Pending approval May 5th announced.

The EEO Complaint Process
Federal Sector Task Force

The National Partnership for Reinventing Government and the Equal Employment Opportunity Commission will partner to establish an inter-agency task force to review the current federal sector EEO complaint process.

Why do we need a task force?

Create more efficient and less cumbersome processes
Eliminate process backlogs
Create government-wide outcomes that no one agency can accomplish alone
Create government as the *model employer*

Mission:

Reinvent the Federal Sector EEO Process
Improve Fairness and Efficiency
Prevent Discrimination
Provide Tools and Guidance

Measurable Objectives:

Reduce average processing times
Reduce backlogs

Timetable:

Announce Task Force - May1999
Assemble Task Force - June 1999
Begin Pilot Projects – April 2000
Complete Task Force - June 2000

Management Structure:

Federal EEO Senior Leadership Committee – senior officials from federal agencies and other stakeholders who will provide advise and "champion" this effort in their organizations.

Executive Management Team - manages the project and directs the task force on a daily basis.

Project Teams – federal employees working on specific areas of the project (see below).

Project Teams:

1. Dispute Prevention Team – identify practices that would prevent disputes from occurring in the first place or that lead to earlier resolution of disputes, such as ADR and other methods the lower or remove barriers.

2. Small Agency Pre-Complaint and Complaint Investigation Team – map out and analyze the EEO compliant process(es) in small agencies to identify critical areas needing focus or re-engineering.

3. Large Agency Pre-Complaint and Complaint Investigation Team – map out and analyze the EEO compliant process(es) in large agencies to identify critical areas needing focus or re-engineering.

4. Benchmarking/Best Practices Team – core group to conduct benchmarking study, identify best practices, and aid other task force members with their benchmarking/best practices efforts.

5. Technology Solutions Team – evaluate process(es) to identify areas where the use of technology can improvements and efficiencies.

6. Task Force Report Writing Team – prepare reports on task force products.

Products:

Agency Assessments
Process Maps
Best Practices
Benchmark Study
Technology Solutions
Identified Pilots/Demonstrations
Final Task Force Report

4-16-99

EEOC FEDERAL SECTOR UPDATE

Here are some statistics from 1997, the latest year for which statistics are available:

- **Formal Complaints Filed**
  Agencies reported 28,947 complaints filed in FY 1997, compared with 26,410 complaints filed in FY 1996, an increase of 9.6%.

- **Complaints Inventory**
  During FY 1997, the government-wide EEO inventory of complaints grew from 30,717 complaints at the beginning of the year to 34,286 at the end of the year.

- **Complaint Resolutions and Average Processing Time**
  In FY 1997, 26,508 complaints were resolved, compared with 25,150 resolutions in FY 1996, a 5% increase in closures.

  The Average Processing Time for all types of resolutions was 391 average days in FY 1997 compared with 379 days in FY 1996. Processing through merits decision accounted for the largest portion of the processing time -- 602 average days government wide. This was an increase of 3.8% from FY 1996 when the average processing time for merit decisions was 580 average days.

- **Where Cases are Pending**
  The largest number of complaints was pending at the investigation stage --12,422. This was 36% of the cases open in the government wide inventory at the end of FY 1997.

Fiscal Year	Complaints on Hand at Beginning of Reporting Period	Complaints Filed During Reporting Period	Complaints Closed During Reporting Period	Complaints on Hand at end of Reporting Period	Inventory Growth	Inventory Growth Percentage
FY 1994	21,929	24,592	21,565	25,707	3,778	17.2
FY 1995	25,072	27,472	22,497	30,682	5,610	22.4
FY 1996	28,949	26,410	25,150	31,195	2,246	7.8
FY 1997	30,717	28,947	26,508	34,286	3,569	11.6

The following five agencies account for 19,724, or 68.1 percent of the complaints filed within the Federal EEO complaint system in FY 1997:

United States Postal Service 14,326

Department of Veterans Affairs	2,316
Department of the Treasury	1,368
Department of Justice	903
Department of Transportation	811

- **Age of Complaints in the Federal Sector Inventory in FY 1997**
  The government-wide inventory of open complaints was 34,286 at the end of FY 1997. Of that total, 34% were pending 1 to 180 days; 14% were pending 181 to 270 days; and 52% were pending more than 270 days.

- **Agencies Accept or Reject AJ Finding of Discrimination**
  In 1997, agencies rejected 64.3 % of AJ's findings of discrimination
  However, agencies accepted 97.7 % of AJ's findings of non-discrimination

Worst Federal Agencies by Largest Number of Processing Days for All Closures in FY 1997

Agency	Total Closures	Average Days	Rank
EEOC	65	1,304 (own complaints)	1
CPSC	1	975	2
Peace Corps	5	967	3
HUD	159	930	4
AID	18	847	5
OPM	35	814	6
SBA	45	809	7
Education	56	782	8
Justice	654	780	9
FDIC	114	756	10
FEMA	12	710	11
NTSB	2	697	12
ACDA	1	696	13
Fed Retirement Thrift Investment Board	1	687	14

Processing Days for Agencies with Most Number of Pending Complaints

Agency	Number of Cases at End of Period	Average Processing Days	Rank (from Best to Worse)
United States Postal Service	13,549	353	30
Department of Veterans Affairs	2,749	440	41
Department of Justice	2,020	780	70
Department of the Treasury	1,467	354	31
Department of Transportation	815	310	22

Mary L. Smith
04/12/99 03:40:32 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Laura Emmett/WHO/EOP, Leslie Bernstein/WHO/EOP
Subject: Update on status of EEOC federal sector rule

Here is an update, prepared by OIRA, on the status of the EEOC Federal Sector rule which is currently in final clearance at OMB. The two major issues, which are detailed below, center on: (1) the EEOC administrative judge (AJ) issuing a ruling and the agency only having the ability to accept or reject the AJ's decision but not to modify it. In this way, agencies will take final action on complaints referred to AJs by issuing a final order, but they will not introduce new evidence or write a new decision in the case. (2) the ability of obtaining interim relief after the AJ's decision but before the end of the administrative process.

OMB plans on meeting with EEOC later this week to go over its concerns, and thereafter plans on contacting the agencies about the rule and requesting that their general counsels or deputy secretaries contact OMB if they still have major concerns. I will also send around a copy of the proposed rule and all of the agency comments. Please let me know if you need anything else.

While the agencies may raise other issues, here is OMB's analysis of the major outstanding issues:

Overview of the Rule
EEOC's objective in issuing this final rule is to streamline, and make more fair, the process by which a federal employee pursues a discrimination complaint. The most significant provisions of the rule eliminate an agency's ability to reverse or amend decisions of the EEOC Administrative Judge (AJ). Under the current process, an complainant/employee can opt for a hearing with an AJ. The agency can then reverse or amend the AJ decision. The only options for the complainant/employee at that point is to accept the agency decision or appeal to the EEOC's Office of Federal Operations (OFO). The final rule would provide that in cases in which the agency does not agree with the decision of the AJ: (a) the agency issues a final order notifying the complainant that it will not fully implement the AJ decision; (b) the agency automatically files an appeal with the EEOC on behalf of that employee; and (c) in cases involving removals or separation of the employee, the agency would provide interim relief (i.e., retroactive restoration) consistent with the finding of the AJ pending a final decision from the AJ.

Other significant provisions of the rule: (a) require all agencies to make available an alternative dispute resolution (ADR) program for the pre-complaint process; (b) provide EEOC AJs with the authority to award attorney's fees and costs to winning complainants for services rendered prior to the filing of the formal complaint (e.g., during the counseling and ADR phases).

Views of the Stakeholders
During EEOC's development of the proposed rule, and following publication of the NPRM on 2/20/98, approximately 30 different Federal agencies expressed significant concerns with many of the provisions in the rule. The agencies are primarily concerned with the elimination of an agency's right to reverse or amend an AJ's decision. Agency arguments range from legal

(EEOC lacks the authority to eliminate this agency action) to policy (the AJ's lack the expertise to adjudicate these claims and agency amendments or reversals are a proper check and balance).

On the other side of the spectrum, OIRA has met with a Federal employees union and a member of the plaintiff's bar who feel that EEOC's proposed changes to the complaint process do not go far enough in limiting agency control in adjudicating cases in which the agency is accused of discrimination.

<u>OIRA Analysis</u>
OIRA agrees with EEOC that the current process of allowing the agency (or the "defendant" in discrimination cases) to amend or reverse the decision of the EEOC AJ may be legitimately perceived as inherently unfair. OIRA is further impressed by data provided by EEOC which demonstrates that agencies reverse a significant majority of AJ findings of discrimination, and that in a majority of those cases that are appealed to the EEOC, the result is a reversal of those agency decisions on appeal from the employee. However, OIRA does have some concerns with the provisions that would implement this change to the process.

The agency issues a final order notifying the complainant that it will not fully implement the AJ decision. As stated above, OIRA believes that this change will improve the fairness of the current process. Further, OIRA, upon consultation with DOJ, agrees with EEOC that a "final agency order" meets the legal requirement in Section 717(c) of Title VII that the agencies have some "final" action they can take following an AJ decision.

If the agency disagrees with the AJ, the rule as drafted would require the agency to automatically file an appeal with the EEOC on behalf of that employee. OIRA has two main concerns with this provision:

- Assume that the AJ rules in favor of the agency, finding that no discrimination occurred. However, the agency now wants to amend or not fully implement that decision because its review did uncover discrimination. Why would there necessitate an appeal to the Commission? EEOC's reg strategy appears to assume a certain outcome which may not in fact always occur.

- A separate provision in the rule contains the requirement for the agency to provide notice to the complainant with all final orders of a complainants right to appeal to EEOC. EEOC has not demonstrated that this notice requirement would be insufficient to allow an employee to exercise a right of appeal. A process in which the employee has the burden to file an appeal following an agency order may be more consistent with other processes of jurisprudence in the U.S.

- In cases involving removals or separation, the agency would provide interim relief (i.e., retroactive restoration) consistent with the finding of the AJ. OIRA has several concerns with this provision:

- This provision was not proposed or addressed at the NPRM stage. OIRA is believes that this substantial change to the process should go through a notice and comment process before becoming effective.

- Section 717(c) of Title VII requires some kind of "final" agency action following an AJ decision. An interim relief provision would basically render the "final" action by agencies as moot, and thus it is no longer clear that EEOC has fulfilled the Section 717(c) requirement.

- OIRA is sympathetic to the concerns voiced by agencies that this provision could create significant disruption in an agency's workforce when considering that that 33% of agency reversals are upheld on appeal to the EEOC, and that it traditionally takes a long period of time for EEOC to issue a final decision on appeal.

- Based on the above concerns, it is not clear why more traditional remedies of back pay and damages would not be sufficient to make an employee whole.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Maria Echaveste/WHO/EOP
Charles F. Ruff/WHO/EOP
Thomas L. Freedman/OPD/EOP
Irene Bueno/OPD/EOP
Edward W. Correia/WHO/EOP

EEOC Data Collection
Question and Answer
July 7, 1999

Q: What is the Administration's response to the GAO report that criticizes the EEOC for failing to collect relevant and useful data on job discrimination trends among the federal workers?

A: The Administration is taking steps to ensure that the data collected from federal agencies is more comprehensive and accurate. The EEOC has begun to clarify the instructions for data collection and to require that federal agencies certify the accuracy of the data. In addition, the Administration has requested for the EEOC a $33 million increase in FY 2000, of which $4 million is directed toward EEOC enforcement efforts including funding for analyzing trends of job discrimination among federal workers. Finally, the EEOC will soon publish a rule that will improve data collection of job discrimination trends among federal workers.

TALKING POINTS ON DRAFT REVISIONS TO FEDERAL SECTOR MANAGEMENT DIRECTIVE

Background

- Under Title VII, federal agencies must maintain affirmative programs of equal employment opportunity for employees and applicants. Under the Rehabilitation Act, agencies must establish affirmative action programs for people with disabilities.

- The EEOC is responsible for implementation and enforcement of these requirements.

- The EEOC's interpretation of these requirements is currently set forth in three different Management Directives.

Need for Revised Directive

- The current Management Directives are more than 10 years old.

- The law has changed considerably in the interim. New guidance is needed on the impact of the *Adarand* decision on race-based programs. Revisions are also necessary to ensure that guidance under the Rehabilitation Act conforms to the standards of the Americans with Disabilities Act.

- Because the current Management Directives address disability-based programs separately from race and gender-based programs, agencies have sometimes focused exclusively on Title VII programs and have neglected affirmative action for people with disabilities. Combining guidance on both types of programs should help to alleviate this problem.

- Because of these concerns and the importance of up-to-date and effective guidance for federal sector employers and employees, EEOC staff began drafting a revised, consolidated management directive nearly two years ago under the direction of then-Chairman Casellas. Staff coordinated the Title VII aspect of the guidance with the Department of Justice since the constitutional principles announced in *Adarand* control the availability of race and gender-based programs in the federal government.

The Draft Management Directive

- The draft Directive provides much needed practical guidance on ensuring the legality of race, gender and disability-based programs, while at the same time emphasizing options that remain open to agencies under the law to pursue affirmative action principles.

- The disability portion of the draft Management Directive will help to implement the Administration's commitment to increasing federal employment opportunities for people with disabilities. In the short-term, the Directive can serve as the model plan for federal agencies requested by the President's Disability Task Force.

- The Title VII portion of the draft:

    - Explains that *Adarand* does not apply unless race, national origin, or gender are taken into account in selection decisions.

    - Requires review of agency policies, targeted outreach and recruitment, and race-neutral training programs where there is evidence that opportunities have been limited for minorities or women, whether or not discrimination could be legally proved.

    - Gives guidance on when race-based selection decisions will be authorized.

- The Rehabilitation Act section:

    - Makes clear that strict scrutiny does not apply to disability-based programs.

    - Requires review of agency policies to identify barriers to opportunity, and outreach and recruitment to increase representation of people with disabilities in the applicant pool.

    - Directs agencies to implement formal procedures for addressing requests for reasonable accommodation and explains required components of those procedures. The draft also instructs agencies to consider the use of excepted appointing authorities and other means of increasing representation of people with disabilities in filling vacancies.

- The reporting and recordkeeping section:

    - Requires agencies to track their progress and report it to EEOC in a manner that enables tracking of government-wide progress as well.

Status of Draft Directive

- The directive has not yet been considered by the Commission.

RECEIVED
APR 22 10 50 AM '98
CHAIRMAN'S OFFICE

OFFICE OF POLICY DEVELOPMENT
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W., Washington, D.C. 20530

TO: **FRANCES M. HART**
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
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Washington, D.C. 20507
PH: (202) 663-4078
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FROM: BOB HINCHMAN
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DATE: April 21, 1998

Number of Pages (excluding this one) 9

Attached are the comments of the Department of Justice concerning the Notice of Proposed Rulemaking which the Equal Employment Opportunity Commission published on February 20, 1998 at 63 FR 8594, proposing changes to 29 CFR 1614 (RIN 3046-AA66).

The original of this letter is being sent to you by courier.

3 big issues
(1) AJ's decision as final (including class complaint) + dilute reconsideration
(2) standard of review (for appeal w/in EEOC)
(3) attorney's fees (pre-complaint)

Julie
Here's a copy of the DOJ letter re federal sector EEOC rule.
Mary

U.S. Department of Justice

Associate Attorney General

Washington, D.C. 20530

April 21, 1998

Frances M. Hart
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

Re: Notice of Proposed Rulemaking published on February 20, 1998 at 63 FR 8594, proposing changes to 29 CFR 1614 (RIN 3046-AA66)

Dear Ms. Hart:

This letter provides the comments of the Department of Justice concerning the Notice of Proposed Rulemaking which the Equal Employment Opportunity Commission published on February 20, 1998 at 63 FR 8594, proposing changes to 29 CFR 1614 (RIN 3046-AA66). This NPRM proposes broad changes in administrative judge authority and processing of EEO complaints.

The Department supports the EEOC in its ongoing effort to improve the effectiveness of the federal sector complaints process and believes that the EEOC should be commended for attempting to remedy deficiencies in the process. However, the Department strongly believes that some of the proposed changes are inconsistent with law, unfairly and improperly deprive federal agencies of the opportunity to review and contest the factual and legal findings of administrative judges, and increase the length of the process in some cases. Comments on the proposed changes which, in the Department's view, make the most significant changes and raise the greatest concerns are set forth in this letter. Additional comments and recommendations are set forth in the attached Appendix.

The Department understands it is EEOC's belief that allowing Federal agencies to reject or modify an Administrative Judge's (AJ's) decision may be perceived to be unfair since an AJ is considered to be a "neutral third party." To "address the perception of unfairness and conflict of interest in agencies deciding complaints of discrimination against [complainants]" (63 FR 8598), the EEOC proposes to eliminate the ability of agencies to reject or modify the AJ's decisions. The Department strongly objects to this EEOC proposal to authorize the EEOC's AJs to make a final decision on a complaint of discrimination where a complainant has requested a hearing. Because it will be the EEOC's AJs who will be making these decisions, the underlying agency will no longer be able to take final action on EEO complaints.

This proposal, as it stands, is inconsistent with the language of Title VII. Specifically, Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), which is applicable to the federal sector EEO process, provides for the agency to take the final action with respect to complaints of discrimination:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection(a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate shall be the defendant.

This provision refers several times to a "final action" by the department or agency, or a final action by the EEOC upon an appeal from a decision or order by the department or agency. A related provision found in §717(b), 42 U.S.C. §2000e-16(b), provides that the "head of each department, agency, or unit shall comply with such rules, regulations, orders and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder."

These statutory provisions provide that the agencies against which an EEO complaint has been filed will have the authority to take and will take "final action" and that this final action can then be appealed to the EEOC. The proposed regulation, which would permit complainants who opted for an administrative hearing to bypass any "final action" by the agency, is inconsistent with the statutory provision cited above.

In order to obtain a definitive resolution of these legal issues, I am asking the Department's Office of Legal Counsel to render a formal opinion concerning the possible conflict between the EEOC's proposed regulation and this statute.

The proposal to bypass the agency in cases where an administrative hearing has been held is based on unfounded concerns and perceptions, at least with respect to the administrative process within the Department of Justice. The concern is that agencies are abusing their right to reject or amend recommended decisions by incorrectly rejecting recommended decisions adverse to the agency. One of the frequently repeated statements expressing this concern is that in any given year, statistics show that executive agencies as a group rejected between 50 to 60 percent of the recommended findings of discrimination while rejecting less than 1 percent of the recommended findings of no discrimination (see House Report No. 103-599, Federal Employees Fairness Act of 1994, July 13, 1994).

These statistics may not actually suggest the level of unfairness on the part of agencies that the EEOC comments imply. It is not surprising that agencies affirm 98% of the recommended findings of no discrimination, because those cases where agency officials suspect discrimination after an EEO investigation has been conducted are generally settled, and are therefore not considered by Administrative Judges. Cases that make it to the administrative hearing stage are mostly those where the agencies have concluded there was no discrimination. In the cases that are forwarded to an Administrative Judge for a hearing, an Administrative Judge's recommended finding of "no discrimination" merely confirms the agency's informal initial assessment, and provides still further indication that the proper assessment of the case is a finding of no discrimination. Given this, it is not surprising that agencies affirm the great majority of recommended findings of no discrimination because such an affirmance is consistent with the earlier informal assessment by the agency and with the EEOC Administrative Judge's findings.

With respect to the Department of Justice, the Department's Complaint Adjudication Office ("CAO") accepts the Administrative Judge's findings of no discrimination most of the time. But, the Complaint Adjudications Office also accepts recommended findings of discrimination most of the time. Whether the recommended finding is for discrimination or no discrimination, the Department's CAO affirms the majority of recommended decisions. Indeed, CAO has, on some occasions, rejected an Administrative Judge's finding of no discrimination, and found discrimination. As noted earlier, complaints reach an administrative hearing stage usually because the agency does not believe, based on the investigative record, that there has been discrimination. When an Administrative Judge agrees with this assessment, that makes for two separate assessments of no discrimination. Yet even in those situations, the CAO has on occasion rejected the recommended decision and reached a finding of discrimination. Such actions are not indicative of partiality towards the agency, and instead demonstrate the objectivity of the office.

Moreover, the EEOC has not reported the percentage of times that the EEOC's Office of Federal Operations (OFO) has reversed an agency's rejection of the AJ's recommended findings of discrimination. If agencies are indeed prone unfairly to reject recommended findings of discrimination, one would expect a high percentage of OFO reversals in such cases. In the Department's experience, OFO has affirmed the majority of this agency's final decisions which rejected recommended findings of discrimination. Given this, there is a strong argument that agency rejection of an AJ's recommended finding of discrimination is not indicative of unfair practices.

Indeed, the Department of Justice has taken care to have in place certain safeguards that will ensure that final decisions are issued after a fair and impartial assessment. Among these is the Department's longstanding use of the "clearly erroneous" standard in reviewing all recommended decisions. Even though the EEOC regulations do not require agencies to apply this legal standard when reviewing Administrative Judges' recommended decisions, the

Department's Complaint Adjudication Office has consistently applied this high standard in the interests of fairness and impartiality. The CAO is well aware that where a hearing has been conducted, the Administrative Judge has had an opportunity to observe the witnesses and thereby be in a position to make credibility findings, and the Department has accordingly applied the "clearly erroneous" standard in such cases. Importantly, the CAO has applied the same high standard even in those cases where an Administrative Judge has issued a recommended decision without holding a hearing. In these cases. there are few persuasive reasons for applying the "clearly erroneous" standard, but in the interests of fairness and impartiality. the CAO has extended the application of this standard to such cases also.

The Department has in place other safeguards that ensure impartiality, including keeping the CAO separate from agency components, so that all final decisions issued by the Complaint Adjudication Office can not only be fair but also have the appearance of fairness and impartiality. The Department of Justice is comprised of several component agencies, and the Complaint Adjudication Office, which is responsible for issuing Department of Justice final decisions, is entirely separate from these components. Since inception, the Complaint Adjudication Office has operated so that its only responsibility is to issue final EEO decisions, and this has been carried out without interference from any component official. These and other safeguards have ensured that Department of Justice final decisions are fair and impartial, and, I believe, help account for the very low percentage of reversals by EEOC's Office of Federal Operations.

Thus, rather than allow AJs to render final decisions on cases that have been referred to them for hearing, perhaps a better solution would be for the EEOC to require each agency to have an independent adjudicatory office to render final agency decisions, as does the Department.

There are also other important reasons to continue to allow the Department of Justice and other federal agencies to issue final decisions. These include: 1) the present opportunity for a full agency assessment whether a given complaint has merit; 2) a potential increase in the time for the issuance of a final decision under the EEOC proposal; and 3) the additional responsibilities that will be added to the EEOC if its proposal is implemented.

The use of the term "final decision" is somewhat misleading in that the final decision by an agency is not and never has been "final" in the sense of being the last step in the process. "Final" decisions were intended to be a vehicle for agencies to make a full, impartial assessment of the record, and where there was evidence of discrimination, to take steps that would provide the complainant with full relief and help ensure that the discrimination does not recur. It was always intended that all agency final decisions adverse to the complainant be subject to appeal to OFO or review in federal district court.

By proposing regulations that effectively eliminate agency final decisions in cases that are heard by an Administrative Judge, the EEOC is limiting the opportunity for agencies to make a full assessment of whether a given complaint has merit. This proposal would have detrimental effects for complainants and for the administrative process. Contrary to the suggestion that agencies do little at the final decision stage on behalf of complainants, our experience is that the final decision stage permits agencies to take steps to further the interests of complainants. Presently, even in cases where there has been no finding of discrimination, the Department's CAO has often informed EEO officers of facts and circumstances in the record which, while not serious enough to make for liability, are troublesome and are a potential basis for future liability. In such cases, the CAO has advised EEO officers to examine the situation more closely and take steps to defuse any potential EEO problem. Thus, even though the Complaint Adjudication Office affirms most of the recommended decisions, it adds to the fairness of the process by providing review of the record without any significant delay, and by permitting the Department to take steps that will ameliorate matters even where there has been no finding of discrimination. Under the proposed regulations, such options would no longer be available because there is no longer an opportunity for the Department, after a hearing, to assess the full record. Administrative Judges likely would not be able to recommend such advisory steps in a case where there has been no finding of discrimination, given that remedial orders require a finding of discrimination.

The proposed regulations may also lengthen the process in some cases. The EEOC has stated that an additional reason for eliminating the final decision after the issuance of a recommended decision is that it "eliminates a layer of review and permits decision-making at an earlier stage, central goals of the National Performance Review." (63 FR 8598) While the intent of the proposed rule is to decrease the number of steps to the process and shorten the time before a final decision is issued, instead it may end up increasing the amount of time before a final ruling by OFO is issued.

Currently, all agency final decisions following a recommended decision by an Administrative Judge must be issued within 60 days of the recommended decision. Given the strict time limit, the final decision step in the administrative process does not unreasonably delay the complainant. Significantly, those final decisions which find discrimination are binding on agency officials, and relief is to be implemented within a reasonable time thereafter. In such cases, under present regulations, agencies are not entitled to appeal an adverse ruling in a final decision and it is issued only 60 days after the Administrative Judge's decision. Under the proposed regulations, agencies are explicitly permitted to appeal an Administrative Judge's decisions of discrimination to OFO. This could create a significant delay for complainants because, under the proposed regulations, OFO is not required to adjudicate the matter within any specified period of time after the Administrative Judge's decision, and review undoubtedly will exceed the 60 day limit now in place for final agency decisions. Given the present backlog, OFO could take well over a year to issue its decision.

Related to this, under the proposed regulations, the EEOC will be taking on the added responsibility of ensuring that relief is implemented in a prompt, effective, and comprehensive manner. Currently, where the Department of Justice final decision makes a finding of discrimination, the Complaint Adjudication Office takes an active role in ensuring that relief is implemented as ordered and promptly. This often means making repeated inquiries, suggesting lines of action, and taking the additional steps needed to overcome the practical difficulties that can arise when relief is being implemented, as well as issuing decisions to clarify relief and awards of attorney's fees. Under the proposed regulations, all of these duties will now be shifted to OFO in hearing cases because agencies will no longer be able to issue a final decision. These additional duties, along with delays caused by appeals to OFO, could make the process take longer in many cases.

In addition to the greater work for the OFO -- because it will be hearing these appeals -- this regulation will result in additional work for the AJs because they will be implementing relief, which is now done by the underlying agencies. Even without the proposed additional duties, Administrative Judges have significant and sizable responsibilities which are difficult to carry out as fully as possible given the caseload and time pressures on Administrative Judges. The proposed regulations will add to these existing responsibilities, without any indication that greater resources will be allocated to handle these additional responsibilities. Given the current limited resources, it is not clear how the EEOC will be able to take on the additional responsibilities imposed by the proposed regulations.

While the Department of Justice agrees that improvement of the Federal sector EEO process is desirable, the changes proposed by the EEOC in this NPRM will limit agency action. The Department urges the EEOC to work further with agencies in an effort to refine its proposals. The goal of all involved in the EEO process should be to identify and resolve those cases where discrimination truly exists while at the same time disposing promptly of non-meritorious complaints.

Sincerely,

Raymond C. Fisher RCF

Raymond C. Fisher
Associate Attorney General

Attachment

cc: Paul M. Igasaki
Chairman
Equal Employment Opportunity Commission

Ellen J. Vargyas
Legal Counsel
Equal Employment Opportunity Commission

APPENDIX

Additional comments and recommendations of the Department of Justice concerning the Equal Employment Opportunity Commission Notice of Proposed Rulemaking published on February 20, 1998 at 63 FR 8594, proposing changes to 29 CFR 1614 (RIN 3046-AA66)

- **Alternative Dispute Resolution.**

The Department has no objection to increased efforts to encourage voluntary participation in alternative dispute resolution (ADR) programs, particularly where agencies are permitted to develop and operate ADR programs suited to their own management approaches and organization structures. However, while the Department fully supports the use of ADR to resolve complaints at the early stages of a dispute, ADR may not be appropriate for all complaints. The proposed regulation would give every complainant the opportunity to take every dispute to ADR. This does not appear to promote an effective use of resources or timely resolution of EEO complaints. The EEOC regulation should provide Federal agencies with the opportunity to decline ADR if they believe that the complainant's case is subject to dismissal.

In addition, the EEOC proposal should be more specific on the discontinuance of the ADR process. The regulations should provide that it is the responsibility of the complainant to advise the EEO Counselor that the complaint was not informally resolved so that the EEO Counselor can conduct the final interview. In some agencies, the EEO Counselor may not have been involved in the ADR process.

- **Dismissals.**

The Department supports the EEOC's proposal to dismiss "spin-off" complaints. However, the Department suggests that any definition of the term provided in the regulations or Management Directive 110 be narrowly defined to include only those complaints that allege dissatisfaction with the agency's processing of the original complaint. In addition, the EEOC's proposal to dismiss complaints that have been filed in an attempt to misuse the EEO process is also a change that we believe will add to the efficiency and credibility of the process. However, here, as in the matter of "spin-off" complaints, a precise definition of what constitutes "a clear pattern of misuse of the EEO process" should be provided. It is critical that any definition of what constitutes "misuse" or "abuse" of the process protect against the arbitrary dismissal of complaints filed by persons who have a history of filing complaints (i.e. multiple filers).

- **Fragmentation of Complaints.**

The Department also supports the EEOC's proposal to provide guidance regarding the fragmented processing of EEO claims. It has been the experience of the Department's Equal

Employment Opportunity office that components within the Department occasionally fail to distinguish between allegations (i.e. factual statements) in support of a claim and the claim itself. This error leads to the "fragmentation of complaints" or the multiple processing of the legal claim, as well as the processing of anecdotal evidence as if it were a separate legal claim. While we agree this problem should be addressed by the EEOC, we believe that providing detailed guidance in EEOC's Management Directive 110 would be more effective than promulgating additional regulations.

- **Class Complaints.**

The Department objects to the proposed amendment of section 1614.204(g)(2) that would require AJs to approve class settlement agreements. The Department agrees with those commenters who have maintained that adequate safeguards exist in the current regulations and that this change would add an unnecessary layer of review. Dissatisfied class members currently have the right to petition to vacate a settlement agreement and the current regulations also require the class agent to fairly and adequately represent the class.

- **Hearings.**

The EEOC has proposed that AJs be given the authority to dismiss complaints during the hearing process for all the reasons currently provided in 29 CFR 1614.107. The Department agrees that this change would help to streamline the process by eliminating the need for the AJ to remand the case back to the agency when he or she believes dismissal is warranted -- if the AJs are not given binding authority to render final decisions. However, the Department objects to the proposal to allow AJs to render decisions without a hearing even when material facts are in dispute If the AJs are to be given binding authority to render final decisions. If the AJs are given final decision authority, and the appeal from those decisions will be on the clearly erroneous standard, then it is imperative for the agencies to settle factual disputes at the hearing stage. Otherwise, agencies will be at a severe disadvantage at the appeal stage. Moreover, should this provision be allowed to remain, the language in the proposed subparagraph 1614.109(g)(4) should be clarified with underlined addition as follows: ...and that the complainant's case lacks merit, the administrative judge may issue a final decision without a hearing.

Further, the regulations should include a provision which allows the complainant to appeal the AJ's decision to the EEOC's Office of Federal Operations for a final decision on the matter. This modification of the proposal will ensure that complainants' appeal rights are preserved and that they receive a fair assessment of their case from the EEOC.

- **Appeals.**

The Department objects to the proposal to change the standard of review on appeals of final decisions rendered by AJs from de novo to clearly erroneous, while maintaining the de novo standard for final decisions rendered by the agencies--in those instances where the complainant seeks a final agency decision *without* a hearing. It would seem that creating two standards of review merely complicates the administrative process rather than simplifying it. Further, EEOC acknowledges that Federal agencies have noted that when they reject AJ's recommended findings of discrimination, those agency decisions are upheld by the OFO most of the time (Federal Sector Workgroup Report at 15, n.8).

Since the current evidence seems to clearly indicate that OFO overwhelmingly agrees with the agencies when they reverse an AJ's finding of discrimination, a move to the clearly erroneous standard would likely mean that incorrect findings of discrimination would be upheld by OFO due solely to the standard of review. Additionally, the sanctioning of agencies who do not comply with these regulations should not rest with the Office of Federal Operations but at a higher level within the EEOC to ensure impartiality. The Department does not object, however, to the elimination of the request for reconsideration.

- **Attorney's Fees.**

The Department objects to the proposal to allow AJs to award attorney's fees in cases where a hearing has been requested. At present, where the Department issues a decision in favor of an individual, the Complaint Adjudication Officer (CAO) directs the attorney for the individual to submit his or her fee request to the component. If the attorney and the component cannot agree on a fee the CAO requests briefs on the amount of the fee and renders a decision directing the component to pay a specific dollar amount. The Department is unaware of any problems with the status quo in this area. The Department also believes that allowing attorney's fees for work done prior to the filing of the formal complaint would, in fact, hinder pre-complaint settlement of claims because of an inherent conflict between speedy settlement and a potential attorney's fees award. The proposal also would make it more difficult to settle cases early in the process when the likelihood of non-monetary settlements are the greatest.

DRAFT

FOR IMMEDIATE RELEASE
Friday, February 20, 1998

CONTACT: William J. White, Jr.
Reginald Welch
(202) 663-4900
TTY (202) 663-4494

EEOC PROPOSES REGULATIONS TO STREAMLINE THE EEO COMPLAINT PROCESS FOR FEDERAL EMPLOYEES

WASHINGTON -- The U.S. Equal Employment Opportunity Commission (EEOC) announced today proposed changes to its regulations governing the procedures for federal employee discrimination complaints as part of the Commission's broader efforts to improve the effectiveness of its operations. The proposed changes, published in the *Federal Register* as a Notice of Proposed Rule Making (NPRM), are the result of a nearly two-year process.

In signing the Notice, EEOC Chairman Paul M. Igasaki said, "These changes take important steps toward making the process for federal workers fairer and more efficient." He added that the NPRM will also "advance the Administration's National Performance Review goals of removing unnecessary layers of review and delegating decision-making to front-line employees."

In developing the NPRM, the Commission consulted broadly with its various stakeholders, including federal agencies and officials as well as federal employees and their representatives. The major proposed changes include:

- Expanded use of Alternative Dispute Resolution to resolve complaints earlier in the complaint process;
- A provision that the decisions of EEOC administrative judges will be final, eliminating the ability of the agency accused of discrimination to change or reverse the decision of the judge;
- Mechanisms to enhance the management of cases by creating two new bases for the dismissal of claims and eliminating an outdated one;
- A new "Offer of Resolution" provision which allows an agency to make a settlement offer to an employee and, if the employee does not accept the offer and does not recover at least as much as the agency offered, avoid further liability for attorney's fees and costs;

(MORE)

FEDERAL SECTOR NPRM -- PAGE 2

- Expanded use of class actions to combat discrimination in federal employment;
- Adoption of a substantial evidence standard of review for decisions of administrative judges following a hearing; and
- Narrowing of the circumstances in which the parties can seek reconsideration of an EEOC appellate decision issued after an appeal by an agency or employee.

The NPRM acknowledges a number of comments made by agencies during the formal inter-agency review process, and asks for public comments on those issues. The public comment period runs from February 20 through April 21, 1998. Comments should be addressed to: EEOC Headquarters, Office of Legal Counsel, 1801 L Street, N.W., Washington, D.C. 20507. The text of the NPRM will be available on EEOC's web site at **www.eeoc.gov** shortly after its publication in the *Federal Register*

EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act, which prohibits discrimination against individuals 40 years of age or older; sections of the Civil Rights Act of 1991; the Equal Pay Act; Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments; and the Rehabilitation Act's prohibitions against disability discrimination in the federal government.

###

FAX TRANSMITTAL

Date: 2.19.98

To: Julie Fernandez

Fax #: 456-5581

From: U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Communications and Legislative Affairs

Fax #: (202) 663-4912

Phone #: (202) 663-~~4900~~ 4911
(202) 663-4494 (TDD)

Bill White

Subject:

Draft Q&A.

Pages not including this page: 2

DRAFT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
29 C.F.R. Part 1614
Notice of Proposed Rulemaking
Federal Sector Equal Employment Opportunity

Questions and Answers

Q: What is EEOC's role in Federal Sector Equal Employment Opportunity?

A: EEOC is responsible for enforcing the laws prohibiting employment discrimination based on race, color, religion, sex, national origin, age and disability in the federal government. The EEOC also promulgates the regulations and procedures by which federal employees file complaints. They are contained in 29 C.F.R. Part 1614.

Q: How do the discrimination complaint procedures for federal employees currently work?

A: Currently, a federal employee or applicant who believes he or she has been discriminated against must contact a counselor at his or her agency within 45 days of the alleged discrimination. After receiving counseling, the person may file a complaint with the agency. The agency will investigate the complaint. At the end of the investigation, the complainant may request a hearing from an EEOC administrative judge or may request a final decision from the agency. If a hearing is requested, the EEOC administrative judge will issue a recommended decision, which the agency may adopt, modify, or reject. If the complainant is dissatisfied with the agency's decision, he or she may appeal the decision to EEOC. If either the agency or the complainant is dissatisfied with the appeal decision, either party may request reconsideration from the Commission.

Q. Why is it necessary for the EEOC to change the way the federal sector process works?

A: EEOC, along with internal and external stakeholders, had concerns about the fairness and efficiency of the federal sector process. This prompted the EEOC to establish a Working Group to identify problem areas within the federal sector and develop recommendations for reform. The Working Group identified the following specific areas of concern:

- Agencies charged with discrimination investigate themselves and make the initial determination of whether or not they have discriminated, leading to widespread perceptions of a process that is not impartial;

- The process is too long and contains many layers of review,

- The process leads to the fragmentation of complaints, increasing the number of complaints in the system, and making it difficult for complainants to prove that they have been discriminated against; and

- The process is subject to abuse by employees who file multiple and unnecessary complaints, and by agencies which ignore time frames and conduct inadequate investigations.

Q: What changes to the federal employee complaint process does EEOC propose in the Notice of Proposed Rulemaking?

A: On Friday, February 20, 1998, the Commission published a Notice of Proposed Rulemaking (NPRM), which seeks public comment on a number of proposed changes to the discrimination complaint process for federal employee complaints. The changes are designed to serve two connected concerns. First, they will ensure that the discrimination complaint process is fair and is perceived to be fair by those participating in it. Second they will make the process more efficient by eliminating unnecessary steps or layers of review, dealing expeditiously with meritless claims and delegating authority to front-line employees. The major changes proposed in the NPRM would:

- Expand the use of Alternative Dispute Resolution mechanisms to resolve complaints earlier in the complaint process;

- Provide for the dismissal of complaints where there is a clear pattern of abuse of the complaint process and where complaints simply address the processing of a prior complaint;

- Institute a new "Offer of Resolution" provision which allows an agency to make a settlement offer to an employee and, if the employee does not accept the offer and does not recover at least as much as the agency offered, avoid further liability for attorney's fees and costs;

- Eliminate the concept of "full relief" and dismissals where the employee turned down what the agency declared to be full relief;

- Eliminate the current practice whereby decisions of EEOC administrative judges would be final and not subject to change by the agency accused of discrimination;

- Expand the use of class actions to combat discrimination in federal employment;

- Adopt a substantial evidence standard of review for administrative judge decisions following a hearing; and

- Narrow the circumstances in which the parties can seek reconsideration of an EEOC decision issued after an appeal by an agency or employee.

EEOC called

(1) doing best of what they then do what SO

SO review → arb & capricious

$\boxed{\text{Substantial evidence}}$

(2) Reconsideration

Re initiate that can do a formal motion

Standard of review: clearly err fact or law

systemic problem

no stay of judgment (putting

Stay $ (interest would accrue).

Employees & agencies.

(3) Statement that seek input from agencies on guidance for fees

(4) Offer of resolution

agencies say: doesn't do much b/c can only offer post-complaint

BUT/

EEOC made policy arguments: earlier on, not a lot of info.

employee w/out tools to know if good offer

(+) no attny

EEOC proposed:

Break up into 2

(1) those represented by an attny

(2) un rep

Those represented: agency can make offer of resolution @ any point
(pre-complaint; pre-invest)

if no attny: agency can't offer until appt. of AJ
(after investigation)
after complaint

EEOC:
if refuse offer and should have taken it. no attny fees.

Attny for assessment of offer
If reject offer

Heidi Hennig
226-7825

Asia Pacif Subcommittee of House Internat. Relations ~~Subcommittee~~ Committee

Ellen Vargyas 663-4637
offer of resolution
very concerned that offer this to those w/out an attny.

After complaint, may make an offer that is refused, then getting a lawyer would be harder b/c risk high

ABBOTT LABS. v. GARDNER

No. 39

SUPREME COURT OF THE UNITED STATES

387 U.S. 136; 87 S. Ct. 1507; 1967 U.S. LEXIS 2974; 18 L. Ed. 2d 681

substantial evid std

January 16, 1967, Argued
May 22, 1967, Decided

DISPOSITION: <=1> 352 F.2d 286, reversed and remanded.

OPINION:

... [*143] [**1512] [***13] challenge to this type of determination should be in the form of a de novo hearing in a district [**1513] court, but the Act as it was finally passed compromised the matter by allowing an appeal on a record with a " substantial [***14] evidence" test, affording a considerably more generous judicial review than the " arbitrary and capricious" test

In any event, the Court of Appeals should have applied only the arbitrary-and-capricious standard. Unlike the FPA, see <=35> 16 U. S. C. @ 825l(b), PURPA does not direct reviewing courts to determine whether orders entered thereunder are supported by substantial evidence. In the absence of a specific command in PURPA to employ a particular standard of review, the full-avoided-cost rule must be reviewed solely under the more lenient arbitrary-and-capricious standard prescribed by the Administrative Procedure Act for judicial review of informal rulemaking. See, e. g., <=36> FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 803 (1978).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[***20]

FERC's explanation of its reasons for promulgating the full-avoided-cost rule must be examined in light of the criteria set forth in @ 210(b) of PURPA, <=37> 16 U. S. C. @ 824a-3(b) (1976 ed., Supp. V), which provides that the purchase rate established by the Commission must be "just and reasonable to the electric consumers of the electric utility and in the public interest" and must not discriminate against qualifying facilities. n8 Since the full-avoided-cost rule plainly satisfies the nondiscrimination requirement, we need only consider whether FERC adequately explained why the rule is "just and reasonable to the electric consumers of the electric utility and in the public interest."

As noted above, the Secretary's determinations must be upheld if supported by " substantial evidence in the record considered as a whole." <=156> 29 U. S. C. @ 655 (f). This standard represents a legislative judgment that regulatory action should be subject to review more stringent than the traditional " arbitrary and capricious" standard for informal rulemaking. We have observed that the arbitrary and capricious standard itself contemplates a searching "inquiry into the facts" in order to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." <=157> Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Careful performance of this task is especially important when Congress has imposed the comparatively more rigorous "substantial evidence" requirement. As we have emphasized, however, judicial review under the substantial evidence test is ultimately deferential. See, e. g., <=158> Richardson v. Perales, 402 U.S. 389, 401 (1971); <=159> Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 618-621 (1966). [***163] The agency's decision is entitled to the traditional presumption of validity, and the court is not authorized to substitute its judgment for that of the Secretary. If the Secretary has considered the decisional factors and acted in conformance with the statute, his ultimate decision must be given a large measure of respect. <=160> Id., at 621.

Note To Agencies in Attendance at the 1/26/98 Inter-Agency Meeting on the EEOC proposed rule.

From: OMB

Date: 1/28/98

RE: Update on Changes to the proposed rule

Attached you should find the following:

A) A table that outlines what dismissals would be available under the proposed rule.

B) The following:

1. **The changes made to the reg and preamble regarding reconsideration.**

2. **The changes made to the reg and preamble regarding standard of review on appeal.**

3. **The changes made to the reg and preamble regarding the offer of resolution.**

4. **The change made to the preamble regarding attorneys fees.**

AN AGENCY CAN DISMISS A COMPLAINT

Current Rule	Proposed Rule
For failure to state a claim	SAME
That is untimely	SAME
When the complainant files suit in court	SAME
Where the complainant has elected the MSPB or negotiated grievance process	SAME
That is moot or involves a proposed personnel action	SAME
Where the complainant cannot be located	SAME
For failure to accept an offer of relief certified by the agency as full relief	REMOVED
	New: When a complaint alleges dissatisfaction with the processing of a prior complaint.
	New: When there is a clear pattern of abuse.

AN ADMINISTRATIVE JUDGE CAN DISMISS A COMPLAINT

Current Rule	Proposed Rule
An administrative judge has no independent authority to dismiss a complaint	**New**: For all reasons given to agency in proposed rule
	New: Can issue decision on the merits in <u>favor of an agency only</u> without a hearing even if facts are in dispute (where claim is meritless)

1. Reconsideration

The NPRM should be revised to amend 1614.405 and 1614.502 as follows:

On p. 46, after the first sentence of 1614.405(b) add:

> A party may request reconsideration within 30 days of receipt of a decision of the Commission, which the Commission in its discretion may grant, if the party demonstrates that (1) The appellate decision involved a clearly erroneous interpretation of material fact or law or (2) The decision will have a substantial impact on the policies, practices or operations of the agency.

At the end of the NPRM, add a new item as follows:

17. Section 1614.502 is amended by revising the first sentence of paragraph (a), paragraph (b), paragraph (b)(2) and by adding a new paragraph (b)(3) as follows:

§ 1614.502 Compliance with final Commission decisions.

(a) Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency except as provided below. * * *

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration and the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision orders retroactive restoration, the agency shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified by the Commission, pending the outcome of the agency request for reconsideration.

* * * * *

(2) When the agency requests reconsideration, it may delay the payment of any amounts ordered to be paid to the complainant until after the request for reconsideration is resolved. If the agency delays payment of any amount pending the outcome of the request to reconsider and the resolution of the request requires the agency to make the payment, then the agency shall pay interest at the rate set by the IRS for the underpayment of taxes compounded quarterly from the date of the original appellate decision until payment is made.

(3) The agency shall notify the Commission and the employee in writing at the same time it requests reconsideration that the relief it provides is temporary or conditional and, if applicable, that it will delay the payment of any amounts owed but will pay interest as specified in paragraph (b)(2) of this section. Failure of the agency to provide notification will result in the dismissal of the agency's request.

reconsideration as a safeguard for agencies against mistakes and inconsistencies by the Office of Federal Operations. It would be unfair to deny agencies this last opportunity for recourse, they maintained, particularly if administrative judges' decisions are made final and given greater deference. They argued the change would unjustifiably tip the balance in favor of complainants, who have the right to file suit in federal court and receive a *de novo* review. As they noted, agencies do not have the right to any court review if dissatisfied with a Commission decision. Several commenters also argued in favor of preservation of the right to request reconsideration of at least those decisions involving important legal issues or having a significant impact on agency policies or programs beyond the case at hand. In response to these comments the Commission has provided standards for parties to meet in seeking reconsideration. While reconsideration will continue to be discretionary, parties can seek reconsideration where there is a clear mistake of fact or law or where the decision will have a far ranging impact on the agency. added

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

2. Standard of review.

To use the substantial evidence standard rather than the clearly erroneous standard, on p. 46, line 4 substitute the following:

§ 1614.405 Decisions on appeals.

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

party within 30 days of receipt of a statement or brief in support of an appeal. The Commission will strictly apply appellate time frames. Currently, complainants have 30 days after filing the notice of appeal to submit a statement or brief. The Commission believes that 30 days is sufficient time to file briefs in procedural cases (cases that are dismissed by the agency or the administrative judge) because those cases usually do not raise voluminous factual issues. On the other hand, appeals of final decisions on the merits of cases generally require a thorough review of the record and warrant additional time to formulate arguments to support the appeals. In connection with the briefing schedule changes, the Commission proposes to amend the regulation to require agencies to submit the complaint file to EEOC within 30 days of notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

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

The Commission proposes to amend section 1614.405 of the regulations to provide that decisions on appeal from final decisions by administrative judges after a hearing will be based on a substantial evidence standard of review, but review of all other decisions will be based on a de novo standard of review. No new evidence will be considered on appeal unless the evidence was

changed

not reasonably available during the hearing process. It should be emphasized that the substantial evidence standard does not preclude meaningful review of factual findings. However, applying the de novo standard of review to the factual findings in administrative judge's final decisions after hearings would be an inefficient use of EEOC's limited resources. In addition, since EEOC's Office of Federal Operations did not see and hear the witnesses, it would not be in a position to second-guess the administrative judge during the appellate process, especially with respect to credibility determinations based on a witness' demeanor. Factual findings based on documentary evidence are more susceptible to review in the appellate process.

changed

Finally, the Commission proposes to amend sections 1614.405 and 1614.407 to model its reconsideration process after the process used by the Merit Systems Protection Board (MSPB). Reconsideration is an extra layer of review that is duplicative and time-consuming but that does little to improve the complaints process. The Commission denies the majority of requests for reconsideration, whether in procedural or merits cases. The purpose of this change is to enable the Commission to direct more resources to decision-making at the first appellate level, focusing on policy issues it deems important and developing a consistent body of decisional law on those issues. Restructuring the reconsideration process will permit the Commissioners to become more involved in the initial appellate decision. This proposal would also effectuate one of the central goals of the National Performance Review by eliminating an unnecessary layer of review and permitting decision-making at an earlier stage. The Commission will retain its discretion to reconsider any decision under section 1614.407(a).

Most agency commenters who commented on this proposal when it was coordinated under Executive Order 12067 opposed this change. They urged retention of the right to request

3. Offer of resolution. Revise regulation as follows (Changes indicated in bold):

§1614.109 should be changed to read ....

(c) Offer of resolution. Any time after **the initial counseling session** but more than 30 days prior to the hearing, the agency may make an offer of resolution of the complaint to the complainant. The offer of resolution shall be in writing and shall include a notice explaining the possible consequences of failing to accept the offer. The complainant shall have 30 days from receipt of the offer of resolution to accept or reject it. If the complainant **is represented by an attorney when the offer is made and** fails to accept an offer of resolution, and the final decision on the complaint is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the agency of attorney's fees or costs incurred after the date of rejection or the expiration of the 30-day period of the offer of resolution. An acceptance of an offer must be in writing and will be timely if postmarked or received within the 30-day period. Where a complainant fails to accept an offer of resolution, an agency may make other offers of resolution or either party may seek to negotiate a settlement of the complaint at any time.

The preamble language will be revised as follows:

Offer of Resolution

The Commission proposes to add a provision to the procedures permitting agencies to make offers of resolution to complainants as long as they are made at least 30 days prior to the hearing. Offers of resolution must be in writing and must explain to the complainant the possible consequences of failing to accept the offer. Complainants will have 30 days to consider the offer and decide whether to accept it. If a complainant is represented by an attorney at the time that the offer is made, fails to accept an offer of resolution, and the decision on the complaint is not more favorable than the offer, then, except where the interest of justice will not be served, the complainant will not receive payment from the agency of attorney's fees or costs incurred after the date of rejection or the expiration of the 30-day period of the offer of resolution. Failure to accept an offer of resolution will not preclude an agency from making other offers of resolution or either party from seeking to negotiate a settlement of the complaint at any time. **If an agency believes that it has made a fair offer to an unrepresented complainant who later obtains representation and seeks to avoid further liability for attorney's fees, the agency can renew its offer in writing at that time.**

The Commission proposes the offer of resolution procedure, in part, in response to comments from the agencies requesting that the failure to accept a certified offer of full relief dismissal provision be retained or modified. The Commission wishes to encourage resolution of complaints at all times in the complaint process and believes the proposed offer of resolution provision will provide incentive for agencies and complainants to resolve complaints. The Commission seeks comment on the offer of resolution proposal, particularly on the interest of justice exception to the preclusion of costs and fees. The Commission believes that the interest of justice standard in the proposal will apply to those situations in which an administrative judge determines that it would be unfair to preclude payment of attorney's fees and costs.

recognizes appellate decisions as final and binding but permits parties to seek MSPB reconsideration to avoid a miscarriage of justice.

4. **Attorney's Fees**

The Commission proposes to amend the attorney's fees section of the regulations to authorize administrative judges to calculate reasonable attorney's fees in cases where a hearing is requested. Currently, administrative judges decide the entitlement to attorney's fees. Agencies, however, calculate the amount of the award. The Commission believes that administrative judges are in a better position to render an impartial decision on the reasonableness of the fees request. They have heard the evidence and can assess the complexity of the case as presented by the attorney as the basis of the award. Moreover, because administrative judges are neutral third parties to the dispute, their attorney's fees calculations will not be perceived as biased in favor of one party or the other. This proposal has been questioned by some agencies because administrative judges generally have not issued such awards previously. In light of these concerns, the Commission will issue guidance to administrative judges on the calculation of reasonable attorney's fees. [The Commission will consult with other agencies prior to issuing the guidance.] added

In addition, the Commission proposes to amend section 1614.501(e)(1)(iv) to provide that an award of attorney's fees may include compensation for the time spent during the counseling period including any ADR process. The Commission believes that the current regulation, which limits attorney's fees awards to fees for work performed after a formal complaint is filed, could serve as a disincentive to participate in alternative dispute resolution, which often occurs during the counseling period, or otherwise settle a case during counseling.

OMB mtg. re: federal-sector regs 01/26/97

SK: Where do we want to be as a policy matter on Q of whether AJ decision should be final

Treasury: Concerns that the system as a whole is flawed b/c so many more complaints than resolutions in favor of complainants.

EEOC: This is a regulatory proposal, but we also have statutory problems that we can't change.

→ What of final ability to get to federal ct. (?)
Center of gravity as a policy matter w/ the agencies having control ~~&~~ over anti-discrim. efforts w/in the agency.

SK – The issue is reaching justice in a sensible way.
Of those who request a hearing, not many have findings of discrim. w/ AJ.
But most of those are wiped out by the agency.

Movement on standard of review?

Educ: policy of ~~ag~~ AJ decision as final seems o.k.
movement on standard of review (?)

Vargyas: need clearly erroneous for resource purposes on appeal to OFO

EEOC – wants deference (not de novo) on the facts

Postal – OFO usually agrees w/ agency over AJs.
Broad range of quality in AJs.
(?) When agencies reverse AJ decisions, OFO usually agrees w/ agency.

EEOC – But many of these decisions are never appealed.

Anticipated increase in # of hearings (b/c of perception of more fairness?).

SSA – What is the bigger problem?
Agencies unfairly rejecting or judges finding too often for complainants

SK – Reconsideration (?)

85% of requests for reconsideration are raised by complainants.

one idea: motion for reconsideration maybe shouldn't stay the proceedings

(+)
maybe only agency can make such a request (their last chance)

MSPB(?)

(+)
Create a standard (rather than standardless) for when OFO reconsiders

deferential

SK - Suggests that, if we agree on policy, we should go forward.

(?) We need to see more data to figure out how to really fix the system (federal-sector complaints)

Admin. w/ a bill that goes to the heart of the problem??

SK - We could commit to doing this kind of reform as well as other things

$\boxed{\text{178 = \# of cases where AJ finds discrimination per year}}$

SK - Commit in preamble to look @ other areas & data gathering (?)

① Wants to AJ decision to be final
② Change standard of review (not as high as clearly erroneous)
③ Reconsideration
a. Agency as a matter of right
b. no stay of proceedings
c. review of AJ be deferential, but not too high

concern to give this to agencies but not to complainants.

stay payment of damages (w/interest) during period of reconsideration (?)

can't stay non-monetary damages.

Standard for reconsiderat[ion] could be: something that has implications broader than this case.
(Systemic effect)

(2) Attorneys Fees

guidance ~~would~~ could be submitted through OMB process?
or other, less formal, eg agency input on guidance

(*) EEOC has ~~agreed~~ asked to eliminate the offer of full relief; agencies can dismiss if π fails to accept an offer of full relief.

EEOC difficult to figure out what is an offer of full relief (in light of damages)

2 other things offer → offer of resolution

[available only after complaint filed]

Like Rule 68 (agency can make an offer of resolution. If rejected by complaining party and end up w/ less fees are cut off @ that point.

How different?
(1) timing
(2) consequences: if reject offer of full relief, can appeal to EEOC, but end of story.

Offer of resolution pre-complaint, but not too soon

SK - wants a chart on basis for dismissal now & then.
- as a package
to see where there can be a trade
(bases that agencies like & those they don't like)

VA - Still wants an answer to the legal question

Sally is disinclined to open up this process to OLC @ this point

Should we wait for EEOC to be sued?

SK - OLC process is noncontrollable (+)
process is final & unappealable

other issues?
VA - ① partial dismissal
Adds costs

EEOC to consider the Q of offers to settle earlier
(pre-complaint).

Fill in white stuff ① dismissal — current / ~~proposed~~
② final decision

for the agencies from EEOC

Standard of review - EEOC w/ changing standard

Reconsideration

~~Agencies~~

Discretionary, but one of the grounds
① clearly erroneous material fact
OR ② systemic problem beyond agency mission

Calls:
Laura
re: 3pm mtg.
Jim

Mott Foundation

Ellen Vargyas:

Mtg. w/ Sally @ 2pm

A couple of the agencies are not happy
territorial about this

OPM: defender of the fed managers
10 agencies have been very involved

Publication for notice & comment

Treasury & OPM are most upset

EEOC doesn't care what OLC thinks re: the reg.
OMB can stop it on a policy basis.

Thinks they are thinking of referring to OLC
~~out~~ of desire for delay.

No legal argument

Her position is not outcome determinative.
She doesn't like the idea of OLC making a

Substantive — DOJ is in
Procedural — real core institutional issue.

EEOC ~~of~~ ~~[illegible]~~ as independent

(Arbitrary or capricious) $\boxed{\text{review}}$

If EEOC disagrees w/ OLC decision, what is the recourse. (?) — $\boxed{\text{No answer}}$

OPM opposition has to do w/protecting Personnel

Lorraine Lewis

Edus
SSA
Transp.
} all ok

Lee Schein
COS

Postal
Commerce
Defense
VA
OMB → from Trea

Agencies can't sue EEOC
A π could challenge the regulation (?)

Huge lingering issue:

8717 Why can't agencies appeal to fed ct (?)
In MSPB process, OPM is the gatekeeper.
Can appeal to fed ~~ct~~ circuit
Advocates wouldn't want agencies to appeal.
Gate keeper (?)

Ellen doesn't want to set
precedent of OLC review of EEOC regs

OMB has to sign off on the rule
OMB gives deference to OLC decisions
b/c of "good admin. policy"
or good res. practice.

Under OMB Exec. Order
3 parameters
1. cost / benefits
2. consist w/ Pres. priorities
3. ~~[illegible]~~ Meet w/ an applicable
statute or law.

Ellen: ~~[illegible]~~ wants us

Sally wants her to know that this a
decision meeting.

OMB Gen Counsel — Thinks it should be
decided by OLC

~~If~~

Do we want to back ~~EEOC~~
on waiting to avoid
an OLC referral

Delay is the danger

Inter-Agency Meeting on EEOC Proposed Rule - 1/26/98

ISSUE #1 - What happens after an AJ Decision?

	Current Rule	Proposed Rule
Administrative Judge Decision	Agency can adopt, modify, or reject.	Final (agency can appeal to the commission)
Appeal to the Commission (OFO)	Standard of Review = de novo for the facts and the law	Standard of Review = de novo for the law, clearly erroneous for the facts
Reconsideration	Agencies can file a formal motion for reconsideration - standard of review= de novo	Commission can reconsider but there is no formal process; Commission would reconsider in order to avoid a miscarriage of justice

ISSUE #2 - Attorneys Fees

	Current Rule	Proposed Rule
	Attorneys fees or costs incurred prior to filing of formal complaint CANNOT be awarded	Attorneys fees or costs incurred prior to filing of formal complaint CAN be awarded; EEOC to issue guidance for AJs on how to calculate reasonable attorneys fees.

Julie A. Fernandes
01/26/98 10:41:46 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: OMB mtg. this afternoon re: EEOC reg

Elena,

As you know, this afternoon at 2pm Sally Katzen is having a meeting (that will include Gen Counsel or Dpty Secy from various agencies) re: proposed EEOC federal sector complaint rule. Sally wants you to know that this will be a decision meeting.

There are several outstanding issues that Sally wants to resolve this afternoon. Her strategy is to try to reach middle-ground compromises on each. The following outlines the current rule, the proposed rule and where Sally wants to try to end up.

1. What happens after an AJ decision?

a. Current
Agency can adopt, modify or reject AJ decision. Either the agency or the complainant can then appeal within the EEOC (OFO).

b. Proposed
AJ decision is final. Agency or complainant can appeal within the EEOC (OFO).

c. Middle ground?
Sally will likely advocate for a change in the standard of review for EEOC appeals. Currently, there is de novo for facts and law. The EEOC wants to change it to clearly erroneous on the facts. Sally will likely propose substantial evidence for the facts.

2. Reconsideration

a. Current
Agencies can file a formal motion for reconsideration after an adverse decision by the EEOC appeallate group.

b. Proposed
No formal process. Commission can reconsider when it believes there is a miscarriage of justice.

c. Middle ground?
Maintain the formal motion for reconsideration, but place a high standard on accepting. Commission will reconsider if they find the prior decision to have been arbitrary or capricious?

3. Pre-complaint attorneys' fees

a. Current
Attorneys fees cannot be awarded for pre-complaint work

b. Proposed

Fees would be permitted for pre-complaint work. EEOC would issue guidance to the AJs about what is reasonable and how to calculate.

c. Middle ground?

Not a lot. Push hard for agency involvement in developing guidance?

According to OMB, both OPM and Treasury have indicated that they intend to seek an OLC opinion on whether EEOC has the authority to take the agency out of the process of reviewing AJ decisions. According to Ellen Vargyas (EEOC Gen Counsel), the EEOC does not think that OLC has the authority to pass on regulations that EEOC promulgates. She has asked us (the WH) to try to intervene to stop the agencies from going to OLC.

The OMB General Counsel takes the position that since OMB has the authority to review the regs promulgated by the EEOC, these rules should not be considered exempt from OLC legal review. Under the OMB Executive Order, one of the parameters for their review is whether the rule is consistent with the applicable statute or law. Thus, the OMB GC is in favor of the OLC review (if the agencies want it) prior to OMB signing off. According to Ellen, the Commissioners may not want to press for this rule if doing so might open up the question of OLC review of their rules generally. Also, Ellen has stated that she is concerned that referral to OLC will delay the promulgation of the rule.

I would not recommend that we intervene to stop the agencies from going to OLC. Ellen's strongest argument for not doing so is rooted in her assertion that an OLC opinion is irrelevant to their authority. However, OMB seems clear on their authority (or that of the agencies) to seek OLC advise on the legality of the rule. Also, if Ellen is right on the substance (that EEOC has the authority to issue this rule) an opinion from OLC confirming that would be helpful (considering the agency opposition). However, if EEOC is without the legal authority, it would not be good for us to go forward.

If we intend on backing the EEOC on their desire to avoid an OLC referral, OMB would like to know before the 2pm meeting. Thanks.

Julie

Daniel I. Werfel
01/20/98 05:43:56 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: EEOC Update

You will soon be receiving a marked up copy of the EEOC rule. This is the latest version of the rule that EEOC has just sent us.

At quick glance it appears that EEOC has agreed to make just about every change that was recommended at the 1/16 meeting and was recommended in the OMB memo sent to EEOC on 1/16. (Note: The only major issue that EEOC did not agree to was a change in the standard of review on appeal. In the latest version of the rule the standard for issues of fact remains "clearly erroneous." However, they have added language to the preamble that indicates that this standard "does not preclude meaningful review of factual findings." (see page 28)

What we need in the short term is to know whether anyone has any remaining issues with what was decided at Friday's meeting. Please see my last email for a run down of the issues still remaining. (Remember, EEOC has now agreed to all of the changes on the table after friday's meeting except the standard of review.) Or if there are any other outstanding issues that need to be addressed. Let me know by Wednesday at 2:00 P.M.

In the slightly longer term, send me comments, if any, on how the new version of the rule incorporates those changes. Let me know by Friday C.O.B.

Thanks for everything.

Message Sent To:

Julie A. Fernandes/OPD/EOP@EOP
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