NLWJC - Kagan

DPC - Box 041 - Folder 006

Race-Race Initiative Policy - Civil Rights - Federal Employees [1]

Race - civil rights enf

Edward W. Correia

08/04/98 12:31:17 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP, "Christopher Edley, Jr." <edley @ law.harvard.edu>

cc: Leslie Bernstein/WHO/EOP, Laura Emmett/WHO/EOP

Subject: Re: CR Mtg

Here is my suggested list of issues for our civil rights overview. Please let me know if other issues should be on the list. (We don't have to talk about all of these, but I will try to be prepared on all of them.)

Education

Higher education admissions, including current private litigation (Michigan, Hopwood, etc.) and investigations of the use of standardized tests (Univ. of California)
High stakes testing in other contexts -- e.g., elementary and secondary schools
Bilingual education, including the California and Denver situations
Single sex schools
School desegregation, the Indianapolis and St. Louis cases
Other Title IX issues -- abortion, sexual harassment
Magnet schools and use of race
School funding

Employment

Civil rights division enforcement strategy
Employer testing
EEOC and testers
Broadcasting -- pending case involving EEO rules, ownership initiatives
Diversity and Title VII (follow-up to Piscataway)

Environmental Justice

ADA enforcement and policy development

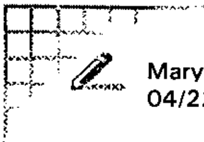
Procurement -- 8(a) reform, benchmarking implementation

Housing -- enforcement and broader integration issues

Process issues

Particular issues raised by OCR; Civil Rights Division; and EEOC
Generally, how should the White House monitor and oversee enforcement policy?

Race init policy - civil rights - federal employees



Mary L. Smith
04/22/98 05:54:13 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Julie A. Fernandes/OPD/EOP, Thomas L. Freedman/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: EEOC Federal Sector Rules

FYI -- Today Ellen Vargyas called to say that DOJ sent them a letter stating that they are sending to OLC the issue of whether EEOC has the authority to permit administrative judges, rather than the agencies themselves, to issue final decisions in federal sector discrimination cases. Sally Katzen had specifically brokered a deal with the agencies not to send this issue to OLC. However, DOJ was not at the meeting where the deal was brokered. This is unusual because DOJ merely sent the letter in and did not call first to discuss their concerns. Sally has put in a call to Don Arbuckle to get him to call DOJ to find out what's going on. I will keep you updated. Mary

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Fed Employees

Julie A. Fernandes
02/13/98 04:30:07 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: EEOC federal sector rule

Elena,

The EEOC voted yesterday to approve the federal sector rule. We will hopefully know by the end of today when the rule will be published in the federal register. EEOC is interested in coordinating their announcement of the rule with the PIR.

Julie

Julie -

What's the story on timing here? Do Sylvia/Judy want to do anything with this? If so, what ~~do~~ (if anything) do they want us to do?

Elena

Race Unit Policy -
Civ Rts Enf -
Federal Employees

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 6, 1998

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

MEMORANDUM FOR ERSKINE BOWLES

THROUGH: Franklin D. Raines

FROM: Sally Katzen

SUBJECT: Heads-up on Proposed EEOC Rule Re: Federal Employee Complaint Procedures

We are about to conclude review of a proposed Equal Employment Opportunity Commission (EEOC) rule revising how discrimination complaints made by Federal employees are handled. The rule, which aims to streamline and make more fair the administrative process set in motion once an employee files a discrimination complaint against an agency, would, among other things, (1) make the decision of an EEOC administrative judge (AJ) final, subject to an appeal to the full Commission (the effect of this would be to eliminate an agency's current authority to reject an AJ finding of discrimination) and (2) increase the time period for which an employee can be awarded attorneys fees.

Many of the agencies are concerned that the rule would create a more litigious process, which would make it harder to dispose of frivolous and/or minor complaints. The civil rights community will either be supportive or argue that the EEOC should have gone further. We believe the proposed rule strikes an appropriate balance and sends the right message.

Please let me know if you have any questions.

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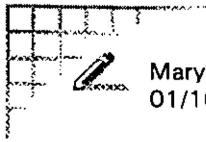

Mary L. Smith
01/16/98 12:46:25 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Thomas L. Freedman/OPD/EOP, Laura Emmett/WHO/EOP
Subject: EEOC Reforms to Federal Sector Complaints

On Thursday, we met with OMB to discuss the changes that the EEOC has proposed to its federal-sector cases. We all agreed with the main parts of the EEOC's proposals, which allow the EEOC rather than the agencies to issue final administrative decisions and permit attorney's fees even during the pre-complaint stage. However, many of the agencies disagree with these changes, and even dispute EEOC's authority to issue final administrative decisions. We are going to meet with the EEOC on Friday, January 16 at 2 p.m.

We did, however, decide to push the EEOC to change a few other items in response to the agency comments. (These are outlined below). Things seem to be fairly on track to send the rule out for public comment by the State of the Union. However, as some of the agencies seem to be greatly opposed to these changes, they may begin to put political pressure on the White House to slow the process down. In fact, Sally Katzen may have spurred the agencies to ratchet up their concerns. In an interagency meeting on Thursday unrelated to these EEOC changes, Sally brought up the topic and suggested that the agencies voice their concerns to their Secretaries. In addition, OMB indicated that if any of the agencies request a formal opinion from OLC as to whether EEOC has the legal authority to issue final decisions, this request could possibly slow down the process of the rule going out for comment. However, at this point, it doesn't seem that any of these things will slow down the process; we just thought you should be aware of these issues.

The following are the items that OMB is going to try to get EEOC to change:

1. Spell out more fully in the preamble its legal authority to issue final administrative decisions.

2. Currently, the EEOC version of the rule removes the ability of the agency to seek reconsideration of a final administrative decision. OMB is going to suggest that EEOC add back this ability. Given that an agency cannot appeal to federal court, a reconsideration request is the agency's last chance to change the decision.

3. Currently, the EEOC version provides that appeal of the EEOC's final decision after hearing will review the AJ's findings of fact under a clearly erroneous standard of review. We are suggesting that the EEOC change this to the substantial evidence standard of review, which is the same standard used for reviewing the Merit Systems Protection Board's findings in federal court.

4. The EEOC has proposed eliminating one basis of dismissal of complaints--dismissal when the agency offers "full relief." The EEOC argues that this type of dismissal prejudices the complainant who often does not know at early stages of the process whether an offer constitutes full relief. OMB suggests retaining this basis of dismissal, but in keeping with some agency comments, that the EEOC be required to certify that an agency offer constitutes full relief so that the complainant will have the benefit of a third-party assessment of the offer before any rights to proceed are barred.

5. Many of the agencies have objected to the availability of attorney's fees during the pre-complaint process. The agencies argue that this discourages settlement, and encourages attorneys to continue with the litigation. OMB is suggesting that the EEOC provide guidance to the AJs to help them determine what are "reasonable" attorney's fees in order to help prevent any abuses by attorneys to simply increase their fees.

These all seem to be reasonable changes, and will probably help to assuage the agency's concerns. If the EEOC agrees to these changes, the agencies will at least believe that the EEOC is paying attention to their concerns before the rule goes out for public comment.

We'll let you know what happens with the EEOC, although I suspect that they will agree to most of these changes. Regards, Mary

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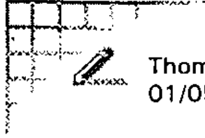

Thomas L. Freedman
01/05/98 10:02:59 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP, Mary L. Smith/OPD/EOP
Subject: EEOC reforms

You asked about the status of the proposed EEOC regulations that limit federal agencies ability to veto AJ decisions. Sally Katzen's office is the one handling it. They have set up a process for hearing the numerous complaints they are hearing from agencies. After they have recieved all the concerns (due by 1/12/98) they will set up a meeting with DPC, OMB, EEOC to go through the comments, and see what accomadations EEOC can make so everybody is happier but the deal still gets done. If there are still problems, Sally would hold meetings with more senior members of the agencies. We are working with OMB in all this, going to a briefing tomorrow led by EEOC, and Mary is drafting a background memo for you on the issues. They know we are shooting for the SOTU.

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federal employees

Julie A. Fernandes
01/23/98 09:14:08 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: EEOC rule

Elena,

OMB spoke yesterday with the agencies that commented on the new EEOC rule to let them know the modifications that the EEOC had agreed to make pursuant to their comments. The agencies were not pleased. Sally is holding a meeting with them on Monday at 2pm to discuss their remaining concerns.

The agencies are particularly upset with the provision of the EEOC rule that would remove the agency's ability to review AJ decisions. The agencies have argued that the EEOC does not have the authority, under Title VII, to remove the agency from the process. The General Counsel from OPM (Lorraine Lewis) called Sally and Don Arbuckle and requested that OMB put this question to OLC. OMB may want to seek informal advice, rather than a legal opinion, in order to expedite the response. I have told OMB that I would be happy to make the contact with OLC on this question. Does that sound o.k.? Thanks.

Julie

THE WHITE HOUSE

WASHINGTON

Elena,

Here are the cost savings that EEOC has projected for its reforms to federal employee cases. Basically, EEOC expects the number of formal complaints filed to decrease. There is a good short summary on p. 1. We are still on track to go over final agency comments on Friday, January 16.

Tom Many

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Race Initiative Policy – Civ Rts Enf – Fed Employees

January 12, 1998

MEMORANDUM

TO: Danny Wurfel
Desk Officer
Office of Management and Budget. OIRA

FROM: Ellen J. Vargyas
Legal Counsel
Equal Employment Opportunity Commission

SUBJECT: Budget Projections for Federal Sector Proposal

This is the draft we discussed. It is all, of course, preliminary and the result of a very fast turnaround. Give me a call at your earliest ~~convenience and~~ let's talk about how best to proceed.

EEOC's preliminary cost analysis

It is expected that the total number of formal complaints filed with agencies will actually decrease. Using as a base, the 26,410 complaints filed in FY 1996, it is projected that the net effect of all the proposed changes after full implementation is that the number of complaints filed per year will be approximately 23,000. Many more EEO concerns and inquiries will be resolved at the pre-complaint stage. All these will result in less staff and financial resources required at Federal agencies. Although there is a projection of eventual reduction in workload government-wide, the proposed amendments will result in the remaining workload being of more substantive and complex nature.

The Commission used the following assumptions:
26,410 complaints filed in FY 1996
6,000 (or 50% of 12,000 reprisal complaints per year) reduction because of elimination of spin-off complaints
2,600 or roughly 10% reduction because of elimination of fragmentation of cases
17,810 new base of calculation

+ 30 % increase because of new procedures and AJs' issuing final decisions
1.3 x 17,810 = 23,000
.60% of complainants requesting hearing
.6 x 23,000 = 13,800 or approximately 14,000 requests for hearings per year
leaving 23,000 - 14,000= 9,000 complaints with agencies for final actions

Attorney Fees Available at Pre-complaint Stage

1. Government wide

   - Savings

     - Could result in an increase in cases resolved at precomplaint stage.

     - Fewer cases to be investigated, hearing to be defended and final decisions to write.

   - Expenses

     - Increased cost at the pre-complaint stage of the process.

2. EEOC

   - Savings

     - Reduction in hearings to be conducted.

     - Reduction in appeals filed.

- Reduction in mailing and other administrative processing of appeals.

- Expenses

  - None expected.

Alternative Dispute Resolution Programs
Regulations require use of new alternative dispute resolution programs for the EEO pre-complaint process and encourages its use at all stages of the process.

1. Government wide

   - Savings.

     - Cost of processing complaints through full adjudicative process

     - Fewer agency staff resources - OGC, EEO offices, deciding officials, agency heads

     - Use of ADR lessens the increase in costs of complaint processing to the agencies

     - Increase at the front end in attorney costs

     - Offset by reduced attorney fees further in the process because of ADR resolutions

     - Variety of ADR techniques allows agencies to select most effective

   - Expenses - Costs will be offset by savings from existing resources

     - Establishing new ADR programs

     - Training participating staff in new ADR techniques

     - Training programs for managers and supervisors on ADR

2. EEOC

   - Savings -- Will occur following first 2 years of implementation

•Reduction in hearings to be conducted.

•Reduction in appeals filed.

• Reduction in mailing and other administrative processing of appeals.

•Reduction in cost of processing complaints through full adjudicative process

•Reduction in administrative support costs to monitor and respond to written and telephonic inquiries regarding Federal agency complaints and processing

o Expenses

•None expected

Elimination of Final Agency Decision With Request For AJ Final Decision

1. Government wide

o Savings -- Federal agencies will issue fewer Final Agency Decisions.

• 7000 less final agency decisions

• 20 hours per FAD / 140,000 hours divided by 2087

• Approximately 70 FTEs saved

• Complainants will get more AJ rulings from EEOC.

• The number of complaints filed will increase approximately 30% to approximately 23,000 complaints.

• With administrative judges issuing final decisions, there would be approximately 9000 cases, as compared to 16000 current, for which hearings are not requested and for which the agencies would take the final actions in closing the cases.

•General Counsels' offices and Agency Head level staff will have fewer final agency decisions to review

o Expenses

•None expected.

2. EEOC

o Savings

• None expected.

o Expenses

•The number of requests for hearings are approximately 40% of receipts.

•This percentage will increase to 60%.

•Based upon 23,000 complaints filed, there will be an initial increase in hearings from 11,198 in FY 1997 to approximately 15,000 in FY 1999, and a decreasing volume over the next two years leveling off at approximately 12,000 per year beginning in FY 2001.

•Agencies can appeal AJ final decision.

•1st year training costs for EEOC increase of $180,000

Elimination of Abuse of Process

1. Government wide

o Savings

• Reduction in the cost of complaint processing at all stages of the complaint process.

• Federal agency staff time lessened due to calls and contacts which pull staff away from meritorious complaints.

o Expenses

•None expected

2. EEOC

- Savings

  - Complainants consume a disproportionate amount of EEOC staff time to deal with frivolous matters, taking time away from meritorious complaints.

  - Savings on administrative staff resources dedicated to responding to inquires from complainants who abuse process.

- Expenses

  - None expected

Elimination of Spin-off Complaints

1. Government wide

- Savings

  - 12,000 complaints were filed per year alleging reprisal.

  - Approximately 50% raised complaint processing issues.

  - Thus, at agency level, complaints filed may be reduced by about 6,000 claims.

  - Over time will result in fewer agency appeals from AJ's decisions.

- Expenses

  - None predicted

2. EEOC

- Savings

  - Elimination of all staff resources dedicate to processing appeals on spin off complaints

• Reduction in administrative costs associated with appellate process and responding to inquiries regarding processing of spin off complaints.

o Expenses

• Complexity of the cases will be increased because these spin-off issues must be decided by the AJ within the underlying complaint and this may impact on processing time.

Elimination of Fragmentation of Cases

1. Government wide

o Savings

•Reduce the number of complaints

•Reduction in costs at all processing levels. No hard data on number of such complaints currently being filed.

• Estimate that they represent as many as 10% of complaints filed are fragmented.

o Expenses

• None expected.

2. EEOC

o Savings

•Reduced number of appeals filed

•Reduced staff time in response to client inquiries

•Reduced staff resources for monitoring agency compliance with appellate decisions and responding to inquiries regarding complaint processing.

o Expenses

• None expected

Offers of Resolution

Costs and savings generated from this revision should offset each other.

1. Government wide

   o Savings

   - Agencies will no longer have to expend time determining what constitutes full relief

   - Agencies will not have to defend against appeals filed from dismissals for failure to accept an offer of full relief

   o Expenses

   - Agencies will have to continue processing cases which would have been dismissed for failure to accept an offer of full relief

1. EEOC

   o Savings

   - Will eliminate appeals from dismissals for failure to accept offers of full relief

   - Will eliminate decisions by AJ s on what constitutes full relief in cases that are at hearing

   o Expenses

   - AJ s will have to continue processing hearings where bona fide offers of resolutions are rejected

Class Complaints

There are four proposed revisions--permitting class issues to be raised at any reasonable point; giving AJS authority to issue final decisions on class certification; requiring AJ approval of settlement agreements; and changing the burden of proof at the relief stage.

1. Government wide

   o Savings

   - Saving to agencies since they will no longer have to issue final decisions.

• Realized expenditures since processing of class complaints involve less ressources than processing individual complaints.

o Expenses

• None projected since fewer individual complaints may be filed

2. EEOC

o Savings

• None expected

o Expenses

•More AJ s needed to handle class certification and investigations to comply with processing time requirements of regulations.

•No direct cost increases.

• Complexity of the work of AJ s will increase because they will have to approve settlement offers.

• Processing time for AJs may be longer. We estimate that AJ cases processed under the new procedures will require 15% additional time because of increased complexity, offset by 5% resulting from increased ability to issue decisions without a hearing.

Elimination of Request To Reconsider (RTR)

1. Government wide (FY-1997: 1119 RTR's filed in EEOC by agencies and appellants)

o Savings

• No staff time, generally legal staff, rearguing legal issues (resulting in a savings on salaries)

• Less government cost for complainants attorneys fees for work when complainant prevailed

• Savings on mailing and copies

- Less processing time may result in reduced staff level and less record keeping such as tracking open complaints.

- Likely to result in reduction of backpay awards and interest in that the time between the discriminatory act and the final order awarding back pay will be shortened.

- Federal agencies' legal staff will not have to respond to requests.

- Savings would be a minimum of 22 FTEs.

o Expenses

- None

2. EEOC

o Savings

- FY-1997: resolved 705 RTRs

- Staff resources of about 6 attorneys, 2 supervisors, 1 secretary at appellate, Commissioners' staff, and Executive Secretariat.

- Less office space and storage space

- Mailing: acknowledgments, files, decisions

- Supplies: copying, computer, paper

- Elimination of compliance monitoring for all decisions issued from RTR level

- Number of inquiries on status of RTR reduced

o Expenses

- None predicted

- Potential for increase in customer inquiries

- Commission can reopen on its own motion projected at a very minimum.

Clearly Erroneous Standard of Review

1. Government wide

   - Savings

     - Over time could result in less agency appeals from to AJ's decisions.

     - More precise legal arguments; avoid lengthy agency's presentation.

   - Expenses
     - None predicted

2. EEOC

   - Savings

     - Potential for less attorney time at appellate level

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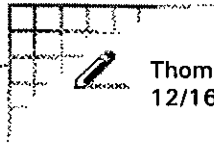
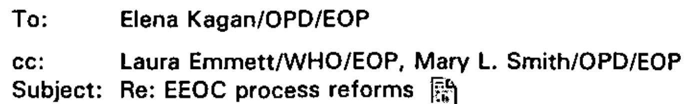


Thomas L. Freedman
12/16/97 10:12:50 AM

Record Type: Record

To: Elena Kagan/OPD/EOP



cc: Laura Emmett/WHO/EOP, Mary L. Smith/OPD/EOP
Subject: Re: EEOC process reforms

I've talked to Danny Werfel and Susan Carr who are handling this at OMB to suggest this may need to be on a fast track for mid-January. Danny says that is achievable. EEOC voted to approve sending over the regs Monday, Ellen Vargyas says they will be sent over this week. EEOC will be coming in to brief OMB the beginning of January. Agencies are sending in their criticisms already. Dan Chenok, a more senior person who ordinarily might handle this at OMB, was injured in an accident. Ellen suggests that Sally Katzen will be the ultimate person to deal with on this. I'll call her unless you want to.

Race Init Policy - Civil Rights Enforcement - Federal Employees

Draft 12/8/97

[Billing Code 6570-06]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission (EEOC)

ACTION: Notice of Proposed Rulemaking

Rule as submitted to OMB

SUMMARY: The Equal Employment Opportunity Commission is proposing revisions to its federal sector complaint processing regulations to implement recommendations made by the Chairman's Federal Sector Workgroup. The Commission proposes to require that agencies establish or make available alternative dispute resolution (ADR) programs during the EEO pre-complaint process. The Commission proposes revisions to the counseling process, the bases for dismissal of complaints, and procedures for requesting a hearing. The Commission also proposes to provide administrative judges with the authority to issue dismissals and final decisions on complaints. The Commission proposes a number of changes to the class complaint procedures, including authorizing administrative judges to issue final decisions on class certification and requiring that administrative judges determine whether a settlement agreement is fair and reasonable. The Commission proposes changes to the appeals procedures to provide agencies the right to appeal an administrative judge's final decision, to revise the appellate briefing schedule, to establish different standards of review for agency final decisions and administrative judges' final decisions, and to eliminate the right to request reconsideration of a decision on appeal. Finally, the

Commission proposes to amend the remedies section of the regulation to permit administrative judges to award attorney's fees and to provide for payment of attorney's fees for all services provided by an attorney throughout the equal employment opportunity (EEO) process, including counseling.

DATES: Comments on the notice of proposed rulemaking must be received on or before [60 days after Federal Register publication date].

ADDRESS: Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507. As a convenience to commentators, the Executive Secretariat will accept comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. (This is not a toll free number.) Only comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by call the Executive Secretariat staff at (202) 663-4078 (voice) or (202) 663-4077(TDD). (These are not toll free numbers.) Copies of comments submitted by the public will be available for review at the Commission's Library, room 6502, 1801 L Street, N.W., Washington, D.C. between the hours of 9:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Nicholas M. Inzeo, Deputy Legal Counsel, Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, Office of Legal Counsel, 202-663-4669 (voice), 202-663-7026 (TDD). This notice is also available in the following formats: large print, braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to EEOC's Publications Center at 1-800-669-3362.

SUPPLEMENTARY INFORMATION:

Introduction

As part of an ongoing effort to evaluate and improve the effectiveness of the Equal Employment Opportunity Commission's operations, the Chairman established the Federal Sector Workgroup to review the federal sector equal employment opportunity process. The Workgroup was composed of representatives from offices throughout the Commission. The Workgroup focused on the effectiveness of the EEOC in enforcing the statutes that prohibit workplace discrimination in the federal government, namely: section 717 of Title VII of the Civil Rights Act of 1964, which prohibits discrimination against applicants and employees based on race, color, religion, sex and national origin; section 501 of the Rehabilitation Act of 1973, which prohibits employment discrimination on the basis of disability; section 15 of the Age Discrimination in Employment Act, which prohibits employment discrimination based on age, and the Equal Pay Act, which prohibits sex-based wage discrimination.

The Workgroup's review evaluated the Commission's administrative processes governing its enforcement responsibilities in the federal sector and developed recommendations to improve its effectiveness. In addition, the review sought to implement the goals of Vice President Gore's National Performance Review (NPR), including eliminating unnecessary layers of review, delegating decision-making authority to front-line employees, developing partnership between management and labor, seeking stakeholder input when making decisions, and measuring performance by results.

The Federal Sector Workgroup issued a report entitled "The Federal Sector EEO Process.....Recommendations for Change" in May 1997. The report contains numerous recommendations for changing the federal sector complaint process, including changes to the Part 1614 regulations, changes to EEOC's Management

Directive 110 which contains additional guidance and instructions on the federal complaint process, and changes to EEOC's internal procedures.

The Commission proposes to amend Part 1614 to implement the regulatory recommendations. The proposed changes, which are discussed in greater detail below, address the continuing perception of unfairness and inefficiency in the federal sector complaint process. In addition, the proposals accomplish the National Performance Review goals of removing unnecessary layers of review and delegating decision-making authority to front-line employees.

The Commission coordinated this proposed regulation with all federal agencies pursuant to Exec. Order No. 1 2067 (1978). A number of comments were received from agencies, which included helpful suggestions to improve the proposed regulation as well as criticisms of essential elements of the proposals. The Commission believes, however, that it would be inappropriate to decide whether or how to make changes to this proposal without the benefit of public comment. Federal agencies are, of course, the entities whose conduct would be regulated by these proposals and making decisions based only on their input, without having the opportunity to consider the input of other stakeholders, including complaining parties and their representatives, would be insufficient. The Commission will seriously consider the agency comments in conjunction with the public comments. The Commission has made certain limited changes, principally in the form of added clarifications, pursuant to agency comments.

Alternative Dispute Resolution

The Commission proposes to amend section 1614.102 to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. The required pre-complaint ADR program would be in addition to the provisions in the current regulation that encourage the use of ADR

at all stages of the complaint process. Agencies would be free to develop the programs that best suit their particular needs. While many agencies have adopted the mediation model as their ADR initiative, other resolution techniques would be acceptable, provided that they conform to the core principles set forth in EEOC's policy statement on ADR, which will be contained in Management Directive 110. Although ADR is believed to be most effective at the early stages of a dispute, agencies may continue their ADR efforts at any stage in the process, including after the formal complaint has been filed.

The Commission also proposes changes to section 1614.105, which covers pre-complaint processing, to require that counselors advise aggrieved persons that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation. If a matter is not resolved during ADR or during traditional counseling activities, the counselor will conduct a final interview and the aggrieved person may file a formal complaint. As noted above, agencies would be free to establish the type of ADR program they offer during the counseling period as long as it is consistent with the ADR program core principles set out by EEOC. Before aggrieved persons make a choice between counseling and ADR, counselors must fully inform them about the counseling process and the ADR program. Counselors must also inform aggrieved persons that if the ADR process does not result in a resolution of the dispute, they will receive a final interview and have the right to file a formal complaint. If the aggrieved person chooses to participate in the agency's ADR program, the role of the counselor would be limited to advising that person of his or her rights and responsibilities in the EEO complaint process, as set forth currently in section 1614.105(b). Counselors would not be required, in those instances, to attempt to resolve the dispute, but would not be precluded from doing so, if they believe a

matter could be resolved quickly.

Many agencies who submitted comments on the draft revisions when it was coordinated under Exec. Order No. 12067 (1978) welcomed Alternative Dispute Resolution (ADR) at the pre-complaint process stating that ADR would result in an early resolution of many cases and create a positive view of the EEO process. A number of agencies suggested that not all cases are appropriate for ADR. Rather, these agencies requested that they should have the flexibility to establish what type of matter or circumstance would be eligible for ADR. Several agencies also requested that consideration be given to the practical difficulties of creating an ADR program, and accordingly, that ample time be provided to them to obtain the necessary expertise, personnel and funds for ADR.

Under the proposed regulations, agencies would be free to develop ADR programs that would best serve their particular needs and unique circumstances. The EEOC encourages creativity and flexibility in establishing ADR programs. This would certainly encompass an array of ADR programs. Agencies with limited funds and resources could use the services, in whole or in part, of another agency, a volunteer organization or other resources to provide for their ADR programs. Keeping with our emphasis on flexibility, an agency could, within certain limitations, exclude circumstances or matters not appropriate for its ADR program. As circumstances and needs change within a particular agency, it could modify its ADR program. However, it is essential that all agency ADR programs comply with the spirit of the EEOC's policy statement on the following core principles of ADR:

- Provide for an impartial and independent forum for the parties to discuss their dispute;
- Allow both parties to develop a realistic assessment of their own as well as other party's procedural and substantive alternatives;

- Promote trust by the parties in the forum thereby facilitating the discussion of each party's perceptions;
- Ensure that the legal rights are preserved;
- Have the support of upper level management in order to be effective;
- Ensure that the parties willingly and voluntarily agree to the resolution of the dispute; and
- Ensure the confidentiality of the parties.

The Federal Sector EEO Process....Recommendations for Change. (Report) (EEOC May 1997)(released October 1, 1997) at 47-48. Management Directive 110 (MD 110) will further provide further information and amplify these core principles .

Some agencies urged that the regulations should clarify the precise roles and responsibilities of the person responsible for conducting ADR during the pre-complaint process and the EEO counselor, for example, whether the mediator or counselor will complete the counselor's report if mediation or other means of ADR fails. These concerns and other questions raised by the agencies about how ADR and EEO counseling will coexist will be explained in MD 110. Each agency will have discretion to develop its own procedures in accordance with the regulation and MD 110. With this flexibility, there will most likely not be uniformity among agencies in the precise roles and responsibilities of EEO counselors and persons conducting ADR activities.

Dismissals

The Commission proposes to amend section 1614.107 to remove one basis for dismissal of EEO complaints and add two new bases for dismissal. The Commission proposes to eliminate the provision in section 1614.107(h) that permits agencies to dismiss complaints for failure to accept a certified offer of full relief. The full relief dismissal policy was premised on the view that adjudication of

a claim is unnecessary if the agency is willing to make the complainant whole. The regulatory process, however, has been criticized because complainants are placed in the position of risking dismissal of their complaints if they do not believe the offer of their opposing party is an offer of full relief. If a complainant makes the wrong assessment of the offer and EEOC decides on appeal that the agency did offer full relief, the complainant is precluded from proceeding with the complaint or from accepting the offer. In addition, difficulties assessing what constitutes full relief increased when, as a result of the Civil Rights Act of 1991, damages became available to federal employees. Unless the agency offers the full amount of damages permitted under the statutory caps in the law, it is virtually impossible to assess whether the agency has offered full relief. The Commission found that offers of full relief must address compensatory damages, where appropriate. Jackson v. USPS, Appeal No. 01923399 (1992); Request No. 05930306 (1993).

During coordination of EEOC's proposals pursuant to Executive Order 12067, some agencies agreed with EEOC's position that full relief dismissals have become rare since compensatory damages became available to federal employees. Other agencies recommended that EEOC revise the procedure to permit an independent review and certification of full relief offers by EEOC, arguing that certification of offers by EEOC would minimize the risk complainants must now take in determining on their own whether an agency's offer constitutes full relief. Finally, many agencies simply disagreed with the proposal to eliminate the full relief dismissal provision, arguing that they continue to use it in some cases. As noted above, without certification of full relief offers by EEOC, complainants are in the unfortunate position of trying to evaluate whether the agencies they believe discriminated against them have truly offered them all the relief they would be entitled to in a federal court, and jeopardizing their whole case if they decide in

error. The Commission has determined that it would not be a wise use of our limited resources at this time to create a certification procedure for full relief offers. Hence, for all of the reasons set forth above, the Commission proposes eliminating the regulatory provision permitting agencies to dismiss complaints for failure to accept a certified offer of full relief.

The Commission proposes to add dismissal provisions permitting agencies to dismiss complaints for two reasons. First, the Commission proposes to permit agencies to dismiss complaints that allege dissatisfaction with the processing of a previously filed complaint (commonly called spin-off complaints). EEOC's regulations at 29 CFR Part 1613, which were superseded by 29 CFR Part 1614 in 1992, expressly permitted complainants to file separate complaints alleging dissatisfaction with agencies' processing of their original complaints. 29 CFR 1613.262 (1991). The procedure resulted in the filing of multiple spin-off complaints. The Commission recognized the need to limit these complaints, and did not include the Part 1613 provision in Part 1614. Guidance was provided in Management Directive 110. Complainants continued, however, to file spin-off complaints. Any alleged unfairness or discrimination in the processing of a complaint can--and must--be raised during the processing of the underlying complaint and there is ample authority to deal with such complaints in that process. There is no provision in either the regulations or the management directive permitting the filing of a separate complaint on this issue. The Commission proposes to add the dismissal provision permitting dismissal of spin-off complaints to ensure that a balance is maintained between fair and nondiscriminatory agency processing of complaints and the need to eliminate multiple filing of burdensome complaints about the manner in which an original complaint was processed.

In conjunction with this regulatory change, the Commission will issue

companion guidance in Management Directive 110 addressing the procedures agencies must follow to resolve allegations of dissatisfaction with the complaints process quickly. Individuals who are dissatisfied with the processing of a complaint will be advised to bring this dissatisfaction to the attention of the official responsible for the complaint, whether it be an investigator, an EEOC administrative judge, or the Commission's Office of Federal Operations on appeal. The allegation of dissatisfaction, and any appropriate evidence, will then be considered during the processing of the existing complaint. Proper handling of spin-off allegations is important to the Commission because it involves the overall quality of the complaints process. Individuals who do not follow the process set out in the Management Directive for allegations of dissatisfaction will have such complaints dismissed by the agency or by the Commission.

The Commission also proposes to add a dismissal provision at section 1614.107(l) permitting an agency to dismiss a complaint where it finds a clear pattern of abuse of the EEO process through strict application of the criteria set forth in Commission decisions. The proposed section codifies the Commission's decision in Buren v. USPS, Request No. 05850299 (1985). The Commission has stated that it has the inherent power to control and prevent abuse of its processes, orders or procedures. It is within the Commission's purview to determine that either complainants or agencies are engaging in conduct that constitutes a scheme designed to frustrate the administrative process. The Commission also has recognized that dismissing complaints for abuse of process should be done only on rare occasions because of the strong policy in favor of preserving complainants' EEO rights whenever possible. Kleinman v. Postmaster General, Request No. 05940579 (1994). The Commission believes that evaluating complaints for dismissal for abuse of process requires careful deliberation and application of strict

criteria. Agencies must analyze whether a complainant's prior behavior evidences an ulterior purpose to abuse the EEO process. Evidence of numerous complaint filings, in and of itself, is an insufficient basis for making such a finding. Hooks v. USPS, Appeal No. 01953852 (1995). However, multiple filings combined with the nature of the subject matter of the complaints, lack of specificity in the allegations, and allegations involving matters previously raised may be considered in determining whether a complainant has engaged in a pattern of abuse of the EEO process. Goatcher v. USPS, Request No. 05950557 (1996). The Commission proposes to add the dismissal provision based on abuse of process because it believes that it will improve the efficiency and effectiveness of the EEO process.

Fragmentation of Complaints

The Commission seeks public comment on whether regulatory changes are necessary to correct the problem of fragmented processing of EEO claims. A recurring problem found by the Federal Sector Workgroup was that many agencies do not distinguish between allegations in support of a legal claim and the legal claim itself. As a result, some claims involving a number of different allegations are fragmented or separated. What should be one legal claim then becomes a number of miscellaneous events, losing its character as a claim. A hypothetical example would be a harassment claim where a pattern of incidents are used to support a claim, but the separate incidents would not constitute a legally cognizable claim of discrimination. As a result of fragmentation, the number of discrimination complaints by federal employees is unnecessarily multiplied and cognizable claims are fragmented to such an extent that potentially valid claims become meaningless. The Commission plans on amending its Management Directive to address this problem and seeks comment on what, if any, regulatory changes are necessary to correct this problem..

Hearings

The Commission proposes four changes to the hearings process. First, the Commission proposes to amend section 1614.108, by adding a new paragraph (g), providing that complainants who wish to have a hearing on their complaints after the 180 days period for investigation has expired would be required to submit requests for hearings directly to EEOC, rather than to their agencies, as is the current practice. Agencies will be required to inform complainants in their acknowledgment letters of the EEOC office and address where a request for hearing is to be sent. When requesting a hearing from EEOC, complainants will be required at the same time to send a copy of the request for a hearing to their agencies' EEO offices. Upon receipt of a request for hearing, EEOC would request that the agency provide copies of the complaint file to EEOC and, if not previously provided, the complainant. The Commission believes that the proposed change will expedite the complaint process. In addition, the proposed change would alleviate concerns that agencies are not responding to requests for hearings quickly enough by allowing the parties to communicate directly with EEOC.

Second, the Commission proposes to specify in the regulation at section 1614.109(b) that administrative judges have the authority to dismiss complaints during the hearing process for all of the reasons contained in the dismissal section, 29 CFR 1614.107. Currently, administrative judges do not have the authority to dismiss complaints that are in the hearing process, but must refer complaints back to the agency for dismissal, where appropriate. The proposed change would eliminate duplicative and burdensome procedures.

Third, the Commission proposes to add a provision permitting administrative judges to issue a final decision without a hearing where they determine, even though material facts remain in dispute, that there is sufficient information in the

record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate a witness' demeanor and that the case lacks merit. A new paragraph 1614.109(f)(4) would contain this provision, which would supplement administrative judges' existing authority to issue summary judgment decisions currently contained in 29 CFR 1614.109(e).

Finally, the Commission proposes to amend the regulations to provide that administrative judges issue final decisions on complaints that have been referred to them for a hearing. Complainants or agencies could appeal administrative judges' final decisions to EEOC. Agencies would continue to issue final decisions in cases where the complainants request an immediate final decision without a hearing.

The Commission believes that allowing agencies to reject or modify an administrative judge's findings of fact and conclusions of law is fundamentally unfair. This is particularly true because those cases have been referred to a neutral third party, an EEOC administrative judge, to hear the dispute. Historically, agencies have rejected or modified a majority of administrative judges' findings of discrimination, but have adopted nearly all findings of no discrimination. The Commission believes that the proposed change will address the perception of unfairness and conflict of interest in agencies deciding complaints of discrimination against them. In addition, this proposal eliminates a layer of review and permits decision-making at an earlier stage, central goals of the National Performance Review.

Of those federal agencies that commented on the draft regulation when the regulation was coordinated under Exec. Order No. 12067 (1978), some supported the proposal to make the decision of the administrative judge final. A number of agencies opposed it, however, chiefly arguing that the Commission did not have

authority to allow administrative judges to issue final decisions, while some agencies believed that the administrative judge could only issue a final decision if the hearing was the first level of an appeal to the Commission. The Commission believes that it has broad authority to restructure the discrimination complaint process for federal employee complaints and that administrative judges can issue decisions as proposed.

Section 717(b) authorizes the Commission to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." 42 U.S.C. § 2000e-16(b). Such broad language has been interpreted by the courts to constitute a delegation of legislative rulemaking authority. E.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Public Utilities Commission of California v. United States, 355 U.S. 534, 542-43 n. 4 (1958).

In 1972 Congress gave this rulemaking authority to the Civil Service Commission, which was the predecessor to the EEOC in having responsibility for enforcing the employment discrimination laws in the federal sector. In so doing, Congress made it clear that it was granting the Commission complete authority to restructure the complaint process to ensure protection of the interests of all parties involved in the process. It explained:

> One feature of the present equal employment opportunity program which deserves special scrutiny by the Civil Service Commission is the complaint process. The procedure under the present system, intended to provide for the informal disposition of complaints, may have denied employees adequate opportunity for impartial investigation and resolution of complaints.
>
> Under present procedures, in most cases, each agency is still responsible for investigating and judging itself. Although provision is made for the appointment of an outside examiner, the examiner does not have the authority to conduct an independent investigation, and his conclusions and findings are in the nature of recommendations to the agency head who makes the final agency determination on whether there is, in fact,

> discrimination in that particular case. The only appeal is to the Board of Appeals and Review in the Civil Service Commission.
>
> The testimony before the Labor Subcommittee reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. Complainants have indicated skepticism regarding the Commission's record in obtaining just resolution of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement. **The new authority given to the Civil Service Commission in the bill is intended to enable the Commission to reconsider its entire complaint structure and the relationships between the employee, agency, and Commission in these cases.**

S. Rept. No. 92-415 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, 410 at 423 (1972) (emphasis added).

In 1979, the authority for enforcement of the federal employee complaint process was transferred from the Civil Service Commission to EEOC. In proposing this transfer, the President stated:

> Transfer of the Civil Service Commission's equal employment opportunity responsibilities to EEOC is needed to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in state and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized....The Civil Service Commission has in the past been lethargic in enforcing fair employment requirements within the Federal government.

Hearings Before a Subcommittee of the Committee on Government Operations, Reorganization Plan No. 1 of 1978 (Equal Employment Opportunity), at 6-7 (1978). In its report on the Plan, the Office of Management and Budget found that "The Civil Service Commission is expected to be lawmaker, prosecutor, judge and jury on employment discrimination in the Federal workforce. Organizational deficiencies like these inevitably lead to less rigorous compliance." Hearings, Reorganization Plan No. 1 of 1978 at 186. In addition, OMB found that "[t]he Civil Service

Commission's regulations concerning the filing of class action complaints are highly restrictive." Hearings, Reorganization Plan No. 1 of 1978 at 193.

By proposing these changes, the EEOC is doing precisely what the Congress envisioned would be done, i.e., the Commission is reconsidering the complaint structure and the relative positions of the employee, the agency and the Commission. The language of section 717, its legislative history, and the transfer of that responsibility to EEOC under Reorganization Plan No 1 of 1978 all confirm that the EEOC has been given the broadest possible authority to restructure the complaints process for individual and class complaints.

Those agencies that assert that EEOC lacks the authority to change its regulations to make administrative judges' decisions final, or that it can only be done as part of an appellate procedure, rely on section 717(c), 42 U.S.C. § 2000e-16(c). Section 717(c) provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination,...or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit, until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706,....

This language, which permits a federal employee to file suit against the agency alleged to have discriminated, waives the government's sovereign immunity from suit. Chandler v. Roudebush, 425 U.S. 849 (1976); Brown v. GSA, 425 U. S. 820 (1976). Nothing in this statutory language limits EEOC's ability to issue regulations under subsection 717(b) or to structure the administrative process to enhance its effectiveness and fairness. The language delineates when, under the procedures that existed at that time, an individual could file suit in court. There is

no indication that Congress also intended to codify any parts of the existing administrative procedures by the language of this sentence. Indeed, the legislative history of section 717 demonstrates that Congress expected the then-Civil Service Commission to make significant changes to the complaint process. The importance of administrative flexibility to improve the complaint process was reaffirmed in 1978 when the President transferred the responsibilities for federal employee complaints to EEOC.

Class Complaints

The Federal Sector Workgroup identified a series of concerns with the class complaint process. It found that despite studies indicating that class-based discrimination may continue to exist in the federal government, recent data reflect that very few class complaints are filed or certified at the administrative level. Only a very small number of cases are brought as class actions and those that are filed generally result in a denial of class certification. While an effective administrative process for class complaints offers several advantages over litigation in federal court, including informality, lower cost, and the speed of resolution, the Workgroup found there is a perception the current process does not adequately address class-based discrimination in the federal government. As a result, complainants often have elected to pursue their complaints in federal court.

Class actions play a particularly vital role in the enforcement of the equal employment laws. They are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices. The courts have long recognized that class actions "are powerful stimuli to enforce Title VII," providing for the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible

classification." Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). The class action device exists, in large part, to vindicate the interests of civil rights plaintiffs. *See* 5 James W. Moore, Moore's Federal Practice § 23.43[1][a], at 23-191 (3d ed. 1997).

These same policies apply with equal force in the federal sector. Accordingly, we propose several changes to strengthen the class complaint process. The purpose of these changes is to ensure that complaints raising class issues are not unjustifiably denied class certification in the administrative process and that class cases are resolved under appropriate legal standards consistent with the principles applied by federal courts. In addition, to further address the concerns identified by the Workgroup, the Commission has undertaken a pilot program in which all decisions on class certification will be made centrally by the Complaint Adjudication Division of its Office of Federal Operations to explore possible operational changes.

The Commission proposes four regulatory changes to the class complaint procedures found at 29 CFR 1614.204. The Commission proposes to revise section 1614.204(b) to provide that a complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications raised in an individual complaint. If a complainant moves for class certification after completing counseling, the complainant will not be required to return to the counseling stage. Some agencies who commented on this proposal when it was coordinated under Executive Order 12067 supported the change but asked that the regulation define "reasonable point in the process" and indicate what criteria would be used to determine that a complaint has class implications. Some agencies opposed the change, arguing that it would entail additional investigative costs and invite abuse by complainants seeking to bypass

the counseling process by making frivolous class allegations. They maintained that a complainant should have to elect between a class or an individual claim at the pre-complaint stage. Others objected only to eliminating counseling, as that it is how the complainant is informed of his or her rights and responsibilities as class agent.

The Commission believes that the proposed change is an important step toward removing unnecessary barriers to class certification of complaints that are properly of a class nature. The Commission has consistently recognized that its decisions on class certification must be guided by the fact that a complainant has not had access to pre-certification discovery in the same manner and to the same extent as a Rule 23 plaintiff. Similarly, often an individual complainant will not have reason to know at the counseling stage that the challenged action actually reflects an agency policy or practice generally applicable to a class of similarly situated individuals. The Commission intends that "reasonable point in the process" be interpreted to allow a complainant to seek class certification when he or she knows or should know that the complaint has class implications, i.e., it potentially involves questions of fact common to a class and is typical of the claims of a class. Normally, this point would be no later than the end of discovery at the hearing stage. It would be the responsibility of the agency or administrative judge, as appropriate, to ensure that the class agent is advised of his or her obligations at this time. The Commission believes it would be impracticable and unproductive to require the complainant to return to counseling at this stage.

The Commission proposes to amend section 1614.204(d) to provide that administrative judges would issue final decisions on whether a class complaint will be accepted (or certified) or
dismissed. Currently, administrative judges make recommendations to agencies on

acceptance or dismissal. The Commission particularly invites comment on this proposal. Agencies who commented on this proposal when it was coordinated under Executive Order 12067 said they either supported or opposed it for the same reasons they gave with respect to the proposal for administrative judges to issue final decisions on individual complaints. Some agencies said they supported it only if the agency is given the right to appeal a certification decision. Under the Commission's proposal, an agency would have such a right under section 1614.401(b), which provides that an agency may appeal an administrative judge's final decision. The Commission also seeks public comment on whether to make administrative judges' decisions on the merits final in class cases, consistent with the proposal to eliminate final agency decisions in section 1614.109(h).

In addition, the Commission proposes to amend section 1614.204(g)(2) to require that administrative judges must approve class settlement agreements pursuant to the "fair and reasonable" standard, even when no class member has asserted an objection to the settlement. Several agency commenters under Executive Order 12067 supported this proposal while others disagreed, arguing that it would add an unnecessary layer of review and that adequate safeguards exist in section 1614.204(g)(4), which gives dissatisfied class members the right to petition to vacate a settlement, and 1614.204(a)(2), which requires the class agent to fairly and adequately represent the class. The Commission believes this proposed change is necessary to protect the interests of the class. As one agency commenter noted, class agents sometimes seek to settle their individual claims without full regard for the interests of the class. The change would make the regulations consistent with the practice in federal courts where the court must approve any settlement of a class case under a fair and reasonable standard.

Finally, the Commission proposes to amend section 1614.204(l)(3) to clarify

the burdens of proof applicable to individual class members who believe they are entitled to relief. The proposed change would make explicit that the burdens enunciated in Teamsters v. United States, 431 U.S. 324 (1977), apply. In Teamsters, the Court stated that where a finding of discrimination has been made, there is a presumption of discrimination as to every individual who can show he or she is a member of the class and was affected by the discrimination during the relevant period of time. Agencies then would be required to show by clear and convincing evidence that any class member is not entitled to relief, as is provided currently in section 1614.501(b), (c).

Appeals

In addition to the proposal to allow complainants or agencies to appeal administrative judges' final decisions, noted above, the Commission proposes to revise the briefing schedules for appeals to EEOC, to add a provision permitting the Office of Federal Operations to sanction parties for failure to comply with the regulations, to change the standard of review for some appeals, and to eliminate the right to request reconsideration of appeals decisions. The Commission proposes to amend section 1614.403 of the regulations to require that complainants submit any statement or brief in support of an appeal of dismissal of a complaint to EEOC within 30 days of receipt of the dismissal. Any statement or brief in support of an appeal of a final decision on a complaint would have to be submitted to EEOC within 30 days of filing the notice of appeal. Statements or briefs in opposition to appeals would have to be served on the opposing party within 30 days of receipt of a statement or brief in support of an appeal. The Commission will strictly apply appellate time frames. The Commission believes that 30 days is sufficient time to file briefs in procedural cases (cases that are dismissed by the agency or the administrative judge) because those cases usually do not raise substantive legal

issues. On the other hand, appeals of final decisions on the merits of cases generally raise legal issues or require a thorough review of the record and warrant additional time to formulate arguments to support the appeals. In connection with the briefing schedule changes, the Commission proposes to amend the regulation to require agencies to submit the complaint file to EEOC within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

The Commission proposes to amend section 1614.404 to add a paragraph authorizing the Office of Federal Operations to take appropriate action where a party to an appeal fails without good cause shown to comply with the appellate procedures or to respond fully and in timely fashion to a request for information. The proposal would allow the Office of Federal Operations to draw an adverse inference that requested information a party failed to provide would have reflected unfavorably on that party, to consider the matters to which the requested information pertains to be established in favor of the opposing party, to issue a decision fully or partially in favor of the opposing party, or to take such other actions as appropriate.

The Commission proposes to amend section 1614.405 of the regulations to provide that decisions on appeal from final decisions by administrative judges after a hearing will be based on a clearly erroneous standard of review, but review of all other decisions will be based on a de novo standard of review. Under the clearly erroneous standard of review, no new evidence will be considered on appeal unless the evidence was not reasonably available during the hearing process. The clearly erroneous standard of review is the normal appellate standard of review where findings of fact are given deference by the reviewing authority and questions of law are considered de novo. Applying the de novo standard of review to administrative

judge's final decisions after hearings would be an inefficient use of EEOC's limited resources. In addition, since EEOC's Office of Federal Operations did not see and hear the witnesses, it would not be in a position to second-guess the administrative judge during the appellate process, especially with respect to credibility determinations based on a witness' demeanor.

Finally, the Commission proposes to amend sections 1614.405 and 1614.407 to eliminate the right of agencies and complainants to request reconsideration of decisions issued by the Office of Federal Operations at the initial appellate level. Reconsideration is an extra layer of review that is duplicative and time-consuming but that does little to improve the complaints process. The Commission denies the majority of requests for reconsideration, whether in procedural or merits cases. The purpose of this change is to enable the Commission to direct more resources to decision-making at the first appellate level, focusing on policy issues it deems important and developing a consistent body of decisional law on those issues. This proposal would effectuate one of the central goals of the National Performance Review by eliminating an unnecessary layer of review and permitting decision-making at an earlier stage. The Commission will retain its discretion to reconsider any decision on its own motion under section 1614.407(a).

Most agency commenters who commented on this proposal when it was coordinated under Executive Order 12067 opposed this change. They urged retention of the right to request reconsideration as a safeguard for agencies against mistakes and inconsistencies by the Office of Federal Operations. It would be unfair to deny agencies this last opportunity for recourse, they maintained, particularly if administrative judges' decisions are made final and given greater deference. They argued the change would unjustifiably tip the balance in favor of

complainants, who have the right to seek *de novo* review in federal court while agencies do not. Several commenters also argued in favor of preservation of the right to request reconsideration of at least those decisions involving important legal issues or having a significant impact on agency policies or programs beyond the case at hand.

We plan to consider these comments during the public comment period. Elimination of the reconsideration process is an important component of the proposed federal sector reforms. It will provide the resources to improve the timeliness and quality of the Commission's Office of Federal Operations decisions across the board. The availability of reconsideration has not significantly enhanced the overall decision-making process. Many requests are simply a reargument of previously unsuccessful positions. They are sometimes used only to delay the finality of an adverse decision. The overwhelming majority of requests are denied. For example, in fiscal year 1997, requests for reconsideration resulting in a reversal of an order on the merits occurred in about 4% of the cases. For fiscal years 1996, 1995, 1994 and 1993, the figures were 5%, 2%, 2% and 3%, respectively.

To the extent agencies have legitimate complaints about erroneous Office of Federal Operations decisions, the Commission believes the appropriate remedy is to seek to improve the quality and consistency of the decision-making process as a whole. The concern expressed by some agencies about the length of time the Office of Federal Operations takes to issue decisions also will be alleviated by the shift in resources and priorities this change will accomplish. Although the agencies view it as unfair that unlike complainants, they cannot go to court if they are dissatisfied with the administrative process, the same is true of a decision on reconsideration. This inherent aspect of the process does not outweigh the need

for finality and the value of a more streamlined process. Some agencies have argued that reconsideration is an important step to ensure full consideration of the agency position in cases involving significant legal issues or broader consequences for agency policies and programs. This is a valid need that can be met by providing for greater Commission involvement in Office of Federal Operations decisions of that nature. It is incumbent upon the agency to identify and thoroughly address such policy or legal issues in its brief at the appellate stage (rather than waiting for reconsideration, as sometimes occurs now) so that the Commission can give the case the level of scrutiny warranted. Finally, the Commission will retain its authority to reconsider, within a reasonable time, any decision on its own motion. 29 CFR 1614.407(a); Kleinman v. United States Postal Service, EEOC Request No. 05930493 (1993) (Commission has the authority to reopen decision on its own motion to correct error).

Attorney's Fees

The Commission proposes to amend the attorney's fees section of the regulations to authorize administrative judges to award attorney's fees in cases where a hearing is requested. Currently, administrative judges decide the entitlement to attorney's fees. Agencies, however, calculate the amount of the award. The Commission believes that administrative judges are in a better position to assess the reasonableness of the fees request, because they have heard the evidence and can assess the complexity of the case as presented by the attorney as the basis of the award. Moreover, because administrative judges are neutral third parties to the dispute, their attorney's fees calculations will not be perceived as biased in favor of one party or the other.

In addition, the Commission proposes to amend section 1614.501(e)(1)(iv) to provide that an award of attorney's fees may include compensation for the time

spent during the counseling period including any ADR process. The Commission believes that the current regulation, which limits attorney's fees awards to fees for work performed after a formal complaint is filed could serve as a disincentive to participate in alternative dispute resolution, which often occurs during the counseling period, or otherwise settle a case during counseling.

During inter-agency coordination of the proposed rule, many agencies expressed opposition to this proposal to provide for attorney's fees awards for pre-complaint activities, arguing that providing for attorney's fees will formalize the informal counseling process and make it more legalistic and adversarial. The Commission proposes the change, in part, to make the EEO complaint remedies consistent with the remedies available to federal employees in other forums. The Office of Personnel Management's (OPM) Back Pay Act regulations provide for the payment of attorney's fees without a temporal restriction in cases correcting unjustified or unwarranted personnel actions. 5 CFR 550.807. In other words, OPM's regulations provide for full attorney's fees, including cases resolved during the informal stage (first step) of the grievance process. Likewise, the Merit System Protection Board's (MSPB) regulations do not contain any restriction on attorney's fees. 5 CFR 1201.37. The Commission does not believe that federal employees who have been discriminated against should receive a lesser remedy than federal employees who prevail in grievances and MSPB appeals.

In addition to the proposed changes outlined above, the Commission proposes to amend section 1614.103(b) of the regulations to include the Public Health Service Commissioned Corps and the National Oceanic and Atmospheric Administration Commissioned Corps in the coverage of Part 1614. This inclusion is consistent with prior Commission decisions and with the determination of the Solicitor General that Commissioned Corps members are covered by federal sector

anti-discrimination statutes.

Regulatory Procedures

Executive Order 12866

In promulgating this notice of proposed rulemaking, the Commission has adhered to the regulatory philosophy and applicable principles of regulation set forth in section 1 of Executive Order 12866,. Regulatory Planning and Review. In addition, the Commission has determined that this regulatory action is not "significant" as defined by Executive Order 12866, and is therefore not subject to review by the Office of Management and Budget.

Regulatory Flexibility Act

In addition, the Commission also certifies under 5 U.S.C. § 605(b), enacted by the Regulatory Act (Pub. L. 96-354), that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and agencies and departments of the federal government. For this reason, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This regulation contains no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Age discrimination, Equal employment opportunity, Government employees, Individuals with disabilities, Race discrimination, Religious discrimination, Sex discrimination.

For the Commission

GILBERT F. CASELLAS
Chairman

Accordingly, for the reasons set forth in the preamble, it is proposed to amend chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1614--[AMENDED]

1. The authority citation for 29 CFR Part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

2. Section 1614.102 is amended by redesignating paragraphs (b)(2) through (b)(6) as paragraphs (b)(3) through (b)(7), and by adding paragraph (b)(2) to read as follows:

§ 1614.102 Agency program.

* * * * *

(b) * * *

(2) Establish or make available an alternative dispute resolution program for the equal employment opportunity pre-complaint process.

3. Section 1614.103 is amended by deleting the word "and" at the end of paragraph (b)(3), deleting the period at the end of paragraph (b)(4), adding the word "; and" at the end of paragraph (b)(4) and adding paragraphs (b)(5) and (b)(6) to read as follows:

§ 1614.103 Complaints of discrimination covered by this part.

(b) * * *

(5) The Public Health Service Commissioned Corps, except when in time

of war or national emergency, the President declares the Corps to be a military service in accordance with 42 U.S.C. 217;

(6) The National Oceanic and Atmospheric Administration Commissioned Corps.

4. Section 1614.105 is amended by redesignating paragraph (b) as paragraph (b)(1), revising the first sentence of paragraph (b)(1), adding paragraph (b)(2), revising the first sentence of paragraph (d) and revising paragraph (f) to read as follows:

§ 1614.105 Pre-complaint processing.

* * * * *

(b)(1) At the initial counseling session, Counselors must advise individuals orally and in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with § 1614.108(f), election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. * * *

(2) Counselors shall advise aggrieved persons that they may choose between participation in the alternative dispute resolution program offered by the agency and the counseling activities provided for in paragraph (c) of this section.

* * * * *

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative

dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. * * *

* * * * *

(f) Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

5. Section 1614.106 is amended by adding a sentence after the first sentence of the introductory text of paragraph (d) to read as follows:

§ 1614.106 Individual complaints.

* * * * *

(d) * * * The agency shall advise the complainant in the acknowledgment of the EEOC office and its address where a request for a hearing shall be sent. * * *

6. Section 1614.107 is amended by removing paragraph (h) and adding new paragraphs (h) and (i) to read as follows:

§ 1614.107 Dismissals of complaints.

* * * * *

(h) That alleges dissatisfaction with the processing of a previously filed complaint; or

(i) Where the agency strictly applies the criteria set forth in Commission decisions and finds a clear pattern of misuse of the EEO process.

7. Section 1614.108 is amended by revising paragraph (f) and adding a new

paragraph (g) to read as follows:

§ 1614.108 Investigation of complaints.

* * * * *

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and final decision from an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed.

(g) Where the complainant has received the notice required in paragraph (f) of this section or at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing by submitting a request for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The complainant shall send a copy of the request for a hearing to the agency EEO office. Upon receipt of a request for a hearing, EEOC will request that the agency provide copies of the complaint file to EEOC and, if not previously provided, the complainant.

8. Section 1614.109 is amended by revising paragraph (a), redesignating paragraphs (b) through (g) as paragraphs (c) through (h), adding a new paragraph (b), revising the introductory text of paragraph (e)(3), in paragraph (e) removing the phrases "findings and conclusions" and adding, in their place, the words "final decisions", adding a new paragraph (f)(4), and revising paragraph (h) to read as follows:

§ 1614.109 Hearings.

(a) When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge may remand any such issue for counseling in accordance with § 1614.105 or for such other processing as ordered by the administrative judge.

(b) Dismissals. Administrative judges shall dismiss complaints or portions of complaints pursuant to section 1614.107 of this part.

* * * * *

(e) * * *

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:

* * * * *

(f) * * *

(4) Where the administrative judge determines, even though material facts remain in dispute, that there is sufficient information in the record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate a witness' demeanor and that the case lacks merit, the administrative judge may issue a final decision without a hearing.

* * * * *

(h) Final decisions by administrative judges. Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a final decision, within 180 days of receipt by EEOC of a request for a hearing, an administrative judge shall issue a final decision on the complaint, and shall order appropriate remedies and relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the final decision to the parties by certified mail, return receipt requested. The final decision shall contain notice of the right of either party to appeal to the Commission, notice of the right of the complainant to file a civil action in Federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 shall be attached to the decision.

9. Section 1614.110 is amended by revising the title and first sentence to read as follows:

§ 1614.110 Final decisions by agencies.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, the agency shall issue a final decision.* * *

10. Section 1614.204 is amended by revising paragraph (b), removing the words "recommend that the agency" from paragraphs (d)(2), (d)(3), (d)(4), and (d)(5), removing the word "recommend" and replacing it with the word "decide" in paragraph (d)(6), revising paragraph (d)(7), paragraph (e)(1), paragraph (g)(2) and paragraph (l)(3) to read as follows:

§ 1614.204 Class complaints.

* * * * *

(b) Pre-complaint processing. An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105. A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. If a complainant moves for class certification after completing the counseling process contained in § 1614.105, no additional counseling is required.

* * * * *

(d) * * *

(7) The administrative judge shall transmit his or her decision to accept or dismiss a complaint to the agency and the agent. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart A or that the complaint is also dismissed as an individual complaint in accordance with § 1614.107. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Office of Federal Operations or to file a civil action and shall include EEOC Form 573, Notice of Appeal/Petition.

(e) (1) Within 15 days of receiving notice that the administrative judge has accepted a class complaint or a reasonable time frame specified by the administrative judge, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

* * * * *

(g) * * *

(2) The complaint may be resolved by agreement of the agency and the

agent at any time as long as the administrative judge finds the agreement to be fair and reasonable.

* * * * *

(l) * * *

(3) When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found class-wide discrimination in its final decision. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief. The period of time for which the agency finds class-wide discrimination shall begin not more than 45 days prior to the agent's initial contact with the Counselor and shall end not later than the date when the agency eliminates the policy or practice found to be discriminatory in the final agency decision. The agency shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits.

11. Section 1614.401 is amended by redesignating paragraphs (b) through (d) as paragraphs (c) through (e) and adding a new paragraph (b) to read as follows:

§ 1614.401 Appeals to the Commission.

* * * * *

(b) A complainant or an agency may appeal an administrative judge's final decision or an administrative judge's dismissal of all or a portion of a complaint.

12. Section 1614.403 is revised to read as follows:

§ 1614.403 How to appeal.

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The appellant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.

(b) The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party.

(c) If an appellant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be dismissed by the Commission.

(d) Where an appellant appeals a dismissal, any statement or brief in support of the appeal must be submitted to the Office of Federal Operations within 30 days of receipt of the dismissal. Where an appellant appeals a final decision, any statement or brief in support of the appeal must be submitted within 30 days of filing the notice of appeal.

(e) The agency must submit the complaint file to the Office of Federal Operations within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

(f) Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the

statement or brief supporting the appeal.

13. Section 1614.404 is amended by adding a new paragraph © to read as follows:

§ 1614.404 Appellate procedure.

* * * * *

(c) When either party to an appeal fails without good cause shown to comply with the requirements of this section or to respond fully and in timely fashion to requests for information, the Office of Federal Operations shall, in appropriate circumstances:

(1) Draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(2) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(3) Issue a decision fully or partially in favor of the opposing party; or

(4) Take such other actions as appropriate.

14. Section 1614.405 is amended by revising the third sentence and adding a new fourth sentence to paragraph (a) and revising paragraph (b) to read as follows:

§ 1614.405 Decisions on appeals.

(a) * * * The decision on an appeal from a final decision shall be based on a de novo review, except that the decision on an appeal from a final decision by an administrative judge issued pursuant to § 1614.109(h) shall be based on a clearly erroneous standard of review. * * *

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless the Commission on its own motion reconsiders the case. There is no right by either party to request reconsideration.

15. Section 1614.407 is removed and sections 1614.408 through 1614.410 are

redesignated sections 1614.407 through 1614.409.

16. Section 1614.501 is amended by revising the last sentence of the introductory text of paragraph (e)(1), and revising paragraph (e)(1)(iv) to read as follows:

§ 1614.501 Remedies and relief.

* * * * *

(e) Attorney's Fees or costs --

(1) * * * In a final decision, the agency, administrative judge, or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing the complaint.

* * * * *

(iv) Attorney's fees shall be paid for all services performed by an attorney, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

Race Initive Policy - Civil Rts Enforcement - Federal Employees Policy

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 26, 1997

Elena Kagan
Domestic Policy Counsel
The White House
Washington, D.C.

Dear Elena:

I am so glad we had the opportunity to talk this afternoon. I have enclosed a copy of our federal sector recommendations along with a short summary piece. If you have any questions or if we can otherwise be of assistance, please call Irene Hill, Chairman Casellas' Special Assistant, at (202) 663-4013. Otherwise I will be back on the office in October 6, 1997 and I will talk to you then.

Sincerley,

Ellen

Ellen J. Vargyas
Legal Counsel

Enclosure

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

THE FEDERAL SECTOR EEO PROCESS ... RECOMMENDATIONS FOR CHANGE

EEOC is responsible for enforcing the laws prohibiting employment discrimination in the federal government. The federal sector program has come under criticism based on a number of factors. Principal among them are the following:

- Agencies charged with discrimination investigate themselves and make the initial determination of whether or not they have discriminated, leading to widespread perceptions of a process that is not impartial;
- The process is too long and contains too many layers of review;
- The process leads to the fragmentation of complaints, increasing the number of complaints in the system and making it difficult for complainants to prove that they have been discriminated against; and
- The process is subject to abuse by employees who file multiple and unnecessary complaints and agencies which ignore time frames and conduct inadequate investigations.

In order to address these problems, EEOC Chairman Gilbert F. Casellas established a Working Group to study the federal sector program and develop recommendations for reform. In carrying out its mission, the Working Group relied on extensive input from both internal and external stakeholders. This was in keeping with the approach EEOC had recently relied on to achieve major reforms in its private sector charge processing and litigation programs, as well as to create a nation-wide mediation program for non-federal charges. Based on the recommendations of the Working Group, EEOC is moving forward with important changes in its federal sector program. In particular, EEOC will:

- Introduce Requirements for the Use of ADR: EEOC will require agencies to offer ADR to complaining parties. While not mandating any particular form of ADR so long as it comports with governing principles including voluntariness and confidentiality, EEOC will encourage agencies to make ADR available throughout the process. In particular, EEOC will permit agencies to offer ADR in lieu of counseling.
- Strengthen Requirements for Thorough Investigations: EEOC will strengthen requirements that the agencies develop a complete and impartial factual record.

- Eliminate Agency Fragmentation of Complaints: EEOC will instruct the agencies to investigate actual claims of discrimination, including all relevant facts, rather than breaking down -- or fragmenting -- the claims into individual incidents. For example, agencies will not be permitted to break down sexual or racial harassment claims that are part of a pattern into a series of "separate" incidents and rule on them separately; rather they must look at the full claim. This will help keep the number of complaints down. At the same time it will eliminate artificial barriers to the ability of complaining parties to prove legitimate cases. In a harassment case, for example, the individual incidents may not themselves be sufficient to make out a legal claim but the full pattern would state a legally cognizable claim of harassment.

- Eliminate Spin-Off Complaints: Under the current system, complainants have been permitted to file new, "spin off" complaints challenging the processing of existing complaints. These complaints have swollen the number of cases in the system and have burdened the processing of complaints with few, if any, offsetting benefits. EEOC will propose that any complaint about the processing of an existing complaint must be raised as part of that existing complaint.

- Improve the Procedures for Handling Class Complaints: EEOC has undertaken a trial program to enhance the handling of requests for class certification by referring those requests to a specialized unit for determination. EEOC will also propose a series of steps to enhance the ability of complainants to establish their cases as class actions in appropriate cases.

- Enhance Administrative Judges' Authority to Resolve Cases: EEOC believes that, at the hearing stage, Administrative Judges should have more authority to resolve cases expeditiously. EEOC's proposal will include provisions designed to expedite the resolutions of hearings, including permitting AJs to resolve complaints without a hearing in appropriate circumstances. At the same time, EEOC will propose deleting the current provision permitting the dismissal of complaints where the complaining party has been offered "full relief" for his or her claim and has rejected such offer. This recognizes the fact that, with the advent of damages, it is nearly impossible to make a judgment regarding whether there has actually been an offer of "full relief."

- Eliminate the Final Agency Decision Where There Is a Hearing: EEOC will propose to eliminate the final agency decision when the case has been referred to an Administrative Judge for a hearing. This will dramatically enhance both the integrity and efficiency of the system by removing the opportunity for agencies to second guess neutral decision makers who have ruled against them. In fact, the most current figures show that while agencies only reverse decisions favorable to them approximately 0.1 % of the time, they reverse decisions favorable to charging parties nearly 62.7 % of the time. At the same time, agencies would gain the right to appeal adverse decisions to the EEOC.

- Streamline the Appellate Process:

    - Since hearing decisions will be directly appealed to EEOC, EEOC proposes to change the standard of review from de novo to clearly erroneous for such cases. Where final agency decisions are issued, the de novo standard for review would remain.

    - EEOC will propose the elimination of the right to request reconsideration of EEOC appellate decisions. These reconsiderations infrequently result in different outcomes but substantially burden the already overloaded system.

    - EEOC will shorten current time periods for filing briefs and submitting the complaint file when cases are appealed.

- Improve the Enforcement of Orders: EEOC will use appropriate sanctions to assure that both agencies and complaining parties comply with their responsibilities and that agencies enforce orders which are issued.

- Training Requirements For EEO Staff: EEOC will establish minimum training requirements for EEO counselors and investigators.

CURRENT FEDERAL SECTOR EEO ENFORCEMENT STATISTICS

In FY 1995, the most recent year for which there are complete statistics:

- 68,936 counseling contacts were made at the agencies;

- 27,472 formal complaints were filed;

- There were 10,515 hearings requests;

- 8,152 appeals were filed; and

- EEOC resolved 6,017 appeals.