



April 22, 2014

VIA electronic submission to Regulations. gov¹

U.S Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Response to Solicitation of Public Comments on Revised Management Directive Improving Federal Sector Complaint Process

To Whom It May Concern:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the U.S. Equal Employment Opportunity Commission's February 24, 2014, Solicitation of Public Comments on Revised Management Directive Improving Federal Sector Complaint Process.² NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees and/or represent federal employees in employment law matters, and thus we have an interest in the modifications to MSPB's procedural regulations.

NELA appreciates the opportunity to comment on the proposals modifications to Management Directive 110 (MD-110). While there are certain proposed revisions to MD-110 that NELA supports, other changes raise concerns upon which we wish to comment.

NELA favors the inclusion of new MD-110, Ch. 1, § IV, insofar as it supports strengthening the independence of agency EEO offices from their host agencies' personnel and general counsel offices. NELA is particularly encouraged that the draft provisions of new § IV: a) that eliminate the pernicious practice of agency EEO office staff and EEO investigators deferring to agency counsel representing management in proceedings at the agency level; and b) that prohibit agency counsel representing management from being present in interviews with non-management witnesses.

¹ <http://www.regulations.gov/#!docketDetail;D=EEOC-2014-0001>.

² <http://www.eeoc.gov/eeoc/newsroom/release/2-24-14.cfm>

Just as new “Q&A 9” (discussing agency counsel accompanying managers in investigative interviews) has its counterpart in “Q&A 10” (prohibiting agency counsel accompanying non-manager witnesses in investigative interviews), we suggest that new “Q&A 12” (discussing agency counsel reviewing managers’ affidavits) should also have a new counterpart “Q&A” which prohibits agency counsel representing management from requiring non-manager witnesses to submit their affidavits for review by agency counsel. NELA members have observed that agency counsel representing management will impose this requirement on non-management witnesses, which puts pressure on those witnesses (through fear of reprisal) to corroborate management and to not be forthcoming about disclosing evidence of discrimination that may result in agency liability.

NELA further believes that new “Q&As” 8, 9 and 12 need to go further to reduce the improper involvement of agency counsel coaching management witnesses at the investigative stage. The Commission should modify new § IV to bar any agency attorney from representing the agency as an entity in proceedings before the EEOC (either in front of an Administrative Judge or at the Office of Federal Operations) if that attorney represented any agency managers in the investigative phase of the same case (e.g. in reviewing the manager’s affidavit or attending that manager’s witness interview). That way, the same agency counsel would not be representing the agency claim at the investigation while then later defending the agency at the hearing stage.³

Finally, NELA supports the Commission’s expansion of MD-110, Ch. 11 to provide more detailed guidance (with citations) to the various forms of remedies that Commission administrative judges can award as part of ‘make-whole relief.’

Again, NELA appreciates the opportunity to respond to the Solicitation of Public Comments, and wishes to thank the Commission for its attention and consideration.

Respectfully submitted,



Terisa E. Chaw
Executive Director

³ This is not, admittedly, a perfect solution. Ideally, agency counsel representing management should be barred from representing individual managers at the agency’s expense until after the completion of the investigation (although the managers could always hire their own counsel to represent themselves, at their own expense). The investigation is how the agency as an entity determines its interests in the case, and so the determination of whether “the agency’s and manager’s interests coincide” described in “Q&A 9” should fundamentally only occur after the investigation is complete.