

7.02, for any other violation of these rules that does not result from reasonable error.

§ 9.04 Ex parte communications.

(a) *Definitions.*

(1) The term *person outside the Office* means any individual not an employee or agent of the office, any labor organization and agent thereof, and any employing office and agent thereof, and the General Counsel and any agent thereof when prosecuting a complaint proceeding before the Office pursuant to sections 210, 215, or 220 of the CAA. The term also includes any employee of the Office who becomes a party or a witness for a party other than the Office in proceedings as defined in these rules.

(2) The term *ex parte communication* means an oral or written communication (a) that is between an interested person outside the Office and a Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking; (b) that is related to a proceeding or a rulemaking; (c) that is not made on the public record; (d) that is not made in the presence of all parties to a proceeding or a rulemaking; and (5) that is made without reasonable prior notice to all parties to a proceeding or a rulemaking.

(3) For purposes of section 9.04, the term *proceeding* means the complaint and hearing proceeding under section 405 of the CAA, an appeal to the Board under section 406 of the CAA, a pre-election investigatory hearing under section 220 of the CAA, and any other proceeding of the Office established pursuant to regulations issued by the Board under the CAA.

(4) The term *period of rulemaking* means the period commencing with the issuance of an advance notice of proposed rulemaking or of a notice of proposed rulemaking, whichever issues first, and concluding with the issuance of a final rule.

(b) *Exception to Coverage.* The rules set forth in this section do not apply during periods that the Board designates as periods of negotiated rulemaking.

(c) *Prohibited Ex Parte Communications and Exceptions.*

(1) During a proceeding, it is prohibited knowingly to make or cause to be made:

(i) a written *ex parte* communication if copies thereof are not promptly served by the communicator on all parties to the proceeding in accordance with section 9.01 of these Rules; or

(ii) an oral *ex parte* communication unless all parties have received advance notice thereof by the communicator and have an adequate opportunity to be present.

(2) During the period of rulemaking, it is prohibited knowingly to make or cause to be made a written or an oral *ex parte* communication. During the period of rulemaking, the Office shall treat any written *ex parte* communication as a comment in response to the advance notice of proposed rulemaking or the notice of proposed rulemaking, whichever is pending, and such communications will therefore be part of the public rulemaking record.

(3) Notwithstanding the prohibitions set forth in (1) and (2), the following *ex parte* communications are not prohibited:

(i) those which relate solely to matters which the Board member or Hearing Officer is authorized by law, Office rules, or order of the Board or Hearing Officer to entertain or dispose of on an *ex parte* basis;

(ii) those which all parties to the proceeding agree, or which the responsible official formally rules, may be made on an *ex parte* basis;

(iii) those which concern only matters of general significance to the field of labor and employment law or administrative practice;

(iv) those from the General Counsel to the Office or the Board when the General Counsel is acting on behalf of the Office or the Board under any section of the CAA; and

(v) those which could not reasonably be construed to create either unfairness or the appearance of unfairness in a proceeding or rulemaking.

(4) It is prohibited knowingly to solicit or cause to be solicited any prohibited *ex parte* communication.

(d) *Reporting of Prohibited Ex Parte Communications.*

(1) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who determines that he or she is being asked to receive a prohibited *ex parte* communication shall refuse to do so and inform the communicator of this rule.

(2) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding who knowingly receives a prohibited *ex parte* communication shall

(a) notify the parties to the proceeding that such a communication has been received; and

(b) provide the parties with a copy of the communication and of any response thereto (if written) or with a memorandum stating the substance of the communication and any response thereto (if oral). If a proceeding is then pending before either the Board or a Hearing Officer, and if the Board or Hearing Officer so orders, these materials shall then be placed in the record of the proceeding. Upon order of the Hearing Officer or the Board, the parties may be provided with a full opportunity to respond to the alleged prohibited *ex parte* communication and to address what action, if any, should be taken in the proceeding as a result of the prohibited communication.

(3) Any Board member involved in a rulemaking who knowingly receives a prohibited *ex parte* communication shall cause to be published in the Congressional Record a notice that such a communication has been received and a copy of the communication and of any response thereto (if written) or with a memorandum stating the substance of the communication and any response thereto (if oral). Upon order of the Board, these materials shall then be placed in the record of the rulemaking and the Board shall provide interested persons with a full opportunity respond to the alleged prohibited *ex parte* communication and to address what action, if any, should be taken in the proceeding as a result of the prohibited communication.

(4) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who knowingly receives a prohibited *ex parte* communication and who fails to comply with the requirements of subsections (1), (2), or (3) above, is subject to internal censure or discipline through the same procedures that the Board utilizes to address and resolve ethical issues.

(e) *Penalties and Enforcement.*

(1) Where a person is alleged to have made or caused another to make a prohibited *ex parte* communication, the Board or the Hearing Officer (as appropriate) may issue to the person a notice to show cause, returnable within a stated period not less than seven days from the date thereof, why the Board or the Hearing Officer should not determine that the interests of law or justice require that the person be sanctioned by, where applicable, dismissal of his or her claim or interest, the striking of his or her answer, or the imposition of a some other appropriate sanction, including but not limited to the award of attorneys' fees and costs incurred in responding to a prohibited *ex parte* communication.

(2) Upon notice and hearing, the Board may censure or suspend or revoke the privilege of practice before the Office of any person who knowingly and willfully makes, solicits, or causes the making of any prohibited *ex parte* communication. Before formal proceedings under this subsection are instituted, the Board shall first provide notice in writing that it proposes to take such action and that the person or persons may show cause within a period to be stated why the Board should not take such action. Any hearings under this section shall be conducted by a Hearing Officer subject to Board review under section 8.01 of these Rules.

(3) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who knowingly makes or causes to be made a prohibited *ex parte* communication is subject to internal censure or discipline through the same procedures that the Board utilizes to address and resolve ethical issues.

§ 9.05(a)

(a) *Informal Resolution.* At any time before a covered employee who has filed a formal request for counseling files a complaint under section 405, a covered employee and the employing office, on their own, may agree voluntarily and informally to resolve a dispute, so long as the resolution does not require a waiver of a covered employee's rights or the commitment by the employing office to an enforceable obligation.

Signed at Washington, D.C., on this 10th day of July, 1996.

R. GAULL SILBERMAN,
Executive Director,
Office of Compliance.

CONCLUSION OF MORNING
BUSINESS

The PRESIDING OFFICER (Mr. SMITH). Under the previous order, morning business is closed.

DEPARTMENT OF DEFENSE AP-
PROPRIATIONS FOR FISCAL
YEAR 1997

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to the consideration of S. 1894, which the clerk will report.

The bill clerk read as follows:

A bill (S. 1894) making appropriations for the Department of Defense for the fiscal year ending September 30, 1997.

The Senate proceeded to consider the bill.

Mr. STEVENS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alaska is recognized.

Mr. STEVENS. Mr. President, I call the Senate to order, under the previous order, pursuant to the provisions of rule 19, paragraph 1(b), and ask that the proceedings be in accordance thereof for the purposes of consideration of the appropriations bill.

Mr. REID. Parliamentary inquiry.

The PRESIDING OFFICER. Will the Senator yield for a parliamentary inquiry?

Mr. STEVENS. Yes.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Will the Chair explain the rule? I could not hear. The Senator's microphone was not on.