number of resources available to parties, including the services of the Federal Mediation and Conciliation Service (FMCS), which offers labor-management dispute resolution mediation by skilled facilitators as well as programs to improve labor-management relationships generally. The final rule urges the parties to a ULP dispute to be responsible for their relationship and the resolution of their disputes. This is consistent with the statement of a number of commenters that ADR works best when parties mutually agree to utilize such services to resolve their dispute.

Through vigorous enforcement of the Statute, the OGC protects the rights of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them. In addition, the OGC encourages the amicable settlement of disputes between employees and their employers by urging parties to work collaboratively to resolve their ULP disputes prior to filing a ULP charge and throughout the processing of a ULP charge after it is filed. In addition, once a determination is made that the Statute has been violated, the OGC will actively work with the parties using ADR processes to resolve the parties' ULP dispute and actively pursue litigation where appropriate. These actions are wholly consistent with the Statute, and accordingly, the final rule as promulgated is the same as the proposed rule.

Section 2423.2

The comments concerning this section are addressed in connection with section 2423.1 above. The final rule as promulgated is the same as the proposed rule.

Section 2423.3

The final rule as promulgated is the same as the proposed rule.

Section 2423.4

Numerous commenters responded favorably to the regulatory revision that provides for the inclusion of e-mail addresses in charges for all of the parties and witnesses. One commenter suggested modifying the e-mail requirement to reflect that e-mail addresses for the Charged Party and the Charged Party's point of contact be provided only ''if known.'' This suggestion has been incorporated into the final regulation because, as noted by the commenter, not all Charging Parties will know the e-mail address of the Charged Parties.

One commenter suggested inserting a requirement that a charge include the particular agent of the Charged Party that allegedly committed the ULP, as well as the specific setting—e.g., division, section, or department within an agency—where the alleged ULP took place, if the Charged Party is an agency. The commenter notes that at times the general nature of the information set forth in a charge against a large agency is insufficient for the Charged Party to take a proactive approach and conduct its own investigation into the allegations, and resolve the issue. The final rule adopts this suggestion.

One commenter claims that this section now adds a new requirement that a party explain how the facts alleged violate the specific paragraphs of the Statute. It is noted that the requirement set forth in 5 CFR 2423.4(a)(5) is not a new requirement and was not revised in the proposed rule.

Section 2423.5

This section is reserved.

Section 2423.6

All of the comments on this section were favorable and pertained to the elimination of the 2-page limitation on charges filed by facsimile transmission. The final rule as promulgated is the same as the proposed rule.

Section 2423.7

A number of comments were received regarding the role of the OGC in the resolution of a ULP charge prior to a merit determination. As addressed fully in connection with section 2423.1 above, under 5 U.S.C. 7104(f)(2), the OGC has an investigatory and prosecutorial role in the enforcement of the Statute, and as such, it is consistent with the Statute to limit the OGC's efforts to fulfilling that role—i.e., turning the focus back to the core mission.

As noted above, to the extent that the involvement of a third-party enhances the ability of parties to resolve their dispute, there are a number of resources available to parties, including the services of the FMCS, which offers programs, training and mediation involving labor-management disputes and relationships. Under the final rule, the parties to a ULP dispute are always encouraged to work collaboratively to resolve their own dispute, taking a problem-solving approach, rather than filing a ULP charge. Once a ULP charge is filed, parties are also encouraged on their own to attempt to resolve their dispute while the OGC conducts its investigation of the facts and determines the merits of the charge. The final rule as promulgated is the same as the proposed rule.

Section 2423.8

A number of commenters stated that the rule should include a sanction for the Charged Party in the event that a Charged Party does not cooperate in an investigation. Two commenters stated that the definition of what constitutes cooperation is too narrow. The final rule clarifies the long-standing practice that the failure of a party to cooperate during an investigation may result in a dismissal of the ULP charge by the Regional Director. To the extent that a Charged Party fails to cooperate in an investigation, the final rule continues to set forth that the General Counsel may issue a subpoena under 5 U.S.C. 7132 for the attendance and testimony of witnesses and the production of documentary or other evidence. The final rule as promulgated is the same as the proposed rule.

Section 2423.9

The final rule as promulgated is the same as the proposed rule.

Section 2423.10

One comment was received regarding this section. The commenter did not oppose the revisions to this section. The final rule as promulgated is the same as the proposed rule.

Section 2423.11

Some commenters favored the revision to § 2423.11(a) providing that the Regional Director will notify all parties to a dispute of a decision to dismiss a ULP charge upon completion of the investigation. One commenter stated that this is a positive rule change that promotes neutrality and employs parties to take responsibility for their actions.

A number of commenters expressed concern regarding informing a Charged Party of an OGC decision to dismiss a charge even where a Charging Party may withdraw the charge. These commenters uniformly claimed that this will disadvantage the Charging Party and will have a chilling effect on any settlement discussion that the parties

may be engaged in over the pending ULP charge. In this respect, one commenter stated that the proposed rule will remove the impetus of the Charged Party to enter into a settlement. According to one commenter, the current practice of allowing a Charging Party to withdraw a charge without notifying the Charged Party of a Regional Director's decision to dismiss the charge is a ''face-saving'' measure for the Charging Party. A few commenters also questioned whether the basis for the dismissal will be communicated to the Charged Party.

The final rule ensures that both parties to the dispute are apprised of the result of the investigation, including the basis for the decision where requested, and maintains the neutrality of the OGC, as it is a neutral fact-finding investigator reporting the results of its investigation. As discussed above, the OGC's role is limited to investigating and prosecuting alleged violations of the Statute. In cases where an alleged violation of the Statute is not found, the OGC's processes and procedures are not intended to be a tool for parties to bring about a settlement of their underlying non-meritorious dispute or to provide either party with the opportunity to ''save face.'' It is recognized that labor-management disputes which do not rise to the level of a ULP are still serious, and that their resolution is critical to good labor-management relations and to an effective and efficient Government. These regulations, however, place the responsibility for resolving such disputes in the hands of the parties where they are more appropriately addressed.

Some commenters expressed concern that if a decision is made to dismiss an otherwise meritorious charge on procedural grounds, then the parties may have a false sense that unlawful conduct is in fact lawful. As set forth above, parties will be apprised of the basis for a dismissal where requested. In addition, under the ULP processes and procedures, a party is always free to file a new charge once all procedural matters are resolved and where all of the other filing requirements, such as timeliness, etc, are met.

The final rule as promulgated is modified as set forth above.

Section 2423.12

A number of comments were received regarding the use of ADR after a decision to issue complaint has been made. One commenter asserted that waiting to address settlement of ULP charges until after a merit decision is made will result in more thorough investigations and, therefore, a better understanding of the parties' positions prior to attempting to use ADR. The commenter stated that this will result in better settlement discussions when parties are contacted regarding settlement.

A few commenters expressed concern that the proposed rule providing for the use of ADR prior to the issuance of complaint will result in all meritorious ULP charges being settled even over the objections of the Charging Party, and that the OGC will no longer issue complaint and litigate such cases. The OGC will actively work with the parties using ADR processes to reach a satisfactory resolution that is consistent with the Statute, resolves the parties' ULP dispute, and obtains the same types of remedies and relief as would be appropriate if the complaint was litigated. The OGC will also continue to vigorously enforce the Statute, prosecuting unresolved violations through litigation. The final rule as promulgated is the same as the proposed rule with a minor editorial clarification.

Regulatory Flexibility Act Certification

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

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

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

Paperwork Reduction Act of 1995

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

List of Subjects in 5 CFR Part 2423

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

■ For these reasons, the General Counsel of the Federal Labor Relations Authority, amends 5 CFR Part 2423 as follows:

PART 2423—UNFAIR LABOR PRACTICE PROCEEDINGS

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

Authority: 5 U.S.C. 7134.

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

Sec.

2423.0 Applicability of this part.

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

2423.1 Resolution of unfair labor practice disputes prior to a Regional Director determination whether to issue a complaint.
2423.2 Alternative Dispute Resolution (ADR) services.
2423.3 Who may file charges.
2423.4 Contents of the charge; supporting evidence and documents.
2423.5 [Reserved]
2423.6 Filing and service of copies.
2423.7 [Reserved]
2423.8 Investigation of charges.
2423.9 Amendment of charges.
2423.10 Action by the Regional Director.
2423.11 Determination not to issue complaint; review of action by the Regional Director.
2423.12 Settlement of unfair labor practice charges after a Regional Director determination to issue a complaint but prior to issuance of a complaint.
2423.13–2423.19 [Reserved]

§ 2423.0 Applicability of this part.

This part is applicable to any charge of alleged unfair labor practices pending or filed with the Authority on or after February 19, 2008.

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

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

The purposes and policies of the Federal Service Labor-Management Relations Statute can best be achieved

by the collaborative efforts of all persons covered by that law. The General Counsel encourages all persons on their own to meet, and in good faith, attempt to settle unfair labor practice disputes. To maintain complete neutrality, the General Counsel may not be involved with such settlement discussions with the parties prior to a Regional Director determination on the merits. Attempts by the parties to resolve unfair labor practice disputes prior to filing an unfair labor practice charge do not toll the time limitations for filing a charge set forth at 5 U.S.C. 7118(a)(4).

§ 2423.2 Alternative Dispute Resolution (ADR) services.

The General Counsel provides ADR services under § 2423.12(a) after a Regional Director has determined to issue a complaint.

§ 2423.3 Who may file charges.

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

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

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

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

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

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

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

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

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

(5) A clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the Federal Service Labor-Management Relations Statute and the date and place of occurrence of the particular acts, which includes the identity (name and title) of the all the individuals involved, as well as the specific agency entity (if applicable) within which the events took place; and

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

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

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

(iii) Involves a negotiability issue raised by the Charging Party in a petition pending before the Authority pursuant to part 2424 of this subchapter; or

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

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

(b) *When to file.* Under 5 U.S.C. 7118 (a)(4), a charge alleging an unfair labor practice must normally be filed within six (6) months of its occurrence.

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

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

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

(f) *Submitting supporting evidence and documents and identifying potential witnesses.* When filing a charge, the Charging Party shall submit to the Regional Director, any supporting evidence and documents, including, but not limited to, correspondence and memoranda, records, reports, applicable collective bargaining agreement clauses, memoranda of understanding, minutes of meetings, applicable regulations, statements of position and other documentary evidence. The Charging Party also shall identify potential witnesses with contact information (telephone number, e-mail address, and facsimile number) and shall provide a brief synopsis of their expected testimony.

§ 2423.5 [Reserved]

§ 2423.6 Filing and service of copies.

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

(b) *Filing date.* A charge is deemed filed when it is received by a Regional Director. A charge received in a Region after the close of the business day will be deemed received and docketed on the next business day. The business hours for each of the Regional Offices are set forth at *http://www.FLRA.gov.*

(c) *Method of filing.* A Charging Party may file a charge with the Regional Director in person or by commercial delivery, first class mail, facsimile or certified mail. If filing by facsimile transmission, the Charging Party is not required to file an original copy of the charge with the Region. A Charging Party assumes responsibility for receipt of a charge. Supporting evidence and documents must be submitted to the Regional Director in person, by commercial delivery, first class mail, certified mail, or by facsimile transmission.

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

§ 2423.7 [Reserved]

§ 2423.8 Investigation of charges.

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

(b) *Cooperation.* The purposes and policies of the Federal Service Labor-Management Relations Statute can best be achieved by the full cooperation of all parties involved and the timely

submission of all potentially relevant information from all potential sources during the course of the investigation. All persons shall cooperate fully with the Regional Director in the investigation of charges. The failure of a Charging Party to cooperate during an investigation may provide grounds for a Regional Director to dismiss the charge for failure to produce evidence supporting the charge. Cooperation includes any of the following actions, when deemed appropriate by the Regional Director:

(1) Making union officials, employees, and agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation;

(2) Producing documentary evidence pertinent to the matters under investigation; and

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

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

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

(i) By delivering it to the witness in person;

(ii) By registered or certified mail; or

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

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

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

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

(d) *Confidentiality.* It is the General Counsel's policy to protect the identity of individuals who submit statements and information during the investigation, and to protect against the disclosure of documents obtained during the investigation, as a means of ensuring the General Counsel's continuing ability to obtain all relevant information. After issuance of a complaint and in preparation for a hearing, however, identification of witnesses, a synopsis of their expected testimony and documents proposed to be offered into evidence at the hearing may be disclosed as required by the prehearing disclosure requirements in § 2423.23.

§ 2423.9 Amendment of charges.

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

§ 2423.10 Action by the Regional Director.

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

(1) Approve a request to withdraw a charge;

(2) Dismiss a charge;

(3) Approve a written settlement agreement in accordance with the provisions of § 2423.12;

(4) Issue a complaint; or

(5) Withdraw a complaint.

(b) *Request for appropriate temporary relief.* Parties may request the General Counsel to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d). The General Counsel may initiate and prosecute injunctive proceedings under 5 U.S.C. 7123(d) only upon approval of the Authority. A determination by the General Counsel not to seek approval of the Authority to seek such appropriate temporary relief is final and shall not be appealed to the Authority.

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

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

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

(a) *Opportunity to withdraw a charge.* If, upon the completion of an investigation under § 2423.8, a decision is made to dismiss the charge, the Regional Director will notify the parties of the decision, including the basis of the decision, if requested, and the Charging Party will be advised of an opportunity to withdraw the charge(s).

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

(c) *Appeal of a dismissal letter.* The Charging Party may obtain review of the Regional Director's decision not to issue a complaint by filing an appeal with the General Counsel within 25 days after service of the Regional Director's decision. A Charging Party shall serve a copy of the appeal on the Regional Director. The General Counsel shall serve notice on the Charged Party that an appeal has been filed.

(d) *Extension of time.* The Charging Party may file a request, in writing, for

an extension of time to file an appeal, which shall be received by the General Counsel not later than 5 days before the date the appeal is due. A Charging Party shall serve a copy of the request for an extension of time on the Regional Director.

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

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

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

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

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

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

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

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

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

(a) *Alternative Dispute Resolution (ADR).* After a merit determination to issue a complaint, the Regional Director will work with the parties to settle the dispute using ADR, to avoid costly and protracted litigation where possible.

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

(c) *Unilateral informal settlement agreement.* If the Charging Party elects not to become a party to a bilateral settlement agreement which the Regional Director concludes effectuates the policies of the Federal Service Labor-Management Relations Statute, the Regional Director may choose to approve a unilateral settlement between the General Counsel and the Charged Party. The Regional Director, on behalf of the General Counsel, shall issue a letter stating the grounds for approving the settlement agreement and declining to issue a complaint. The Charging Party may obtain review of the Regional Director's action by filing an appeal with the General Counsel in accordance with § 2423.11(c) and (d). The General Counsel shall take action on the appeal as set forth in § 2423.11(e)–(g).

§§ 2423.13–2423.19 [Reserved]

Dated: February 13, 2008.

Colleen Duffy Kiko,

General Counsel, Federal Labor Relations Authority.

[FR Doc. E8–3013 Filed 2–15–08; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 982

[Docket No. AMS–FV–07–0150; FV08–982–1 IFR]

Hazelnuts Grown in Oregon and Washington; Establishment of Interim Final and Final Free and Restricted Percentages for the 2007–2008 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule establishes interim final and final free and restricted percentages for domestic inshell hazelnuts for the 2007–2008 marketing year under the Federal marketing order for hazelnuts grown in Oregon and Washington. The interim final free and restricted percentages are 8.1863 and 91.8137 percent, respectively, and the final free and restricted percentages are 9.2671 and 90.7329 percent, respectively. The percentages allocate the quantity of domestically produced hazelnuts which may be marketed in the domestic inshell market (free) and the quantity of domestically produced hazelnuts that must be disposed of in outlets approved by the Board (restricted). Volume regulation is intended to stabilize the supply of domestic inshell hazelnuts to meet the limited domestic demand for such hazelnuts with the goal of providing producers with reasonable returns. This rule was recommended unanimously by the Hazelnut Marketing Board (Board), the agency responsible for local administration of the marketing order.

DATES: Effective February 20, 2008. This interim final rule applies to all 2007–2008 marketing year restricted hazelnuts until they are properly disposed of in accordance with marketing order requirements. Comments received by April 21, 2008 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Fax:* (202) 720–8938; or *Internet: http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Barry Broadbent or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW. Third Avenue, Suite 385, Portland, OR 97204; *Telephone:* (503) 326–2724, *Fax:* (503) 326–7440, or *E-mail: Barry.Broadbent@usda.gov* or *GaryD.Olson@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–