April 8, 2013

Executive Officer
Office of the Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

E-filed at strategic.plan@eeoc.gov

Re: National Employment Lawyers Association's Supplemental Comments On The EEOC's Quality Control Plan (QCP)

Dear Sir or Madam:

The National Employment Lawyers Association (NELA) expresses its appreciation for the opportunity for Daniel B. Kohrman, NELA Vice President of Public Policy, to participate in the March 20, 2013 Roundtable Discussion of the Commission's Quality Control Plan (QCP).

Pursuant to Chair Berrien's commitment to leave open the record of the March 20, 2013 meeting for the Commission to receive additional comments, NELA hereby submits the following supplemental comments and recommendations for the Commission's consideration in drafting its QCP. Our comments are based on notes taken during the March 20 meeting since a transcript is not yet available.

Panel 1: EEOC Line Staff

Commissioner Barker began the proceedings by asking about the adequacy of EEOC staff communications with charging parties and respondents regarding pending charges. Staff expressed concern that the anticipated amount of time that would be required to engage in additional communications with charging parties and respondents would detrimentally affect ongoing investigations.

NELA Comment: We appreciate the heavy workload faced by many line staff. We also acknowledge the response of one staff member who stated that some time needs to be devoted to returning calls from charging parties and respondents. NELA believes that inadequate communication with charging parties can impede and frustrate EEOC investigations, thereby compromising the quality and efficiency of the investigations. For example, failure to return calls may cause investigators to miss important factual developments. In addition, for charging parties unrepresented by private counsel, being ignored by EEOC staff is highly likely to discourage complainants with worthy cases, thereby undermining the EEOC's ability to fulfill

its mission "to pursue fair and vigorous enforcement where there is any form or level of employment discrimination covered by the laws [it] implement[s]." Thus, NELA strongly recommends that adequate communications with charging parties be a component of assessing the quality of an EEOC investigation.

Commissioner Feldblum asked about the value of exchanging information between charging parties and respondents, including access to the position statement of the latter by the former.

NELA Comment: NELA supports the sharing of verified position statements (PS) with all charging parties (CPs) as a matter of course so that CPs can meaningfully assess the strength of their cases and compose useful rebuttals. Such exchange also benefits the EEOC by providing staff with a basis for making sound judgments about the strength of the charges. NELA believes that a charge, a PS , and a rebuttal are the fundamental building blocks of a quality investigation. The only "substantive" staff objections we heard to sharing position statements with charging parties pertained to charging parties unrepresented by private counsel who are discouraged by detailed legal arguments by employer counsel and who are disconcerted by counsel's factual assertions with which they disagree. These concerns can be effectively addressed and managed by EEOC staff with appropriate training. Beyond this, staff objections centered not on substance but on EEOC staff retaining "discretion" to share or not to share information with the parties based on unspecified reasons or reasons that, in NELA's view, lack significance.

NELA fervently believes that there is no basis for a general policy of unfettered discretion to withhold the substance of an employer position statement from a charging party. The standard operating procedure should be disclosure unless compelling circumstances dictate otherwise. Unrepresented charging parties can be directed to the factual issues that are central to their complaints, and can be instructed that the best way to respond to anything they disagree with and/or have concerns about in the employer's position statement is to respond in writing with facts that clarify or contradict the employer's assertions. It is difficult to imagine any circumstance in which a represented CP should be denied immediate access to an employer position statement once it is properly screened for legitimate confidential or trade secret material.

NELA considers EEOC staff time devoted to distilling position statements for disclosure or composing new documents summarizing employer position statements to be a waste of limited agency resources, and an impediment to a quality investigation. To maximize EEOC resources, to the extent feasible, respondents and charging parties should be held responsible for serving one another with position statements and rebuttal statements .

Employer community representatives shared numerous complaints regarding the alleged shortcomings of charges in the area of identifying specific comparators, and the burdens this

imposes on employers. These complaints are illusory and ignore the fact that comparator information often is largely or wholly unavailable to charging parties since such information usually is in the possession and control of the employers themselves. Indeed, obtaining comparator information from employers is where the EEOC can leverage its investigative authority to level the playing field for charging parties.

Commissioner Lipnic posed a number of useful questions to EEOC staff. Our comments focus on staff responses related to the issue of time as a criterion for a quality investigation. Staff expressed admirable determination not to terminate investigations until the "evidence convinces you" the right result has been reached or until "the right decision" can be made. Yet such comments also reflected the fact that the EEOC does not have the resources "to do it right" with respect to every charge. Staff resisted the imposition of time guidelines for fear that an investigation would be short-changed in order to meet arbitrary deadlines.

NELA Comment: A quality investigation must necessarily acknowledge the element of time as a legitimate criterion since it directly relates to the efficient and effective use of agency resources in achieving the EEOC's mission. Without it the EEOC will be unable to address what our members identify as rampant, endemic patterns of unexplained delay in many EEOC offices between the filing and termination of charges that receive minimal investigation or none whatsoever.

In cases unlikely to receive priority treatment or further attention by the EEOC as a result of a delay in resolution, NELA recommends a limited quality investigation consisting of a charge, a verified position statement shared with the CP, a rebuttal, and a closing memorandum by the investigator. The memorandum should either (1) explain a finding of cause or no cause, or state that a cause determination cannot be reached given the information in the file; or (2) inform the CP that no further investigation will be conducted because the case does not fall within the agency's priorities to justify such efforts, and that the EEOC will issue a dismissal without a cause determination. While receiving timely notification of a no cause finding or dismissal without a cause determination may be disappointing to some charging parties, they will be no more disappointed by learning many months or even years later of the agency's decision without any meaningful investigation by the agency of their charge.

Chair Berrien closed this session by asking about case closure targets and a series of other questions. Staff indicated that case closure targets give rise to counterproductive incentives to meet the numbers rather than to adhere to standards of quality.

NELA Comment: We agree that achieving case closures for their own sake is unlikely to foster a culture of quality at the EEOC. But the agency cannot ignore closure data and allow the unwieldy backlog of charges to recur. We believe too many charges now are closed without any meaningful investigation. Insisting on a prompt limited quality investigation and timely

resolution of most cases – presumably those of low priority – should assist the EEOC in preventing a backlog and improving the quality of results in cases to which the agency does not devote significant resources. This also should leave ample opportunity to assign greater agency resources to investigations involving higher priority cases whose timelines may accordingly be longer. It is important to underscore that longer timelines should be tied to the EEOC's strategic goals and priorities (e.g., a longer investigation should correlate with high priority issues).

Panel 2: Private Counsel

During this panel, Commissioner Feldblum asked two related questions: What should be in a file to evaluate whether an investigation has been adequate, and how can technology help to assess the quality and/or implementation of the QCP?

NELA Comment: Our comments above indicate some evolution in NELA's views on these issues. On March 20, Mr. Kohrman indicated that a file used to evaluate a quality investigation must include at minimum a charge, a verified employer position statement, and a charging party's rebuttal. Mr. Kohrman expressed concern that requiring anything more, such as an investigator's assessment of the other three documents, might impose undue burdens. On reflection, however, it is clear that the EEOC's analysis of the quality of an agency investigation must include a review of an agency document analyzing the investigative file, and drawing conclusions from it as to the agency's next steps. The investigator's assessment of the file and the case would be such a document. The EEOC should establish standards for what this review must encompass, mindful of the need not to impose rigid requirements such that the process of quality control itself becomes a new hurdle to timely completion of a charge investigation. Presumably, the components of a quality investigative file review would vary according to the extent to which the case involves the EEOC's enforcement priorities.

NELA continues to encourage the EEOC to use technology to enhance the agency's ability to assure timely sharing of the parties' investigative submissions, easy access to case files and submissions by the parties and their counsel, and online tracking of case status.

Chair Berrien asked private counsel about the availability of charge forms online, and a possible initiative to dismiss some charges early in the charge process without a cause finding.

NELA Comment: As indicated above and at the March 20 meeting, NELA supports early dismissal without a cause finding for low priority charges unlikely to benefit from extensive investigative efforts. Nevertheless, many such charges now sit without action for many months and even years in agency offices. An early dismissal without a cause finding is far preferable to a long-delayed dismissal, usually without meaningful investigation, and a finding of no cause. We do not believe, however, that such an initiative justifies foregoing any investigation – such

as an employer position statement and a charging party rebuttal, both of which should be required, so that they can be used at least by the parties (if not EEOC) to help them carefully assess the case merits.

NELA also supports online availability of charge forms so that they are readily accessible to the public, and to enable individuals to complete and submit them to the agency.

Panel 3: Senior EEOC Staff

NELA Comments: NELA has great respect for the many dedicated public servants working in management for the EEOC, but we respectfully differ on some fundamental points raised at the March 20 meeting.

First, with all due respect to the experience and judgment of many senior and junior EEOC staff, quality control cannot be improved, much less markedly enhanced, if the sole agency standard is that Regional or District office managers "know it when they see it." While appropriate discretion is essential, we consider the "rule" articulated by staff to be a non-standard that is tantamount to freedom from accountability and underscores the need for a Quality Control Plan. That said, NELA is confident that the QCP need not mean – as many EEOC senior staff seemed to fear – that EEOC staff will simply have to do more, better and faster with less.

Second, in regard to the kind of information exchanged between parties, the successful experiences of some senior managers with more extensive information sharing procedures should reassure other senior managers not accustomed to such practices that they can be implemented without compromising agency efficiency. We were encouraged to hear accounts by staff of leading state FEP agencies that routinely share position statements with charging parties without difficulty. We believe the EEOC can look to the FEPs for best practices to incorporate into the QCP.

Finally, the successful sharing of critical case information with charging parties at an early stage has taken place in multiple EEOC offices. This has been accomplished without giving rise to another difficulty cited as a barrier to disclosure by several staff witnesses – demands by employers that charging parties also share more information, such as the information on their intake questionnaires. In a number of offices, this has precluded the sharing of position statements, but in other EEOC offices the answer to this request has been a simple "No." NELA believes such ad hoc resistance by any EEOC office is unacceptable and thus the EEOC should endeavor to create a QCP standard that reinforces the sharing of critical case information with charging parties.

Conclusion

A lesson to be gleaned from the March 20 meeting is that it is incumbent upon the EEOC to develop a better approach to balancing flexibility and discretion on the one hand with consistency and minimum standards on the other. The latter principles should make it easier to require greater disclosure, minimum investigative procedures, and new standards for providing excellent customer service at agency offices nationwide. By contrast, such principles should not be utilized to maintain inefficient practices such as applying the same investigative approach to all cases regardless of priority. Flexibility and discretion should be preserved so long as it enables the EEOC to focus its resources on priority cases, and to handle lower priority cases in a timely and efficient manner. Under no circumstances should the exercise of flexibility and discretion result in postponing EEOC action on lower priority cases, or permitting charging parties to languish in limbo while waiting for years for agency action without adequate disclosure. Such a result denies victims of discrimination the opportunity to vindicate their rights and agency staff the ability to maximize EEOC resources by pursuing promising, high priority cases and dismissing weak, low priority charges.

Again, thank you for the opportunity to submit these comments.

Sincerely yours,

Terisa E. Chaw
Executive Director