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The Federal Sector EEO Process

.....Recommendations for Change

U.S. Equal Employment Opportunity Commission
Federal Sector Workgroup Report
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THE FEDERAL SECTOR EEO PROCESS
.....Recommendations for Change

I. INTRODUCTION

As part of his ongoing effort to evaluate and improve the effectiveness of the Equal Employment Opportunity Commission's (EEOC's) operations, Chairman Gilbert F. Casellas initiated a review of the federal sector equal employment opportunity (EEO) process.[1] The study focused on the effectiveness of the EEOC in enforcing various statutes that prohibit workplace discrimination in the federal sector, namely: Section 717 of Title VII of the Civil Rights Act of 1964, which makes it unlawful for federal departments and agencies to discriminate against applicants or employees on the basis of race, color, religion, sex, and national origin; Section 501 of the Rehabilitation Act of 1973, which prohibits employment discrimination on the basis of disability; and, the Age Discrimination in Employment Act and the Equal Pay Act which prohibit age discrimination and sex-based wage discrimination, respectively.

The review sought to evaluate the Commission's administrative processes governing its enforcement responsibilities in the federal sector and to develop appropriate 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 partnerships between management and labor, seeking stakeholder input when making decisions, and measuring performance by results.

After securing extensive input regarding the nature and scope of the review and determining the policy and operational issues requiring further exploration, the Chairman established a Working Group to study key issues and to develop recommendations, as appropriate. The Group was comprised of representatives from each of the Commissioners' offices, as well as staff from the Office of Federal Operations (OFO), the Office of Legal Counsel (OLC), the Office of Field Programs (OFP), and Administrative Judges from the Washington Field Office. Throughout the process, the Working Group sought and considered extensive input from the Commission's internal

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[1] In 1995, Chairman Casellas asked his fellow Commissioners to lead three task forces focusing on fundamental policy and operational questions: the charge processing system; the relationship with state and local fair employment practices agencies; and alternative dispute resolution. This review is similar to the reviews conducted by the Commissioner-led task forces. All reflect the Chairman's desire to evaluate and improve the operations of the EEOC and to involve internal and external stakeholders in this process.

and external stakeholders. The Working Group solicited written comments from internal stakeholders, federal agencies, organizations which represent federal employees, advocacy groups, and the private bar. Over 27 federal agencies and other external stakeholders provided written comments that were carefully considered by the Working Group.

The Working Group also met with internal and external stakeholders, including the Council of Federal EEO and Civil Rights Executives, a group comprised of EEO professionals from various federal agencies throughout the Washington, D.C. area, an ad hoc group of agency attorneys who represent agencies in EEO matters, members of the private bar who represent federal employees who have filed EEO complaints, and representatives from advocacy groups and federal employee unions. Staff from the Chairman's office also met with representatives of the General Accounting Office (GAO) who have previously evaluated the federal sector EEO complaint process on behalf of Congress.

II. GOVERNING PRINCIPLES

The Working Group's evaluation of the federal sector EEO process was guided by several general principles, many of which emerged from the NPR, namely:

1. The federal EEO process should provide expeditious and effective enforcement of federal civil rights laws to deter future discriminatory conduct and to compensate victims of discrimination. The process should be designed to combat both individual and class-based discrimination;

2. Government resources should be targeted to addressing colorable claims of discrimination. Excessive resources devoted to non-meritorious claims of discrimination undermines the credibility of the process and impairs the rights of those with meritorious claims;

3. The Commission should be at the forefront in the development and use of appropriate alternative dispute resolution to resolve allegations of discrimination;

4. Unnecessary layers of substantive review of complaints of employment discrimination should be eliminated;

5. Decision-making authority should, where appropriate, be delegated to front-line employees;

6. Continuing education and training for employees working in federal EEO at the Commission and at other agencies is vitally important; and,

7. Communication with internal and external stakeholders about the federal sector processes is strongly encouraged. The suggestions of employees, agencies, unions, advocacy groups, and the private bar are always welcome.

III. DISCUSSION AND RECOMMENDATIONS

A. EEO COUNSELING

DISCUSSION

The Commission's regulations require aggrieved persons who believe they have been discriminated against to consult with an agency EEO counselor prior to filing a complaint in order to try to informally resolve the matter. 29 C.F.R. §1614.105 (a). In addition to facilitating informal complaint resolutions, the counselor's responsibilities include advising aggrieved persons about the EEO complaint process, framing the issue (s) and base(s) of the complaint, conducting a limited inquiry for the purposes of furnishing information for settlement efforts and determining jurisdictional questions, advising aggrieved persons on the right to file a formal complaint, and if a complaint is filed, reporting on the issues and actions taken during counseling. Management Directive (MD) 110, Ch. 2, Sec. 1. An aggrieved person must contact a counselor within 45 days of the alleged discrimination. 29 C.F.R. §1614.105 (a) (1). The counseling period runs for thirty days after the initial counselor contact. This period can be extended up to 90 days with the written consent of the aggrieved person. 29 C.F.R. §1614.105 (d) (e).

Stakeholders provided several comments about the counseling process. Some stakeholders believe that the counseling process is not effective in resolving discrimination complaints and only serves to lengthen an already very protracted process. These stakeholders recommended that the counseling process be eliminated, made voluntary rather than mandatory, or, at a minimum, be shortened. Other stakeholders, primarily agency representatives, strongly believe that counseling is effective in resolving significant numbers of EEO matters before a formal complaint is filed. To support this view, they point to statistics indicating that the overwhelming majority of EEO counselor contacts do not result in formal complaints. In fiscal year 1995, 40% of individuals counseled filed formal complaints, (68,936 persons counseled; 27,472 complaints filed).[2] Due to insufficient information about what actually happens to complaints during counseling, the Working

[2] This high rate of informal resolution is consistent with what has occurred in previous fiscal years. For example, in fiscal year 1994, 36% of persons counseled filed formal complaints. In fiscal year 1993, 33% of individuals counseled filed formal complaints.

Group was unable to determine why so many counselor contacts do not result in formal complaints. Stakeholders believe that this may be occurring because employees are consulting counselors about non-EEO claims, employees and agencies are effectively resolving their EEO disputes, employees with EEO claims are somehow being discouraged from filing a formal complaint, or because of some combination of these or other factors.[3]

In addition, many stakeholders believe that counseling is not consistently achieving the regulatory objective of fully informing aggrieved persons about their rights and responsibilities under the EEO complaint process. Some of these stakeholders attributed this problem to insufficient training of EEO counselors, many of whom perform the counseling function as a collateral duty or on a part time basis. They suggested that more training of counselors is needed, and that more full-time counselors be employed. Currently, OFO offers non-mandatory training for EEO counselors through the revolving fund.[4]

The Working Group decided to retain the 30-day EEO counseling process. Although there is evidence to suggest that the process is successful in resolving at least some workplace disputes that might otherwise become the subject of an EEO complaint, there is insufficient information to determine precisely how disputes are handled during counseling. Therefore, the Working Group concluded that elimination of the counseling process is not warranted. In addition, counseling is essential to framing the issues and bases of any subsequent complaint and, if done properly, the Group believes that it can be effective in successfully resolving EEO matters. Smith v. U.S.P.S., Request No. 05921017 (1993). Finally, the Working Group has made several recommendations for the increased use of ADR in the federal sector complaint process. Some of these recommendations pertain to the counseling period. (See discussion on ADR beginning at pg. 46 infra.)

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[3] Anecdotal information provided by OFO staff suggests that a significant portion of EEO counselor contacts do not involve EEO matters, and that employees use the EEO process to address a variety of workplace disputes. For example, when the Postal Service changed its definition of "counselor contact" to limit it to contacts in which the employee alleges an EEO matter. Their counselor contacts dropped by fifty percent.

[4] In fiscal year 1995, 80% of all counselors were performing the function as a collateral duty. Some stakeholders stated that collateral duty counselors generally did not perform as well as full-time counselors. Agencies are required to maintain a trained counseling staff. However, there are no uniform mandatory training requirements for EEO counselors. Anecdotal information provided by OFO staff indicates that many EEO counselors need additional training, and that mandatory training requirements are needed.

The Commission's regulations give agencies and EEOC the authority to award attorney's fees only for work performed after a formal complaint is filed. 29 C.F.R. §1614.501 (e) (1) (iv). Some stakeholders recommended that the regulation be changed to authorize the award of attorney's fees for time spent by their attorneys prior to the filing of a formal complaint. These stakeholders commented that the current regulation may serve as a disincentive to participate in Alternative Dispute Resolution (ADR), which most often occurs in the counseling period, or to otherwise settle a case during the counseling period, if a complainant is represented by counsel. The Working Group agrees with these concerns.

Several stakeholders argued that the 45-day timeframe for contacting the EEO counselor should be extended to as much as 180 days, to make it analogous to the private sector charge filing period. Some stakeholders argued that the shorter timeframe operated to screen out meritorious claims. Others argued that it forced potential complainants to contact the EEO counselor prematurely, in order to preserve the right to file a complaint. The Commission has previously taken the position that the analogy between the private sector filing period and the federal sector counseling time limit is not appropriate. (See preamble to the final 1614 regulation, 57 Fed. Reg. 12634-12635 (April 10, 1992).) The Commission noted that there are significant differences between the two situations. For example, private complainants must actually file a charge within 180 days, not just contact an EEOC office about doing so. Filing a charge may involve traveling many miles or using the mails, while a federal employee may only have to use the telephone or visit a counselor who is located in the same workplace in order to meet the counseling time limit. The Commission also noted that federal complaint filings are three times greater than private sector charge filings. Further, the Commission stated that the earliest possible contact with the counselor aided in the resolution of disputes because positions had not yet hardened. For these reasons, the Commission concluded that a significant lengthening of the time limit for contacting an EEO counselor was not warranted.

Despite the Commission's earlier position on this issue, stakeholders raised the issue of extending the time limit for contacting an EEO counselor during this review. In considering the issue, it became apparent that there is insufficient data and other information to determine what impact the relatively short time limit for contacting an EEO counselor has on the EEO process. For example, we could not substantiate the view that the time limit screened out meritorious claims, or the view that it forced employees to file complaints prematurely. Nevertheless, the Working Group believes that this is an important issue that warrants further study. We have included a recommendation to explore the feasibility of collecting data to allow the Commission to evaluate the impact of the current time limit for contacting a counselor, and to determine whether the time limit should be extended.

RECOMMENDATIONS

1. Amend Management Directive 110 (MD) to establish a mandatory minimum training requirement for all EEO counselors. OFO should establish appropriate training requirements. However, new counselors must receive a minimum of 16 hours of training, with an additional 8 hours of training every other year. OFO should develop training courses to satisfy this requirement and offer them to agencies through the revolving fund. Agencies may also develop their own courses to satisfy this requirement, but they must satisfy training requirements established by OFO.

2. Amend 29 C.F.R. §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.

3. Encourage agencies to use more full-time counselors. Although the Working Group recognizes that budgetary and personnel constraints may prevent some agencies from using full-time counselors, the Group believes that it is important for the Commission to encourage agencies to do so.

4. Direct the Office of Federal Operations, in conjunction with the Office of Legal Counsel, to explore the feasibility of collecting data from agencies which would enable the Commission to determine the impact the current time limit for contacting the EEO counselor is having on the EEO process, and whether that time limit should be extended.

B. THE INVESTIGATIVE PROCESS

DISCUSSION

The Commission's regulations require agencies to investigate complaints of employment discrimination. 29 C.F.R. §1614.108.[5] This section of the regulations also requires agencies to develop a complete and impartial factual record upon which to make findings on the issues raised by the complaint. Chapter 5 of MD 110 describes how agencies should conduct investigations in order to ensure that they are complete and impartial. For example, the MD discusses the role of the investigator as well as a variety of methods available for accomplishing the investigator's mission.

[5] The number of federal sector complaints filed has been increasing over the last several years: in fiscal year 1992, 19,106 complaints were filed; in fiscal year 1993, 22,327 complaints were filed; in fiscal year 1994, 24,592 complaints were filed; and in fiscal year 1995, 27,472 complaints were filed.

It stresses that the investigator must be unbiased, objective and thorough in obtaining all relevant evidence from all sources regardless of how it may affect the outcome. The MD also discusses the quality, types and sources of evidence that must be gathered during the investigation.

Internal and external stakeholders raised several concerns about the investigative process. The primary concern is that there is an inherent conflict of interest in the process because it requires the agency charged with discrimination to investigate itself. There is a widespread perception that agencies are not able to conduct impartial investigations of themselves. The Federal Employment Fairness Act (FEFA) was a legislative attempt to address this issue by transferring investigative authority from agencies to EEOC. The Working Group agrees that requiring agencies to investigate themselves is a fundamental flaw in the present system. However, the Group believes that any change to that requirement is best accomplished through legislation. Therefore, our review was limited to developing recommendations that could improve the investigatory process through discreet changes to the regulations and management directive.

Stakeholders also articulated a significant degree of dissatisfaction with the quality of agency investigations. Although the guidance in the MD is mandatory, external stakeholders and OFO staff indicated that investigatory files frequently lack the relevant information necessary to make a determination on the merits of the complaint. Several stakeholders suggested that greater complainant input into the investigation would assist the agency in satisfying its obligation to conduct a complete and impartial investigation. However, currently there is no requirement that agencies allow complainants to review the investigative file after the investigation is complete. Stakeholders also suggested that additional training for investigators is needed. The Working Group agrees with these observations. In addition, the Group believes that, under appropriate circumstances, the AJs and OFO should exercise their authority to issue sanctions against agencies for failing to conduct a complete investigation. The use of sanctions in this circumstance may have the effect of improving the quality of future investigations.

Finally, the regulations require agencies to notify complainants that the investigation is complete and that they must elect between a hearing before an EEOC Administrative Judge (AJ) or a final agency decision (FAD) based on the investigative record without a hearing. 29 C.F.R. §1614.108 (f). Many complainants do not respond to the notice, therefore agencies issue a FAD. Several agencies strongly recommended that they be allowed to dismiss such complaints for failure to prosecute pursuant to 29 C.F.R. §1614.107 (g). They argued that many complainants do not respond to the notice because they do not want to proceed with their complaints, and that it is a waste of government resources to require them to issue a FAD. The Working Group determined that failure to choose between a FAD or a hearing does not constitute failure to prosecute under the standards developed by the Commission. See e.g., Przygoda v. Federal Deposit Insurance Corporation, Appeal No. 01940900 (1994). Therefore, the Working Group decided not to develop a procedure permitting the dismissal of such complaints.

RECOMMENDATIONS

1. Amend the MD to require agencies to allow complainants to examine the file and notify the agency of any perceived deficiencies in the investigation prior to transferring the case to EEOC for a hearing, or the issuance of a FAD.[6] The agency must correct the deficiencies or, if it disagrees with the complainant, it must include the complainant's request in the final investigative file, along with a statement explaining the rationale for the disagreement. This step should be accomplished within the timeframe provided for completion of an investigation contained in 29 C.F.R. 1614.108 (e). Failure of an agency to adequately respond to reasonable requests to supplement the investigation will be considered in determining whether a complete and impartial factual record was developed.

2. Amend the MD to clarify that AJs and OFO have the authority to issue sanctions against an agency for failure to develop a complete and impartial factual record on a complaint in appropriate circumstances. For example, AJs and OFO may exercise their discretion to issue sanctions when it is clear from the allegations in the complaint that certain information should have been included in the complaint file, and it appears that the agency made no effort to include such information. In such circumstances, the sanctions listed in 29 C.F.R. §1614.108 (c) (3) are available. See McDuffie v. Navy, Request No. 05880134 (1988) (adverse inference can be drawn from agency's failure to include relevant statistical information in the file.)

3. Amend the MD to establish mandatory minimum training requirements for all investigators, including contract investigators. OFO should establish appropriate training requirements. However, new investigators must receive a minimum of 32 hours of training. OFO should develop courses to satisfy this requirement and offer them to agencies through the revolving fund. Agencies may also develop their own courses to satisfy this requirement, but they must satisfy training criteria established by OFO.

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[6] The Commission has previously held that EEO counselors must ensure that complainants agree on the issues which will be the subject of the inquiry and subsequent attempts at settlement. Smith v. U.S.P.S., Request No. 05921017 (1993); see also Poxon v. Navy, Appeal No. 01933724 (1994).

C. THE ADMINISTRATIVE HEARING PROCESS

DISCUSSION

Once a complainant requests a hearing the agency is required to forward the investigative file to an EEOC district office where the case is assigned to an Administrative Judge (AJ) for further processing. Generally, an AJ will conduct a hearing which provides the parties a reasonable opportunity to explain and supplement the record and to examine and cross-examine witnesses. AJs have the authority to regulate the conduct of hearings. This authority includes the power to administer oaths, exclude irrelevant and repetitious evidence, order discovery or the production of documents and witnesses, limit the number of witnesses, issue findings and conclusions of law without a hearing if there are no material facts in genuine dispute, and impose appropriate sanctions on parties who fail to comply with discovery orders. 29 C.F.R. §1614.109.

AJs must exercise their authority in a manner that will lead to a full development of the record. This means that AJs may direct supplemental investigations when discovery would be inadequate in developing the record. It also means that AJs may request that the complainant, an agency, or any employee of a federal agency submit relevant evidence directly to the AJ without remanding the complaint back to the agency for further investigation. MD 110, Ch. 6, Sec. II, B, 1, 2, & 3.

Many stakeholders provided useful suggestions on how the AJs can handle the hearings process more effectively, which the Working Group adopts. For example, stakeholders stated that AJs do not exercise fully their authority to issue summary judgments to dispose of complaints that do not warrant a hearing, and that they should use sanctions more frequently to ensure agency compliance with their orders pertaining to discovery requests. Stakeholders also stated that AJs should make full use of their authority to request that information required to make a determination on the complaint be submitted directly to them, rather than remanding the entire case to the agency for additional investigation. They believe that use of this authority would greatly expedite the processing of complaints.

Several issues were raised concerning the scope of the AJ's authority. One issue was whether an agency can issue an FAD after a complaint has been referred to an AJ. Stakeholders suggested that we clarify that once a case goes to the AJ, the AJ has jurisdiction over the case. Therefore, an agency must seek approval from the AJ prior to taking any further action on the complaint. Similarly, stakeholders requested that the Commission change its regulations to require that requests for a hearing be submitted directly to EEOC if the 180-day time period for conducting an investigation has expired. After 180 days, complainants have a right to request a hearing. Agencies are then obligated to promptly request that an AJ be appointed. Stakeholders argued that having

complainants submit their hearing requests directly to EEOC would avoid some of the delay which frequently occurs in getting agencies to submit complaint files to EEOC.

Currently, AJs do not have the authority to dismiss complaints that are in the hearing process. If they believe that a complaint should be dismissed, they must refer the complaint back to the agency with a recommendation that it be dismissed. Several stakeholders argued that it would be more efficient to permit AJs to dismiss complaints for the reasons provided in Section 1614.107 of the regulations.[7] This would expedite the dismissal of complaints that should not be processed further.

The AJs requested clarification of their authority to calculate the amount of compensatory damages awards. Currently, AJs hear evidence and determine whether a complainant is entitled to compensatory damages, but they do not calculate the amount of the award. The AJs recommended that they also be permitted to calculate the amount of damages to which a complainant is entitled.[8] In many instances, damages calculations involve credibility determinations which are usually the province of a jury or other factfinder. AJs argue that since they have seen and heard the witnesses, they are in the best position to make credibility determinations concerning compensatory damages awards. AJs also argue that they are fully capable of calculating compensatory damages awards. In litigation, juries determine these awards with guidance from the court. Unlike most jurors, AJs are lawyers, and OFO has issued guidance on how to calculate such awards. Therefore, AJs should be able to perform this function. Finally, AJs argue that limiting them to determining only the entitlement to compensatory damages fragments the process and results in unnecessary delay. The Working Group agrees.

Similarly, the Working Group believes that AJs should have the authority to calculate the amount of attorney's fees to which a complainant is entitled. Currently, AJs decide entitlement to attorney's fees in a finding of liability. However, agencies calculate the amount of the award. The Working Group believes that AJs 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

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[7] Section 1614.107 lists the bases for agency dismissal of a complaint or portion of a complaint. The list includes dismissal for failure to state a claim, untimeliness, failure to seek EEO counseling, and mootness.

[8] Currently, agencies calculate the amount of compensatory damages awards. Their calculations are subject to review by OFO if there is an appeal. This procedure has permitted OFO to establish standards for compensatory damages awards, and to apply those standards in a consistent manner. The Working Group believes that OFO's interpretations of these standards have provided sufficient guidance to enable the AJs to apply them in a consistent manner.

by the attorney as the basis for the award. Moreover, since AJs 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. This change will accord EEOC AJs the same authority to calculate attorney's fees awards that administrative judges at the MSPB currently have.

The Working Group also examined the issue of whether AJs have the authority to order that complainants submit to a medical examination when they have put their health at issue via compensatory damages claims. Agencies frequently request that complainants undergo medical examinations to rebut medical evidence submitted by the complainant to support their claims for compensatory damages. Neither the regulations nor the MD identify this among the available discovery methods. However, agencies should be entitled to request this type of discovery, particularly when the complainant is introducing expert testimony from a treating physician or forensic. Without an opportunity to examine the complainant, the agency's expert would be at a severe disadvantage.

The Working Group believes that AJs should be given the express authority to order complainants to undergo medical exams for the sole purpose of rebutting medical evidence submitted by complainants to support their compensatory damages claims, if requested by an agency. Such requests must be approved by the AJs to ensure that they are fair and reasonable in light of the circumstances of the case.

Finally, stakeholders provided helpful suggestions on how discovery could be conducted more efficiently, which we have adopted.

RECOMMENDATIONS

1. Amend the MD to include additional guidance on the legal standards for the use of summary judgments and sanctions in the hearing process. The MD should also include additional guidance on how to handle inadequate investigatory records. This guidance should clarify that before sending a case back to an agency for additional investigation, AJs should consider all available alternatives. Ordinarily, if relevant information is not included in the file, AJs should request that the agency produce such information within a prescribed period of time, to be established by the AJ. The investigative file should be retained by the AJ and the agency should submit the requested information. If the agency fails to provide the requested information, sanctions should be imposed on the agency. In these circumstances, the sanctions set forth in 29 C.F.R. §1614.109 (d) (3) will be available.

Future training for the AJs should include discussion of the amendments to the MD contained in this recommendation. It should also include discussion on recognizing relevant evidence, the use of affidavits as direct testimony, the use of stipulations of fact, and the effective use of bench decisions.

2. Amend the MD to clarify that once a case is referred to an AJ, the AJ has jurisdiction over the case. Therefore, an agency must seek approval from the AJ before it takes any action on a complaint in the hearings process.

3. Amend the regulations to provide that complainants must submit requests for hearings directly to EEOC if the 180-day period for conducting an investigation has expired. EEOC will then request the case file from the agency.

4. Amend the regulations to permit AJs to dismiss complaints in the hearing stage of the process for all of the reasons provided in 29 C.F. R. 1614.107. The complainant would retain the right to file an appeal.

5. Amend the MD to clarify that AJs have the authority to calculate compensatory damages awards. An AJ can determine whether it is appropriate to bifurcate the hearing or to hear evidence concerning the compensatory damages claim during the hearing on the claim on the merits.

6. Amend the regulations to provide that AJs have the authority to calculate attorney's fees awards.

7. Amend the MD to provide that AJs have the authority to order that complainants undergo medical examinations when they have put their health at issue via a compensatory damages claim. Requests by the agency that complainants undergo such examinations must be approved by the AJ. The AJ will determine whether the request was made to rebut the complainant's medical evidence, and is otherwise reasonable in light of the circumstances of the case. The MD should include explicit criteria on how AJs should assess the reasonableness of agency requests.

8. Amend the discovery provisions of the MD to: eliminate the complainant's right to request documents at the prehearing conference, which typically occurs after discovery closes; clarify the circumstances in which parties may commence discovery without requesting permission from the AJ; and clarify that AJs have the discretion to modify the timeframe for discovery contained in the MD if warranted by the circumstances.

D. ADMINISTRATIVE JUDGE OVERSIGHT AND REPORTING STRUCTURE

DISCUSSION

The Hearings Units are part of the organizational structure of the Office of Field Programs (OFP). Since these units are located in the district offices, AJs are ultimately accountable, in terms of line management, to the district directors. District directors determine who the Hearings Units report to and this varies from office to office. Hearings Units may report to the director, the deputy director, or the regional attorney.

The Complaints Adjudication Division (CAD) in OFO does not have line management authority over the AJs. However, they serve as desk officers for the AJs, providing information, advice and technical assistance related to the processing of complaints, as requested by the AJs. The Division also reviews a sample of AJ decisions for quality control, and reports their findings to OFP, which then considers this information when evaluating the district offices on how they are carrying out the hearings function.

The AJs recommended that an Office of Administrative Judges, with a separate budget, be created which would serve as a single source of supervision, policy guidance, and support to the AJs in the field. In their view, this would ensure that the hearings units' resource, guidance and staffing needs are met. The AJs also stated that they need additional information on relevant policy guidance and improved technical assistance regarding the processing of complaints. However, they view the position as "quasi-independent" warranting flexibility in how they conduct their daily operations.

Many outside stakeholders commented on the lack of uniformity and consistency in AJ procedures, and believe this creates an image of disarray throughout the agency. They strongly recommended that EEOC adopt uniform standards and procedures for the hearings process as other federal agencies which conduct administrative hearings have done.

Due to budgetary and streamlining considerations, the Working Group concluded that it is impractical and inefficient to create an Office of Administrative Judges at this time. In addition, the Group has concerns about the operational and management implications of removing the AJs from the authority of the district directors. Nevertheless, the Working Group recognizes the validity of many of the AJs' concerns. The recommendations that follow are designed to address those concerns while also addressing the concerns of the external stakeholders regarding the efficiency of the hearing process.

RECOMMENDATIONS

1. OFP should designate an individual to serve as a full-time Coordinator of the hearings function. This individual would oversee the operation of the hearings function in a manner similar to the ADR Coordinator's oversight of the ADR function in the field. The Coordinator would serve as an advocate for the hearings units. As such, this individual would address issues related to budget, staffing and resources and would be responsible for ensuring that the AJs' concerns are communicated effectively and taken into account by the district offices when allocating resources. The Hearings Coordinator would also serve as a liaison between OFP and CAD in OFO. In this capacity, he/she would be the point of contact between OFP and CAD. The Coordinator would also ensure that new decisions, policy guidance and other relevant information are promptly communicated to the AJs.

2. CAD, along with the Hearings Coordinator, should play an expanded role in providing policy guidance and technical assistance to the AJ's. In view of the AJ's expanded role and enhanced responsibility, such as increased use of sanctions, and the calculation of compensatory damages and attorney's fees, CAD should develop, in conjunction with Legal Counsel and the Hearings Coordinator, a set of standard operating procedures to be used in the hearing process. These procedures should take into account the need for some degree of uniformity, while recognizing that an administrative judge needs a certain amount of flexibility to operate efficiently.. CAD, should also play a greater role in evaluating the quality of AJ decisions. They should evaluate decisions for policy and procedural consistency, and provide this information to OFP. The Working Group recognizes that the implementation of this recommendation may require that additional staff be assigned to CAD.

E. FINAL AGENCY DECISIONS

DISCUSSION

Federal agencies issue final agency decisions (FADs) on complaints. The FAD consists of findings by the agency on the merits of each issue in the complaint and, if discrimination is found, appropriate remedies and relief. A FAD must be issued within 60 days of the receipt of the findings and conclusions issued by the AJ. Where no AJ decision was issued, the agency must issue a FAD within 60 days of the notice that complainant has requested an immediate decision without a hearing. 29 C.F.R. §1614.110.

The Working Group believes that there is an inherent conflict of interest in allowing an agency charged with discrimination to issue a final decision on whether discrimination has occurred. This is particularly true in cases which have been referred to an EEOC AJ, a neutral third-party to the dispute. Many stakeholders agree. They argued that agencies are unlikely to find that they have discriminated against one of their own employees. To support this argument, they point to statistics indicating that agencies rarely issue FADs finding discrimination. For example, in fiscal year 1995, only 1.26% of FADs issued without an AJ decision found discrimination. AJs find discrimination is a much higher percentage of cases referred to them for a hearing, 11.7 % in 1995. Moreover, in 1995, agencies rejected or modified 55.1% of the AJs' findings of discrimination, but only 3.1% of the AJs' findings of no discrimination.[9]

Some stakeholders recommended that the regulations be amended to delete the requirement that agencies issue FADs on complaints which have been referred to an AJ for a hearing. Under this proposal, the AJ decision would be the final decision, and either the complainant or the agency could appeal the decision to OFO. Stakeholders advocating this change believe that it will address the perception that there is an intrinsic conflict of interest in allowing agencies to modify or reject AJ decisions.

If the FAD is retained, stakeholders argued that the regulations or MD should be amended to specifically state that the FAD must address each of the AJ's findings of fact and conclusions of law. Currently, many agencies reject or modify an AJ's findings and conclusions without providing any reason for doing so. These stakeholders also argued that if an agency rejects or modifies an AJ's factual findings, it must specify why it believes that the factual findings are erroneous.[10]

The Working Group decided to recommend that the FAD be eliminated in cases referred to an AJ for a hearing. For all of the reasons advanced by the stakeholders, the Group believes that

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[9] Some agency representatives argue that these statistics do not support the conclusion that agencies are rejecting or modifying AJs' findings of discrimination because they are unwilling to find that they have discriminated against their own employees. They note that OFO affirms their decisions to reject or modify AJs' findings of discrimination in a majority of cases. They believe that this suggests that agencies modify or reject AJs' findings of discrimination only when they think that an AJ's determination is wrong.

[10] The Commission's regulations provide that an agency may reject or modify an AJ's findings and conclusions within 60 days of receipt. If an agency does not reject or modify the findings and conclusions within 60 days, they will become final. 29 C.F.R. §1614.109 (g). This language strongly suggests that the AJ's findings and conclusions are presumptively valid, and that agencies should provide justifications for rejecting them. The regulations also provide that a FAD must contain findings on the merits of each issue in the complaint. 29 C.F.R. §1614.110.

allowing an agency to reject or modify an AJ's findings of fact and conclusions of law is a fundamental flaw in the current system that must be corrected. An EEOC AJ is a neutral third-party to the complaint. To permit the AJ's decision to be rejected or modified by the agency, a party to the dispute, only serves to perpetuate the perception that the process is not impartial. In addition, the Working Group concluded that the issuance of a FAD in cases that have been referred to an AJ for a hearing creates an unnecessary layer of review. At this point in the process, significant resources have already been devoted to a complaint by the agency during the investigation and by the EEOC AJ. This is particularly true for those complaints in which discovery was conducted and a hearing was actually held. A process that allows an agency to then reject or modify the findings and conclusions of the AJ creates a conflict of interest, an unnecessary layer of review, and undermines the function of the AJ.

RECOMMENDATIONS

1. Amend the regulations to eliminate the final agency decision in cases that have been referred to an AJ for a decision. The AJ decision would be final, but either the complainant or the agency could appeal the decision to EEOC.[11]

2. Until the regulation is changed to eliminate the FAD in complaints which have been referred to an AJ, issue guidance which specifically requires agencies to address each of an AJ's findings of fact and conclusions of law if they reject or modify them. An agency must explain why it believes that the AJ's factual findings and legal determinations are erroneous.

F. APPEALS

DISCUSSION

The Commission's regulations allow a complainant to appeal an agency's final decision or the dismissal of a complaint or any portion of a complaint to the EEOC. 29 C.F.R. §1614.401 (a).

[11] The version of FEFA introduced in the 104th Congress eliminated the FAD altogether. It required that complainants choose between a hearing before an EEOC AJ or file a civil action in federal district court. For two reasons, the Working Group decided not to require that all complaints which remain in the administrative process be heard by an AJ. First, the Commission does not have the resources to undertake this responsibility. Second, the Group believes that many complainants do not want their cases heard by an AJ. We wanted to retain another option for these complainants.

In fiscal year 1996, the Commission received 6,933 appeals.[12] The regulations also allow the complainant or the agency to request reconsideration of a decision issued by OFO at the initial level of appeal. 29 C.F.R. §1614.407(b). (See Section 2. below for a full discussion of the request to reconsider process.)[13]

1. STANDARD OF REVIEW ON APPEAL

Currently, OFO reviews all complaints on appeal from a final agency decision under a de novo standard of review. However, "[a] credibility determination of an AJ that is based on the demeanor or tone of voice of the witness will be accepted by OFO unless OFO finds that the determination was clearly erroneous, e.g., where documents or other objective evidence contradicts the witness' story or the story itself is so internally inconsistent or implausible that a reasonable factfinder would not credit it." 57 Fed Reg. 12645 (April 10, 1992). This standard was in place when the Commission assumed authority over federal sector equal employment opportunity from the Civil Service Commission in 1979. In practice, it means that OFO reviews the complete record on appeal and makes its own determination as to whether discrimination occurred. In doing so, it takes into account the final agency decision and the AJ's recommended findings of fact and conclusions of law, if any, but OFO is not obligated to accord any deference to those previous determinations.

Many stakeholders stated that applying a de novo standard of review on appeal is an inefficient use of the Commission's limited resources if an AJ has previously issued recommended findings of fact and conclusions of law in a case. These stakeholders argued that OFO should apply an appellate standard of review, such as the clearly erroneous standard, to an AJ's factual findings. Since OFO did not see and hear the witnesses, they should not be in a position to second-guess the AJ, particularly on credibility determinations.

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[12] The number of appeals filed with the Commission has been increasing over the last few years. In fiscal year 1995, the Commission received 6,947 appeals. In fiscal year 1994, we received 5,890 appeals.

[13] OFO also reviews appeals from decisions of the Merits Systems Protection Board (MSPB) in "mixed cases," i.e., those in which the MSPB has primary jurisdiction and in which discrimination has been raised as an affirmative defense. The Commission receives very few mixed cases. In fiscal year 1995, the Commission received 159 mixed cases. We received 134 mixed cases in fiscal year 1996. In addition, OFO reviews Petitions for Enforcement filed by appellants where the Commission has issued an order on behalf of a complainant and the agency does not comply. Like mixed cases, the Commission receives very few Petitions for Enforcement. During fiscal years 1995 and 1996, the Commission received 62 Petitions for Enforcement.

Most stakeholders recommended that the de novo standard of review continue to apply in cases that are appealed to OFO without an AJ decision. In such cases, OFO is the first neutral third-party to the dispute to assess the merits of the complaint. For this reason, their review should be de novo.

The Working Group agrees with the recommendations of the stakeholders. Their reasons for recommending that the Commission adopt a traditional appellate standard of review are even more compelling if the AJs' decisions become final rather than recommended decisions, which the agency can accept, reject, or modify in a FAD. Under the current procedure, OFO reviews the FAD on appeal, not the AJ decision. Since OFO conducts the first neutral third-party review of the merits of the complaint, it is appropriate that the review be de novo. However, if the appeal is from the decision of the AJ, another neutral third-party to the dispute, there is no legitimate basis for de novo review by OFO.

RECOMMENDATIONS

1. Continue to apply the de novo standard of review to complaints that are appealed to OFO from a FAD without an AJ decision.

2. Apply a clearly erroneous standard to factual findings appealed to OFO directly from an AJ's decision. Under this standard of review, no new evidence will be considered on appeal unless the evidence was not reasonably available during the hearing process.

3. All legal determinations by the AJs and the agency are reviewed on appeal under a de novo standard of review.

4. Amend the MD to include guidance on the application of these standards of review, and include such guidance in future training for the AJs.

2. REQUEST FOR RECONSIDERATION

DISCUSSION

As noted above, the Commission's regulations allow a complainant or an agency to request reconsideration of a decision issued by OFO at the initial appellate level. The request must contain arguments or evidence which tend to establish that "new and material evidence is available that was not readily available when the previous decision was issued, the previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy,

or the decision is of such an exceptional nature as to have substantial precedential implications." (See 29 C.F.R. §1614.407 (c)). Currently, the Commission reviews all decisions drafted by OFO on requests for reconsideration (RTR or O5s).

The number of requests for reconsideration received by the Commission has been declining over the last several years. In fiscal year 1993, the Commission received 1,223 requests, in fiscal year 1994, the Commission received 1,034 requests, in fiscal year 1995, we received 994 requests, and in fiscal year 1996, the Commission received 887 requests for reconsideration.

The overwhelming majority of requests for reconsideration involve procedural issues, as opposed to issues related to the merits of the complaints. For example, in fiscal year 1995, there were 846 closures of requests for reconsideration. Of those, 520 were procedural cases, and 273 involved the merits of the complaint.[14]

The majority of requests for reconsideration are denied. In fiscal year 1993, there were 545 total closures of RTRs on procedural cases, of which 394 were denied. Only 149 were reversed or modified. In fiscal year 1994, there were 610 closures of RTRs on procedural cases, of which 463 were denied, and 140 were reversed or modified. In fiscal year 1995, there were 520 closures of RTRs on procedural cases, of which 422 were denied, and 89 were reversed or modified.

A similar rate of denial of RTRs occurs on merits cases. In fiscal year 1993, there were 338 total closures of RTRs on merits cases, of which 303 were denied, and 25 were reversed or modified. In fiscal year 1994, there were 480 closures of RTRs on merits cases, of which 429 were denied, and 19 were reversed or modified. In fiscal year 1995, there were 273 closures of RTRs on merits cases, of which 241 were denied, and only 19 were reversed or modified.

RECOMMENDATION

Amend 29 C.F.R. 1614.407 (b) to eliminate the right to request reconsideration, but involve the Commission more meaningfully in the initial appellate decision-making process (01s). The Commission currently reviews 01 decisions drafted by OFO only if they raise certain policy issues identified on a Commission-approved issues list.[15]

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[14] The remainder of requests for reconsideration closed in fiscal year 95 were closed for other reasons, such as the request was withdrawn or settled, or a civil action was filed.

[15] In fiscal year 1993, the Commission reviewed 112 01 decisions, of which 27 were (continued...)

Under this recommendation, the Commission would also develop an issues list, however, the content of the list and the manner in which it would be developed differs from the current 01 issues list process. This recommendation contemplates that the list would contain policy as well as certain procedural issues that are important in federal sector complaint processing. It also contemplates that the Commission would review, update and vote on the list quarterly. This allows the Commission to evaluate and determine which issues should be submitted to the Commission on an ongoing basis. In addition, OFO would be required to report to the Commission on the kinds of 01 cases it is resolving without Commission review. This information could then be used by the Commission in deciding which issues should be included on the issues list.

Many of our external stakeholders told us that the Commission has not developed a consistent body of precedential decision law in the federal sector, and that this is sorely needed. The Working Group believes that this recommendation will result in a reduction in the number of decisions coming to the Commission for review. If this reduction occurs, the Commission can devote more staff resources to the policy issues it deems important, and develop a consistent body of decision law on those issues.

This recommendation also eliminates a layer of review. One of the central goals of the National Performance Review is to eliminate unnecessary layers of review, and to allow decision-making at the lowest possible level.[16] Those goals are reflected in the Commission's National Enforcement Plan and the Priority Charge Handling Procedures. The current request for reconsideration process is directly contrary to those goals. As noted above, most of the cases that come to the Commission at the 05 level do not involve substantive legal issues, and therefore, could be decided at a lower level. In addition, very few 01 decisions are reversed by the Commission at the 05 level. This suggests that there is no need for an additional layer of review.

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[15](...continued)
placedon hold. In fiscal year 94, the Commission reviewed 190 01 decisions, and placed 50 on hold. In fiscal year 95, the Commission reviewed 97 01 decisions, of which 21 were placed on hold, and during fiscal year 96, the Commission reviewed 121 01 decisions, of which 21 were placed on hold.

[16] In addition, the General Accounting Office (GAO) has recently expressed concerns to the Working Group and to Congress about the length of the federal sector complaint process. They would like to see the process streamlined. This recommendation addresses GAO's concern.

Some of our stakeholders recommended that the request for reconsideration process be retained. Agencies that argued for its retention wanted to be able to appeal an adverse OFO appellate decision. They stated that, unlike the complainant, they cannot go into court if they don't like the result in the administrative process. However, this is also true if they are dissatisfied with the 05 decision. Having more Commission input in the 01 process may alleviate some of their concerns. Some agencies and plaintiffs' attorneys also stated that the 05 process should be retained because they get a better written and reasoned decision at the 05 level. The Working Group does not believe that this concern justifies retaining the request for reconsideration stage of the process. Instead, the Group recommends that OFO address issues related to the quality of 01 decisions, if any, through the use of internal management and quality controls. The solution is not to retain an unnecessary layer of review.[17]

3. FORMAT OF OFO DECISIONS

Several employees in OFO raised concerns about the format and length of OFO decisions. Generally, they were concerned that OFO decisions are too long, and include too much extraneous discussion. They suggested that much of this is due to defensive writing by OFO attorneys in anticipation of the review which will be done by the Special Assistants. According to these attorneys, the Special Assistants frequently conduct a separate de novo review of cases they review. This practice has resulted in attorneys being over-inclusive in terms of the amount of background and factual information they include in decisions.

Ironically, many of the Special Assistants also expressed concerns about the length of OFO decisions, and believe that they could be substantially shortened by eliminating unnecessary background discussion and focusing more on the legal analysis used to decide the case.

The Working Group believes that the following recommendations will result in more concise decisions. However, these recommendations contemplate that all decisions will contain an explanation of the basis for the decision.

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[17] Although this recommendation eliminates a complainant's right to request reconsideration, it does not disturb the Commission's authority to reconsider any decision previously issued on its own motion. See 29 C.F.R. §1614.407 (a); Kleinman v. U.S.P.S., Request No. 05930493 (1993) (Commission has the authority to reopen decision on its own motion to correct error.)

RECOMMENDATIONS

1. Issue a summary decision when there is an AJ decision or FAD in the record that contains a thorough factual and legal analysis of the case, that OFO is adopting. Incorporate the AJ decision or FAD by reference and attach a copy of the decision.

2. Issue a summary decision when appellants do not raise any arguments to support the appeal, and OFO intends to uphold the prior decision. In this context, the decision should contain enough discussion to assure the appellant that the file has been read and that the decision being appealed was correctly decided.

3. Issue a summary decision in certain procedural cases, such as those dismissing a case for untimeliness or failure to state a claim.

4. Issue a summary decision on complaints from repeat filers who file numerous appeals that are very similar to one another. For example, a summary decision should be issued if an appellant files a new complaint every quarter about denial of overtime.

5. When a full decision is written, it should be as short and succinct as possible. As appropriate, OFO should eliminate the "Background" section of all full decisions and replace it with a statement that OFO has reviewed all of the facts. The legal analysis should then contain only the facts relevant to the analysis included in the decision.

4. REDUCE THE PROCESSING TIME ON APPEAL

A complainant must file a notice of appeal within 30 days of receipt of the dismissal of a complaint, portion of a complaint, or the issuance of a final agency decision. See 29 C.F.R. §1614.402 (a). The Commission's regulations also state that "[a]ny statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the agency within 30 days of filing the appeal." After OFO receives the appeal and any brief in support of the appeal, it requests the file from the agency by certified mail. The agency must then submit the file and any brief in opposition to the appeal to OFO within 30 days of receipt of OFO's request for the complaint file. 29 C.F.R. §1614.403 (d).

OFO staff believe that Section 1614.403 (d) has caused unnecessary delays in processing appeals. Pursuant to this provision, it may be three months after a notice of appeal is filed before OFO has the complaint file and the briefs necessary to decide an appeal. OFO stated that it

frequently takes longer because many agencies do not comply with the regulatory requirement that they submit the file and brief in opposition to OFO within 30 days of OFO's request.

Many stakeholders complained about the length of time it takes to receive a decision on an appeal. Most of this delay is obviously due to the volume of work in OFO. However, OFO attributes some of the delay to the time it takes to obtain the information necessary to decide the appeal. The following recommendations are intended to streamline the procedures for appeal and thus reduce the amount of time it takes to process an appeal.

RECOMMENDATIONS

1. Amend 29 C.F.R. §1614.403 (d) to require a complainant to file a notice of appeal and the brief in support of the appeal within 30 days of receipt of the final agency decision in procedural cases. However, retain the current regulatory provision that accords a complainant 30 additional days after a notice of appeal is filed to file a statement or brief in support of the appeal in merits cases. This recommendation is based on the Working Group's belief that complainants do not require an additional 30 days to file a brief in procedural cases, most of which do not raise substantive legal issues.[18] On the other hand, an appeal on the merits of a case always raises legal issues and therefore warrants additional time to formulate arguments to support the appeal. OFO should make appropriate changes to the MD and the Notice of Appeal form to ensure that complainants are aware of the time frames that apply to their particular appeal.

2. Amend 29 C.F. R. 1614.403 (d) to require an agency to submit the complaint file within 30 days of notification that an appeal has been filed.

3. Amend 29 C.F.R. §1614.403 (d) to require an agency to submit any brief in opposition to the appeal within 30 days of receipt of the notice of appeal and brief, if any, in a procedural case, and within 30 days of receipt of the complainants brief in support of the appeal in a case on the merits.

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[18] OFO estimates that only about 25 - 30 percent of procedural cases include briefs to support the appeal. If an appellant believes that an appeal raises difficult procedural issues that require additional time to formulate arguments to support the appeal, a request for an extension of time can be filed. OFO has the authority to grant such requests for good cause shown.

4. OFO should begin to draw adverse inferences, in appropriate cases, if an agency fails to provide the complaint file within the prescribed timeframe. MD 110, Ch. 8, Sec. III. B., ("[f]ailure to provide the complaint file within the prescribed time frame may result in the Commission drawing an inference adverse to the agency.") See also Dacus v. U.S.P.S., Appeal No. 01912544 (1991) (adverse inference used against agency for failure to comply with two requests to produce complaint file).

5. Amend 29 C.F.R. §1614.403 (d) to eliminate the requirement that requests for complaint files be mailed by certified mail.

5. COMPLIANCE AND ENFORCEMENT

The Commission's regulations provide that relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency unless a party files a timely request for reconsideration. 29 C.F.R. §1614.502 (a). The MD states that relief shall be provided no later than 60 days after receipt of the final decision unless otherwise ordered in the decision. MD 110, Ch. 10, Sec. VII, A. In establishing timeframes for compliance with an EEOC order, OFO evaluates the circumstances of each case as well as agency resource considerations. This usually results in OFO granting more than 60 days to comply.

The Commission's regulations also provide that a complainant may file a petition for enforcement of an order issued under the Commission's appellate jurisdiction. 29 C.F.R. §1614.503 (a). However, even without the filing of a petition for enforcement, the regulations direct OFO to determine whether agencies are complying with Commission orders, and to take actions to obtain compliance if an agency is found not to be in compliance. 29 C.F.R. §1614.503(b). Section 1614.503(d) of the regulations also provides that if OFO is not able to obtain compliance, it should submit appropriate findings and recommendations for enforcement of the order to the Commission. The regulations specify the enforcement mechanisms available to the Commission. See 29 C.F.R. §1614.503 (e), (f), and (g).

Although agencies comply with Commission orders in most cases, stakeholders commented that they frequently do not comply within the time frames provided in the orders. OFO staff confirm this practice, particularly in cases remanded to an agency for investigation. According to OFO staff, failure to meet the timeframes contained in orders occurs less frequently when the Commission has found discrimination, and has ordered that relief be provided.

The Working Group believes that the Commission should make full use of sanctions and the regulatory enforcement mechanisms to enforce Commission orders. While the Group recognizes that many agencies face resource and staffing considerations that may delay investigations on

remand, OFO takes these factors into account when it establishes the timeframe for completion of the investigation. Moreover, complaints remanded to an agency for an investigation pursuant to a Commission order should be given priority, if priority consideration is necessary to ensure that the timeframes in the order are met. Such complaints are frequently old and the Commission has determined that they warrant an investigation. In cases where the Commission has found discrimination and has ordered relief, there is no legitimate basis for delay in complying with a Commission order.

The Working Group also believes that OFO is in the best position to determine whether an agency is making reasonable efforts to comply with a Commission order. Currently, OFO monitors compliance of every order issued, and makes repeated requests for compliance, if necessary. The Working Group believes that if OFO determines that an agency is not making reasonable efforts to comply with an order, it should sanction the agency or recommend to the Commission that it take one of the enforcement actions contained in 29 C.F.R. §1614.503.

Stakeholders also commented that the Commission should issue notifications of exhaustion of the administrative process as provided in Section 1614.503 (g) of the Commission's regulations if an agency is not complying with a Commission order. The Working Group believes that this notice should not be issued routinely, particularly when a complainant is not represented by counsel or when the agency is making a reasonable effort to comply with a Commission order. However, when a complainant requests that the notification be issued, OFO should ordinarily issue the notification.

RECOMMENDATIONS

1. Amend the MD to provide that agencies should give priority to cases remanded for an investigation if this is necessary to comply with the timeframes contained in an EEOC order.

2. Amend the MD to specify that OFO will issue sanctions against agencies when it determines that agencies are not making reasonable efforts to comply with a Commission order to investigate a complaint, and, if necessary, may make recommendations for additional action pursuant to Section 1614.503 of the Commission's regulations.

3. Amend the MD to provide that in those cases where the Commission has ordered relief after a finding of discrimination, OFO will aggressively utilize appropriate sanctions and, if necessary, make recommendations for additional action pursuant to Section 1614.503 of the Commission's regulations.

4. Amend the MD to provide that OFO must issue a notification of completion of administrative efforts upon request by the complainant. The issuance of the notice will terminate further processing of the complaint, unless the Director, OFO determines that it would effectuate the purposes of the laws enforced by EEOC to further process the complaint.

G. PROCESSING OF CLASS COMPLAINTS

DISCUSSION

The Working Group examined the current class complaint adjudication system to determine whether it creates unnecessary obstacles to the filing and adjudication of class complaints. Several studies have documented the underutilization and disparities in the treatment of minorities, women, disabled individuals and the elderly at various levels throughout the federal government.[19] These data may indicate the continued existence of class-based discrimination in the federal government.

Despite studies indicating that class-based discrimination may exist in the federal government, recent data reflect that very few class complaints are filed or certified at the administrative level. Currently, there are only 19 cases pending in OFO on class complaints. Similarly, several AJs informally surveyed by the Working Group confirm that there are only a very small number of cases brought as class actions and, those that are filed, generally result in a denial of class certification. Furthermore, from 1991 to 1996, of the approximate 100 OFO decisions that

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[19] See U.S. Merit Systems Protection Board, Fair and Equitable Employment: A Progress Report on Minority Employment in the Federal Government, August 1996 (even when differences in education, experience, and other factors are considered, minorities, particularly, minority women, have lower average grades than white men); Office of Personnel Management, Final Report on Minority/Non-Minority Disparate Discharge Rates, April 1995 (African-American and Native American federal employees are discharged at rates significantly higher than other federal employees); U.S. Merit Systems Protection Board, A Question of Equity: Women and the Glass Ceiling, October 1992 (women continue to confront inequitable barriers to career enhancement in the federal government); NALEO Background Paper #20, Underrepresentative Federal Employment Practices and Their Costs to the Hispanic Community, 1992 (Latinos are underrepresented by 30 percent in the federal labor force).

explicitly reviewed class certification, only two decisions granted certification and seven cases were remanded for additional information.[20]

The class complaint adjudication process includes several procedural steps. A person wishing to file a class complaint must initially seek counseling within 45 days of the alleged discriminatory act and be counseled in accordance with 29 C.F.R. §1614.105.

Within 30 days of receiving a class complaint, an agency must forward the complaint, "along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission." 29 C.F.R. §1614.204 (d). An administrative judge makes a recommendation to the agency on whether the complaint should be accepted or dismissed.[21]

If an agency accepts a class complaint, it must notify potential class members within 15 days of acceptance. 29 C.F.R. §1614.204 (e). The parties are then permitted to develop evidence through discovery. 29 C.F.R. §1614.204 (f) (1). "During the period for development of the evidence, the administrative judge may, in his or her discretion, direct that an investigation of the facts relevant to the complaint or any portion be conducted by an agency certified by the Commission." 29 C.F.R. §1614.204 (f) (3).

Most stakeholders agreed that an effective federal sector process to address class complaints offers several advantages over litigation in federal courts, such as informality, lower cost, and the speed of resolution. However, several stakeholders complained that the federal class action complaint system does not adequately address class-based discrimination in the federal government. As a result of this perception, complainants with class issues have often elected to pursue their complaints in federal court.[22]

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[20] 1996 survey of cases from the Personnet.

[21] An AJ should recommend that a class complaint be dismissed by the agency for any of the reasons set forth in 29 C.F.R. §1614.107 (e.g., mootness, untimeliness, etc.) or if it does not meet the following criteria: (1) the requirements of Rule 23 of the Federal Rules of Civil Procedure; (2) the allegations lack specificity and detail, and the class agent has failed to provide more specific and detailed information; or (3) the agent cannot provide a satisfactory explanation of why an allegation appearing in the formal complaint was not raised in counseling. 29 C.F.R. §1614.204 (d) (2), (3) and (4).

[22] See Thomas v. Christopher, No. 86 Civ. 2850-SS (D.D.C. Nov. 7, 1996) (race discrimination in promotions at the State Department); Perez v. FBI, 707 F.Supp. 891 (E.D. Tex. 1988) (national origin discrimination against Hispanics in promotions and assignments by the FBI).

Stakeholders raised several concerns regarding the class complaint process. Many of these concerns relate to the requirement, embodied in 29 C.F. R. 1614.204 (a) (2), that a class complaint meet the requirements for certification contained in Rule 23 of the Federal Rules of Civil Procedure. Stakeholders believe that the Rule 23 requirements are a formidable barrier for complainants and are almost always used to deny certification. Their specific concerns include the following:

a. The thirty-day counseling period does not provide sufficient time for the complainant to determine whether his/her allegations should be brought as an individual complaint or a class complaint;

b. Neither the regulations nor the MD expressly requires an investigation of the issues related to class certification. Consequently, AJs often do not have adequate information to determine whether to certify a class;

c. If the complaint file does not include enough information to make a determination on class certification, AJs often recommend that the agency reject the complaint instead of seeking additional information from the agency relevant to the issue of class certification. Given that most of the relevant information is usually in the agency's possession, some stakeholders urged that AJs exercise their regulatory authority to require the agency to produce the evidence;

d. The general unavailability of discovery prior to class certification limits the ability of the class complainant to develop all of the information relevant to the issue of class certification; and,

e. The class system includes a "Catch-22" that may defeat class certification. Class complaints are frequently not certified because the class agent is unable to satisfy the "adequacy of representation" prong of Rule 23. However, class agents are often unable to obtain adequate representation willing to invest resources in a case until the class is certified.

Stakeholders also stated that EEO counselors need more training on how to adequately counsel complainants on the class complaint process. Complainants often are not informed of the class certification requirements or of the responsibilities of a class agent.

Many stakeholders recommended that the Commission reassess the types of statistical data it requires agencies to maintain and report to EEOC. For example, some agencies do not maintain applicant flow information which is critical to challenging discriminatory recruitment and entry-level

hiring systems. Other agencies do not maintain and provide prior selection information and/or applications. [23]

Finally, stakeholders were concerned that the regulations do not expressly provide for AJ approval of a class complaint settlement unless a petition to vacate is filed by an individual willing to replace the class agent. The regulations provide that such agreements should be evaluated under a "fair and reasonable" standard only when a petition to vacate the agreement is filed. 29 C.F.R. §1614.204 (g) (4). Many AJs are reluctant to evaluate settlement agreements if there has been no objection to the settlement without express regulatory authority to do so. Some stakeholders believe that clarification is needed to ensure that class settlements meet the fair and reasonable standard.

As noted above, many of the stakeholders' concerns regarding the class complaint process relate to the requirement that the AJ certify that the class meets the requirements of Rule 23 of the Federal Rules of Civil Procedure. 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 precertification discovery in the same manner and to the same extent as a Rule 23 plaintiff. The Commission discussed the concerns related to the lack of precertification discovery in Geraldine Brown v. Department of the Treasury, Request No. 05830298 (August 29, 1985), and suggested a process for addressing such concerns:

> The Commission is mindful that the instant case involves a federal employee who has been, up to this point, bound by the procedures outlined in EEOC regulations, as opposed to the Federal Rules of Civil Procedure which are available to the private sector employee. The practical problem within the administrative process is at what point sufficient data is gathered and presented to establish the class since, pursuant to EEOC regulations, this issue is addressed prior to the initiation of a formal investigation. The class agent has no authority or right to discovery until the investigation stage and, therefore, could be in a dilemma with

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[23] As discussed infra, at pg. 50, the Office of Legal Counsel and the Office of Federal Operations are preparing recommendations for the revision of Management Directive 715, the guidance provided to agencies for the collection of EEO data. Therefore, the Federal Sector Working Group has not made any specific recommendations on data collection. However, the Working Group believes that the Commission should consider the feasibility of collecting additional data related to the processing of complaints so that the Commission can assess the effectiveness of the complaints process. For example, the Working Group was unable to determine what actually happens during the counseling process, and why the majority of counselor contacts do not result in the filing of a formal complaint. In assessing the effectiveness of the counseling process, it would be very helpful to know if matters are settled during counseling, and if so, for what kinds of relief.

> the need to demonstrate the existence of a class but without access to necessary data to do so.
>
> Under Rule 23 of the Federal Rules of Civil Procedure, the appellant would have the right of a hearing after the filing of the complaint in federal court. At this hearing, the appellant would have the opportunity to present testimony and documents supporting her position that a class action under Rule 23 was appropriate. This would be an evidentiary hearing not available under EEOC regulations. The sole means of evaluating a class complaint under EEOC regulations is a review of the complaint itself and the preinvestigatory record, as it exists. Therefore, it would appear that it would be unjust to hold the appellant to the level of proof of Rule 23 at the federal court level, when the appellant has been at the administrative level.
>
> EEOC [AJs] have recognized this dilemma and have used their discretionary authority to meet the need. EEOC Regulation 29 C.F.R. §1613.604 (b) requires an [AJ] to make a determination of the Rule 23 issues discussed above. Where there is insufficient information available to them through evidence provided by the complainant, [AJs] cite this regulation as authority to require such information from the agency so that they may meet their obligations under the regulation. Similarly, §1613.604 (d), which permits the [AJ] to return a complaint to the class agent for more specificity and detail, is often cited as further authority to seek out necessary data from the agency so that the intent and purpose of the regulations may be fulfilled. Therefore, although there is no explicit provision in the regulations for a special hearing or investigation on the issue of class certification, there appears to be adequate discretion and authority at the initial processing stage to allow for proper development of necessary evidence in order to meet the requirements of federal case law.

Accord Moten v. Federal Energy Regulatory Commission, Request No. 05910504 (1991), Masten v. U.S.P.S., Request No. 05930253 (1993), Hines v. Secretary of the Air Force, Request No. 05940917 (1996). All of these decisions recognize that the Rule 23 requirements should not be applied rigidly in the administrative process. They also recognize that the AJ has an obligation to ensure that the record contains adequate information to make a determination on class certification. Nevertheless, stakeholders consistently argued that the Rule 23 requirements operated as an impediment to the filing and processing of class complaints, and that AJ's frequently do not have enough information in the complaint file to make a determination on class certification. Some of the AJs told the Working Group that due to time and docket constraints, they are often unable to devote the time necessary to obtain all of the information required to make a determination on class certification.

The Working Group developed several recommendations to address these concerns. The Group considered recommending that the Rule 23 requirements be eliminated altogether, but decided not to do so at this time. In order to file a class complaint in federal court, a federal employee must exhaust class administrative remedies. See Gulley v. Secretary of the Air Force, 905 F.2d 1383 (10th Cir. 1990) (and cases cited therein.) If a class is certified in the administrative process, a federal court is obligated to accept and enforce EEOC's decision to certify a class, if the complainant requests that the court do so. Charles, et al. v. Secretary of the Navy, No. C-91-2153 MHP (Unpublished), (N.D. Cal., January 31, 1996). If the Commission were to eliminate the Rule 23 requirements and adopt a "pattern and practice" model for federal sector complaints, a complainant would still have to satisfy the requirements of Rule 23 if a lawsuit based on the complaint is ever filed in federal court. Complainants would then not have the advantage of an administrative class certification that the district court would be required to accept. Procedures for class complaints were added to the regulations in 1977 in response to criticism by the courts about the lack of such procedures. See Gulley v. Secretary of the Air Force, 905 F.2d at 1384 (and cases cited therein.) The Working Group recommends that the Office of Legal Counsel study these issues and provide recommendations on whether elimination of the Rule 23 requirements is feasible.

The Working Group also considered the feasibility of developing new procedures which would allow the Commission to be more proactive in addressing systemic discrimination in the federal government. Currently, the 1614 regulations only allow the Commission to address discrimination through the complaint process, and through the affirmative employment program. However, as the statistics noted above indicate, the complaint process has not resulted in the filing of many class complaints. There is no mechanism in the federal sector, similar to the private sector Commissioner charge process, which would permit the Commission to initiate investigations of agency policies and practices on the basis of reliable information indicating that an investigation is warranted. The development of such a procedure raises significant issues which require further study. Therefore, the Working Group recommends that the Office of Legal Counsel also study the feasibility of developing mechanisms to allow the Commission to proactively address systemic and class-based discrimination in the federal sector.

RECOMMENDATIONS

1. Institute an 18-month trial program which requires that the Complaints Adjudication Division (CAD) in OFO handle requests for class certification. During the trial program, AJs would refer class complaints to CAD, which would be responsible for ensuring that the complaint file contains adequate information to make a determination on whether the requirements of 29 C.F.R. §1614.204 (a) (2) are met. This can be accomplished by overseeing discovery at this stage, (see recommendation 3 below), or by requesting that agencies submit the necessary

information to CAD. CAD should work closely with the referring AJ as it drafts the decision on whether to certify a class. If a class is certified, the AJ would resume processing of the complaint. The decision to certify a class would be a final decision. The agency or the complainant can appeal the decision to OFO.

This recommendation should facilitate the class certification process. It temporarily relieves AJs of the responsibility to develop a complete record on class certification, which should be particularly helpful when the complainant is pro se. The Working Group believes that temporarily relieving the AJs of this responsibility is particularly important because many of the recommendations contained in this Report may increase the workload of the AJs. In addition, the 18-month trial period will permit CAD to develop standards for the application of Rule 23 in the administrative process, and to apply them consistently. The development of such standards in the context of actual decisions will assist the AJs when the responsibility for class certification reverts back to them after the trial program. Further, CAD has relatively easy access to OFO and OPM employment data that may be helpful in making class certification determinations. Where appropriate, CAD may take judicial notice of this data.

OFO should evaluate this program at the end of the 18-month trial period to determine whether it was helpful to the AJs and whether it had an impact on the number of complaints certified as class actions. The Director of OFO shall report the findings of the evaluation to the Commission.

2. Amend the regulations to allow a complainant to 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 the complaint.

3. Amend the MD to allow complainants the right to conduct reasonable discovery on the elements of class certification prior to a determination on class certification. Pre-class certification discovery should be conducted under the supervision of CAD, or ultimately the AJs.

4. Amend the MD to clarify that AJs have the authority to grant conditional certification for a reasonable period of time, when appropriate, until a complainant finds representation. For example, if the record on a class complaint satisfies the numerosity, typicality and commonality requirements for class certification, the AJ may "conditionally" certify the class for a reasonable period of time so that the class agent may secure adequate representation. AJs should refer complainants to the

attorney referral systems operating in District Offices for assistance in obtaining adequate legal representation.

5. Amend the MD to expressly state that AJs must approve class settlement agreements pursuant to the "fair and reasonable" standard contained in the regulations, even when no class member has asserted an objection to the agreement. This is consistent with the practice in federal courts under Rule 23 (e), where the district court must approve any settlement of a class case under a fair and reasonable standard.

6. Amend 29 C.F.R. 1614.204 (l) (3) to clarify the burdens of proof applicable to individual class members who believe they are entitled to relief.

7. Mandatory training for EEO counselors should include training on counseling class complainants, including training on the responsibilities of the class agent, and the requirements of class certification. (The issue of training for EEO counselors is discussed in Section A, at pg. 4 and in Recommendation 1 on pg. 6.)

8. Future training programs for the AJs should include training on issues related to class certification. Such training should clarify that the AJs have the responsibility to ensure that the record contains enough information to determine whether class certification is appropriate, and that the requirements of Rule 23 should not be applied rigidly.

9. Direct the Office of Legal Counsel and the Office of Federal Operations to study the feasibility of eliminating the requirement that class complaints comply with Rule 23 of the Federal Rules of Civil Procedure. They should also study the feasibility of developing procedures which authorize the Commission to proactively address systemic discrimination in the federal government, such as through the issuance of Commissioner's charges. The Director of OFO shall report the findings of the study to the Commission.

H. FRAGMENTED PROCESSING OF EEO CLAIMS

DISCUSSION

Agencies are responsible for identifying and framing the issue(s) and base(s) raised during an EEO counselor contact and any subsequent complaint. A recurring problem in federal sector complaint processing is that many agencies do not distinguish between allegations (i.e., factual statements) in support of a claim and the legal claim itself. This can occur at the counseling stage

of the process. One of the counselors' responsibilities is to identify the issues being raised by the potential complainant. In doing so, counselors must separate factual incidents which constitute a claim of discrimination from evidence which the potential complainant is providing to support his/her claim of discrimination. This distinction is important because potential complainants frequently raise factual incidents that occurred outside the 45-day time period for contacting an EEO Counselor. If the incidents are merely evidence to support a claim, they should be considered even if they occurred outside of the 45-day period. However, if the incidents constitute a separate claim of discrimination, they are subject to the 45-day period, unless they are part of a continuing violation, or are like and related to incidents previously submitted to a counselor in a timely manner.

This problem also occurs at the investigation, hearings and appellate stages of the process. For example, during the investigative process, complainants may raise factual information as evidence to support the complaint of discrimination. However, investigators frequently treat such information as a separate claim of discrimination for which relief is being sought and refuse to consider this information during the investigation if it was not raised with an EEO Counselor. If the incidents occurred more than 45 days prior to the time it was raised with the investigator, the investigator will simply disregard the information. If the incidents occurred within the 45-day time frame for consulting a counselor, investigators remand the information back to the counselor. This frequently results in the incidents becoming the subject of a separate complaint, which then goes through the entire 1614 process.

For example, in a sexual harassment hostile environment complaint, each sexual advance or request for sexual favors should constitute the evidence to support the sexual harassment claim. However, in the federal sector complaint process, agencies may treat each sexual advance or request for sexual favors as an isolated incident and separate allegation, and try to determine whether it constitutes a hostile work environment. This practice may make it impossible to prove a hostile environment claim, which is based on the pervasiveness and severity of the conduct. An isolated incident of harassment usually will not establish a hostile environment claim.

Under this practice, a complainant's ability to present an integrated and coherent claim is severely compromised, regardless of the merits of the case. Moreover, the practice substantially increases the inventory and workload of agencies which process several related matters under separate docket numbers. It also has a tremendous impact on the inventory of the hearings units and of OFO, and the nature of their workloads. Stakeholders recommended that the Commission issue guidance explaining that only claims of discrimination should be processed as complaints. Any factual information submitted by the complainant that relates to or supports the claim should be treated as evidence and considered in determining the merits of the claim.

A related issue involves the regulatory provision permitting appeals of an agency's dismissal of a portion of a complaint. 29 C.F.R. §1614.401 (a). After dismissing a portion of a complaint,

some agencies may continue to process the portion of a complaint which they have accepted for investigation, while the dismissed portion is on appeal to EEOC. Other agencies hold the accepted portion in abeyance until OFO rules on the appeal. If OFO reverses an agency's dismissal of the portion of a complaint, and sends it back to the agency for processing, many agencies do not consistently consolidate the returned portion with the portion of the complaint which was accepted for processing. Instead, the returned portion is processed as a separate complaint. This practice also hinders a complainant's ability to establish a coherent claim of discrimination, and inflates the inventories of agencies which engage in this practice.

The following recommendations are intended to eliminate the fragmented processing of EEO claims.

RECOMMENDATIONS

1. Expressly require agencies to investigate claims of discrimination, rather than factual incidents or allegations which are raised as evidence to support claims of discrimination. This will require major changes in federal sector EEO complaint processing since fragmentation of claims has been the practice for decades. Therefore, the Commission must undertake a concerted effort to educate federal EEO personnel about how federal sector claims should be processed in the future. The following steps should be taken:

    a. Issue a new chapter of the Management Directive instructing federal EEO personnel on how to differentiate between claims of discrimination and factual allegations or incidents that substantiate a claim. The Management Directive should clarify that only claims of discrimination should be treated like a complaint and all incidents supporting a claim should be considered in making a determination as to whether a claim has merit. This chapter should include specific guidance on how new incidents of discrimination that have occurred or been raised after a formal complaint has been filed should be handled. The Management Directive should also include detailed discussion on the concepts of "like and related" allegations and "continuing violations," and how they should be applied when processing complaints;

    b. Subject to available resources, the Commission should conduct training for EEO personnel on the new Management Directive chapter once it is distributed to agencies. This training should be

included in training courses routinely offered to agencies, and offered to a wider audience through the revolving fund;

c. Subject to available resources, the Commission should develop a training video on this issue. It is important that all agency personnel who work in the EEO area become educated about this approach to processing EEO complaints. While face to face training is preferable, it may not be feasible, given our limited resources, to reach all those who need training by this method. A video is a cost effective way of reaching significant numbers of employees. The video could be offered to agencies through the revolving fund.

2. Amend the MD to require consolidation of multiple complaints. The MD should require the complainant and the agency to notify the AJ, in the hearing request if possible, or at the pre-hearing conference, and OFO in the notice of appeal, of other pending complaints or appeals. To the extent possible, complaints relating to a single claim of discrimination should be consolidated for a hearing or an OFO decision.

3. Amend the MD to require agencies to consolidate complaints after OFO reverses the dismissal of a portion of a complaint and remands it back to the agency for further processing, if possible.

I. FULL RELIEF

DISCUSSION

The Commission's regulations provide that an agency may dismiss a complaint where the complainant has refused an "offer of full relief containing a certification from the Agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint." 29 C.F.R. §1614.107 (h). The full relief policy is premised on the idea that adjudication of a claim is unnecessary if the agency is willing to make the complainant whole. The determination of whether an offer constitutes full relief must be based on an assessment of what the complainant would be entitled to if he/she were to prevail on the merits of the claim.

This policy has been severely criticized for the adverse consequences which may occur if a complainant rejects an agency's offer which does constitute full relief. If a complainant believes that an agency's offer does not constitute full relief, he/she must reject the offer and appeal the dismissal

of the complaint to the EEOC. This occurs frequently because complainants, many of whom are unrepresented, are skeptical that an offer from the agency they believe has discriminated against them actually constitutes full relief. If the complainant has made the wrong assessment of the offer and the EEOC decides that the agency did in fact offer full relief, the complainant is precluded from proceeding with the complaint or from accepting the offer. In addition, some courts have held that a complainant's rejection of an offer of full relief cancels that complainant's right to file a civil action. Wrenn v. Secretary, Department of Veterans Affairs, 918 F. 2d 1073, 1074 (2d Cir. 1990).

The difficulties with assessing what constitutes full relief were compounded by the decision in Jackson v. Runyon, Appeal No. 01923399 (1992), where the Commission held that the Civil Rights Act of 1991 entitles a complainant to an offer of compensatory damages as part of an offer of full relief, if the complainant presents objective evidence of the harm suffered, and establishes a causal connection between the agency's action and the harm suffered. Many agencies commented that certified offers of full relief are no longer an effective tool for the early resolution of complaints, due to the difficulty agencies are having in determining the appropriate amount of compensatory damages, and complainants' skepticism regarding the fairness of the agencies' offer.

For all of the foregoing reasons, the Working Group decided to recommend that the regulatory provision permitting the dismissal of complaints for failure to accept a certified offer of full relief be eliminated. The Group believes that the adverse consequences of a complainant erroneously rejecting a certified offer of full relief outweigh any advantages to retaining the current procedure. We considered making recommendations that would alleviate these consequences while retaining agency certified offers of full relief, but decided against taking that approach. The Working Group concluded that the inherent uncertainty concerning the calculation of full relief, particularly compensatory damages invites disputes between the parties, and may actually hinder the prospect of prompt resolution of complaints.

In Poirrier v. Department of Veterans Affairs, Appeal No. 01933308 (1994), the Commission held that an AJ may, prior to a hearing, advise the parties as to the full and complete remedy to which a complainant would be entitled should there be a finding of discrimination. Under Poirrier, the agency must unilaterally and unconditionally promise, in writing, to provide the complainant with the full and complete remedy as defined by the AJ. The AJ may then remand the case to the agency to dismiss as moot. If the agency fails to provide the complainant with the full and complete remedy as promised, the complainant may file an appeal with the Office of Federal Operations for breach of the settlement agreement.

According to the AJs, Poirrier settlements are an effective mechanism for resolving complaints without the costs involved in conducting a full fledged hearing. The Working Group agrees. In evaluating a Poirrier settlement, an AJ may request information from the parties on the issue of relief, or permit the parties to engage in discovery on the issue. Moreover, since an AJ, a

neutral third party, evaluates the offer after an opportunity for discovery, complainants are much less likely to be skeptical about whether the offer constitutes full relief. The Working Group encourages the continued use of Poirrier settlements by the AJs.

Finally, during the course of the review, a question was raised as to whether complainants routinely and unreasonably refuse bona fide settlement offers by agencies, and continue to process their complaints administratively. It was suggested that this practice results in the unnecessary expenditure of resources by the agencies and EEOC. Although the Working Group did not have sufficient information to evaluate the extent to which this is occurring, and whether the issue should be addressed by EEOC, the Group does believe that the issue warrants further study. We have recommended that OFO evaluate the issue, and make recommendation to the Commission, as appropriate.

The Working Group recommends that the following changes be made to the Commission's regulations and to the Management Directive.

RECOMMENDATIONS

1. Delete 29 C.F.R. Sec. 107 (h) from the regulation.

2. Amend the MD to include the procedures set forth in the Commission's Poirrier decision.

3. Direct OFO to assess whether, at any stage of the process, complainants routinely and unreasonably refuse to accept bona fide settlement offers by agencies. If OFO identifies a problem in this area, OFO and OLC should determine which mechanisms, if any, may aide in ensuring that bona fide settlement offers are seriously considered by complainants. Consideration should be given to the procedures utilized by federal district courts in such circumstances.

J. CASE MANAGEMENT

DISCUSSION

In its September 1996 report on the "Appellate Processes in the Federal Sector," the National Academy of Public Administration found that one of the main problems with the EEO complaint process is the large number of "frivolous" discrimination complaints that are filed. However, in making this finding, the Academy also recognized that describing complaints as "frivolous" is

deceptive and simplistic since a complaint, although not warranting a complex appellate procedure, is not "frivolous" from the perspective of the complainant. The Report commented that there may be a correlation between so-called "frivolous" cases and those which should be amenable to early resolution in a less prescribed setting than the established formal complaint processes.

The Working Group believes this is particularly true in the EEO process where the evidence suggests that the process is being used as a forum for resolving all kinds of workplace disputes. This practice has overburdened the system and made it difficult for the EEOC and agencies to resolve EEO claims fairly and expeditiously. Agencies offered different and varied recommendations on how to alleviate this problem. Although many agencies recommended that agencies be allowed to dismiss so called "frivolous" complaints, there was no agreement on what constitutes a "frivolous complaint," or on what criteria would be appropriate to warrant dismissal of these complaints.

Another area of concern is the large number of complaints filed alleging dissatisfaction with an agency's processing of a pending complaint. Agencies recommended that these complaints, known as "spin-off" complaints, be eliminated. Agencies also recommended early dismissal of complaints filed by so-called "frequent filers," i.e., complainants who abuse the EEO process by filing numerous complaints lacking merit. Finally, agencies recommended the establishment of an early dismissal mechanism for complaints that do not establish a prima facie case of discrimination, with appeal rights to EEOC.

The recommendations that follow are designed to address many of the agencies' concerns. However, the Working Group decided not to recommend the establishment of an early dismissal mechanism for complaints that do not establish a prima facie case of discrimination. In view of the conflict of interest which exists because agencies investigate themselves, the Working Group believes that allowing agencies to dismiss complaints on the merits without an appropriate investigation would only heighten the perception among many stakeholders that the system is not impartial.

1. ALLEGATIONS OF DISSATISFACTION REGARDING THE PROCESSING OF PENDING COMPLAINTS (SPIN-OFF COMPLAINTS)

The previous regulatory scheme was interpreted to permit a complainant to file a separate complaint alleging dissatisfaction with the agency's processing of his/her original complaint. (See 29 C.F.R. §1613. 262 (a) (b)). The reason for the dissatisfaction could be general dissatisfaction with the manner in which an agency is processing a complaint, as well as allegations of retaliation for utilizing the EEO process. This procedure often resulted in the filing of multiple spin-off

complaints. Recognizing the need to limit these complaints, the Commission did not include this provision in the 1614 regulation.

MD 110, Ch.IV Sec. III, D, provides guidance on this issue. It states that if a complainant files a complaint alleging dissatisfaction with the processing of a pending complaint, whether or not the complaint alleges discrimination as the basis for the dissatisfaction, he/she should be referred to the agency official responsible for the quality of complaint processing. Agency officials should earnestly try to resolve the matter as early and expeditiously as possible. In addition, the MD provides that in those instances where an aggrieved person or participant in the EEO process alleges that he/she has been treated differently or is being affected by a policy or practice having a discriminatory effect on the processing of the complaint on a basis protected by the laws which the EEOC enforces, the aggrieved person must be provided with EEO counseling and the opportunity to file a formal complaint.

Despite the Commission's attempt to limit complaints regarding the processing of an underlying complaint to only those instances where an unlawful basis has been asserted, the reality is that many complaints alleging dissatisfaction with the way a complaint is being processed, or dissatisfaction with the finding on the merits of the underlying complaint are still being filed and accepted, often under the guise of an allegation of discrimination. The Working Group believes that a balance must be achieved between ensuring that complaints are processed in a fair and non-discriminatory manner and the need to eliminate the filing of multiple burdensome complaints about the manner in which an underlying complaint is being processed. The recommendations that follow are intended to achieve that result.

RECOMMENDATIONS

1. Amend the MD to clarify that allegations of dissatisfaction with the processing of a pending complaint should be referred to the agency official responsible for the quality of complaint processing. Agency officials should earnestly attempt to resolve the dissatisfaction with the complaints process as early and expeditiously as possible. The agency's file on the underlying complaint should contain a statement describing the complainant's concerns, and any actions the agency took to resolve the issue. If no action was taken, the file must contain an explanation of the agency's failure to take any action.

2. Amend the MD to provide that if the dissatisfaction with the processing of the pending complaint is not resolved informally, the complainant may present the allegations regarding the processing of the complaint to the AJ, if the complainant requests a hearing, or to OFO on appeal, if the complainant elects not to request a

hearing. If the AJ or OFO determine that the complaint was processed improperly, and that the improper processing was due to discrimination or retaliation, the AJ or OFO may request information necessary to make a finding on the merits of the allegation, and may order relief, if appropriate.[24] Presenting the issue to the AJ or OFO will preserve a complainant's right to bring suit on the claim in federal district court.

3. Amend the MD to state that no complaints alleging dissatisfaction with the processing of a pending complaint will be accepted after a final decision has been issued by the agency or the AJ.

2. ABUSE OF PROCESS

Abuse of process has been defined by the Commission as a clear pattern of misuse of the EEO process for ends other than those which it was designed to accomplish. Buren v. USPS, EEOC 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 which 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).

Agencies argued that they should be expressly permitted to dismiss complaints for abuse of process. However, there was a recognition by all who commented on this issue that evaluating complaints for dismissal for abuse of process requires careful deliberation and application of strict criteria. Nonetheless, stakeholders noted that allowing agencies to dismiss complaints based on abuse of process, subject to appeal rights to EEOC, would improve the efficiency and effectiveness of the EEO process. The Working Group agrees.

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[24] The AJ or OFO may also submit information about improper processing of complaints to Federal Sector Programs for use in their reviews of agencies' equal employment opportunity programs.

RECOMMENDATION

Amend the MD to specifically permit agencies to dismiss complaints for abuse of process in appropriate circumstances. Agencies should strictly apply the criteria set forth in the Commission decisions on this issue. These include an analysis of 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. However, multiple filings as well as the nature of the subject matter of the complaints, lack of specificity in the allegations, and the filing of complaints on matters previously raised, may be considered in determining whether a complainant has engaged in a pattern of abuse of the EEO process. The complaint file must include evidence to support the agency's decision. EEOC will closely monitor agency dismissals under this provision to ensure that they are warranted.

3. ADDITIONAL PROCEDURES FOR THE SUMMARY RESOLUTION OF COMPLAINTS BY AJS AND OFO

In order to address their growing inventory, the AJs and OFO staff requested that the Commission develop additional procedures for the summary resolution of complaints that appear to be without merit. In addition, many stakeholders told the Working Group that the Commission should adopt a federal complaint processing system similar to the priority charge handling procedures used in private sector charge processing. These comments were based on the stakeholders' belief that the Commission must have mechanisms in place to control the growing inventory in the federal sector, and to devote the Commission's scarce resources to complaints that are likely to result in findings of discrimination.

As of May 30, 1997, there were 9,303 hearings cases pending in the district offices. Moreover, many of the recommendations contained in this Report are likely to result in an increase in requests for hearings, and in the number of hearings actually conducted. There were 9,404 appeals pending in OFO as of May 19, 1997. Although production is at an all time high, receipts continue to outpace production. For example, for the week of May 19ty, OFO received 200 appeals, but was able to resolve only 92 appeals, thus increasing their inventory by 108 cases. Since the beginning of the fiscal year, OFO's inventory has grown from 8,377 cases to 9,404 cases. These statistics demonstrate that the need for additional mechanisms to control the inventory in the hearings units and in OFO is critical.

While the Working Group believes that the AJs and OFO should be given additional mechanisms for quickly resolving complaints that are unlikely to result in a finding of discrimination, the Group does not believe that the priority charge handling procedures used in

private sector charge processing should be adopted without modification in the federal sector. There are fundamental differences between the private sector charge process and the federal sector complaint process that make the private sector approach inappropriate in the federal sector. The federal sector process is quasi-adjudicatory. Consistent with this quasi-adjudicatory function, a federal district court will enforce final Commission orders. In the private sector, on the other hand, the Commission only determines whether there is reasonable cause to believe that a violation of the law occurred. A reasonable cause determination is not enforceable. A charging party is only entitled to a trial de novo in federal court.

In addition, one of the primary reasons for the adoption of priority charge handling procedures in the private sector was to prioritize the Commission's workload consistent with the national and local enforcement plans. This rationale does not apply in the federal sector. In the federal sector, the Commission adjudicates all claims presented to it for review. However, this policy does not require the Commission to process all complaints in the same manner. Nor does it preclude the Commission from deciding that the manner in which a complaint should be processed will be determined by the likely merit of the complaint.

In evaluating the feasibility of developing procedures for summary resolution of complaints in the federal sector, the Working Group was mindful of the unique posture in which complaints come to the Commission for processing. Complaints come to the AJs after some investigation by the agency, and to OFO after the issuance of a FAD. Therefore, there is a record that the Commission must review prior to deciding the merits of a complaint. In the private sector, the charge prioritization process begins and may end at intake.

One of the reasons stakeholders recommended the development of a procedure for the early resolution of complaints was to expedite the processing of so-called "frivolous" complaints. However, as noted earlier in the Report, there was no consensus among stakeholders about what constitutes a frivolous complaint. Although they may not be frivolous, the Working Group is aware of countless examples of complaints that may state a claim, but the complainant does not appear to be aggrieved, i.e., to have suffered an injury in fact, or there is no or little relief available. This may be due to the fact that the requirements that the complainant be aggrieved and state a claim have been interpreted more broadly in the federal sector than the private sector. Applying one uniform standard to the private and federal sector might result in the early dismissal of many of these complaints.

Prior to dismissing any complaint under a procedure for summary resolution of complaints, the AJs must ensure that the complainant's claim has not been fragmented into more than one complaint. A complaint may appear to be "frivolous" or otherwise without merit because it represents only part of an individual's claim of discrimination. If the entire claim is viewed together, it may be inappropriate for summary resolution.

The Working Group also believes that the increased use of the summary judgment procedures contained in 29 C.F.R. 1614.109 (e) may result in prompt resolution of many complaints. As noted earlier in the Report, stakeholders stated that AJs do not exercise fully their authority to issue summary judgments to dispose of complaints that do not warrant a hearing. Therefore, the Working Group recommended that the Commission issue additional guidance and provide training on the use of the summary judgment authority contained in the regulations. The Commission has consistently interpreted the regulatory provision to permit the AJs to decide a complaint without a hearing only when there are no material facts in genuine dispute. See, e.g., Laborde v. Runyon, Postmaster General, Appeal No. 01923809 (1993); Patton v. Runyan, Postmaster General, Request No. 05930055 (1993). However, the Working Group believes that there may be complaints in which material facts remain in genuine dispute, but which can be resolved by the AJs without a hearing. For example, there may be cases where there are no credibility issues, material facts are in dispute, but the factual disputes can be resolved on the basis of the written record without a hearing.

Based on all of the foregoing considerations, the Working Group concluded that the AJs need a new procedure permitting them to process such complaints without a hearing. Arguably, the current regulatory provision, which was intended to reflect Rule 56 of the Federal Rules of Civil Procedure, permits the AJs to do so. However, as noted above, the regulatory provision has been interpreted to permit the use of summary judgment only when there are no material facts in genuine dispute.[25] Therefore, the Working Group is recommending that the regulation be amended to include a procedure specifically authorizing the AJs to decide certain complaints in which material facts remain in dispute without a hearing. AJs will have the discretion to decide complaints under this procedure when there is sufficient information in the record to decide the issues raised in the complaint, there are material facts in dispute that can be decided on the basis of the written record, there are no credibility issues, and the AJ has decided that the case is without merit.

Prior to resolving a complaint under this procedure, the AJ must notify the complainant that his/her complaint may be decided without a hearing and allow the complainant an opportunity to respond. In addition, the AJ may hold a conference with the complainant and the agency to ensure

[25] The Working Group agrees that the summary judgment provision in the regulation should be interpreted narrowly to cover only cases where no material facts remain in genuine dispute. In the administrative process, a complaint reaches the hearing stage without the complainant having had significant control over the evidence contained in the investigative file. The hearing stage is a continuation of the investigative process, which allows a complainant to exercise more control over the contents of the investigative file. The actual hearing also furthers this goal. Under these circumstances, it is inappropriate to interpret the summary judgment provisions contained in the regulation broadly. Nevertheless, the Working Group recognizes that some nonmeritorious complaints simply do not warrant a hearing.

that the case is appropriate for decision under this procedure without a hearing. A decision issued under this procedure is a determination on the merits of the claim. It may be a summary decision, but must contain an explanation of the basis for the decision. The decision would be appealable to OFO. The AJs' determination to decide the complaint without a hearing under the new procedure would be reviewed under an abuse of discretion standard. The determination on the merits would be reviewed by OFO under a clearly erroneous standard of review.

The Working Group also considered whether to provide OFO with additional mechanisms to manage its growing inventory. However, the Group considered different factors in evaluating this issue at the appellate level. Once a case gets to OFO, significant resources have already been expended on an investigation, an AJ decision and/or a FAD. The record should be complete. When OFO decides a case, the administrative process is complete. The decisions issued by OFO are final and enforceable. Because of the posture of complaints on appeal, any savings in resources at the appellate stage of the process can only be realized by changing the manner in which OFO decisions are written.

Section F. 3. of the Report contains recommendations pertaining to the format of OFO decisions, and authorizes OFO to issue summary decisions in certain circumstances. In addition, the Working Group concluded that OFO should be permitted to issue summary decisions when it decides an appeal from a AJ decision issued under the procedure for early resolution of complaints without a hearing.

RECOMMENDATIONS

1. Amend 29 C.F.R. 1614.109 to include a procedure which permits the AJs, in their discretion, to decide complaints without a hearing if they determine that the complaint is without merit, that the record contains sufficient information to decide the issues raised in the complaint, that disputed material facts can be resolved without a hearing, and that there are no credibility issues. Conforming changes should also be made to MD 110, Ch. 6, Sec. 1.

2. Permit OFO to issue summary decisions on appeals from AJ decisions issued under the new procedure for summary resolution of complaints without a hearing.

3. Request that Legal Counsel examine the standards that have been used in the federal sector to determine whether a complainant is aggrieved and states a claim. If Legal Counsel determines that the federal standards are not consistent with the standards applied in the private sector, OFO should amend the MD to clarify that one standard should be applied in the federal and private sector, and to explain that standard.

4. USE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Alternative dispute resolution (ADR) provides another means of improving the efficiency of the federal EEO complaint process. In 1990 Congress passed the Administrative Dispute Resolution Act (ADRA), which affirmatively authorized and encouraged federal agencies and departments to consider ADR as an alternative to litigation. The Senate Report accompanying ADRA noted that, "application of the ADRA to employment decisions in the federal workplace would provide agencies the opportunity to stem the tide and the cost of employment litigation in the federal government." Although ADRA sunsetted in 1995, it was reauthorized in September of 1995 and was signed into law on October 19, 1995 as P.L 104-320.

In April 1995, the Commission approved the recommendations of the Alternative Dispute Resolution Task Force. The Task Force recommended that the Commission implement a mediation program in its private sector charge processing program and further recommended that the program be guided by the principles of informed and voluntary participation in mediation, confidential deliberations, and the use of neutral third parties to conduct the mediation sessions. At the Chairman's request, the Office of Legal Counsel developed a policy statement which incorporated and implemented these principles. The policy statement was approved by the Commission in July of 1995.

The ADR Task Force also recognized the potential and importance of exploring various ADR mechanisms in the federal sector program. The Task Force recommended that the Office of Federal Operations expand its current role in the oversight area and encourage agencies to develop and implement ADR programs to resolve employment discrimination disputes. The Task Force further recommended that the Office of Federal Operations work with the Administrative Conference of the United States and with the Federal Mediation and Conciliation Service to propose model ADR programs for consideration by federal departments and agencies, consistent with the culture of each agency.

In the Spring of 1996, the Office of Federal Operations Special Services Staff conducted a survey of federal departments and agencies to determine the extent to which ADR has been incorporated into the federal sector EEO complaint process. Surveys were sent to 109 agencies. Responses were received from 87 agencies, of which 43 reported having some kind of ADR program. Of the agencies with no ADR program at the time of the survey, 17 were in the process of developing one. The survey revealed that mediation is the primary ADR technique utilized by the agencies with ADR programs. Some agencies use mediation combined with some other form of ADR, such as non-binding fact finding. The results of the OFO survey confirm that the federal sector is looking to alternative means of resolving workplace disputes similar to the existing trend in the private sector.

Support for the use of ADR in the federal sector process is further reflected in EEOC regulations governing the EEO process. The regulations require agencies to take "reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage ...." 29 C.F.R. §1614. 603. The regulations also extend the counseling stage of the complaint process from 30 to 90 days in those instances where the complainant agrees to participate in an established ADR program. 29 C.F.R. §1614.105(f). If the complaint is not resolved during counseling, agencies are further encouraged to incorporate ADR techniques into their investigative efforts. 29 C.F.R. §1614.108 (b).

A clear majority of the stakeholders supported the use of ADR in the federal workplace. Many expressed a strong desire for EEOC to issue guidance on the use of alternative dispute resolution in the processing of EEO complaints in the federal government. The Working Group reviewed a wealth of materials on the various ADR techniques in use today, including documents from the now defunct Administrative Conference of the United States, which generated an enormous amount of information on the subject. As a result of these efforts, as well as the Group's overall review of the federal sector EEO process, we recommend that an integrated ADR program play a more direct role in the federal complaint process and that it be incorporated as a permanent feature of the EEO complaint process at all federal agencies.

RECOMMENDATIONS

1. Amend the regulations to require that all federal agencies establish or make available alternative dispute resolution programs to complainants in the EEO complaint process. Agencies would be free to develop the programs that best suit the particular culture and/or needs of their agency. Although many agencies have adopted the mediation model as their ADR initiative, other forms of resolution would be acceptable if they comply with the core principles listed below. Although ADR is believed to be most effective at the early stages of a dispute, agencies may implement their ADR programs at any stage in the process, including after the formal complaint has been filed.

2. Agency ADR programs must reflect the core principles contained in EEOC's policy statement on ADR. Specifically, agency ADR programs must:

   ---Provide 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 the 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 parties' 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;

---Ensure the confidentiality of the parties.

3. Permit agencies to establish a program which allows a potential complainant to choose between participation in the ADR program offered by the agency and the traditional counseling process contained in the regulations. Agencies would be free to establish the parameters of the program they will offer during the counseling period as long as the program is consistent with the core principles listed above. Prior to making a choice between counseling and ADR, potential complainants must be fully informed about the counseling process and the ADR program so that they can make an informed choice. They should also be informed that the dispute will proceed directly to the formal complaint stage of the process if ADR is not successful and they choose to file a complaint. If the complainant chooses to participate in the agency's ADR program, the role of the counselor would be limited to advising individuals of their rights and responsibilities in the EEO complaint process, as set forth in 29 C.F.R. §1614.105 (b). Counselors would be relieved of their obligations to attempt to resolve the complaint. However, counselors would not be precluded from attempting to resolve a matter which they believe could be resolved quickly.

4. Develop, in conjunction with the Federal Mediation and Conciliation Service (FMCS) or other organizations, programs to assist small agencies offer ADR to their employees. Such programs could involve facilitating access to the shared neutrals program, or having employees from EEOC, FMCS or other organizations serve as mediators for small agencies.

5. Encourage agencies to develop training programs for supervisors and managers on the use and advantages of alternative dispute resolution mechanisms to resolve workplace disputes. The Working Group believes that agency management must

fully understand and support ADR if it is to be effective in resolving disputes. To the extent that resources permit, EEOC should develop such training programs and offer them to agencies through the revolving fund.

6. To the extent that resources permit, OFO Special Services Staff should review agency ADR programs to ensure that they are consistent with EEOC's 1614 regulations, and provide guidance and technical assistance to agencies on the use of ADR in federal sector complaint processing. Most of the federal agencies which submitted comments during this review requested that EEOC take a more proactive role in encouraging agencies to use ADR in the EEO complaint process, and in providing technical assistance for agencies which are developing ADR programs. Agencies also commented that since ACUS ceased to exist there has been a void in the federal community regarding the dissemination of information on ADR. They requested that EEOC begin to fill that void. The Special Services Staff has performed some of these functions in the past, however, due to a lack of resources and expertise they have been unable to perform all of these functions. The Working Group recognizes that additional resources would be necessary for Special Services to take a more proactive role in disseminating information on ADR to other federal agencies, and in providing technical assistance to agencies on the use of ADR.

7. Permit EEOC field offices to develop mediation programs for cases in which the complainant has requested a hearing. District Directors may develop such programs in conjunction with federal agencies located in their districts, for submission to the Director, Office of Field Programs for approval. The triggering mechanism for participation in mediation at this stage would be the request for a hearing. Cases should be scheduled for mediation as soon after the request as possible. Under 1614.109 (g), an administrative judge must issue a recommended decision within 180 days of the request for a hearing, unless good cause exists for extending the time period. The Working Group believes that the possibility of successfully mediating the matter within a reasonable time before an independent neutral constitutes "good cause" for extending the 180 day period for an additional 90 days. If mediation is not successful in resolving the complaint, it should be referred back to the AJ for further processing.

These mediation programs must reflect the core principles listed above, except that district directors may require that both parties attend the mediation session. This is similar to the current requirement that both parties attend the settlement conferences conducted by AJs prior to a hearing. Mandatory attendance at the mediation session is justified in this context because the hearings process is a quasi-adjudicatory process. Courts routinely mandate participation in mediation programs prior to the

formal adjudication of a case. Moreover, although complainants would be required to attend the mediation session, the decision on whether to resolve the dispute during mediation would remain within the discretion of the parties. Therefore, the Working Group believes that this approach is consistent with the Commission's policy concerning the voluntary nature of EEOC-sponsored mediation programs.

8. Develop a chapter in the MD on alternative dispute resolution mechanisms, to include the Commission's ADR Policy Statement and any other information or guidance which would assist agencies develop alternative dispute resolution programs.

K. AFFIRMATIVE EMPLOYMENT

DISCUSSION

Section 717 of Title VII of the Civil Rights Act of 1964, as amended, requires federal departments and agencies to develop an affirmative employment program for the employment and advancement of minorities and women. Section 501 of the Rehabilitation Act of 1973, as amended, requires federal agencies to develop similar programs for individuals with disabilities. Pursuant to its authority to enforce Sections 717 and 501, the EEOC has oversight and evaluation responsibilities over agency affirmative employment programs. This includes the responsibility to issue appropriate rules, regulations, orders and instructions to guide agencies in developing their affirmative employment programs.

The Affirmative Employment Division in OFO monitors and evaluates the affirmative employment programs developed by federal agencies. The Commission has issued a series of Management Directives which provide specific instructions to agencies on the development of their programs. Management Directive 714 provides guidance on preparing affirmative employment plans to eliminate under representation of minorities and women in the work force. Similarly, Management Directive 713 provides such guidance for affirmative employment plans for individuals with disabilities. These directives require agencies to prepare and submit multi-year affirmative employment plans, annual accomplishment reports, and plan updates to the EEOC.

Management Directives 713 and 714 are currently being revised and consolidated into Management Directive 715. The proposed revisions are being done by the Office of Legal Counsel and the Office of Federal Operations, therefore this review did not address issues covered in the MDs. However, the Working Group has shared the comments and suggestions received from stakeholders in this area with the Office of Legal Counsel.

Since EEOC lacks meaningful enforcement authority in the federal sector, our oversight of agency affirmative employment programs has focused primarily on monitoring and reporting on agency programs. The Affirmative Employment Division also conducts on-site reviews of agency programs and provides technical assistance to correct problems identified during the review. The Division also provides technical assistance to agencies upon request. Many of our internal stakeholders suggested that the focus of the program should be changed so that greater emphasis is placed on providing technical assistance and training to agencies and conducting more on-site reviews. Internal stakeholders also suggested that EEOC should be more proactive in identifying agencies who have successful affirmative employment programs as well as those that do not. They suggested that one way of doing this would be to include a section in the annual report that evaluates and discusses the progress made by specific agencies and notes those agencies whose performance needs improvement.

The Working Group evaluated the role of the Federal Affirmative Action (FAA) units in the field. There are nine FAA units in district offices located in Atlanta, Chicago, Denver, New York, Philadelphia, St. Louis, San Francisco, Seattle and Dallas. These units provide an EEOC presence in the federal regions, and provide affirmative employment advice, technical assistance and information to federal installations located in their regions. The FAA unit staff also evaluate agencies' compliance with the program through reviews of the reports submitted by agencies as well as by conducting on-site reviews of regional facilities. During FY 96, these units and reviewed over nine hundred reports from various federal agency field installations.

The Working Group was asked to evaluate the mission of the FAA units and to determine whether they should be retained in their current operational structure. Our consideration of this issue included an assessment of whether resources devoted to the FAA units could be more efficiently utilized in the private sector enforcement units of the district offices. The Working Group concluded that the role of the FAA units should be reassessed after Management Directive 715 is issued. The new Management Directive provides updated legal, policy and operational guidance on the development of an affirmative employment program. It includes the basic principles which must underlie an affirmative employment program, as well as guidance on the content of such programs. The Working Group believes that the Commission should first approve the policy document which defines its affirmative employment program, and then determine the appropriate operational structure to implement that policy. Nevertheless, the Working Group did identify certain factors which should be considered in determining whether all or some of the FAA units should be retained. As noted above, one of the considerations should be whether the resources devoted to the FAA units could be better utilized on the private sector enforcement side of the district offices. Consideration of this factor necessarily involves a determination of whether the functions currently being performed by the FAA units could be effectively performed at headquarters. The Commission should also evaluate the relationship between OFO headquarters and the FAA units to determine whether there is appropriate coordination between headquarters

and the field, and whether the units receive adequate resources and leadership. FAA unit staff strongly argued that they do not. Similarly, in assessing the effectiveness of these units, the Commission must evaluate whether the practice of requiring FAA unit staff to perform other field office functions has undermined their ability to perform effectively.

The Working Group's preliminary view is that the FAA units can play an important role in providing oversight, guidance and technical assistance to field installations of other government agencies that cannot be provided by headquarters. In our view, the headquarters division does not currently have the resources or the knowledge of the various regions to perform these functions. However, it may not be necessary to retain all nine units. Each unit should be evaluated in terms of its usefulness, taking into account the downsizing of federal agencies and the closing of federal field installations. Given this trend and the impact on the workload of the FAA units that may have occurred as a result, it may be more efficient to transfer resources currently devoted to certain units to other field functions.

RECOMMENDATIONS

1. Reassess the role and mission of the Affirmative Employment Division once Management Directive 715 is approved. Although the division has recently been devoting more time to providing technical assistance and onsites, the division's functions should reflect Commission policy and achievement of Commission goals in this area as defined in the new MD.

2. Modify the annual report so that it contains an analysis and evaluation of the progress made by federal agencies in this area. This section should also note those agencies which need to improve their efforts. In addition, there should be a discussion concerning agencies which have made progress in the employment of women, minorities, and individuals with disabilities, and an analysis of the factors which contributed to the progress.

3. Reassess the role of the FAA units once Management Directive 715 is approved. The FAA units can play an important role in providing communication, assistance and oversight to federal installations throughout the country. However, in order to be effective, the role of these units needs to be clarified. In addition, each FAA

unit should be evaluated in terms of its performance and usefulness. Consideration should be given to retaining some, but not necessarily all, of the FAA units.

IV. CONCLUSION

The Working Group believes that the recommendations contained in this report will streamline the federal sector EEO process and make it more effective in addressing discrimination in the federal government. As indicated throughout the document, many of the Working Group's recommendations will require changes to the Commission's regulations or Management Directive 110.[26] Since this may be a lengthy process, the Working Group recognizes that the impact of many of the recommendations will not be realized immediately. However, many of the recommendations can be implemented without changes to the regulations or MD and should result in a more immediate and positive impact on the process.

Although these recommendations will improve the federal sector EEO process, the evaluation of the EEOC's effectiveness in carrying out its enforcement responsibilities in the federal sector must be an on-going process. The impact of the recommended changes should be evaluated on an continual basis to determine whether they have achieved their stated goals. These recommendations represent the beginning of that process. Such evaluations may reveal the need to modify the recommendations or to make additional changes. This strategy is consistent with Chairman Casellas' approach with respect to the recent changes made to the private sector case processing procedures and also reflects his desire to continually examine and refine enforcement initiatives, to learn from these experiences, and to act on the lessons learned in an effort to achieve continuous improvement.

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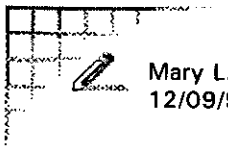
[26] Although the Working Group did not make specific recommendations on the issue, some of these recommendations will also require organizational changes within OFO. The reorganization of OFO was not included in the recent reorganization of headquarters offices recently approved by the Commission, pending the outcome of this review. The Working Group contemplates that the reorganization of OFO will reflect the specific recommendations of the report, such as the elimination of the right to request reconsideration, and the reassessment of the FAA units. The reorganization should also reflect the underlying goals of the review, such as the elimination of unnecessary organizational layers of review, and the delegation of decision-making authority to front-line workers, where appropriate.

Race Initiative policy -
civil rights enforcement



Mary L. Smith
12/09/97 03:53:18 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Thomas L. Freedman/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: Civil Rights Enforcement Initiative Cost Estimate

TEMPLATE.B Here is a breakout of costs for the civil rights enforcement initiative. The Department of Education survey is still in there. Let me know if you need anything else, Mary

CIVIL RIGHTS ENFORCEMENT INITIATIVE

Mandatory/Entitlement Cost

Proposal	FY99 Cost	Five-Year Cost

Mandatory/Tax Cost

Proposal	FY99 Cost	Five-Year Cost

Discretionary Cost

Proposal	FY99 Cost	Five-Year Cost
EEOC		
• Mediation Program	$13,000,000	3 yr @ $40M
• Benchmark EEO Survey Data	$ 250,000	
• Video Outreach and Technical Assistance	$ 225,000	
• PSA Campaign	$ 100,000	
• Stakeholder Meetings	$ 125,000	
• Translation of Materials	$ 280,000	
• 162 FTEs	$8,000,000	
• Cost Increases	$7,600,000	
• Information Systems	$10,000,000	3 yr @ $25M
• Replacing Paper Forms	$ 200,000	
	$39,780,000	
Ed-OCR		
• Across All Programs	$3,000,000	
• Alternate Dispute Resolution	$ 100,000	
• Elementary and Secondary School Civil Rights Compliance Report	$1,700,000	
• Intranet Technology to share information	$ 500,000	
	$5,300,000	

HHS-OCR

• Mediation Partnerships	$ 250,000
• Testing Program - Nursing Home Assistance and Program Abuse	$2,600,000
• Analysis of Differential Treatment Modalities	$1,065,000
• Managed Care Data Collection	$ 550,000
• Outcome Measurement	$ 250,000
• Changes in Complaint Processing to Respond to Additional Workload	$ 400,000
• State and Local Program	$ 500,000
• Civil Rights on the Internet	$ 250,000
• Geo-Coded/Mapping Data Base on a Civil Rights Internet	$ 350,000
	$6,215,000

HUD

• Targeted, audit-based enforcement initiative	$10,000,000
• Across ongoing programs	$4,000,000
	$14,000,000

DOL-OCR

• Mediation	$ 990,000
• Improved Targeting	$ 100,000
• Compliance Activities - 18 FTEs	$1,620,000
• Data Collection on JTPA	$ 360,000
• Compliance Assistance - 3 FTEs	$ 270,000
• Technology Improvements	$ 158,000
	$3,498,000

DOL-OFCCP

• Alternate Dispute Resolution	$ 203,000
• Future Targeting	$28,400,000
• Ombud Activities	$1,700,000
• Information Technology	$4,000,000
• Coordination with DOJ and Veterans Affairs	$ 400,000
	$34,703,000

DOJ

• Coordination between DOJ and OMB	$ 90,000
• Interagency Training Program	$1,000,000
• Litigation Support	$1,500,000

•	Police Brutality and Conduct Cases	$ 300,000
		$2,890,000

ALL CIVIL RIGHTS ENFORCEMENT AGENCIES

•	Linked Civil Rights Data Bases	$ 500,000
•	Interagency Civil Rights Councils	$ 200,000
		$ 700,000

TOTAL **$107,086,000**

Race initiative policy –
civil rights enforcement

EK--

1. OMB comments on our proposal. I've given our additional material to the appropriate people at OMB (Allan Rhinesmith and Susan Carr) who are reviewing it. In many cases they have seen it before in agency proposals and rejected it. I discussed the ideas and material with Deich. He asked that we not say in our memo which proposals OMB had rejected, but for the time being simply indicate that they were "currently under review." He promised they would seriously reconsider. I added a "project status" section to the memo indicating that OMB had approved $57 million of the package, noting which large programs OMB was now reviewing, and that we had heard from civil rights leaders but not discussed the specific package yet with them.

2. EEOC and federal power. I added a section to the "coordinating and streamlining" section indicating the reasons for giving EEOC more teeth, but suggesting WH counsel and OMB consider the legal issues in the dispute.

3. Expanding the ADR option to both A and B cases. The Executive Director of EEOC said the commissionors would react "angrily" to the proposal to offer mediation for class A cases. She argued that it would signify that the cases were not being treated seriously enough and it would reflect on EEOC-- that the agency was no longer enforcing legal action in cases that merited serious treatment. Ellen Vargyas noted that there are two classes of A cases-- A1 cases involving new legal issues, class actions, and some types of serious violations which simply should be litigated, but there were also A2 cases that might be apprpriate for ADR. However, there is not a consistent A1/A2 system now and Ellen also worried about the perception problem.

4. Other HUD programs that might be appropriate for this enforcemnt package. I discussed the FHAP and FHIP programs which are the fair housing activity grant programs with HUD and OMB. They agreed that the audit program is the key new initiative. Of the $14 million increase in grants, $10 million goes to the audit program, $4 million is spread around ongoing programs. HUD suggested three other options. First, HUD requested funds to support its plan to double enforcement actions (previously announced by the President at the PIR meeting). This initiative has already been announced, and as you recall, HUD said that it would not need extra funding. Also, they will find resources for this program, whether or not they get more funds. Second, they have a proposal to create a revolving loan fund which private litigants could repay if they are succesful. The money could not be used to sue the government. As this is essentially a subsidy to litigate, I think this would complicate our message that we are not seeking to simply promote more litigation. Finally, HUD has announced a partnership with realtors to train them in non-discriminatory techniques ("One America Broker"). While this is a great sounding proposal, they have already announced it. I suggest we look into trying to do it with banks etc.

Race Initiative Policy –
~~Civil Rights Initi~~
Civil Rights Enforcement

MEMORANDUM

TO: BRUCE REED, ELENA KAGAN

FROM: TOM FREEDMAN, MARY L. SMITH

RE: CIVIL RIGHTS CROSSCUT

DATE: DECEMBER 2, 1997

Below is a list of performance goals that are applicable across agencies and suggestions as to how they might be implemented at the various civil rights enforcement agencies.

I. ALTERNATE DISPUTE RESOLUTION

A. EEOC

- Mediation Program. EEOC proposes to mediate approximately 8,000, or 10 percent of the 80,000 new charges expected in FY 1999. ($4,000,000)(OMB approved)

B. HHS-OCR

- Mediation Partnerships: HHS would contract with providers of mediation services in five to ten pilot urban and rural areas. OCR would decentralize the use of third party mediation services for a subset of complaints assessed through its case triage process. ($250,000) (new)

C. DOL-OCR

- Mediation. 7 FTE will be required to market ADR and to assist states in developing and designing ADR programs. In addition, 4 FTE will be needed to provide ADR for those complainants who request ADR in the processing of their complaints. ($990,000) (new)

D. DOL-OFCCP

- Alternate Dispute Resolution. OFCCP is initiating an alternate dispute resolution program in order to facilitate the closure of compliance reviews and complaint investigations. ADR will be used as an effort to avoid litigation and to reduce the number of cases referred to the Solicitor of Labor for enforcement. ($203,000) (new)

E. EDUCATION

- Alternate Dispute Resolution. In December 1993, OCR issued a new Case Resolution

Manual (CRM). The CRM streamlined the complaint resolution process so that OCR can provide more efficient and effective service to complainants. One element of the CRM is an alternative dispute resolution procedure (ADR). Any additional funding over OCR's FY 1999 appropriation could be used to provide additional staff training to build skills necessary for effective ADR or to hire contract mediators to actually facilitate resolution between the parties. ($100,000) (new)

II. TARGETING FUTURE COMPLIANCE AND TECHNICAL ASSISTANCE EFFORTS (through data collection and other means)

A. EEOC

- Benchmark EEO survey data. EEOC would like to perform a one-time data collection from employers to obtain benchmark EEO survey data for the Americans with Disabilities Act (ADA) of 1990. ($250,000) (new)

- Video Outreach and Technical Assistance. Three video productions on subjects such as "Information for Small Employers," "Mediation to Resolve Charges," and "Best Practices for Employers." ($225,000) (new)

- PSA Campaign. ($100,000) (new)

- Stakeholder Meetings. Stakeholder meetings around the country for 25 offices. ($125,000) (new)

- Translation of materials. Translate pamphlets into several languages, including production costs. ($280,000) (new)

B. EDUCATION

- Elementary and Secondary School Civil Rights Compliance Report: OCR would conduct a survey of the approximately 15,000 school districts in the country on the following: number and types of schools within a school district; the demographics of the school district for both teachers and students; the number of students by race and gender in gifted and talented programs;; the number of students with disabilities by race and gender; and the number of students in math, science, and computer programs by race and gender. This data is used by other government agencies, including DOJ in its enforcement activities for approximately 400 court-ordered school districts. In addition, information and data obtained by the survey would be used as a baseline for OCR's proposed activities under GPRA. ($1,700,000) (new)

C. HHS-OCR

- Testing Program - Nursing Home Assistance and Program Abuse. OCR proposes establishing a new program to broaden the use of testing in the nursing home sector to uncover discriminatory practices. Consumer education and outreach will be targeted toward informing racial minorities and disability communities about discriminatory and abusive admissions and marketing practices so that they can report questionable practices to OCR and to the HHS Inspector General, DOJ. ($2,600,000) (new)

- Analysis of Differential Treatment Modalities. OCR, working with the HHS Data Council, would investigate medical decision-making at the individual facility level to see how it is influenced by race and ethnicity. OCR would contract for the development of methodologies to determine potential areas of discrimination or differential access to services through assessment of Departmental and State level administrative data sets. The purpose of this initiative is to identify potentially non-complying hospitals and to target and implement Title VI compliance reviews and outreach initiatives. As the result of this effort, HHS expects to change the compliance status of from 220 to 280 facilities. If HHS were to undertake all such reviews over a three-year period, it would need approximately $565,000 per year, beyond an initial $500,000 for survey design and analysis, to support the staffing needed to carry out such reviews while simultaneously avoiding an accumulation of a backlog. ($1,065,000) (new)

- Managed Care. OCR's FY 1999 budget request seeks consultant services to develop data collection measuring the effect of managed care arrangements on Hill-Burton facilities and others. The purpose of this initiative is to target compliance reviews and outreach activities in support of both the President's Initiative on Race and to ensure effective oversight of the nondiscrimination provisions of the Patients' Bill of Rights endorsed by the President on November 19. HHS expects that these reviews of managed care plans and other insurance arrangements will require 50 percent more time than individual facility reviews. Accordingly, HHS estimates that it would need approximately $300,000 per year, beyond an initial $250,000 for survey design and analysis, to support the staffing needed to carry out 50 such reviews per year. ($550,000) (new)

- Outcome Measurement. OCR is moving from output and process measures to assessing the extent to which the number and quality of services to protected classes has changed. The purpose of this initiative is: (1) to collect data on program performance that focuses on the public's ability to access and benefit from HHS services and (2) to focus performance goals and reporting on outcome measures identified in the Annual Government Performance and Results Act (GPRA) Plan. By collecting outcome data focusing on service to individuals, OCR will be able to effectively target activities based on which compliance strategies result in the greatest number of additional minority persons served by programs, the greatest number of additional services, or changes in the quality of services provided. ($250,000)(new)

D. **DOL-OCR**

- Improved Targeting. An enhanced management information system could produce reports that would identify problem areas that should be targeted for review. This system could also identify trends in complaints so that compliance activities could be directed towards those entities most in need of assistance. This would maximize the utilization of staff resources to address the targeted problem areas in a given year and enhance development of work plans and results under GPRA. Approximately $100,000 is needed to design management information reports to meet this performance goal. ($100,000) (new)

- Compliance Activities. 18 FTE will be required to provided total compliance monitoring coverage on a three-year cycle. Within existing resources, only 4 compliance reviews can now be conducted, due to the regulatory need to process complaints. This will enable staff to conduct 18 reviews per year. ($1,620,000) (new)

- Data Collection on JTPA. Currently, applicant data is not captured to identify those seeking entry into programs such as JTPA. To ensure that discriminatory factors are not being used in the intake process, a pilot program could be instituted. This would require revisions to ETA's management information system, agreement by the pilot state to participate, and OMB concurrence to collect this data. ($360,000) (new)

- Compliance Assistance. 3 FTE will be required to conduct 20 technical assistance visits per year. This represents staff being on travel two weeks out of every month. ($270,000)(new)

E. **DOL-OFCCP**

- Future Targeting. The OFCCP's three-pronged Fair Enforcement Strategy includes a comprehensive regulatory reform component. One aspect of the regulatory reform effort is the redesign of the compliance review process. This process, as restyled "compliance evaluations," will enable the OFCCP to institute a multi-tiered level of review, varying from limited "compliance checks" to the full-scope compliance review. Additional resources for the three-pronged strategy will allow OFCCP to revise the requirements for the Affirmative Action Plan, fully implement the Affirmative Action Program Summary Report, and enhance the tiered compliance review enforcement strategy. ($4,800,000) (OMB approved)

- Ombud Activities. OFCCP will increase the use of its Ombud Office to improve customer quality and service. The Ombud Office, established in 1995, provides customer service, technical assistance, and a means for OFCCP's stakeholders to obtain confidential advice regarding the laws, policies, and programs that are administered by the OFCCP. Through this expansion of the Ombud Office, OFCCP will provide technical assistance earlier with the result of reducing the amount of resources needed during full compliance reviews performed at a later time. ($1,700,000) (new)

F. **HUD**

- Targeted, audit-based enforcement initiative. HUD will receive $10 million for a targeted, audit-based enforcement initiative, piloted in several metropolitan areas, that would raise awareness of the extent of discrimination through focused and publicly released audit results and subsequent enforcement action. An audit-based enforcement initiative using paired testers could be piloted in 20 metropolitan areas around the country. $5 million would provide each of the 20 non-profit organizations with $250,000 to establish an organizational capacity to administer paired testing in the rental and sales markets, develop comparable indices of discrimination, and provide for analysis and public dissemination of audit results. An additional $5 million would provide the 20 metropolitan areas with sufficient funds to conduct audits using 500 pairs of testers. (OMB approved)

III. **REDUCING BACKLOG**

A. **EEOC**

- Inventory Reduction. To reduce the private-sector backlog from the current over 9.4 months it takes to resolve private sector complaints to 6 months by the year 2000, EEOC requires 165 new FTEs. ($8,000,000) (OMB approved)

B. **HHS-OCR**

- Changes in Complaint Processing to Respond to Additional Workload. OCR proposes expanding its pilot program which uses teams of investigators to review incoming cases and to provide ongoing case management. This expansion will require additional team training. OCR also anticipates increased complaint workload resulting from the Patients' Bill of Rights and the Adoption 2002 initiatives. OCR estimates that $360,000 would be needed both to continue to enhance expedited complaint processing and to prevent development of a backlog. ($400,000) (new)

- State and Local Program. OCR's Strategic Plan proposes to increase partnerships with state and local agencies to expand the scope of civil rights compliance coverage of HHS grantees. OCR proposes a pilot program to contract with states and local civil rights agencies to conduct investigations, thus expanding its capacity to enforce civil rights while giving states an active role in enforcement. The purpose of these partnerships is to enhance the ability to target OCR staff resources on precedent-setting and high priority complaint investigations while continuing to improve response times to citizen complaints. ($500,000) (new)

IV. PAPERLESS OFFICE

A. EEOC

- Information Systems. The EEOC has proposed a three-year $25 million initiative to upgrade hardware, communications infrastructure, and the deployment of integrated information systems throughout the agency. The FY 1999 request of $10 million would provide a basic communication infrastructure that would allow the EEOC to complete the development and procurement of new information systems capabilities. These upgrades will allow the field offices and headquarters to communicate via electronic mail, eliminate redundant data entry procedures, and provide for greater operational efficiency through the sharing of information and enhanced research capabilities for investigators and attorneys. ($10,000,000) (OMB approved)

- Replacing Paper Forms. The EEOC proposes developing an "Interactive Diskette" data collection to replace "Paper Forms" for all EEOC employment survey data collection programs. ($200,000) (new)

B. HHS-OCR

- Civil Rights on the Internet: New technology that would allow the public to file complaints via computer. Also technical assistance to grantees could be accomplished via the Internet. Survey data collections, pre-grant certifications, investigative data requests and responses could also be expedited. ($250,000) (new)

C. ALL CIVIL RIGHTS ENFORCEMENT AGENCIES (Justice, Labor, HHS, Education, and EEOC)

- Linked Civil Rights Data Bases: This linking of all the data bases would permit the agencies to share statistics that each agency collects. Linking technology would also improve coordination among the civil rights agencies. ($500,000)(new)

D. DOL-OCR

- Technology Improvements: There is a need for the establishment of a data base that can provide management information reports that can respond to GPRA and DOJ requirements. A review is required of the current information technology infrastructure that supports the civil rights enforcement of federal financial assistance programs to determine what is needed to achieve the desired outcomes of improved case processing and case management. A working group could be established to conduct the survey and make recommendations in this area. Some economies of scale could be achieved if agencies explored the possibility of selecting a data base system that would meet the needs of agencies with some modifications adaptable to their specific programs.

($158,000) (new)

E. **DOL-OFCCP**

- Information Technology: These funds will be used to upgrade the agency's infrastructure and replace outmoded systems hardware, enabling OFCCP to meet its current requirements and to develop the systems necessary for federal contractors to submit data electronically to the program. The agency will also provide the technology necessary for compliance officers to record all documents related to reviews electronically. ($4,000,000) (new)

V. **COORDINATION AMONG CIVIL RIGHTS AGENCIES**

A. **Proposed by HHS-OCR**

- Inter-agency Civil Rights Coordination Group: A standing inter-agency group composed of principals or their deputies would address cross-cutting issues including broad strategic planning, coordination of litigation strategies, development of performance outcome measures, outreach and partnership strategies, coordinated public service announcement and public relations initiatives, coordinated town meetings on civil rights issues, coordinated training initiatives, data collections, reviews, and investigations.

- Inter-agency training program. A coordinated training strategy could entail creation of an inter-agency training program. The training program could be under the auspices of the Department of Justice. It would focus on investigative methodologies, examination of best practices in non-discriminatory service delivery, litigation review and strategy, data collection techniques and other compliance techniques that can be employed by many agencies, including HHS, ED, HUD, DOL, DOT, and EEOC. The center could also provide civil rights investigative and outreach training to state and local partners. A training center with dedicated staff could either be contracted or use federal agency staff. A rough estimate of the cost for rent, staff support, curriculum development, scholarships for non-federal participants, equipment, trainers, etc. is $1,000,000 government-wide per year. ($1,000,000) (new)

- Intra-agency civil rights councils. These councils would be a means for furthering civil rights compliance throughout individual departments and agencies. Each Department would establish a high-level body that would be advisory to the Secretaries or Agency Heads on civil rights issues. A Civil Rights Council would be a forum for review of agency-wide policies and practices and could serve as a forum for external organizations to present civil rights concerns associated with individual agency programs. Such a council would be headed by the Department or Agency's chief Civil Rights Official and would require minimal staffing (an Executive Secretary to the Council and perhaps one support staff) in addition to staff that could be provided from within the agencies.

($200,000) (new)

- Geo-coded/Mapping Data Base on a Civil Rights Intranet. OCR proposes development, in conjunction with the Census Bureau and the Department of Justice, of a government-wide pilot project that would make geo-coded mapping of race, ethnicity, and national origin Census data available to all civil rights agencies on a Civil Rights Intranet. This resource would enable civil rights agencies to have immediate access to tract level data during the course of investigations and reviews. Other uses of this system could include a government-wide index of administrative decisions, letters of findings, and entities under civil rights investigation. ($350,000) (new)

B. **Proposed by DOL-OCR**

- Coordination between DOJ and OMB. In order to achieve enhanced civil rights enforcement, OMB will be required to review the civil rights enforcement function on a cross-cutting basis to achieve performance goals. DOJ could work with OMB and the respective agencies to promote a comprehensive civil rights agenda. This would provide the framework and overall reporting relationships to integrate civil rights enforcement within the budget process. ($90,000) (new) .

C. **Proposed by DOL-OFCCP**

- The Civil Rights Working Group, made up of all the civil rights agencies in the Federal government and a liaison from the White House, should be formalized and meet on a regular basis to integrate efforts to achieve civil rights in America.

- Coordination with DOJ and Veterans Affairs. Increase compliance on national origin discrimination and to share a database with Veterans Affairs so that veterans have equal employment opportunities. ($400,000) (new)

D. **Proposed by ED-OCR**

- Intranet technology. Civil rights enforcement agencies need to improve their communication network. Intranet technology could be used to create a network for used by selected civil rights enforcment agencies. The system could be used for various purposes such as sharing data; posting information like current research, historical document, special alerts, best practices, scheduled meetings/conferences, newsworthy events, and training opportunities. The system could also be used to communicate essential information and materials to agencies' staff on Presidential initiatives. ($100,000 to 500,000) (new)

Race initiative policy - civil rights enforcement

MEMORANDUM

TO: BRUCE REED, ELENA KAGAN

FROM: TOM FREEDMAN, MARY L. SMITH

RE: CIVIL RIGHTS ENFORCEMENT INITIATIVE

DATE: DECEMBER 4, 1997

Summary:

The goal of this initiative is to improve the handling of federal discrimination cases so that citizens' complaints are heard more promptly and with less paperwork, and to reform federal civil rights offices so they are more effective at prevention and are better coordinated. The plan was developed in meetings with leaders of federal civil rights offices and with input from representatives of leading civil rights organizations and offices within the Administration including the White House Counsel, OPL, PIR, NEC, and OMB.

Among the highlights of the initiative is its commitment to modernize and reform the Equal Employment and Opportunity Commission. The initiative outlines investments in EEOC technology and programs so that by the year 2000 the average EEOC case will be heard within 6 months. In addition, the plan puts in place, for the first time, a comprehensive strategy across the six leading civil rights agencies (the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor's Office of Civil Rights, the Department of Labor's Office of Federal Contract Compliance Programs, Housing and Urban Development, and the Department of Health and Human Services' Office of Civil Rights) to make it easier to comply with federal laws and more difficult to discriminate. Each agency will expand the use of alternative dispute resolution techniques, improve data collection and technical assistance to business, participate in a $15 million technology upgrade to reduce paperwork, and share expertise as part of a coordinated federal civil rights working group. The package of improvements totals approximately $78 million, including a 12.5% increase above the enacted FY 1998 budget for EEOC, and a roughly 50% increase for the relevant HUD office. **[Note: OMB has so far approved only $57 million worth of new expenditures. An attached memo lists the $21 million in new, as yet unapproved, spending.]**

I. Reducing Backlogs

One of the most commented upon problems in civil rights enforcement is delay in hearing cases at the EEOC. Although substantial progress has been made in reducing EEOC delays, this plan uses improvements in technology and a $8 million infusion of resources to lower the average time it takes to resolve private-sector complaints to 6 months by the year 2000. The plan

also includes two new initiatives at HHS to reduce backlogs by expanding the use of teams of investigators to provide case management and by contracting with state and local civil rights agencies to give states an active role in enforcement. These initiatives will also help to reduce increased workloads resulting from the Patients' Bill of Rights and Adoption 2002 initiatives.

II. Alternate Dispute Resolution

The plan calls for the introduction and expansion of Alternate Dispute Resolution (ADR) across all relevant agencies. The largest initial investment is a $4 million expansion of the EEOC's mediation program for FY 1999 so that the EEOC will be able to mediate 10 percent of its 80,000 new charges. In addition, pilot programs will be introduced at several agencies including a program developed by HHS for 10 urban and rural areas, and a program run by Labor to assist states in developing ADR.

III. Improving Compliance, Data Collection and Technical Assistance Efforts

The initiative includes a fund to improve the surveying, technical outreach, and compliance efforts by lead civil rights offices. The largest measure is a $10 million program run by HUD to conduct targeted, audit-based enforcement using paired testers, piloted in several metropolitan areas, designed to raise awareness of the extent of discrimination through focused and publicly released audit results and subsequent enforcement action. The Department of Education will undertake a $1.7 million survey of the 15,000 school districts across the country to determine the demographics of the elementary and secondary schools in the districts for both teachers and students. This survey will be used by Education and other agencies to target and assist in future technical assistance, compliance, and litigation efforts. Other projects include EEOC's efforts to improve compliance through videos for employers and a public service campaign, and a $1.5 million initiative by the DOL's Office of Federal Contract Compliance for technical assistance that focuses on prevention rather than enforcement. The Department of Labor will begin a comprehensive compliance monitoring program allowing it to triple the number of compliance reviews it conducts a year and reform the system by which it chooses targets for its reviews. HHS will use the funds to investigate medical decision-making to determine how it is influenced by race and ethnicity.

IV. Improving Technology

The plan includes a $15 million technology initiative for EEOC, HHS, Labor, and Education to provide for communication via electronic mail; eliminate redundant data entry procedures; permit the sharing of information and enhanced research capabilities for investigators and attorneys; allow for the filing of forms and complaints over the Internet, and provide for the sharing of civil rights data bases.

V. Coordination Among Civil Rights Agencies

A common complaint by groups who work with federal civil rights offices is the lack of coordination among Administration efforts. This initiative will institute a standing inter-agency group to address cross-cutting issues including broad strategic planning, and development of performance outcome measures, training initiatives and data collections. In addition, the plan recommends that the President call upon each Department to establish an internal high-level civil rights advisory council to agency-wide policies and practices and serve as a forum for external organizations to present civil rights concerns associated with individual agency programs.