United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Civil Service, Committee on Government Reform and Oversight
House of Representatives

For Release on Delivery
Expected at
9:00 a.m. EST
Wednesday
November 29, 1995

FEDERAL EMPLOYEE REDRESS: An Opportunity for Reform

Statement of Timothy P. Bowling
Director Federal Management and Workforce Issues
General Government Division

Federal Employee Redress: An Opportunity for Reform

Statement by
Timothy P. Bowling, Associate Director
Federal Management and Workforce Issues
General Government Division

The purpose of the redress system for federal employees is to uphold the merit system principles by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. But how well is the redress system working, and does it add to or detract from the fair and efficient operation of the federal government? In response to these questions, GAO makes three points:

- First, because of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.
- Second, because the system is so strongly protective of the redress rights of individual workers, it is vulnerable to employees who would take undue advantage of these protections. Its protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems. Further, the demands of the system put pressure on employees and agencies alike to settle cases—regardless of their merits—to avoid potential costs.
- Third, alternatives to the current redress system do exist. These alternatives, in the private sector and elsewhere, may be worth further study as Congress considers modifying the federal system.

Leading private sector and nonfederal employers have told GAO that managers in their organizations are held accountable for treating people fairly but are also given the flexibility and discretion to make the tough decisions that are an inevitable part of managing well. These organizations recognize that a balance must be struck between individual employee protections and the authority of managers to operate in a responsible fashion. To the extent that the federal government's administrative redress system is tilted toward employee protections at the expense of the effective management of the nation's business, it deserves congressional attention.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the administrative redress system for federal employees. The current redress system grew out of the Civil Service Reform Act of 1978 (CSRA) and related legal and regulatory decisions that have occurred over the past 15 years. The purpose of the redress system is to uphold the merit system principles by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. Today, as more voices are heard calling for streamlining or consolidating the redress system, I would like to address the question of how well the redress system is working and whether, in its present form, it contributes to or detracts from the fair and efficient operation of the federal government.

I have three points to make:

- First, because of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.
- Second, because the system is so strongly protective of the redress rights of individual workers, it is vulnerable to employees who would take undue advantage of these protections. Its protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems. Further, the demands of the system put pressure on employees and agencies alike to settle cases—regardless of their merits—to avoid potential costs.
- Third, alternatives to the current redress system do exist. These alternatives, in the private sector and elsewhere, may be worth further study as Congress considers modifying the federal system.

I would like to make one additional observation: Leading private sector and nonfederal employers have told us that managers in their organizations are held accountable for treating people fairly but are also given the flexibility and discretion to make the tough decisions that are an inevitable part of managing well. These organizations recognize that a balance must be struck between individual employee protections and the authority of managers to operate in a responsible fashion. To the extent that the federal government's administrative redress system is tilted toward employee protection at the expense of the effective management of the nation's business, it deserves congressional attention.

My observations today are based on interviews with officials at the adjudicatory agencies, the Office of Personnel Management (OPM), and the now defunct Administrative Conference of the United States; analysis of data on case processing provided by the adjudicatory agencies; and a review of the redress system's underlying legislation and other pertinent literature.[1] In addition, my remarks draw upon a symposium GAO held in April of this year at the request of Senator William V. Roth, Jr., then Chairman of the Senate Governmental Affairs Committee, with participants from the governments of Canada, New Zealand, and Australia, as well as private sector employers such as Xerox, Federal Express, and IBM.[2] The proceedings added to our awareness and understanding of current employment practices outside the federal government.

A Complex and Duplicative System

Today, executive branch civil servants are afforded opportunities for redress at three levels: first, within their employing agencies; next, at one or more of the central adjudicatory agencies; and finally, in the federal courts. Although one of the purposes of CSRA was to streamline the previous redress system, the scheme that has emerged is far from simple. Today, no fewer than four independent agencies hear employee complaints or appeals. The Merit Systems Protection Board (MSPB) hears employee appeals of firings or suspensions of more than 14 days, as well as other significant personnel actions. The Equal Employment Opportunity Commission (EEOC) hears employee discrimination complaints[3] and reviews agencies' final decisions on complaints.[4] The Office of Special Counsel (OSC) investigates employee complaints of prohibited personnel actions—in particular, retaliation for whistleblowing. For employees who belong to collective bargaining units and have their individual grievances arbitrated, the Federal Labor Relations Authority (FLRA) reviews the arbitrators' decisions.[5]

While the boundaries of the appellate agencies may appear to be neatly drawn, in practice these agencies form a tangled scheme. One reason is

[1]My comments focus on the redress processes available to individual employees, both within and outside of collective bargaining units, but not on the collective bargaining processes under which unions can appeal agency actions affecting the groups they represent.

[2]We will be issuing a full report on the symposium in the near future.

[3]Complaints may be filed for unlawful employment discrimination on the bases of race, color, religion, sex, national origin, age, or handicap.

[4]In addition, EEOC receives and investigates employment discrimination charges against private employers and state and local governments.

[5]In addition, employees can appeal position classifications to OPM.

that a given case may be brought before more than one of the agencies—a circumstance that adds time-consuming steps to the redress process and may result in the adjudicatory agencies reviewing each other's decisions. Matters are further complicated by the fact that each of the adjudicatory agencies has its own procedures and its own body of case law. All but OSC offer federal employees the opportunity for hearings, but all vary in the degree to which they can require the participation of witnesses or the production of evidence. They also vary in their authority to order corrective actions and enforce their decisions.

What's more, the law provides for further review of these agencies' decisions—or, in the case of discrimination claims, even de novo[6] trials—in the federal courts. Beginning in the employing agency, proceeding through one or more of the adjudicatory bodies, and then carried to conclusion in court, a single case can take years.

An Inefficient System: The Mixed Case Example

The most frequently cited example of jurisdictional overlap in the redress system is the so-called "mixed case." A tenured federal employee who has been fired (or who has experienced any of several other major adverse actions such as a demotion) can appeal the agency's decision to MSPB. Likewise, a federal employee who feels that he or she has been discriminated against can appeal to EEOC. But an employee who has been fired, and who feels that the firing was based on discrimination, can essentially appeal to both MSPB and EEOC. The employee first appeals to MSPB, with hearing results further appealable to MSPB's three-member Board. If the appellant is still unsatisfied, he or she can then appeal MSPB's decision to EEOC. If EEOC finds discrimination where MSPB did not, the two agencies try to reach an accommodation. If they cannot do so—an event that has occurred only three times in 15 years—a three-member Special Panel is convened to reach a determination. At this point, the employee who is still unsatisfied with the outcome can file a civil action in U.S. district court, where the case can begin again with a de novo trial.

A mixed case can become even more complicated and duplicative if it is adjudicated under the provisions of a collective bargaining agreement, which may lead to a hearing before an arbitrator. If the employee goes through arbitration (which his or her union must approve and for which it generally pays part of the cost) and is left unsatisfied by the arbitrator's

[6]In a de novo trial, a matter is tried anew as if it had not been heard before.

ruling, he or she can appeal the arbitrator's ruling to MSPB, starting the adjudication process almost from scratch.

The complexity of mixed cases has attracted a lot of attention. But two facts about mixed cases are particularly worth noting. First, few mixed cases coming before MSPB result in a finding of discrimination. Second, when EEOC reviews MSPB's decisions in mixed cases, it almost always agrees with them. In fiscal year 1994, for example, MSPB decided roughly 2,000 mixed case appeals. It found that discrimination had occurred in just eight. During the same year, EEOC ruled on appellants' appeals of MSPB's findings of nondiscrimination in 200 cases. EEOC disagreed with MSPB's findings in just three. In each instance, MSPB adopted EEOC's determination.

One result of this sort of jurisdictional overlap and duplication is simple inefficiency. A mixed case appellant can—at no additional risk—have two agencies review his or her appeal. These agencies rarely differ in their determinations, but an employee has little to lose in asking both agencies to review his or her case.

A Costly System, With Many Costs Unknown

Just how much this multilevel, multiagency redress system costs is hard to ascertain. We know that in fiscal year 1994, the share of the budgets of the four agencies that was devoted to individual federal employees' appeals and complaints totaled $54.2 million (see table 1). We also know that in fiscal year 1994, employing agencies reported spending almost $34 million investigating discrimination complaints. In addition, over $7 million was awarded for complainants' legal fees and costs in discrimination cases alone.[7] But many of the other costs cannot be pinned down, such as the direct costs accrued by employing agencies while participating in the appeals process, arbitration costs, the various costs tied to lost productivity in the workplace, employees' unreimbursed legal fees, and court costs. All these costs either go unreported or are impossible to clearly define and measure.

[7]Consists of legal fees and costs (1) paid by agencies in discrimination complaints resolved by administrative procedures and (2) paid from the Judgment Fund for settlements and judgments arising out of lawsuits.

Table 1. Portion of Budgets for Adjudicatory Agencies Devoted to Individual Federal Employee Appeals and Complaints, Along With Cases Received in FY 1994

Agency	Budget (millions $)	Cases received
MSPB	24.7	10,341[a]
EEOC	19.4	16,637[b]
OSC	8.0	1,837[c]
FLRA	2.1	97[d]
Total	**54.2**	**28,912**

[a]Total of initial appeals and petitions for review of initial appeals.

[b]Total of requests for hearings before an administrative judge and appeals to the Commission of agency final decisions.

[c]These complaints contained 3,471 separate allegations of prohibited personnel practices.

[d]Number of appeals of arbitration awards decided in FY 1994.

Source: OMB data, agency data, and agency estimates.

A Time-Consuming System, Especially in Discrimination Cases

Individual cases can take a long time to resolve—especially if they involve claims of discrimination. Among discrimination cases closed during fiscal year 1994 for which there was a hearing before an EEOC administrative judge and an appeal of an agency final decision to the Commission itself, the average time from the filing of the complaint with the employing agency to the Commission's decision on the appeal was over 800 days.[8]

One reason it takes so long to adjudicate a discrimination case is that the number of discrimination complaints has been climbing rapidly. As shown in table 2, from fiscal years 1991 to 1994, the number of discrimination complaints filed increased by 39 percent; the number of requests for a hearing before an EEOC administrative judge increased by about 86 percent; and the number of appeals to EEOC of agency final decisions increased by 42 percent. Meanwhile, the backlog of requests for EEOC hearings increased by 65 percent, and the inventory of appeals to EEOC of agency final decisions tripled.[9]

[8]EEOC processed requests for hearings before an administrative judge in an average of 154 days. The Commission processed appeals of agency final decisions in an average of 185 days. Cases before MSPB are processed more quickly but still take a long time. In fiscal year 1994, MSPB processed initial appeals in an average of 81 days and processed appeals of initial decisions to the three-member Board in an average of 162 days.

[9]EEOC officials told us that they have undertaken an assessment of discrimination complaint processing for federal employees and expect to complete the study in early 1996.

Table 2: Increase in Discrimination Complaints, FYs 1991 to 1994

	FY 1991	FY 1994	Percent increase
Complaints filed with employing agencies	17,696	24,592	39.0
Requests for EEOC hearing[a]	5,773	10,712	85.6
Appeals to EEOC of agency final decisions	4,167	5,925	42.2

[a]These caseload data do not include mixed case appeals to MSPB.

Source: EEOC.

Implications of the Focus on Employee Rights

One reason Congress placed employee redress responsibilities in several independent agencies was to ensure that each federal employee's appeal, depending on the specifics of the case, would be heard by officials with the broadest experience and expertise in the area. In its emphasis on fairness to all employees, however, the redress system may be allowing some employees to abuse its processes and may be creating an atmosphere in which managing the federal workforce is unnecessarily difficult.

As things stand today, federal workers have substantially greater employment protections than do private sector employees. While most large or medium-size companies have multistep administrative procedures through which their employees can appeal adverse actions, these workers cannot, in general, appeal the outcome to an independent agency. Compared with federal employees, their rights to take their employer to court are also limited. And even when private sector workers complain of discrimination to EEOC, they receive less comprehensive treatment than do executive branch federal workers, who, unlike their private sector counterparts, are entitled to evidentiary hearings before an EEOC administrative judge, as well as a trial in U.S. district court.

Another characteristic of the redress system for federal employees is that certain kinds of complaints receive more prominence or attention than others. OSC, for instance, was established primarily to investigate cases in which federal employees complain of retaliation against them for whistleblowing. If OSC findings support the employee and the employing agency fails to take corrective action, OSC's findings become part of the employee's appeal before MSPB. OSC's investigation is at no cost to the employee. If OSC's findings do not support the employee, he or she may proceed with an appeal to MSPB as if no investigation had ever been

made.[10] The OSC investigation, therefore, is not just cost-free to the employee, but risk-free as well.

Discrimination is another kind of complaint to which the redress system gives fuller or more extensive protection than other complaints or appeals. Clearly, more administrative redress is available to employees who claim they have been discriminated against than to those who appeal actions to MSPB. For example, workers who claim discrimination before EEOC—unlike those appealing a firing, lengthy suspension, or downgrade to MSPB—can file a claim even though no particular administrative action has been taken against them. Further, those who claim discrimination are entitled, at no cost, to an investigation of the matter by their agencies, the results of which are made part of the record. Further still, if they are unsatisfied after EEOC has heard their case and any subsequent appeals, they can then go to U.S. district court for a de novo trial, which means that the outcome of the entire administrative redress process is set aside, and the case is tried all over again.

What are the implications of the extensive opportunities for redress provided federal workers? Federal employees file workplace discrimination complaints at roughly 10 times the per capita rate of private sector workers. And while some 47 percent of discrimination complaints in the private sector involve the most serious adverse action—termination—only 18 percent of discrimination complaints among federal workers are related to firings.

Another phenomenon may be worth noting. Officials at EEOC and elsewhere have said that the growth since 1991 in the number of discrimination complaints by federal employees is probably an outgrowth of passage of the Civil Rights Act of 1991, which raised the stakes in discrimination cases by allowing complainants to receive compensatory damages of up to $300,000 and a jury trial in District Court.[11]

Vulnerability to Misuse

Officials from EEOC and other agencies have said they are burdened by cases that are not legitimate discrimination complaints. We were told that some employees file complaints as a way of getting a third party's

[10]In addition, the employee who complains of retaliation for whistleblowing can appeal matters to MSPB that ordinarily would not be appealable to that agency.

[11]Figures on compensatory damage awards are not available. These amounts are not reported separately, but are, instead, lumped together with figures for back pay awards. Back pay awards increased nearly threefold from $8.2 million in fiscal year 1991 to $24.1 million in fiscal year 1994.

assistance in resolving a workplace dispute. We were also told that some file frivolous complaints to harass supervisors or to game the system.

All sorts of matters become the subject of discrimination complaints, and they are accorded due process. Here are two examples, drawn from recent issues of the newsletter Federal Human Resources Week: A male employee filed a formal complaint when a female co-worker with whom he had formerly had a romantic relationship "harassed him by pointedly ignoring him and moving away from him when they had occasion to come in contact." Another claimed that he was fired in part on the basis of his national origin: "American-Kentuckian."

We are not in a position to judge the legitimacy of these complaints. We note, however, that EEOC's rulings on the complainants' appeals affirmed the agency's position that there was no discrimination. We would also make the point that federal officials spent their time—and the taxpayers' money—on these cases.

Inhibiting Managers and Encouraging Settlements

At the employing agency level, the prospect of having to deal with lengthy and complex procedures can affect the willingness of managers to deal with conduct and performance issues. In 1991, we reported that over 40 percent of personnel officials, managers, and supervisors interviewed said that the potential for an employee using the appeal or arbitration process would affect a manager's or supervisor's willingness to pursue a performance action.[12]

At the adjudicatory agency level, one effect of complex and time-consuming redress procedures has been to spur the trend toward settlements. About two-thirds of the adverse action and poor performance cases at MSPB were settled in 1994 instead of being decided on their merits. Similarly, during the same period, about one-third of the discrimination complaints brought before EEOC were settled without a hearing. Employing agencies settle many more complaints before they ever get that far.

While the trend toward settling cases has helped avoid a lot of adjudication, there is some concern about the larger implications of the practice. In a given employee's case, the possibility of avoiding the potential costs of seeing the process through to the bitter end—costs that

[12]Performance Management. How Well Is the Government Dealing With Poor Performers? (GAO/GGD-91-7, October 1990).

include not just time and money but human endurance—may be driving the inclination to settle. Federal officials, in deciding whether or not to settle, must weigh the cost of settling against the potential loss of more taxpayer dollars and the time and energy that would be diverted from the business of government.

There is some concern that policies encouraging the contending parties to compromise on the issues may conflict with the mission of the adjudicatory agencies to support the merit principles and may set troublesome precedents or create ethical dilemmas for managers.[13] Further, there is concern that settlements may be fundamentally counterproductive, especially in discrimination complaints, where settlement policies may in fact encourage the filing of frivolous complaints.

In Search of Alternatives

At a time when Congress and the administration are considering opportunities for civil service reform, looking in particular to the private sector and elsewhere for alternatives to current civil service practices, organizations outside the executive branch of the federal government may be useful sources for ideas on reforming the administrative redress system.

In most private sector organizations, final authority for decisions involving disciplinary actions rests with the president or chief executive officer. Some firms give that authority to the personnel or employee relations manager. But others have turned to some form of alternative dispute resolution (ADR), especially in discrimination complaints.[14] Some firms use outside arbitrators or company ombudsmen. Still others employ committees or boards made up of employee representatives and/or supervisors to review or decide such actions. We have not studied the effectiveness of these private sector practices, but they may provide insight for dealing with redress issues in a fair but less rigidly legalistic fashion than that of the federal redress system.

In the same regard, federal agencies are exploring alternatives to rigid, formal grievance processes. The use of ADR methods was, in fact, called

[13]An example is the occasional settlement agreement not to give the separated employee a bad employment reference. The supervisor who argued for the employee's dismissal may not be allowed to give good-faith answers to a prospective employer who calls for a reference.

[14]For a discussion of ADR methods private sector employers use, see our report Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution (GAO/HEHS-95-150, July 1995).

for under CSRA and underscored by the Administrative Dispute Resolution Act of 1990, the Civil Rights Act of 1991, and regulatory changes made at EEOC. Based not only on the fact that Congress has endorsed ADR in the past, but also that individual agencies have taken ADR initiatives and that MSPB and EEOC have explored their own initiatives, it is clear that the need for finding effective ADR methods is widely recognized in government. However, our preliminary study of government ADR efforts last year indicated that agency efforts are, by and large, in their early stages. Right now, results are too sketchy to be of use, but eventually it would be helpful to know if agencies pursuing ADR approaches have achieved savings in time and money and whether their employees have found ADR methods fair and equitable.

Other areas that may be worth studying are those segments of the civil service left partially or entirely uncovered by the current redress system. For example, while almost all federal employees can bring discrimination complaints to EEOC, employees in their probationary periods, temporary employees, unionized postal workers, intelligence agency and FBI employees, and certain other employees generally cannot appeal adverse actions to MSPB. In addition, intelligence agency and FBI employees, as well as certain other employees, are not covered by federal service labor relations legislation and therefore cannot form bargaining units or engage in collective bargaining. What are the implications of the varying levels of protection on the fairness with which these employees are treated? Are there lessons here that might be applied elsewhere in the civil service?

Finally, it should be noted that legislative branch employees are treated differently from those in the executive branch. For example, under the Congressional Accountability Act of 1995, beginning in January 1996 congressional employees with discrimination complaints will be required to choose between two redress alternatives, one administrative and one judicial. The administrative alternative will allow employees to appeal to the Office of Compliance, with hearing results appealable to a five-member board. The board's decisions may then be appealed to the U.S. Court of Appeals for the Federal Circuit, which has a limited right of review. The other alternative will be to bypass the administrative process and file suit in U.S. District Court, with the opportunity to appeal the court's decision to the appropriate U.S. Court of Appeals. The effect of this arrangement is to avoid the opportunity for the "two bites of the apple"—one administrative, one judicial—currently offered executive branch employees. Congress may find that experience with the new system in

operation may be instructive for considering how best to provide employees redress.

An Opportunity to Improve the Way Government Operates

Today, in the face of tight budgets and a rapidly changing work environment, the civil service is undergoing renewed scrutiny by the administration and Congress. In the broadest sense, the goal of such scrutiny is to identify ways of making the civil service more effective and less costly in its service to the American people. With so many facets of the civil service under review—including compensation and benefits, performance management, and the retirement system—no area should be overlooked that offers the opportunity for improving the way the government operates. To the extent that the federal government's administrative redress system is tilted toward employee protections at the expense of the effective management of the nation's business, it deserves congressional attention.

This concludes my prepared statement, Mr. Chairman. I would be pleased to take any questions that you or other Members of the Subcommittee may have.

United States
General Accounting Office
Washington, D.C. 20548-0001

Bulk Rate
Postage & Fees Paid
GAO
Permit No. G100

Official Business
Penalty for Private Use $300

Address Correction Requested

Ordering Information

The first copy of each GAO report and testimony is free. Additional copies are $2 each. Orders should be sent to the following address, accompanied by a check or money order made out to the Superintendent of Documents, when necessary. Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.

Orders by mail:

U.S. General Accounting Office
P.O. Box 6015
Gaithersburg, MD 20884-6015

or visit:

Room 1100
700 4th St. NW (corner of 4th and G Sts. NW)
U.S. General Accounting Office
Washington, DC

Orders may also be placed by calling (202) 512-6000 or by using fax number (301) 258-4066, or TDD (301) 413-0006.

Each day, GAO issues a list of newly available reports and testimony. To receive facsimile copies of the daily list or any list from the past 30 days, please call (202) 512-6000 using a touchtone phone. A recorded menu will provide information on how to obtain these lists.

For information on how to access GAO reports on the INTERNET, send an e-mail message with "info" in the body to:

info@www.gao.gov