Equal Employment Rights for Federal Employees

August 1993

A Report of the United States Commission on Civil Rights

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The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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Introduction

For years, Federal employees,[1] their unions, and advocacy groups have charged that Federal employees do not enjoy the same rights as private sector employees when seeking redress for the alleged discriminatory actions of their employer.[2] The problems, they assert, are serious flaws in the Federal equal employment opportunity system (EEO), which was established to enforce fair employment laws in the Federal sector. This assessment is buttressed by the findings of independent examinations by the House Government Operations Committee,[3] the U.S. Supreme Court (*Chandler v. Roudebush),*[4] and the U.S. Equal Employment Opportunity Commission (EEOC).

Mounting criticism and evidence of the deficiencies in the Federal EEO system have prompted efforts in recent years to correct the situation. However, there is more agreement on the nature of these deficiencies than on how to correct them. EEOC sought to revise the system administratively and on October 1, 1992, after several years of development, implemented new regulations at 29 C.F.R. § 1614 (hereinafter Part 1614).[5] Representatives of Federal employees, civil rights organizations, and professional associations argue that the new regulations fail to address adequately many problems,[6] and support a legislative solution. In response, nearly identical bills were introduced in both houses in the 102d Congress to revamp the Federal EEO system, without success. Similar bills have been reintroduced in the 103rd Congress and are currently under consideration.

This paper compares EEOC's new Part 1614 regulations and the legislation currently being considered by Congress to determine which approach is most likely to provide Federal employees a fair and equitable means of resolving their discrimination complaints. Drawing on the testimony and comments of experts, research reports, and statistical information on the Federal EEO system, the paper highlights the problems in the old (i.e., pre-October 1992) Federal EEO system and evaluates the key features of the new Part 1614 regulations and

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[1]The term "Federal employees" used herein includes applicants for Federal employment.

[2]*Overhauling the Federal EEO Complaint Processing System: A New Look at a Persistent Problem,* H.R. Rep. No. 456, 1987: Hearing Before the House Committee on Post Office and Civil Service and the Subcommittee on Employment Opportunities, 100th Cong., 1st Sess.(1987), (hereinafter cited as *Overhauling the Federal Complaint Processing System).* This report combines findings and recommendations from four hearings, the first of which was held Oct. 8, 1985.

[3]Ibid.

[4]425 U.S. 840, 843–64 (1976) (addressing the issue of whether Federal employees have the same right to a trial *de novo* as is enjoyed by private sector or State government employees under the Civil Rights Act of 1964, as amended).

[5]Equal Employment Opportunity Commission, Federal Sector Equal Employment Opportunity; Final Rule, 57 Fed. Reg. 12634 (Apr. 10, 1992), (to be codified at 29 C.F.R. pt. 1614), (hereinafter Part 1614). The proposal to adopt Part 1614 constituted EEOC's response to criticism from commentaries.

[6]Comments regarding the EEOC Part 1614 proposal to restructure the Federal sector administrative complaint process, submitted by Claudia Withers, director for employment programs, and Joseph Sellers, director of EEO programs, Washington Lawyers' Comm. for Civil Rights Under Law, on behalf of a coalition of 18 organizations (American Federation of State, County, and Municipal Employees; American Association of Retired Persons; American Federation of Government Employees, AFL–CIO; Equal Rights Advocates; Federally Employed Women; Federally Employed Women Legal and Education Fund; Kalijarvi, Chuzi & Stetina; Lawyers' Committee for Civil Rights Under Law; Mexican American Legal Defense and Education Fund; Mental Health Law Project; National Federation of Federal Employees; NAACP Legal Defense and Education Fund; National Women's Law Center; NOW Legal Defense and Education Fund; Washington Council of Lawyers; Washington Lawyers' Committee for Civil Rights Under Law; Women Employed; Women's Legal Defense Fund), (Jan. 2, 1989), (hereinafter cited as Coalition comments).

proposed legislation. The report concludes with staff recommendations for reforming the Federal EEO system.

The Problem

Because EEOC is responsible for establishing and overseeing the operation of the Federal EEO system, it is particularly compelling that the past three Chairs of EEOC have publicly testified on problems in the system. Covering 15 years of cumulative experience, their testimony presents a remarkably uniform assessment of the system as it existed prior to October 1, 1992. In March 1990, the then-chairman of EEOC, Evan Kemp,[7] stated:

> The criticisms heard most often are[:] [a] the system is too complex—there are too many steps and pitfalls for the unwary; [b] there is a perceived conflict of interest in having the accused agency control the development of the record . . . ; [c] there are long delays to get to a final decision, and [d] there is a lack of sanctions against agencies for inadequate investigations and inexcusable delays. . . . These problems disadvantage, most particularly, the Federal worker.[8]

Kemp's predecessor at EEOC, Supreme Court Justice Clarence Thomas, expressed similar views in testimony before Congress, stating, "federal employees with discrimination complaints are hampered by an apparatus that is overly complex, cumbersome and, at the very least, lacks the appearance of objectivity."[9]

Finally, Eleanor Holmes Norton, now Delegate to Congress for the District of Columbia, during whose tenure at EEOC (1977-81) the last major revisions to the Federal EEO system were made in 1979, testified:

> The inherent conflicts of interest, the time delays, the complexity of the machinery, and the lack of sanctions [against employers] have produced a situation in which government workers are not afforded the rights that are available to workers in the private sector. The irony is that Federal employees are second-class citizens in a complaint system that is supposed to eliminate second-class status.[10]

For any law to be effective, just remedies must be awarded and sanctions must be imposed when violations occur. The system must not only be fair, but appear to be fair. This often is not the case in the Federal complaint process. Although there are a number of causes for this failure, inherent conflict of interest in the system is the most critical one. Simply put, Federal agencies investigate, decide, and impose sanctions for violations in discrimination cases in

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[7]Kemp was originally appointed to serve as a Commissioner at EEOC in 1987, and was later appointed to serve as Chairman by President George Bush. He resigned his appointment effective Apr. 2, 1993.

[8]*Equal Employment Opportunity Commission's Proposed Reform of Federal Regulations. Joint Oversight Hearing*, p. 3, 1990: Before the House Subcommittee on Employment Opportunities of the Committee on Education and Labor and the Subcommittee on Civil Service of the Committee on Post Office and Civil Service, 101st Cong., 2d Sess. (Mar. 1, 1990), (hereinafter cited as *Oversight Hearing*, Mar. 1, 1990). See appendix B—Complaint Flow Charts under the new and old regulations.

[9]*Processing of EEO Complaints in the Federal Sector: Problems and Solutions*, p. 44, 1987: Hearing Before the House Subcommittee on Employment and Housing of the Committee on Government Operations, 100th Cong., 1st Sess. (June 25, 1987), (hereinafter cited as *Hearing*, June 25, 1987).

[10]*The Federal Sector Equal Employment Opportunity Complaint Process*, p. 46, 1990: Hearing Before the House Subcommittee on Civil Service of the Committee on Education and Labor and the Subcommittee on Employment Opportunities of the Committee on Post Office and Civil Service, 101st Cong., 2nd Sess. (Aug. 1, 1990), (hereinafter cited as *Hearing*, Aug. 1, 1990).

which their own employees are charging the agency with violating their rights.[11] EEOC administrative judges review Federal employee discrimination cases on appeal, but the appellate process is flawed because agencies are not required to act upon the judges' findings.[12]

The conflict of interest in the system has been recognized for some time. For example, in 1987 the House Committee on Governmental Operations[13] concluded:

> The system of agency self-investigation and decisionmaking is so obviously contrary to normal methods of handling adversary charges that it has been criticized repeatedly by Congress, GAO, civil rights advocates, attorneys, and above all, by complainants who are victimized by it.[14]

Joseph M. Sellers, director of Equal Employment Opportunity Programs for the Washington Lawyers' Committee for Civil Rights Under Law, testified that:

> The conflicts that we've heard so much about will persist as long as the agencies retain significant investigatory or adjudicatory responsibilities . . . . Nor will elimination of the conflicts be easily achieved through the regulatory process as long as Title VII expressly entrusts to the agencies the authority to make final decisions.[15]

Commenting on the biases created by this conflict of interest, in 1987 the Washington Council of Lawyers observed:

> By entrusting the agencies against whom the EEO claims are filed the responsibility for processing and adjudicating these claims, conflicts of interest occur. Indeed, the EEOC reports that, during a recent five-year period, agencies rejected an average of 45.6% of the findings of discrimination recommended by Hearing Examiners at the EEOC while accepting an average of 92.3% of the recommended findings of no discrimination.[16]

Comparable statistics revealed an even greater disparity in 1990, when agencies accepted only 31.6 percent of EEOC's findings of discrimination (rejecting 68.4 percent), while accepting 93.7 percent of the findings of *no* discrimination.[17] Although the disparity in agency acceptance rates alone is not proof of agency bias, it lends credence to the charge that some agencies tend to respond in a partial manner to allegations of discrimination from their employees.

Conflict of interest can also undermine an agency's incentive to process complaints expeditiously. This was especially true under the old Federal EEO system, because EEOC

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[11]There is no mention of sanctions being imposed by Federal agencies or by EEOC in either the earlier § 1613 or the current § 1614 regulations governing the Federal sector EEO process.

[12]29 C.F.R. § 1614.109(g). Under both the EEOC's old and new regulations, the respondent agency has the right to accept or reject the decision of the EEO administrative judge. See the agency rejection rate of EEOC's findings of discrimination shown in EEOC's *Report on Pre-Complaint Counseling and Complaint Processing, EEOC*, 1990, table V, appendix, p. A–24 (see totals).

[13]*Overhauling the Federal Complaint Processing System*, p. 6.

[14]Ibid.

[15]*Oversight Hearing*, Mar. 1, 1990, p. 61. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin, 42 U.S.C.A. 2000e-2.

[16]*Hearing*, June 25, 1987, p. 33.

[17]*Report on Pre-Complaint Counseling and Complaint Processing, EEOC*, 1990, table V, appendix, p. A–24 (total).

regulations[18] did not specify time limits for completing certain critical stages in the process. Moreover, considering the "lengthy, complex nature of the process, the multiple persons responsible for handling the claims, [in addition to] the lack of incentives at agencies to process claims more quickly,"[19] it is not surprising that Federal agencies took an extraordinarily long time to resolve their employees' discrimination complaints under the old system. For example, the president of the National Treasury Employees Union reported an "average of 607 days for agencies to process EEO complaints."[20] The U. S. Department of Justice takes an average of 1,000 days to process a complaint, according to EEOC.[21] In contrast, EEOC closes private sector complaints in less than 300 days, on average.[22]

As of June 1993, the new Federal sector processing standards established by EEOC's Part 1614 regulations have been in place for less than a year. It remains to be seen whether complaint processing times can be substantially shortened under the new system.

Besides the procedural deficiencies in the system, Federal employees are allowed less time to file discrimination complaints than private sector employees. Title VII of the Civil Rights Act of 1964 gives private sector employees 180 days from the occurrence of an alleged discriminatory act in which to file a complaint with EEOC.[23] However, because the law specifies no time limit for Federal employees,[24] EEOC may set it administratively.[25] Under Part 1613 the limit was 30 days; in Part 1614, EEOC raised it to 45 days.[26]

Many groups have expressed concern that the more restrictive time limit for Federal employees unfairly denies some individuals the right to file legitimate complaints.[27] As Congressman Matthew Martinez observed during hearings conducted on this issue in March 1990, "We don't know how many people never file; . . . they never filed simply because somebody told them, 'your right to file has gone by.'"[28]

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[18]29 C.F.R. § 1613.

[19]*Oversight Hearing*, Mar. 1, 1990, p. 68. (testimony of Joseph M. Sellers and Stephen L. Spitz, Washington Lawyers' Committee for Civil Rights Under Law. Their testimony was joined by the following organizations: American Federation of Government Employees, AFL-CIO; Equal Rights Advocates; Federally Employed Women; Federally Employed Women Legal and Education Fund; Mental Health Law Project; NAACP Legal Defense and Education Fund, Inc.; National Women's Law Center; NOW Legal Defense and Education Fund, and; Women's Legal Defense Fund.)

[20]*Daily Labor Report*, Apr. 4, 1992, p. A-6 (No. 70).

[21]*Oversight Hearing*, Mar. 1, 1990, p. 32.

[22]EEOC closed private sector cases in an average of 284 days in FY 1990 and 295 days in FY 1989. (*Office of Program Operations ANNUAL REPORT FISCAL YEAR 1990, EEOC*). Private cases were closed in 155 days in FY 1982. (*18th Annual Report 1983, EEOC*, April 1984, p. 9).

[23]Title VII of the Civil Rights Act of 1964, as amended § 706, 42 U.S.C. § 2000e-4(e)(1988).

[24]42 U.S.C. 2000e-16 (West 1988).

[25]*Oversight Hearing*, Mar. 1, 1990, p. 29 (statement of Evan Kemp, Chairman, EEOC, demonstrates the flexibility EEOC has in setting a time limit on when a Federal employee may file a complaint of discrimination).

[26]29 C.F.R. § 1614.105(a)(1). Part 1614 became effective Oct. 1, 1992, and superseded 29 C.F.R. § 1613.

[27]*Oversight Hearing*, Mar. 1, 1990, p. v.

[28]*Id.* at 3.

EEOC's Part 1614 Regulations

EEOC's efforts to restructure the Federal sector complaints process were underway by 1985 and culminated on October 1, 1992, with the implementation of the new Part 1614 regulations.[29] In proposing Part 1614, EEOC stated that "the impetus for certification, or any oversight process is the delay that is common in processing charges under Part 1613, and that delay by the agency, at least in part, creates the appearance of unfairness in the process."[30] Although the new regulations made a number of significant changes to the way EEOC and Federal agencies process complaints and appeals of agency decisions,[31] they did not change the basic principles and procedures governing the process.

Although EEOC oversees the affirmative employment activities and the processing of Federal sector employment discrimination complaints by executive branch agencies,[32] under Part 1614, as under Part 1613, EEOC's direct involvement in the process continues to be limited to conducting hearings and adjudicating appeals of agency decisions.[33] All other functions are delegated to the Federal agencies. Agencies investigate and decide the merits of charges of discrimination brought by their employees and job applicants, and when violations are found, decide what sanctions will be imposed.[34]

Basic steps in processing a complaint. The "precomplaint process," is set in motion when an employee or job applicant suspects unlawful discrimination and notifies the agency of his or her wish to seek relief. Part 1614 requires the individual to contact an agency counselor within 45 days of the occurrence of an alleged discriminatory action[35] Although the agency may extend this limit,[36] it falls far short of the 180 days allowed private sector and non-Federal Government employees.

Before beginning a formal investigation or even accepting an official complaint, the agency must take informal steps to resolve an employee's allegation.[37] During this stage, the agency

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[29]*Oversight Hearing*, Mar. 1, 1990, (testimony of Evan Kemp, Chairman, EEOC). EEOC spent at least 4 years developing the regulations. Regulations were first developed internally at EEOC in 1985, but were not published, according to Nicholas M. Inzeo, Associate Legal Counsel for Legal Services, EEOC telephone communication, Dec. 22, 1992.

[30]*Part 1614.*

[31]The old complaint process (29 C.F.R. pt. 1613) was created by the Civil Service Commission in 1972 and transferred to EEOC in 1979.

[32]In 1979 the Federal sector program was transferred from the Civil Service Commission, now the Office of Personnel Management (OPM), to EEOC pursuant to Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), Executive Order No. 12144, 44 Fed. Reg. 37193 (1979), and Executive Order No. 12106, 44 Fed. Reg. 1053 (1979).

[33]Complaints may allege discrimination because of race, color, sex, religion, national origin, age, disability, or equal pay, or reprisal for filing a charge pursuant to the following statutes, as amended: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b)(1988); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(b)(1988); Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1)(1988); Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*. Title I of the Americans with Disabilities Act, (Public Law 101-336) 42 U.S.C. § 12101 *et. seq.* (1990) does not apply to Federal employment. Title V, Section 501 of the Rehabilitation Act, 29 U.S.C.794a(a)(1), which has been in effect in the Federal service since 1978, is the applicable statute for disabled Federal applicants and employees. See 57 Fed. Reg. 12634 [Supplement Information] (Apr. 10, 1992).

[34]29 C.F.R. § 1614.108(a).

[35]29 C.F.R. § 1614.105(a)(1).

[36]29 C.F.R. § 1614.105(a)(2).

[37]*Id.* § 1614.105(a).

counsels the complainant about his or her administrative rights and responsibilities, conducts an informal inquiry, and attempts to resolve the complaint. Only if these efforts fail to resolve the complaint may the individual file a formal complaint against the agency.[38]

The agency may dismiss a complaint or portion of a complaint under certain conditions.[39] If the complaint is dismissed, the complainant's only remaining administrative option is to appeal to EEOC.[40] Although several of the conditions for dismissal are quite specific, such as failing to meet established time limits,[41] other conditions allow the agency considerable latitude. For example, a complaint will be dismissed if an offer of settlement by the agency, which has been certified by the agency EEO officer or legal officer (or designates) as providing "full relief," is not accepted by the complainant within 30 days of receipt.[42] Although guidelines for formulating "full relief" offers are provided in Part 1614,[43] these guidelines are very general. Holding the threat of dismissing the complaint, and absent a formal investigation, the agency possesses great potential leverage in responding to complaints.

If the complaint is accepted, the agency conducts a formal investigation. The process can take one of three possible courses, each of which leads to the issuance of a final agency decision in the case. Upon completion of the investigation, the complainant receives a copy of the investigative file[44] and then has 30 days to request either an immediate final agency decision, or a hearing before an EEOC administrative judge prior to the final agency decision.[45] If the 30-day limit expires without the complainant indicating a choice, the agency proceeds to prepare its final decision. In each case, the regulations require that the agency issue its final decision within 60 days of completion of the option selected.[46]

In attempting to streamline the formal complaint process, the new regulations eliminated one significant step that had created a bottleneck under Part 1613, the agency's proposed disposition.[47] Under Part 1613, a proposed disposition was given to the complainant before the agency issued its final decision in the case. The complainant could then either accept these terms, or reject them and request a hearing before an EEOC administrative judge. Part 1613 set no time limits for the employing agency to issue a proposed disposition or for the EEOC administrative judge to issue a decision on an appeal.

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[38] *Id.* § 1614.105(d).

[39] *Id.* § 1614.107.

[40] When an agency dismisses all or part of a complaint, the complainant may immediately appeal the agency's dismissal to EEOC. EEOC will utilize an expedited appeals process to ensure that complaint processing is not unduly delayed by an improper dismissal. *Id.* § 1614.108(e).

[41] 29 C.F.R. § 1614.107(b). Even here, the agency has discretion, e.g., in deciding whether to extend the 45-day filing limit.

[42] 29 C.F.R. § 1614.107(h).

[43] 29 C.F.R. § 1614.501.

[44] *Id.* § 1614.108(f).

[45] *Id.*

[46] *Id.* § 1614.110. The administrative judge's decision must be issued within 180 days of receipt of the complainant's request.

[47] *Id.* § 1613.217(c)(1)(2). In a proposed disposition the agency notifies the complainant in writing that his or her complaint could not be resolved, summarizes the findings and conclusions of the agency's investigation, and informs the complainant of his or her appeal rights. 29 C.F.R. § 1613.222(a)(7).

Hearings. Both the new and old systems require an administrative judge to issue findings of fact and conclusions of law on the merits of the complaint, and where a finding of discrimination is made, to order an appropriate remedy.[48] However, Part 1614 introduces several new provisions regarding administrative judge proceedings and decisions, as well as the right to appeal administrative judge decisions. Parties may now use discovery prior to an EEOC administrative hearing,[49] providing greater assurance that the record before the judge is complete and accurate. After the judge issues a ruling, the agency has 60 days to issue a final decision modifying or rejecting the judge's findings and conclusions.[50] Otherwise, the judge's ruling becomes the final decision. A complainant who is not satisfied with the agency's final decision may appeal to EEOC for appellate review,[51] and either party may seek reconsideration of EEOC's decision from such an appeal.[52] At no point in the appellate process, however, does an administrative judge's decisions bind the agency.[53]

Sanctions for failure to produce information and witnesses during administrative proceedings. Both the new and old systems allow EEOC administrative judges to impose sanctions on parties who fail to produce information (e.g., documents, records, data) or witnesses when requested during investigations or hearings. As stated in EEOC's management directives for Part 1614, "These sanctions include: (1) draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information; (2) consider the matters to which the requested information pertains to be established in favor of the opposing party; (3) exclude other evidence offered by the party failing to produce the requested information; (4) enter a decision fully or partially in favor of the opposing party; and (5) take such other actions as appropriate."[54]

Time limits for processing complaints. The most important change in Part 1614 is the setting of time limits for completing various stages in the complaint process (see attached table). Enforcing these time limits would help to prevent excessive delays in processing complaints. For example, under Part 1613, no time limits were set for the agency: 1) to decide whether to accept, reject, or cancel the formal complaint, 2) to complete the formal investigation, or 3) to issue the proposed disposition,[55] or 4) for EEOC to issue administrative judge decisions.[56] Thus, when unnecessary or excessive delays occurred under the old system, the complainant's only recourse was to file a civil action in Federal district court.

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[48]Compare 29 C.F.R. § 1613.218(i)(3) with 29 C.F.R. § 1614.109(g).

[49]29 C.F.R. § 1614.109(b). The purpose of discovery is to enable a party to obtain relevant information for preparation of the party's case.

[50]*Id.* § 1614.109(g).

[51]*Id.* § 1614.410(a).

[52]*Id.* § 1614.405(b)(1). Ultimately, a complainant may file an action in Federal district court. Subject to differing time constraints, an action may be filed at various stages in the process, after a formal complaint has been filed.

[53]Compare 29 C.F.R. § 1613.221(b)(2)(1992) with 29 C.F.R. § 1614.109(g).

[54]*Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614* (EEO MD 110), Oct. 1992, p. 6–7. *See also* 29 C.F.R. §§ 1614.108(c)(3) & 1614.109(c)(3).

[55]29 C.F.R. §§ 1613.215(a), 1613.216(a) & § 1613.217(c)(1)(1992). Part 1614 replaces "rejection or cancellation" of a complaint with "dismissal," 29 C.F.R. § 1614.107.

[56]*Id.* § 1613.218(i)(3).

Although agencies still do not have an explicit time limit for accepting or dismissing complaints, Part 1614 does require them to complete investigations within 180 days of the complaint filing date.[57] Furthermore, if the agency fails to meet the 180-day limit, the complainant may request a hearing before an EEOC administrative judge[58] or file a lawsuit in Federal district court.[59] Nevertheless, it is still possible for complaints to be dismissed after long and unnecessary delays.

As noted above, Part 1614 eliminated the proposed disposition and its attendant delays. Finally, Part 1614 now requires the EEOC administrative judge to issue findings and conclusions within 180 days of being assigned the case.[60]

Alternative Dispute Resolution Techniques. To promote early and efficient resolution of complaints, Part 1614 encourages the use of alternative dispute resolution (ADR) techniques during an agency's precomplaint counseling and investigation.[61] ADR techniques, codified in the Administrative Dispute Resolution Act,[62] "are informal, consensual procedures which can be used by parties in a dispute to obtain a resolution in lieu of formal litigation. These procedures include settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials and arbitration or any combination of these."[63]

Although ADR is voluntary, EEOC provides an incentive for agencies to use ADR during the precomplaint counseling stage by extending the normal limit for counseling from 30 days to 90 days if ADR is made available by the agency and chosen by the employee or applicant.[64]

Other changes. Other significant changes made by Part 1614 include:

- The provision of a statute of limitations for filing suit and the requirement that administrative remedies be exhausted, as stipulated in Title VII, for Age Discrimination in Employment Act (ADEA) complaints.[65]
- A requirement that employees with disabilities be reassigned as a part of the employing agency's affirmative action obligation.[66]

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[57]A full investigation must be completed within 180 days, unless both the agency and the complainant agree to extend that time up to an additional 90 days, 29 C.F.R. § 1614.108(e).

[58]*Id.* § 1614.108(f).

[59]*Id.* § 1614.408(d).

[60]*Id.* § 1614.109(g).

[61]*Id.* §§ 1614.105(f) & 1614.108(b).

[62]5 U.S.C.A. §§ 71-583 (West Supp. 1993).

[63]*Administrative Dispute Resolution Act*, S. Rep. No. 543, p. 8, Senate Committee on Governmental Affairs, 101st Cong., 2d Sess. (1990).

[64]29 C.F.R. § 1614.105(f).

[65]29 C.F.R. § 1614.201. "The [EEOC] proposed to address the absence of an explicit statute of limitations period in section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a(1988), which creates a right of action against federal agencies for violations of the ADEA. The proposed regulation addressed the situations when the complainant filed an administrative complaint and a notice of intent to sue. The absence of an express limitations period in a statute does not mean that there is no time limitation for filing suits under that statute. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 158 (1983). When a statute is silent, courts borrow a limitations period from a closely analogous statute. Johnson v. Railway Express Agency, 421 U.S. 454, 466 (1975)." See Federal Sector Equal Employment Opportunity, Final Rule, 57 Fed. Reg. 12634, 12639 (Apr. 10, 1992).

[66]29 C.F.R. § 1614.203(g).

• The inclusion of Equal Pay Act complaints within the Federal sector complaint process.[67]
• The elimination of the "opting-out" provision for class members in a class action complaint.[68]
• A clarification of the election of remedies and provisions between the negotiated grievance process and the Federal EEO process.[69]

Public Debate on Part 1614

Despite introducing a number of significant changes, the new Part 1614 regulations did not change the basic principles and procedures governing the Federal EEO system. Consequently, the proposed regulations encountered considerable criticism from the outset. During the course of hearings on the proposed regulations,[70] a number of advocacy and employee groups testified that Part 1614 failed to establish a fair and equitable system for Federal employees.[71] These groups argued that the new regulations did not adequately resolve problems of conflict of interest, ensure timely processing of complaints, or extend the same rights afforded private sector employees.[72] In January 1989, in response to the perceived shortcomings of the proposed Part 1614 regulations, a coalition of 18 organizations issued a joint statement stating, "while we applaud the Commission's interest in revising the regulations governing the federal EEO administrative process, we regret that the current proposal is likely to be so ineffective as not to have been worth the wait."[73]

EEOC Chairman Evan Kemp defended the proposed regulations, stating, "The proposed regulations are intended to provide quicker, more efficient complaint processing and to promote administrative fairness for employees of the Federal Government who believe they

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[67]*Id.* § 1614.202.

[68]Compare 29 C.F.R. § 1613.605(b)(1992) with 29 C.F.R. § 1614.204(e)(2)(iii). "'One important aspect of Part 1614 with regard to class complaints is that it eliminates the opting-out provisions contained in Part 1613 that preserved the individual's right to file his or her complaint or lawsuit. All class members will still receive notice that the class complaint has been filed and notice of any settlement or decision on the class complaint. Potential class members who do not wish to participate in the class complaint need not do so; all individuals in the class, though, will be bound by a final decision or the terms of the resolution of the complaint if it is resolved." *See* Federal Sector Equal Employment Opportunity, Final Rule, 57 Fed. Reg. No. 12638, 12639 (Apr. 10, 1992).

[69]U.S. Equal Employment Opportunity Commission, Office of Federal Operations, "Grievances and Mixed Cases," *The Digest of Equal Opportunity Law*, vol. V, no. 8, July 1992, p. 17. Compare 29 C.F.R. § 1613.219 with 29 C.F.R. § 1614.301.

[70]*Casualties of the Federal Equal Employment Opportunity Complaint Process*, 1991: Hearing Before House, Subcommittee on the Civil Service of the Committee on Post Office and Civil Services and the Subcommittee on Employment Opportunities of the Committee on Education and Labor, 102d Cong., 1st Sess. (Nov. 20, 1991), (hereinafter cited as *Hearing*, Nov. 20, 1991). *Joint Legislative Hearing on H.R. 3613: The Federal Employees Fairness Act of 1991*. 1992: Hearing Before House Subcommittee on Civil Service of the Committee on Post Office and Civil Service and the Subcommittee on Employment Opportunities of the Committee on Education and Labor 102d Cong., 2d Sess. (Apr. 9, 1992) (hereinafter cited as *Hearing*, Apr. 9, 1992). These hearings were held by both houses of the 101st and 102d Congresses. In addition to the oversight hearing on Mar. 1, 1990, additional hearings took place on Aug. 1, 1990, Nov. 20, 1991, and Apr. 1992.

[71]Ibid.

[72]Ibid.

[73]Coalition comments.

have suffered prohibited discrimination."[74] R. Gaull Silberman, former EEOC Vice Chair, added that the proposed Part 1614 regulations were developed in consultation with a committee representing Federal agencies, called the Federal Dispute Resolution Conference. The conference consisted of people involved in EEO matters in the Federal Government who meet to discuss problems of mutual concern.[75]

EEOC received comments on Part 1614 from 56 parties.[76] EEOC reported that of these 56, only 11 responses expressed the view that the proposed rules were not an improvement over the present system.

> Seven . . . commenters supported EEOC's efforts to remedy the deficiencies of the current system, but believed the regulations do not adequately meet EEOC's objectives. Therefore, the seven commenters support the proposal with significant reservations, or only on condition that certain changes be made. Three commenters indicated that they did not believe that proposed part 1614 would be an improvement over the current system. One of those three was an agency, one was a management interest group and one was an individual. Finally, only one commenter, an agency, stated that it opposed the proposed regulation, citing its belief that the proposal contained no significant improvements.[77]

This analysis does not accurately reflect the extent of the concern about the proposed rule. As stated earlier, one response was submitted by a coalition of 18 organizations, and concluded that, "The section 1614 proposal is not satisfactory and cannot be supported by the undersigned organizations unless the changes that we suggest are made."[78]

Some critical comments were also received from Federal agencies. Contrary to EEOC's report that only one agency concluded that the proposed rule would result in no improvement, four Federal agencies submitted very critical comments: the Department of Veterans Affairs (DVA); the Environmental Protection Agency (EPA); the Department of Justice (DOJ); and the Tennessee Valley Authority (TVA).

The DVA stated, "We believe the proposed changes will produce no significant improvements and will probably result in many of the same criticisms which plague the existing complaint procedure."[79] EPA asserted that "the proposed modification
. . . will actually detract from, not improve, the process by which EEO complaints are processed by the Federal government."[80] DOJ stated, "While we agree that the current system has definite weaknesses, we are uncertain that the proposed modifications would significantly remedy these weaknesses and fear that it may harm certain benefits of the existing system."[81] TVA commented, "We believe that the proposed new regulations . . . will not

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[74]*Oversight Hearing*, Mar. 1, 1990, p. 4.

[75]Ibid., p. 27.

[76]Ibid., p. 14. An actual count of the comments received differs somewhat with EEOC's numbers. Records show that 57 comments were received, rather than 56 (see appendix for listing).

[77]Ibid.

[78]The Coalition comments were submitted by the Women's Legal Defense Fund, Jan. 2, 1989.

[79]Comments submitted by Raoul L. Carroll, General Counsel, Department of Veterans Affairs, Dec. 27, 1989.

[80]Comments submitted by Nathaniel Scurry, Director, Office for Civil Rights, Jan. 5, 1990.

[81]Comments submitted by Ted McBurrows, Director, Equal Employment Opportunity Staff, Justice Management Division, U.S. Department of Justice, undated.

accomplish the stated goals of fair and expeditious processing of complaints."[82] Although their criticisms varied, these agencies were unanimous in their skepticism of the new rule.

Of approximately 105 departments and independent Federal agencies,[83] only 30 commented on the proposed rule.[84] Only five agencies thought the rules were an improvement: the Department of Defense (nine components responded); the Department of the Treasury and its Comptroller of the Currency; the Department of Education; the Office of Personnel Management; and the Department of Commerce. Of the 18 organizational and individual comments on the proposed rule, only the Federal Bar Association expressed support for the proposed 1614 regulations.

Summary of Congressional Proposals

The weight of opposition to the proposed Part 1614 regulations prompted efforts by the 102d Congress to reform the Federal complaints system through legislation.[85] Nearly identical bills, H.R. 3613[86] and S. 2801,[87] were introduced in 1991 and 1992 amending Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA).[88] Neither bill reached a full house vote. H.R. 3613 died in committee, and although S. 2801 was reported out of the Government Operations Committee on the last day of the 102d Congress, it never came up for a floor vote. Nevertheless, the bills were strongly supported by a number of organizations. Five employee unions and at least 19 other organizations,[89] representing diverse perspectives, spoke in favor of the bills, including Blacks in Government (BIG); Federally Employed Women (FEW); Mexican American Legal Defense and Education Fund; and the Washington Lawyers' Committee for Civil Rights Under Law.

New legislation similar to H.R. 3613 and S. 2801 is now being considered in the 103rd Congress. H.R. 1111 appears to be identical to its predecessor, while S. 404 contains two

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[82]Comments submitted by Frank D. Robinson, Manager of Equal Opportunity, Tennessee Valley Authority (TVA), Dec. 22, 1989.

[83]National Archives and Records Administration, Office of the Federal Register, *The United States Government Manual* (1992/93), p. v–vii (hereinafter cited as *Government Manual*).

[84]Two cabinet-level Federal agencies did not submit comments: the Department of the Interior and the Department of Housing and Urban Development.

[85]According to a letter from 10 Representatives to EEOC dated Sept. 19, 1988, two earlier bills were introduced in 1988. These bills, H.R. 5112 and H.R. 3330, also proposed amendments to Section 717 of the Civil Rights Act of 1964, as amended in 1972.

[86]H.R. 3613, 102d Congress, 1st Sess. (1991).

[87]S. 2801, 102d Congress, 2d Sess. (1992).

[88]The first bill, H.R. 3613 (entitled *The Federal Employee Fairness Act*), was introduced on Oct. 22, 1991. It was approved by the House Post Office and Civil Service Committee, July 1, 1992, (*Washington Post*, July 2, 1992, p. A–19, also reported in the *Daily Labor Report*, July 2, 1992, (No. 128) p. A–7.) and sent to the House Education and Labor Subcommittee on Employment Opportunities for markup. Jerry Grigsby, legislative analyst, Employment Opportunities Subcommittee, (telephone interview: H.R. 3613 was held by the Committee and not voted on because money was not available for appropriation to assist EEOC in handling more workload, Oct. 29, 1992.) A companion bill, S. 2801, was introduced in the Senate on June 4, 1992, by Senator John Glenn. Robert Harris, Deputy Staff Director, Senate Committee on Governmental Affairs, telephone interview, June 5, 1992.)

[89]Coalition comments and *Hearing*, Apr. 9, 1992.

significant provisions which do not appear in the earlier bills or H.R. 1111. These new provisions are discussed below.[90]

In contrast to Part 1614, which required only procedural changes, the new bills would establish new governing principles and entirely revamp the Federal complaint system. They would streamline the complaints process and strengthen EEOC's ability to oversee the Federal sector EEO program. More important, they address inherent conflicts of interest in the existing system by curtailing or eliminating the responsibilities of employing agencies for investigating and adjudicating complaints. In addition, the bills create an administrative process for imposing sanctions on Federal officials who violate EEO laws and provides for imposing sanctions on agencies that violate certain complaint processing requirements.

The discussion that follows focuses on S. 404. Where its provisions are identical to H.R. 3613 and S. 2801, public comments made in prior hearings are noted.

Basic steps in processing a complaint. The proposed legislation eliminates mandatory precomplaint counseling and, instead, requires agencies to make counseling available "throughout the administrative process"[91] on a voluntary basis. Thus, the filing of a formal complaint becomes the first step in the administrative process, creating a more formal and compelling basis for subsequent counseling and conciliation efforts by the agency. Moreover, complaints would be filed with EEOC, not with the agency, as current procedures require. This provision is intended, in part, to ensure that EEOC can monitor a complaint from the earliest possible moment.

After a complaint is filed, and prior to the formal investigation, agencies have 30 to 60 days[92] to attempt to conciliate the case. If a conciliation agreement has not been reached by the end of the 30—60 day period, the complainant has 90 days to request a hearing by an EEOC administrative judge.[93] To make the conciliation process fairer and more professional, the proposed legislation directs EEOC to appoint conciliators.[94]

Beyond conciliation and counseling, the agency's role under the proposed legislation is quite limited. The key functions of investigating and adjudicating cases are assigned to the EEOC's administrative judges,[95] Office of Special Counsel, and Merit Systems Protection Board.[96] In addition to providing appellate review, EEOC would hear and issue decisions in cases at the request of the complainant, and in preparing for such hearings, conduct a formal

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[90]According to Robert Harris, Deputy Staff Director, Senate Governmental Affairs Committee, telephone interview, Mar. 30, 1993, two bills introduced by Rep. Matthew G. Martinez, H.R. 1111, 103rd Cong., 1st Sess. (1993) and Sen. John Glenn, S. 404, 103rd Cong., 1st Sess. (1993) are nearly identical to H.R. 3631 and S. 2801 introduced in 1992.

[91]H.R. 1111, 103d Cong., 1st Sess. § (2)(4)(A) (1993); S. 404, 103d Cong., 1st Sess. § (2)(D)(IV) (1993).

[92]The legislation gives agencies 30 days in which to attempt conciliation, but if the complainant agrees, the limit can be extended to 60 days. H.R. 1111, 103d Cong., 1st Sess. § (2)(e)(1)(A)(B) (1993); S. 404, 103d Cong., 1st Sess. § (2)(e)(1)(A)(ii) (1993).

[93]H.R. 3613, 102d Cong., 1st Sess. (1992). H.R. 1111, 103d Cong., 1st Sess. § (2)(e)(2)(B)(i)(I) (1993); S. 404, 103d Cong., 1st Sess. § (2)(B)(i)(I) (1993).

[94]S. 404, 103d Cong., 1st Sess. § (2)(e)(1)(C).

[95]*Id.*, § (2)(f)(1)(A).

[96]*Id.*, §§ (2)(k)(3) & (4).

investigation of the charges.[97] As under the current system, the complainant can appeal an administrative judge's decision to EEOC or file a civil action in Federal district court.[98] Senate bill 404 differs from H.R. 1111 and earlier legislation in expressly requiring the administrative judge to permit persons named in complaints to appear at the hearing in person, or by or with a representative.[99]

Both S. 404 and H.R. 1111 require that sanctions be imposed on Federal employees who violate EEO laws. They differ, however, in the role played by the employing agency in determining appropriate sanctions. Under H.R. 1111 agencies determine and impose "appropriate" sanctions, subject to review by EEOC.[100] If the sanctions proposed by the agency are found to be "inadequate," EEOC will refer the case "to the Special Counsel for disciplinary action under section 1215 of Title 5, United States Code."[101] Under S. 404 the agency has no formal role in determining sanctions. Instead, the EEOC administrative judge makes a determination and then conveys the matter to the Office of Special Counsel for a final determination and execution.[102]

Finally, both bills increase the time limit for filing a complaint to 180 days, making Federal and private sector standards the same, and sets forth a new series of administrative steps for processing the complaint.

Comparative Analysis

Streamlining the Complaint Process

Critics argue that EEOC's new system is still too complex, involving unnecessary and duplicative steps and varying time frames at each step. Under Part 1614, the complainant is still required to receive counseling from an agency counselor before he or she may file formal charges. Although the counseling stage is intended to promote voluntary and less confrontational solutions, it creates an unnecessary and inflexible obstacle to anyone seeking a speedy

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[97]S. 404 and H.R. 1111 codify 29 C.F.R. §§ 1614.108(c)(3) & 109(c)(3) authorizing the EEOC administrative judge to impose sanctions on any party who fails to comply with a discovery order or request for the production of documents and witnesses.

[98]29 C.F.R. § 1614.109(g) gives the EEOC administrative judge 180 days to issue findings of fact and conclusions of law. This time frame may be extended by the judge if "good cause exists" to do so. Under proposed legislation, the administrative judge has 210 days in which to issue a decision. H.R. 1111, 103D Cong., 1st Sess.

§ 2(I)(7)(A)(i)(1993); S. 404, 103d Cong., 1st Sess. §§ 2(7)(A)(iii)(I)(1993). Other time frames established by S. 404 and H.R. 1111 included: (1) agencies must notify EEOC of a complaint within 3 days of receipt; see H.R. 1111, 103d., 1st Sess. § 2(3)(A)(1993); (2) EEOC must send complaints to the respondent agencies within 10 days of receipt, when not originally filed with the agency. *See* H.R. 1111, 103d Cong., 1st Sess. § 2(A)(ii)(1993); and S. 404, 103d Cong., 1st Sess. § 2(2)(B)(1993).

[99]S. 404 103d Cong., 1st Sess., § 2(f)(6)(D)(v) (1993).

[100]H.R. 1111, 103d Cong. 1st Sess. § 2(k)(3) (1993).

[101]*Id.* § 2(k)(4)(A). The Office of Special Counsel is an independent agency charged with investigating allegations of "prohibited personnel practices" by Federal employees and officials under 5 U.S.C. § 1214(a)(1)(A)(1988). Possible actions under Section 1215 include removal, debarment from Federal employment for up to 5 years, and civil penalties up to $1,000. *Id.* § 1215(a)(3).

[102]When the matter is transferred to the U.S. Merit Systems Protection Board, (MSPB) the Special Counsel may conduct an investigation and then submit the case to the board for appropriate disciplinary action under 5 U.S.C. §§ 1214-15. S. 404, 103d Cong., 1st Sess. § 2(k)(3)-(4) (1993).

and thorough investigation and adjudication of a complaint. Also, agencies cannot be held accountable for timely and effective processing of complaints during the counseling stage because EEOC is unaware of the complaints' existence.

The proposed legislation requires that counseling be made available throughout the administrative process but does not make it mandatory. Thus, formal investigation and adjudication can begin sooner, and because counseling is optional, the process should be more flexible and efficient.

Under Part 1614, investigation of a complaint can occur in three different and potentially duplicative steps: informal factfinding during the counseling stage, formal investigation by the agency, and during discovery, if the case is appealed to an EEOC administrative judge. The proposed legislation streamlines the process by making the administrative judge solely responsible for conducting the formal investigation. Similarly, much of the informal precomplaint investigation effort would no longer be necessary, although presumably some would be undertaken if the complainant wanted to conciliate the complaint.

Eliminating Conflict of Interest

Because Federal agencies still investigate and ultimately decide how to resolve complaints that are filed against them, Part 1614 perpetuates the inherent conflict of interest that has long crippled the Federal EEO system. The review of agency decisions by EEOC is of little value because EEOC's ruling is not binding on the agency: the ruling becomes final *only* if the agency chooses not to reject it.[103]

Conflict of interest can be eliminated only by establishing neutral, third-party review and enforcement authority. The proposed legislation would achieve this goal by assigning EEOC the responsibility for investigating and deciding Federal sector complaints and, with the Office of Special Counsel, the responsibility for reviewing and enforcing appropriate sanctions against employees who discriminate.

Shifting Investigation to EEOC

The proposed legislation would shift the responsibility for investigating complaints from the agencies to EEOC's administrative judges. EEOC argues that this added responsibility would place a heavy burden on EEOC's resources. First, the workload of each case would increase greatly with the administrative judges' added responsibilities of gathering necessary information, monitoring the discovery process, determining when subpoenas are necessary, and requiring that they be issued by EEOC in a timely fashion. Second, EEOC contends that the number of complaints handled by administrative judges would rise significantly, both because of the longer filing period and because the judges would conduct the only available formal investigation of the charges. And third, EEOC argues that the greater import and finality of administrative judge decisions under the proposed legislation would require upgrading the qualifications needed to be a judge. Consequently, EEOC foresees hiring significantly more judges and increasing expenditures for judges' salaries, training, support staffs, and training under the proposed legislation.[104]

EEOC argues further that by relying on the discovery process to compile an investigative record instead of an internal agency investigation, the proposed legislation places more of a

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[103]29 C.F.R. § 1614.109(g). A similar procedure existed under 29 C.F.R. § 1613.612(1992).

[104]*Hearing*, Apr. 9, 1992, p. 6.

burden on the complainant and less on the respondent agency. EEOC believes this process would severely disadvantage complainants who are not represented by counsel.[105]

Complaint investigations overseen by the administrative judges have several advantages. First, they would eliminate some of the duplication of investigative effort in the present system where an informal investigation during the counseling stage is followed by a formal investigation which, in turn, may be followed by a discovery process if the case goes to a hearing. With discovery used at an earlier stage, moreover, the parties would have a better sense of the strength of their case or defense, thus encouraging settlements. Second, complainants' faith in the process will be greater if an impartial third party is responsible for factfinding. The inherent conflict of interest under the existing system would be removed, and the formality of the process might have a salutary effect on the integrity of the investigation. Subpoenas and sworn testimony are more likely to elicit truthful answers. Third, the assertion that counsel would be needed more than is the case under the existing process is questionable. Complainants are well-advised to have counsel now, given the agencies' multiple roles as investigator, conciliator, decisionmaker, counsel, disciplinarian, and respondent.

Sanctions

Part 1614 regulations do not explicitly require that sanctions be imposed on Federal officials who intentionally violate EEO laws nor do they provide any guidance for determining appropriate sanctions. Consequently, under the current system, sanctions are left entirely up to the employing agency. S. 404 and H.R. 1111 explicitly require that sanctions be imposed for intentional violations of EEO laws. However, neither the bills nor the accompanying legislative record to date provide any guidance for determining appropriate sanctions.[106]

In commenting on H.R. 3613 (reintroduced in the 103d Congress as H.R. 1111), EEOC notes that the bill's sanctions provision, in addition to not establishing standards or a "method" by which EEOC would establish standards,[107] raises unresolved issues pertaining to EEOC's jurisdiction and due process rights.[108]

Limits to EEOC's jurisdiction. EEOC notes that agencies have generally taken the position that the determination or imposition of sanctions is strictly an internal matter, and is not within EEOC's jurisdiction. However, should S. 404 become law, EEOC would not impose

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[105]*Part 1614* and the proposed legislation gives all parties the right to representation throughout the process, specifically when they appear before an administrative judge during a hearing. However, this does not include examining and crossexamining witnesses.

[106]Part 1614 and applicable case law developed under Part 1613 do address the types of relief that should be provided by an agency in making the complainant whole. However, the relief is limited, "in appropriate circumstances," to adjusting the terms and conditions of the complainant's employment with the agency, requiring the agency to notify agency personnel of violations, and securing the agency's "commitment" to prevent unlawful employment practices from recurring. [See 29 C.F.R. § 1613 app. A & Merriell v. Department of Transportation, EEOC Decision No. 05890596 (Aug. 10, 1989).] The regulations do not explicitly address disciplinary actions or other penalties for culpable employees. See also, 29 C.F.R. § 1614.501, "which defines the remedial actions that indicate the measure of remedy that must be afforded in order to effectively provide full relief; and appendix A to Part 1613 (to be codified as appendix A to Part 1614), which is EEOC's policy statement on remedies and relief for individual cases of employment discrimination." Also see, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), held that Title VII is a "make whole" statute. The same standard has been applied to other antidiscrimination statutes enforced by EEOC. *The Digest of Equal Employment Opportunity Law*, EEOC, vol. V, no. 10, September/October 1992, p. 10.

[107]*Id.*, at 6.

[108]*Id.*, p. 6–7.

sanctions; they would become the responsibility of the Office of Special Counsel (OSC).[109] After conducting its own investigation, OSC could recommend personnel action be taken by the employing agency, and after a reasonable period of time has elapsed during which the agency fails to act, OSC then would request that the Merit Systems Protection Board (MSPB) order the agency to take action.

There seems to be no basis for the position that sanctions are an internal agency matter. The MSPB is the ultimate administrative decisionmaker in cases involving prohibited personnel actions. Furthermore, given the potential conflict of interest in permitting sanctions to be determined by an agency that is also the respondent in discrimination complaints, placing these decisions with a neutral party is entirely appropriate and necessary.

Due process. EEOC also pointed out that H.R. 3613 and S. 2801 (hence H.R. 1111), in not stipulating that all parties may participate fully in the adjudicative process, would deny Federal officials charged with discriminating their due process rights.[110] While this concern first arises with the proposed legislation, in reviewing the 1992 hearing on H.R. 3613, it is apparent that it is also a problem with the present system.[111]

S. 404 appears to protect due process rights. Unlike the earlier legislation and H.R. 1111, S. 404 gives all parties named in a complaint the right to representation during EEOC administrative hearings, including the right to examine and cross-examine witnesses.[112] The bill also assigns the responsibility for weighing and imposing sanctions to the Office of Special Counsel and the Merit Systems Protection Board. Thus, due process rights are protected under the same system and to the same extent as other cases dealing with conduct and personnel practices.

One observer argues that giving all named parties to a complaint the right to representation during EEOC administrative hearings is unnecessary.[113] First, the agency's attorneys, in essence, represent the accused employee's interests. Second, under S. 404, the accused employee will still have the right to representation during OSC's investigation and MSPB's consideration of any case under 5 U.S.C. §§ 1214 & 1215.

Based on EEOC's past experience with permitting all parties to be represented during hearings, S. 404's representation provision is expected to cause undue delays in case processing.[114] Until 1987, EEOC permitted all parties to an administrative hearing, including witnesses, to participate or be represented during the proceedings. EEOC concluded that this policy was cumbersome and, because the only purpose of a hearing was to establish whether discrimination had occurred, not the guilt or innocence of specific individuals, permitting all parties to be present was not needed to preserve due process rights.

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[109]Office of Special Counsel derives its authority from 5 U.S.C. § 1215. The role of the OSC is described in a brochure entitled, *The Role of the Office of Special Counsel.*

[110]*Hearing*, Apr. 9, 1992, pp. 6 & 134.

[111]*Id.* at 135. Congressman Gerry Sikorski asks, "... What kind of protections are there now, due process protections?" Jerry Shaw, general counsel for the Senior Executives Association replied, "Basically, none until he or she is charged by the agency."

[112]S. 404 § 6(D)(iii).

[113]Joseph M. Sellers, Washington Lawyers' Committee on Civil Rights Under Law, telephone interview, May 26, 1993.

[114]*Id.*

Consequently, EEOC revised its policy to permit only the agency and the complainant to be represented at hearings.[115]

The Filing Deadline

In setting a 180-day limit for filing a Federal sector EEO complaint, the proposed legislation allows Federal employees the same timeframe that has always applied to private sector employees. Former EEOC Chairman Evan Kemp opposed the 180-day filing period, however, observing "I think the circumstances are quite different for Federal sector employees."[116]

First, he argues, Federal employees work close to or at locations where a complaint can be filed, thus eliminating the need to travel or use the mail.[117] However, Federal workers are stationed throughout the world and many may also have to mail in their complaint or travel considerable distances if they need counsel in filing a complaint. Proximity is not a factor that uniformly distinguishes Federal government employees from private employees.

Even granting that Federal employees will need less time to file a complaint than private employees, this advantage is inconsequential in determining fair filing deadlines: first, the act of filing typically requires at most a few days, and second, filing delays occur for many other legitimate and much more time-consuming reasons. One common reason that people delay filing is that they only suspect they have been the victim of discrimination and may wish to observe the workplace more closely for a period of time or consult with colleagues or an attorney for guidance. Delays in filing can result because employees or job applicants are unfamiliar with the EEO complaint process. Even when people know they have been victims of discrimination and know the EEO process, they may fear retaliation from the employer or fellow workers; or they may simply need some time to weigh the costs and consequences (e.g., psychological, time, and monetary costs) of pursuing a complaint against an uncertain outcome.

Second, Kemp asserts that the private sector does not have an equal opportunity counseling process comparable to the Federal Government. Although this is true of many smaller private employers, it is not true of larger employers and State and local governments, which often maintain very sophisticated EEO programs. It is certainly true that EEO counseling is available, if not always active, in most Federal workplaces. It is unclear, however, whether many employees who receive counseling decide to file a complaint significantly earlier. Given the limited information an EEO counselor is permitted to provide prior to a formal filing, and given the many other reasons (above) for persons to delay such a complex and important decision, it is likely that only a few people file significantly earlier because of the counseling they receive. Moreover, under the proposed legislation, counseling would be voluntary, not mandatory, so counseling programs may become less effective.

EEOC also asserted that extending the time allowed to initiate a complaint would increase the number of complaints filed[118] and viewed the extension of the time to file from 30 to 45 days as a reasonable compromise.[119] Kemp commented, "It just worries me that if by extending it to 180 days, [as proposed in S. 404,] are we going to get the same successful 80

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[115]Nicholas Inzeo, associate legal counsel, Office of Legal Counsel, EEOC, telephone interview, June 3, 1993.

[116]*Oversight Hearing*, Mar. 1, 1990, p. 3.

[117]*Hearing*, Apr. 9, 1992, p. 6.

[118]*Id.*, p. 6.

[119]29 C.F.R. § 1614.105(a)(1).

percent rate? Maybe we could extend it to 60 days. . . ."[120] However, EEOC offered no objective evidence that the number of complaints would dramatically increase or that rates of informal resolution of complaints would fall if time limits were extended. Nor are statistics available to determine how many individuals do not file because of restrictive timeframes.

Critics of EEOC's position counter that some individuals are denied the right to file charges by restrictive timeframes, although others may decide not to file a complaint after careful consideration over a longer period of time.[121] The core issue is not how many more complaints might be filed or whether Federal employees *on average* would file in less time than private employees, but whether individuals are now denied the right to pursue their claims because of the shorter time limit. If more complaints were filed with an extended time limit, then more resources ought to be appropriated.

Shifting Responsibilities and Resource Needs

EEOC was concerned that its resources would be inadequate to fulfill the new responsibilities included in the proposed legislation. This is true. However, a large share of the resources now dedicated to EEO counseling and complaint processing at other Federal agencies could be redirected under a centralized system. For example, many of the resources now dedicated to reviewing and perfecting complaints, investigations, and preparing agency analyses and decisions would no longer be needed by the agencies. The resources thus freed under the proposed legislation would probably be more than sufficient to provide EEOC and the Office of Special Counsel with the necessary additional funds to fulfill their new responsibilities.

The proposed legislation would create cost savings by streamlining the administrative processing of EEO complaints, eliminating unproductive and duplicative steps. First, cost savings would be realized in eliminating the mandatory precomplaint counseling required under current regulations. Although the legislation requires that counseling be made available throughout the complaint process, EEO complaints would be filed immediately and directly with EEOC. As a result, complainants might have less interest in agency counseling, and agencies' incentives to provide counseling might diminish. These forces would decrease the need for counseling resources.

On the other hand, the incentive for agencies to offer counseling as a way of facilitating an informal settlement of complaints might actually be greater than it is now. In addition, on occasion the administrative judge would call upon agencies to attempt conciliation of complaints. These forces would tend to increase the need for counseling.

Although it seems likely that agencies will not need more resources for counseling, it is unclear whether such spending will be substantially lower. In a recent report, GAO concludes

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[120]Kemp stated that about 80 percent of all complaints are resolved at the counseling stage, *Oversight Hearing*, Mar. 1, 1990, p. 29.

[121]All groups testifying in favor of legislative change shared Congressman Martinez' observation that there are no statistics on the number of persons who do not file because time limits had expired, or who only realize weeks or months later that they had been discriminated against by their employer. (See, for example, *Oversight Hearing*, Mar. 1, 1990, p. 40 (statement of Blacks in Government).

that agencies spend more than $40 million on counseling alone.[122] Of this total, perhaps $10 million could be removed from agency budgets without harming any program area.

Second, savings could result from eliminating the agencies' responsibility for conducting formal investigations. By eliminating full-time investigative staff and agency contracting for investigative services, the Federal Government could save an estimated $47 million.[123] Other cost savings could be realized by eliminating the agencies' involvement in evaluating the merits of initial complaints and in making final decisions. These two areas are estimated by GAO to cost $14 million.[124]

Combined, the resources released by reducing agency complaint processing responsibilities should be at least $61 million. This amount could easily fund the $26 million EEOC estimates it would need to implement the proposed legislation and still leave a substantial amount to meet OSC's added responsibilities and other purposes.

Conclusions

Analysis of EEOC's new regulations and pending legislation, S. 404 and H.R. 1111, leads to the following conclusions:

1. It has been widely recognized for at least 10 years that the system for processing Federal sector EEO complaints is seriously flawed. The four basic concerns are: complexity in the system, serious delays in resolving complaints, inherent conflict of interest, and inadequate sanctions for violators of the law. The Equal Employment Opportunity Commission, despite its longstanding recognition of these problems, has been unable to resolve them. Specifically, EEOC's 29 C.F.R. Part 1614 regulations, which went into effect October 1, 1992, and were more than 4 years in the making, fail to address many of the most serious problems.

   A. EEOC's Part 1614 regulations do not significantly streamline the EEO complaint process for Federal employees. In particular, a complainant may not file formal charges until he or she has received counseling. Only after completing the counseling process or receiving a notice that the agency is unable to complete counseling within the 21-day period can formal charges be filed, and then only if they are filed within 15 days of receiving a notice of right to file a discrimination complaint from the agency.

   B. EEOC's Part 1614 regulations set deadlines for agencies and its own administrative judges to complete various phases of the complaint processing. If these deadlines are met, the timeliness of complaints processing would be greatly improved.

   C. EEOC's Part 1614 regulations do not resolve inherent conflicts of interest: investigation and adjudication still remain largely under the control of the respondent agencies.

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[122]General Accounting Office, *Federal Workforce, Agencies' Estimated Costs for Counseling and Processing Discrimination Complaints*, March 1992, app. IV, table IV. 1, p. 14 [hereinafter cited as *GAO's Report on Estimated Cost*]. GAO's estimates are based on reports from only 29 Federal agencies reported to GAO. However, 78 Federal executive branch agencies have 100 or more employees, U.S. Equal Employment Opportunity Commission, report on *Pre-complaint Counseling and Complaint Processing*, 1989, p. 1. And according to the *Government Manual* there are 89 agencies. Therefore, despite the fact that the 29 reporting agencies represent the largest employers, actual savings could be much greater.

[123]*GAO's Report on Estimated Cost*, table 3, p. 18, and table 4, p. 20.

[124]Ibid., table 2, p. 16, and table 8, p. 28.

D. EEOC's Part 1614 regulations do not provide for sanctions against agency officials found to have intentionally discriminated.

2. Whereas non-Federal employees, under law, are allowed 180 days to file an EEO complaint, Federal employees, under EEOC's regulations, are allowed only 45 days. EEOC refuses to extend the Federal sector filing time to 180 days and defends its choice of 45 days on the basis of supposition rather than fact, such as speculation that the number of complaints would increase. EEOC does not cite a legal basis for its decision, nor does it attempt to deal with the fairness of the decision from a complainant's point of view.

3. Legislation introduced into the 103rd Congress, H.R. 1111 and S. 404, would substantially remove the existing problems in the Federal sector EEO system.

A. The proposed legislation goes beyond the revisions made by Part 1614 in streamlining the process. Mandatory counseling prior to the formal filing of a complaint is eliminated and the formal processing of the complaint begins sooner. Since counseling is voluntary, the process is made more flexible.

B. As does Part 1614, the proposed legislation stipulates timeframes for each step in the process. These limits should result in speedier processing of complaints than under Part 1614. As with Part 1614, the legislation does not stipulate the consequences if agencies fail to comply.

C. Both bills would remove inherent conflicts of interest by transferring responsibility for conducting investigations and adjudicating cases from respondent agencies to EEOC.

D. Both bills require sanctions for Federal officials who violate EEO laws and give the Special Counsel authority to impose appropriate sanctions under 5 U.S.C. § 1215. Under H.R. 1111, the agency is responsible for determining and imposing sanctions, but under S. 404 these responsibilities belong to the Special Counsel.

E. Both S.404 and H.R. 1111 require the EEOC hearing judge to determine whether Federal officials named in a complaint are guilty of the charges against them. In elevating the importance of hearings for named officials, it becomes essential that all parties to a complaint receive fair and equal representation *throughout* the administrative process, including the right to participate in hearing proceedings and the right to choose a representative. Specifically, EEOC's current policy to have named officials represented by the employing agency would be unacceptable under the system established under the proposed legislation: it seems unlikely that the agency will always share, and hence represent, the same interests as an employee charged with discriminating, especially where the agency believes the employee is guilty.

For these reasons, the provision in S. 404 (and not present in H.R. 1111) permitting all parties to an administrative hearing to examine and cross-examine witnesses (section 2(f)(6)(D)(v)) is necessary to protect due process rights. By allowing all parties to be fully represented, S. 404 helps to ensure that the hearing record is complete, and the consequent conclusions of law by the administrative judge are just.

4. Both S. 404 and H.R. 1111 extend the filing time permitted for filing a complaint to be the same as private sector employees enjoy.

5. A revision of current civil rights law is the surest way of resolving the inherent conflicts of interest and inadequacy of sanctions that overshadow the Federal sector complaint process. Such changes require a significant redistribution of authority and resources and cannot be accomplished without the direction of the President or Congress.

6. EEOC and the Office of Special Counsel will need additional resources if the Federal EEO program is centralized under the proposed legislation (H.R. 1111 and S. 404). In particular, EEOC would need additional investigators and administrative judges to investigate complaints, to conduct discovery, and to monitor agency compliance with EEOC decisions.

Recommendations

1. EEOC should immediately revise 29 C.F.R. § 1614 to extend the complaint filing time limit to 180 days. In addition, EEOC should make it mandatory that all agencies inform EEOC of all informal EEO complaints in their inventory beyond the 30-day timeframe.

2. Amend 1111 H.R. to include the provisions in S. 404 dealing with rights to representation (section 2(f)(6)(D)(v)) and sanctions (section 2(k)(3)-(4)).

3. Congress should provide further guidance to the Special Counsel in developing standards for determining sanctions. Further, Congress should amend S. 404 and H.R. 1111 to require the Special Counsel to promulgate, within 180 days of enactment, guidelines that it will use in determining appropriate sanctions. Develop these guidelines in consultation with the Equal Employment Opportunity Commission, Merit Systems Protection Board, Department of Justice, Office of Personnel Management, and Federal Labor Relations Board. Sanctions levied in Federal sector cases should be no less stringent than those applied, other things equal, in private sector case law. The guiding principle should be that officials who discriminate or are negligent in preventing discrimination must receive penalties that will prevent recurrences of such unlawful behavior within the organization. Further, require employing agencies to take strong action to prevent future discriminatory acts on the part of its employees.

4. Amend S. 404 and H.R. 1111 to provide EEOC with the authority to file a Commissioners' charge against an agency if sufficient information exists to show that the agency might be engaged in a pattern and practice of discrimination.

5. Amend S. 404 and H.R. 1111 to authorize funds for EEOC and Office of Special Counsel to meet the added workload resulting from this legislation. Congress must appropriate such funds with savings accruing from the diminished EEO workload at all other Federal agencies.

6. Congress should enact S. 404 as amended according to recommendations 3, 4, and 5.

7. The President should issue an Executive order making the head of each department or agency accountable for implementing affirmative measures to uphold EEO laws and provisions of the Federal Employee Fairness Act of 1993. Further, the order should require

the Chair of EEOC to report to the President any department or agency that fails to comply with these terms.

8. The President and the Congress should ensure that the executive agencies continue to have adequate staff and resources in order to implement EEO programs, to further affirmative employment goals, and to eliminate EEO barriers by providing policy guidance, routine evaluation of the agency's EEO status, outreach, and counseling for employees and managers. Provide counseling on a voluntary basis and on a proactive basis to avert EEO problems.

THE FEDERAL SECTOR EEO COMPLAINT PROCESS

PROCESS DESCRIPTION	PART 1613 REGS	PART 1614 REGS	S. 404
Contact EEO Counselor (from date of alleged discrimination)	30 days	45 days	N/A
Informal inquiry and resolution by agency	21 days (extended with complainant's consent)	30 days (extend to 90 if certain conditions met)	N/A
Formal complaint filed	21 days after initial contact with EEO counselor or 15 days from written notice of final interview with EEO Counselor	30 days after initial contact with EEO counselor or 15 days from written notice of final interview with EEO Counselor	180 days
Agency decides to accept or dismiss formal complaint	No time limit	No time limit, however agency must complete investigation within 180 days of filing	N/A (Made an EEOC function. Agency given 60 days to resolve informally.)
Agency attempts to conciliate complaint	N/A	N/A	30 days from receipt by agency of notice of complaint (extended to 60 days if complainant agrees)
Complainant requests AJ hearing or files civil suit in Federal District Court	N/A	N/A	90 days from agency notice that conciliation failed

PROCESS DESCRIPTION	PART 1613 REGS	PART 1614 REGS	S. 404
Formal investigation by agency	No time limit	180 days from date of acceptance of complaint agency to complete investigation	N/A
Agency proposes disposition (preliminary decision)	No time limit. Complainant accepts, or rejects with request for EEOC hearing	N/A	N/A
Informal adjustment of a complaint after proposed disposition	No time limit	N/A	N/A
Request for hearing before an EEOC AJ, or request for final agency decision	15 days after receiving proposed disposition	30 days after end of investigation	N/A
Hearing and decision by EEOC AJ	No time limit	Decision issued within 180 days of request for hearing. All parties given 90 days for discovery prior to hearing. (Agency conducts investigation; EEOC may conduct supplementary investigation.)	Decision issued within 210 days (+30 day ext.) from filing of complaint (270 days for class action). AJ collects information and reviews record. AJ decides frivolous claims.
Final decision by agency	No time limit	60 days from request for immediate agency decision; receipt of AJ decision, or expiration of 30-day decision period.	N/A The EEOC AJ decision is final.

PROCESS DESCRIPTION	PART 1613 REGS	PART 1614 REGS	S. 404
Appeal to EEOC if dissatisfied with agency decision	Complainant has 20 days to appeal for review of agency final decision	Complainant has 30 days to appeal for review of agency final decision	N/A
Appeal to EEOC Commissioners to reconsider EEOC decision/reopen case	30 days if dissatisfied with decision on appeal (previous step)	30 days if dissatisfied with decision on appeal (previous step)	90 days
Imposition of sanctions by Office of Special Counsel (upon EEOC finding named official(s) guilty of EEO violations)	N/A	N/A	No time limit under 5 C.F.R. § 1215
Civil suit filed in Federal District Court	30 days of receipt of notice of final action by agency; 180 days from filing complaint with agency and no decision; 30 days after final action by EEOC; 180 days from appeal to EEOC if there has been no EEOC decision	90 days of receipt of notice of final action by agency; 180 days from filing complaint with agency and no decision; 90 days after final action by EEOC; 180 days from appeal to EEOC if there has been no EEOC decision	Complaint may avoid any of the above administrative steps, except must give agency 30 days (extendable to 60 days) to try and conciliate the complaint before going to court