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EEO DATA AND COMPLAINT PROCESSING PROBLEMS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON
GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

MARCH 29, 2000

Serial No. 106–177

Printed for the use of the Committee on Government Reform

Available via the World Wide Web: http://www.gpo.gov/congress/house
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

68–877 DTP WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
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EEO DATA AND COMPLAINT PROCESSING PROBLEMS

WEDNESDAY, MARCH 29, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2247, Rayburn House Office Building, Hon. Joe Scarborough (chairman of the subcommittee) presiding.

Present: Representatives Scarborough, Cummings, Norton, and Morella.

Staff present: Garry Ewing, staff director; Jennifer Hemingway, deputy staff director; Miguel Serrano, chief counsel; Susan Waren, professional staff member; Bethany Jenkins, clerk; Tania Shand, minority professional staff member; and Earley Green, minority assistant clerk.

Mr. SCARBOROUGH. I call this hearing to order for the Subcommittee on the Civil Service.

I would like to welcome all of you here before this Civil Service Subcommittee.

Today, the subcommittee is going to be conducting an oversight hearing to examine serious shortcomings in Equal Employment Opportunity data and complaint processing. These problems were revealed in several recent reports issued by the General Accounting Office, and we will also consider the use of alternative dispute resolution techniques to resolve employee's discrimination complaints.

As chairman of this subcommittee I am committed, like I know everybody else on this panel is committed, to ensuring that Federal employees have available a procedure for resolving EEO complaints that is fair, timely, and efficient, but that is just not simply the case today.

I think all of us are concerned and appalled at the time it takes for an EEO complaint to travel through the entire appeals procedure process. According to GAO, an employee who has filed an initial complaint with his or her employing agency would, on average, have to wait 3 years until EEOC issues its final ruling. That is simply not acceptable. EEOC and other agencies have to figure out a way to speed this process up.

I am also concerned that EEOC cannot answer fundamental questions about the nature and extent of workplace conflicts. Because EEOC does not collect and report the necessary data, it cannot respond to such basic questions regarding how many individuals have filed complaints, how many complaints allege discrimina-

tion based on race or sex, or what kinds of actions give rise to most of the complaints. And, to compound these problems, GAO also tells us that the reliability of data that EEOC collects from other agencies is also questionable. This is because the agencies don't report the data consistently, completely, or, in my opinion, accurately.

In one example, because of a computer programming error, the Postal Service reported that approximately 68 percent of its complaints were from white postal workers claiming racial discrimination. In fact, the correct figure was 11.4 percent.

Without solid, reliable data, neither the EEOC or employing agencies can understand how much conflict there is in the Federal work force or what causes it, and if they can't do it, then certainly Congress can't do it.

We are going to be looking to the EEOC to assure this subcommittee that it is reducing its case inventories and processing complaints more quickly. I also want to know what EEOC is doing to increase the speed with which employing agencies process complaints of discrimination. And I am going to expect the EEOC to assure us that data problems that the GAO has discovered and revealed are going to be corrected in the future.

On a more optimistic note, we are also going to be examining the use of alternative dispute resolution, techniques to resolve workplace disputes.

Based upon work GAO has performed for this committee in the past, we believe that ADR promises much hope. Used properly, ADR can deliver prompt solutions for a wide variety of workplace disputes that employees and managers, alike, perceive to be fair. It also is generally believed to be far less costly than litigation or a more formal redress process.

Witnesses from the Postal Service and the Air Force will describe their successful ADR programs, and I look forward to their comments and the comments of GAO and other witnesses on this subject, as well.

[The prepared statement of Hon. Joe Scarborough follows:]

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OPENING STATEMENT
CHAIRMAN JOE SCARBOROUGH
SUBCOMMITTEE ON CIVIL SERVICE

MARCH 29, 2000
"EEO Data and Complaint Processing Problems"

Good Morning, and welcome to this hearing before the Civil Service Subcommittee.

Today, the subcommittee will conduct an oversight hearing to examine serious shortcomings in equal employment opportunity data and complaint processing. These problems were revealed in several recent reports issued by the General Accounting Office (GAO). We will also consider the use of alternative dispute resolution techniques to resolve employees' discrimination complaints.

As Chairman of this subcommittee, I am committed to ensuring that federal employees have available a procedure for resolving EEO complaints that is fair, timely, and efficient. But that is not the case today. I am appalled at the time it takes for an EEO complaint to travel through the entire appeals procedure. According to GAO, an employee who has filed an initial complaint with his or her employing agency would, on average, have to wait three years until EEOC issues its final ruling. That is not acceptable. EEOC and other agencies must speed up this process.

I am also concerned that EEOC cannot answer fundamental questions about the nature and extent of workplace conflicts. Because EEOC does not collect and report the necessary data, it cannot respond to such elementary questions as:

1. How many individuals have filed complaints?
2. How many complaints alleged discrimination based on race or sex?
3. What kinds of actions give rise to the most complaints?

To compound the problem, GAO also tells us that the reliability of data the EEOC collects from other agencies is questionable. This is because the agencies do not report the data consistently, completely, or accurately. In one example, because of a computer programming error, the Postal Service reported that approximately 68 percent of its complaints were from white postal workers claiming racial discrimination. In fact, the correct figure was 11.4 percent.

Without solid, reliable data, neither the EEOC nor employing agencies can understand how much conflict there is in the federal workforce or what causes it. Nor can Congress.

I will look to the EEOC to assure this subcommittee that it is reducing its case inventories and processing complaints more quickly. I also want to know what EEOC is doing to increase the speed with which employing agencies process complaints of discrimination. And I will expect EEOC to assure us that the data problems GAO discovered are being corrected.

On a more optimistic note, we will also be examining the use of Alternative Dispute Resolution (ADR) techniques to resolve workplace disputes. Based upon work GAO has performed for this committee in the past, ADR offers a lot of promise. Used properly, ADR can deliver prompt solutions for a wide variety of workplace disputes that employees and managers alike perceive to be fair. It also is generally believed to be far less costly than litigation or more formal redress processes. Witnesses from the Postal Service and the Air Force will describe their successful ADR programs, and I look forward to the comments of GAO and other witnesses on this subject as well.

Mr. SCARBOROUGH. With that, I would like to recognize Mr. Cummings, the distinguished ranking member, for any opening comments he may have.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

I do appreciate the fact that you have called this hearing. I know we will be hearing from Congressman Wynn, but I want to thank you for all your efforts over the years in staying on this issue and making sure it stays at the forefront of our minds.

Mr. Chairman, you just said something that made me really stray away from my prepared comments when you talked about the 3-year delay. Someone once said, "Justice delayed is justice denied," and I think that when you think about the issues that we are addressing here today, when you have someone who is denied justice and they have to wait, and that justice is delayed and they have to wait 3 years, that means that possibly a pay raise doesn't take effect, it means that possibly the children who were in the first grade at the beginning of the complaint are now in the fourth grade and have missed opportunities to do such things as have simple things like violin lessons and simple things that make life better, going on vacation. But it also means that someone is placed in a position of being very frustrated over a course of 3 years, and that frustration not only affects them but affects their families and affects generations yet unborn.

And so it does concern me, and I guess, as I am sitting here—and I am sure you and I agree on the frustration that we so often feel in the Congress where one group blames another group, and then another group blames another group, but the bottom line is, when all the dust settles, the problem is still there.

I am very, very confident and I do agree with you that we have to get to the bottom of this, because, after all, we have been elected to represent the wonderful people of the United States of America, and if we can't get to the bottom of it because an agency can't get to the bottom of it, we don't need to be here.

And so I am hoping that the answers that we will get this morning are ones that will be helpful to us in getting to the bottom line.

I do thank you, Mr. Chairman, for your sensitivity with regard to this issue. These are not in my prepared comments, but the more I listen and I look at Congressman Wynn and I think about all that he has gone through, and feeling, I am sure, the frustration sometimes that everything is not—I mean, he is almost playing a shell game. One person tells him one thing. I have been in the room many times when that has happened. You begin to wonder whether you are crazy or somebody else is. But at the same time we are wondering these things, there are people who are suffering.

That is one of the good things about this hearing. As we notice—I know you noticed coming in, there are people standing all out in the halls. The reason why they are standing out there is because they simply want fairness. They simply want fairness. They don't want anybody to do them any favors. They just want fairness in the system. They don't want justice delayed. They don't want it, because they know that is justice denied.

And so with that, Mr. Chairman, I look forward to hearing from the witnesses, and I want to thank all of them for being with us today.

Mr. SCARBOROUGH. Thank you, Congressman Cummings.

Thanks for your hard work on this. I know you and Congressman Wynn have fought this issue for some time.

With that, I want to introduce our first panel. Our first witness today is the distinguished gentleman from Maryland, Representative Albert R. Wynn. Mr. Wynn represents the 4th District and he is well-known as an advocate for Federal employees. In addition, he, along with the ranking member, Mr. Cummings, asked GAO to study the EEOC's data collection and case processing problems. Those studies and their continued efforts are what led to today's hearings.

Congressman Wynn.

STATEMENT OF HON. ALBERT R. WYNN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. WYNN. Thank you very much, Mr. Chairman.

I sincerely appreciate your calling this hearing today. As my colleague, Mr. Cummings, indicated, this is a very, very important issue to us.

I also appreciate your comments in your opening statement, which reflect a fundamental understanding of the various aspects of this problem and your sensitivity to this problem. I think all Federal employees appreciate your leadership in this effort.

I also want to thank my colleague from Maryland, Mr. Cummings. We have literally worked side-by-side, yoked together on this issue, and he has been tremendous, from our first press conversation back in 1997, when we began talking about this issue, through today, when he has worked in his official capacity as ranking member to see that this issue is brought to light appropriately, and he brings a great deal of not only interest but passion to the discussion.

As he indicated, there is a human element of this that affects people that is below the radar of our policy discussions, and it is important that that perspective be brought to light.

Let me begin with a little history. We have always looked to the Federal Government to intervene in civil rights issues, and it became very ironic, after I got to Congress, that there were some civil rights issues within the Federal workplace. We had a festering sore, so to speak, in our own back yard.

I represent more Federal employees than any other Member of Congress. I have 72,000 active Federal employees in my constituency, so, as you might gather, these issues of the Federal employee rights, benefits, and problems come to my desk quite frequently.

I came in in 1992. By 1993, I began to see patterns in which I was getting enormous numbers of constituent complaints about discrimination in the Federal workplace. I had discussions with the National Institutes of Health, I have had ongoing discussions with the Department of Interior, Agriculture, State, Commerce, the Government Printing Office, the Library of Congress, IRS, U.S. Information Agency—the list goes on and on.

What I concluded was that these were not isolated incidents, but rather a systemic problem, because I was hearing the same kinds of things throughout virtually every department.

As I indicated, in 1997 we held a press conference on discrimination in the workplace, and I stood side by side with Mr. Cummings. We talked about three issues: the lack of diversity in senior management; second, the pervasive and discriminatory misuse of personnel laws; and, third, the enormous backlog of EEO complaints within Federal agencies.

We asked the administration to intervene and make agencies more accountable, and in 1997, in September of that year, this subcommittee held an unprecedented hearing to examine the issues of discrimination—again, a standing-room-only audience. We talked about the various problems that existed.

In 1998, I requested, along with Congressman Cummings, that GAO analyze the information about what we call "inventories of unresolved complaints." I like to call it "backlogs." And they did this, and the report, "Equal Employment Opportunity: Rising Trends in EEO Complaint Case Loads in the Federal Sector," dated July 1998, found the agency complaint inventories, and, even more so, EEO's hearing and appeal inventories had increased since 1991.

Since 1991, there has been 102 percent increase in the number of unresolved complaints, from 16,900 in 1991 to 34,000 by the end of 1997.

At EEO, itself, during this period, the inventory of hearing requests from complaints increased 218 percent, from 3,000 to over 10,000, and the inventory of appeals or the backlog of appeals filed by complaints increased 581 percent, from 1,000 to almost 10,000.

As you can imagine, as the size of these inventories grow, the length of time that you referred to in your opening statement increased, as well.

As I looked at these problems after receiving this information, I said, "It is not enough to just handle individual complaints. We need to begin to understand, as policymakers, what is causing these complaints."

And so I asked GAO essentially two questions: one, what were the statutory bases for discrimination? Was it race, sex, disability discrimination? And, two, what are the kinds of problems that are cited in these complaints? Was it non-selection for promotion, harassment, hostile work environment, whatever might be the case?

In March 1999, GAO advised me that they could not answer these fundamental questions. Obviously, I was quite concerned, which gave rise to the report that you mentioned in your opening statement, "Equal Employment Opportunity Data Collection Shortcomings Hinder the Assessment of Conflicts in the Federal Workplace," which came out in May 1999.

They found that data about the basis of complaints and issues giving rise to them can be valuable in gauging conflict in the Federal workplace; however, EEO does not collect or report relevant data in a way that would help answer fundamental questions about the number of complaints and the prevalence of bases and issues in the universal complaints.

In addition, some data collected and reported by EEO have lacked the necessary reliability, because agencies did not report their data consistently, completely, or accurately, and because EEO did not have procedures to ensure that the data was reliable.

Consequently, the data did not provide a sound basis for decisionmakers, program managers, and EEO to understand the nature and extent of workplace conflict, to develop strategies to deal with conflict, and to measure the results of these interventions. The EEO basically agreed with these findings.

The problem came when we said, "Well, how can we correct them?" They were saying, "Well, it is going to take some time. The reports won't come in until 2001. Then we wouldn't have any information until about 2002." I said, "Well, when can we get a body of reliable data," and they were not able to answer that question.

I was very concerned, as you might imagine. I contacted the President. I said, "We need an inter-agency task force to deal with all these discrimination issues, but, in particular, the issue of data collection, which is just not acceptable." A task force is, in fact, working on this, focusing, among other things, on data collection.

One of the things we said was that, at a minimum, we should develop requirements to ensure that all agencies have the ability to transmit their data electronically in a format that would facilitate accurate and comprehensive analysis.

We also said that we ought to put this issue on a fast track. It shouldn't take a year to develop data collection techniques and then another 2 years to collect the data and then a third year to analyze it.

I think EEO is sincere in attempting to address this concern, but I think there needs to be a real fire under their efforts. I think the administration, as well, has acknowledged the problem and wants to do the right thing, and I think the task force will be productive.

I would ask you, Mr. Chairman, in terms of the committee, to continue aggressive oversight of this issue. You clearly understand the problem we have in effective data collection. I think with aggressive committee oversight, we can resolve this issue, put it on a fast track, and begin to understand the problem, because once we understand the problem I think we can resolve some of these complaints.

Thank you. I apologize for going longer.

[The prepared statement of Hon. Albert R. Wynn follows:]

Representative Albert R. Wynn
Testimony
Committee on Government Reform and Oversight
Civil Service Subcommittee

"EEO Data and Complaint Processing Problems"
March 29, 2000

Good morning, Mr. Chairman, and members of the committee. Thank you for convening this hearing to discuss these important issues. I appreciate your invitation and the opportunity to offer testimony.

Throughout our country's history, minorities have looked to the federal government as an important part of the solution to the problems of racial discrimination. The Federal Government has, traditionally, intervened in civil and human rights issues. Ironically however, the problem of discrimination within the federal workforce has been a long festering sore. In the course of looking at patterns of discrimination, however, the inaccuracy and unreliability of EEO data became evident. In my view, unless we can collect accurate, consistent and reliable data on the nature of EEO complaints we will be unable to address and remedy the problem of discrimination and the lack of equal employment opportunity in the Federal workplace.

As a Member of Congress who represents 72,000 federal employees, more than any other Member, I was, and continue to be, inundated with hundreds of complaints about discriminatory practices in cabinet departments and independent agencies.

In 1993, I became actively involved in inquiring into allegations of discrimination at the National Institutes of Health. Since then, I have been involved in an on-going dialogue with the Department of Interior, and have received complaints about the Departments of Agriculture, State, Commerce, the Government Printing Office, the Library of Congress, IRS, the U.S. Information Agency — the list goes on and on. I've heard from virtually every department and agency in the federal government. These complaints have led me to conclude that the problem is systemic, and not a matter of isolated incidents of disgruntled employees.

In July 1997, I held a press conference on "Discrimination in the Federal Workplace" to call attention to three aspects of the problem, first, the lack of diversity in senior management, second, pervasive and discriminatory misuse of personnel laws, and third, the enormous backlog of EEO complaints against federal agencies. We asked the President to address the issues, and to demand accountability from his cabinet and agency heads.

In September 1997, this subcommittee held an unprecedented hearing to examine the issue of discrimination in the Federal government. It afforded both federal employees, managers and the EEOC the opportunity to testify on their observations, involvement and concerns about the problems as they affected the federal work environment.

As a follow-up measure, in early 1998, I requested that the Government Accounting Office (GAO) develop and analyze information about the inventories of unresolved equal employment opportunity complaints at federal agencies and the EEOC. I also asked GAO to examine how trends in the number of complaints filed and the time taken to process them have contributed to inventory levels. Their resulting report, "Equal Employment Opportunity: Rising Trends in EEO Complaint Caseloads in the Federal Sector, July 1998", found that agency complaint inventories, and even more so, EEOC's hearings and appeals inventories had increased since fiscal year 1991. At agencies, the number of unresolved complaints in inventory rose about 102 percent, from 16,964 at the end of fiscal year 1991 to 34,267 by the end of fiscal year 1997. At EEOC, during this period, the inventory of hearing requests from complainants increased 218 percent, from 3,147 to 10.016, while the inventory of appeals filed by complainants increased 581 percent, from 1,466 to 9,980.

As the size of the inventories grew, so did the average length of time that cases had been in inventory as well as the proportion of cases remaining in inventory longer than allowed by regulations.

Not long after those findings, I asked the GAO to answer fundamental questions about the nature and extent of workplace conflicts that underlie the rising number of discrimination cases. I asked them to develop information about (1) the statutory bases (e.g., race , sex, or disability discrimination) under which employees filed complaints and (2) the kinds of issues (e.g., nonselection for promotion, harassment, etc.) that were cited in these complaints.

In an attempt to answer my questions, GAO analyzed data collected and reported by the EEOC on the bases for complaints filed with federal agencies, including the U.S. Postal Service, and the issues raised in these complaints. In March 1999, GAO informed me that this data would not answer the fundamental questions I had asked. I then asked why the data collected and reported by EEOC were not helpful in answering my questions.

Their report, "Equal Employment Opportunity: Data Shortcomings Hinder Assessment of Conflicts in the Federal Workplace, May 1999", found that, "Data about the bases for complaints and the issues giving rise to them can be valuable in gauging conflict in the federal workplace. However, EEOC does not collect or report relevant agency data in a way that would help answer fundamental questions about the number of complainants and the prevalence of bases and issues in the universe of complaints. In addition, some data collected and reported by EEOC have lacked the necessary reliability because agencies did not report their data consistently, completely, or accurately, and because EEOC did not have procedures that ensured the data was reliable. Consequently, the data do not provide a sound basis for decision makers, program managers, and EEOC to understand the nature and extent of workplace conflict, develop strategies to deal with conflict, and measure the results of interventions."

The EEOC agreed with the findings of the report, but suggested that it would take eight months or more to issue changes to their data collection procedures, and an addition 12 months for the agencies to report complaint data to the EEOC in accordance with the new instructions. Agency statistical reports for the fiscal year ending 2001 would not be submitted to EEOC until fiscal year 2002. EEOC did not indicate, however, when the first federal sector report containing this data would be published.

In my view, that response was unacceptable and I expressed my displeasure to the President by letter. I proposed to the President that an interagency workgroup be established to (1) correct the data collection problems exposed by the GAO study, (2) develop a fast track process to make necessary changes and (3) insure that the EEOC publishes usable data within 6 months of the end of each fiscal year reflecting each agencies' status for the preceding year, rather than continue the 2 year delay which currently exists.

I was encouraged when Vice President Gore took the initiative to form the NPR/EEOC

Interagency Task Force. Through a collaboration with the National Partnership for Reinventing Government, the Equal Employment Opportunity Commission, the President's Management Council, the Small Agency Council, and union and federal employee stakeholder group representatives, the task force's objective is to improve the fairness and efficiency of the Federal Sector EEO Process, and stimulate changes that will prevent discrimination. This task force has taken as a part of its charge to reassess and redesign data collection processes through its Data Collection Team.

The Data Collection Team will respond to the GAO May 1999, which suggested that the EEOC convene a group of federal agency representatives to address data collection issues in the Federal EEO process. This team will review and recommend approaches to improve the type and quality of data collected, the method of collection, the accuracy and reliability of the data, and the timeliness and availability of the data to agencies, the EEOC, and the public. At minimum, this Team will develop requirements to ensure that all agencies have the ability to transmit their data electronically in a format that would facilitate accurate and comprehensive analysis of the data.

Mr. Chairman, the EEO process must be addressed. It is underfunded, ineffective, has a serious backlog, and is often not taken seriously by the organizations it monitors. Moreover, legislation needs to be updated, and the legislation on the books needs to be enforced. There are apparent conflicts of interest within departments and agencies in investigating complaints, some findings of non-discrimination are questionable, and oftentimes, settlements are forced to make complaints "go-away". We must hold Cabinet Secretaries and agency heads accountable and responsible for the actions that take place, or fail to take place in their departments and agencies.

Mr. Chairman, again let me thank you for the opportunity to share my thoughts with you today, and encourage this committee to use its oversight authority to ensure that this process serves federal employees fairly and efficiently, and offers each person equal opportunity to serve the American public at their highest potential.

Mr. SCARBOROUGH. That is fine, Congressman. I thank you. I certainly appreciate your comments, and I want you to know there will be aggressive oversight here and we are going to do whatever we can to make sure it happens.

Let me ask you just one or two very brief questions. I know we have a vote soon.

I wanted to start out by asking you about trends. You have said, obviously, since the early 1990's complaints have skyrocketed. You came here in 1993. Complaints are up since then.

What have you noticed in the past few years, just in your office, from all the—are the complaints on the rise over the last 2 or 3 years?

Mr. WYNN. I think they are on the rise. I think part of that is because we have been giving this issue more attention and more people in agencies are hearing about it.

The other thing that I have said is I don't want to be a complaint-handling office.

Mr. SCARBOROUGH. Right.

Mr. WYNN. That is what EEO is for. But if you have 15 or 16 people who are citing a problem—and most recently we had a problem in IRS where a group of people—what I am saying, bottom line, Mr. Chairman, is groups of people are coming in and saying, "In our agency we have this problem." And it is very serious.

Mr. SCARBOROUGH. Yes.

Mr. WYNN. A lot of it has to do with promotional opportunities, people saying that minorities are being channeled into dead-end jobs, non-minorities are being channeled into tracks where they can gain experience and skills so they will be ready for the next promotion.

Mr. SCARBOROUGH. OK. Let me ask you, I have talked briefly about alternative dispute resolution. What is your read on that? Is that one way to alleviate the backlog of cases?

Mr. WYNN. I think that clearly is part of the equation. There are some complaints that are amenable to alternative dispute resolution, and we have to include that in our processing, so I am very pleased that we are looking at that. Some complaints aren't valid and some complaints can be addressed in kind of a short form fashion. So I think alternative dispute resolution provides a great opportunity.

But the problem that I have been focusing on is, where you can't deal with it in a relatively amicable fashion because you have a climate or you have a few perpetrators within, say, mid-management, who are causing this problem, how can we get at that? And so if we can find out that there are a lot of complaints dealing with harassment or a lot of complaints dealing with the denial of promotions, it enables policymakers to kind of focus in and say, "Wait a minute. Why are we getting a disproportionate number of complaints about promotional denials from these three managers within our entire system?" Because it kind of casts a black eye on an entire agency when, in point of fact, it may be a few people committing the same kinds of discriminatory acts. That is why the data collection is important.

But, clearly, Mr. Chairman, you are on the right track with alternative dispute resolution.

Mr. SCARBOROUGH. Let me go ahead and turn it over to you, Congressman Cummings.

Mr. CUMMINGS. I only have two questions.

The end result that we are trying to get to is trying to reduce discrimination—eliminate it, really, but, I mean, for all practicality, reduce it. I was just wondering, you said that you had met with a number of agencies. Have you found that, in meeting with these agencies, that they were open to change? In other words, I take it that the thing that got you to the agency was that you had a number of complaints, but once you got there I was just wondering, have you seen any kind of action on the part of any of the agencies that you could at least hold up and say, "Look, we saw some problems here, and we see changes taking place."

Mr. WYNN. That is a very good question, Mr. Cummings. It is a mixed bag. I think there are some people who are trying, but the first response is generally, "Well, let me tell you about all the seminars we have had and let me tell you about all the workshops we have had and let me tell you about John Doe, who is our sole senior executive person." So there is a certain resistance to acknowledging the problem. It is like alcoholism or other kinds of problems. You first have to acknowledge the existence of the problem.

But there have been agencies that have indicated a willingness to work. The Secretary of the Department of Agriculture, where there are major problems, has been very positively saying, "Look, I want to do something."

Oftentimes it is not the Cabinet-level person, the Secretary; it is way down in mid-management that the Cabinet Secretary doesn't even see where you have a problem.

It is difficult because some of the mid-management supervisors are not willing to acknowledge a problem.

Mr. CUMMINGS. I know that you believe in the theory of what do you have when the dust settles, and, so that we are singing from the same hymn book and page, when you talk about aggressive oversight, what do you mean? I want to make sure we are saying the same things.

Mr. WYNN. Again, a very good question. I would like to see this committee bring in Cabinet Secretaries and Under-Secretaries, and, after having looked at the good EEO data, say, "Look, there appears to be a problem here. Your inventories are substantial, and the nature of the complaints tend to be consistently about a lack of promotions or consistently tend to be about a hostile work environment. Now, what are you doing about it, Mr. Secretary or Mr. Under-Secretary, given this data?

So I think that is why the data aspect is so important, because, armed with the data, the committee and others can begin to hold Cabinet Secretaries and Under-Secretaries and agency heads accountable.

Mr. SCARBOROUGH. Thank you.

Ms. Norton.

Ms. NORTON. No questions, please.

Mr. SCARBOROUGH. Thank you.

I want to thank you, Mr. Wynn.

You said something really briefly that I think we ought to talk about, as we try to figure out a way to fix this system.

You talked about e-mails and the Internet and everything else. It seems to me, at the beginning of the 21st century, we ought to be able to figure out a way that EEOC can—that these complaints can be put instantaneously, maybe not all the details, not all the information, but at least basics on hat complaints are filed, in what departments. Is it race discrimination? Is it sex discrimination? To me, that doesn't seem so radical. I think that would be a good first start. At least we in Congress could at least tell what trends are occurring in what agencies.

With that, I thank you for your testimony. We are going to have to adjourn briefly for a vote, but we will be back in about 15 minutes.

Mr. WYNN. Thank you, Mr. Chairman and members of the committee.

Mr. SCARBOROUGH. Thank you.

[Recess.]

Mr. SCARBOROUGH. Calling the meeting back to order, I would like to start out by asking unanimous consent that Congressman Joe McDade be allowed to sit up here on the dais. He has a party interested in this matter who will actually be on the third panel.

But I wanted to open this portion up by recognizing the Congresswoman from the District of Columbia for any opening statement she may have.

Ms. NORTON. Thank you very much, Mr. Chairman.

I would like to thank Chairman Scarborough for noting this hearing and for the time and energy he has put into it, and also the ranking member for his unfailing interest in this subject.

I have an unfailing and longstanding interest. When I first came to Chair the Equal Employment Opportunity Commission under President Carter, I found a backlog in the private sector complaints of 2 years. It had paralyzed the agency.

We reduced that backlog and got to the point where we could process cases within 3 months. We did it through the intelligent use, essentially, of alternative dispute resolution. Our focus was on looking for those cases which needed extended treatment, especially litigation, and recognizing that the average case filed in any large complaint system is not of that variety.

We pioneered the use of alternative dispute resolution. We called it "rapid charge processing." And it had an extraordinary effect, both on the remedy rate and on the reduction of time—a system which keeps people locked into it—and the chairman has said 3 years here. I take it these are Government-sector complaints. This is a system that does not provide relief. You cannot provide relief by taking everybody through every step of the process. You have got to find a way to help people who can get all the relief they can deserve early.

In our system of law, the way to do that is to have more than one track. There ought to be a track for very complicated cases—and there remain such cases in the courts and at the EEOC. But I have to tell you the average case that comes before the EEOC is not a very complicated case.

I fear that there has been backtracking here, just as there was in the 1980's, after we set off a system that used alternative dispute resolution, did not depend upon the complexities of a ponder-

ous system, there was huge backtracking in the 1980's that took every case through the system.

EEOC more recently has begun to use alternative dispute resolution, but I fear that, with the new system of greater involvement of EEOC administrative judges, which I applaud, that the whole notion of how to treat some complaints so that they are appropriately treated for more rapid resolution has been lost in the process.

I will be very interested to hear whether or not the EEOC has learned to sort out cases so that cases can be treated appropriately according to their complexity and, therefore, so that the agency can, in fact, face the backlog and get rid of it.

I thank you very much, Mr. Chairman.

Mr. SCARBOROUGH. And I thank you, and I agree with you 100 percent that we do have what you called a "ponderous system." As proof, we were going to actually blow up the administrative process for EEOC. Unfortunately, every time we tried to blow this up, our computers crashed. So we are going to try again. We may go to Kinko's on 7th Street, and perhaps those computers will be able to handle it a little bit better than our own. But it is an absolute mess and, in fact, a ponderous system.

Let us go ahead and call up our second panel right now, if they could come up and have a seat.

The witnesses on our second panel are going to be Mr. Michael Brostek and Mr. Carlton M. Hadden.

Mr. Brostek is the Associate Director of the Federal Management and Work Force Issues in the General Government Division of the General Accounting Office, and Mr. Hadden is the Acting Director of the Office of Federal Operations at the U.S. Equal Employment Opportunity Commission.

I thank both of you gentlemen for coming, and I would ask, if you could, please stand and give an oath.

[Witnesses sworn.]

Mr. SCARBOROUGH. Mr. Hadden.

STATEMENTS OF CARLTON HADDEN, ACTING DIRECTOR OF FEDERAL OPERATIONS, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; AND MICHAEL BROSTEK, ASSOCIATE DIRECTOR, FEDERAL MANAGEMENT AND WORKFORCE ISSUES, U.S. GENERAL ACCOUNTING OFFICE

Mr. HADDEN. Thank you, Mr. Chairman.

I ask that my statement be entered into the record.

Mr. SCARBOROUGH. Without objection, so ordered.

Mr. HADDEN. And I would like to just take the time that I have to kind of summarize some of the concerns, I think, which have been addressed, and address some of the steps that we have begun at EEOC.

The Commission's mission is the eradication of discrimination. The process that we are talking about is a shared process with Federal agencies. The Commission has oversight responsibility of this process. We have administrative judges in the field, we have appellate attorneys at EEOC.

With the arrival of Chairwoman Castro in 1998, we accelerated the process that had begun with Chairman Gilbert Casellas to

make the Federal sector reforms. I don't think you will find much argument from the Commission in recognition that this is a process that certainly needs to be improved.

The regulatory reforms which took effect this past fall certainly are a key to making that change. One of the regulatory reforms that we are most interested in is ADR. ADR is now required. All agencies must make that available as part of their processes.

We also believe that another key advantage of these regulations is the manner in which complaints are now processed. They can no longer be fragmented complaints. They have to be a unified claim which we look at.

In overall approach, this process is what we call the "comprehensive strategic approach to enforcement" at the Commission, which simply means using all the tools that we have at our arsenal, not just relying on the administrative judges or the appeals attorneys, but looking at certainly ADR, looking at oversight of Federal agencies, how they are managing their EEO complaint process. What are the issues relating to glass ceiling issues?

That whole approach will hopefully get us to a much better place. The NPR—we have an inter-agency task force that Congressman Wynn alluded to in his prior testimony. We are very excited about that. We believe that will be absolutely key.

This is the first time that we have all parties and players at the table engaging in a dialog. This is a very complicated process, and we believe that this task force holds great promise for ultimately delivering reform to the EEO complaint process for Federal agencies.

In regard to the data, you know, what we did with the data, we had begun a process of correcting some of the mistakes. I am pleased to tell you that we expedited publication of the 1998 report. I am very hopeful that we will have the 1999 report in short order. The reason, in large part, that you don't have it now is we want to make sure that it is accurate data.

We know, preliminarily, that 21,847 people filed complaints in fiscal year 1999, and those 21,847 people filed 25,177 complaints. That is excluding the Department of the Treasury, which could not give us a number on the number of individuals filing EEO complaints.

Preliminary data on 1999 shows us that the time it takes to process complaints continues to rise. We are very interested in using technology. We certainly want to increase our use of technology. We have a lot of the guidance that we give agencies and our stakeholders now on the website. Certainly, we would like to look at expanding our use of that. A lot of that is often resource driven and, to that extent, we do the best we can with the resources we have, but we think technology is certainly a viable way to increase our effectiveness.

One innovation that we think will help, in terms of helping agencies understand how this process works, is what we call "computer-based training." We are developing a CD which we will distribute to all of our stakeholders—agencies, in particular—explaining this new EEO process. That, I think, will help the agencies understand how to move EEO complaints.

We have done, in terms of the approach, the comprehensive approach, we have expanded the outreach. We have had town hall meetings, in partnership with NPR. We had a town hall meeting March 22nd in St. Louis. We are having one April 5th in Los Angeles, and having one here in Washington April 25th.

This expanded dialog and communication with our stakeholders we believe is certainly a key to figuring a good solution to this process. As I said before, the Commission is responsible for eradicating discrimination. This is a shared process with Federal agencies.

The Commission's authority, in regard to the Federal agencies, is more limited on the Federal than on the private side.

I will keep my comments brief. Thank you.

Mr. SCARBOROUGH. Thank you. We appreciate your testimony. I am sure you will have a chance to expand in the question period.

[The prepared statement of Mr. Hadden follows:]

STATEMENT OF
CARLTON M. HADDEN, ACTING DIRECTOR
OFFICE OF FEDERAL OPERATIONS
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

MARCH 29, 2000

Good morning Mr. Chairman and Members of the Subcommittee. I appreciate the opportunity to appear before you today on behalf of Ida L. Castro, Chairwoman of the U.S. Equal Employment Opportunity Commission (EEOC). I am Carlton M. Hadden, Acting Director of EEOC's Office of Federal Operations. EEOC is grateful that you have provided a forum through which we can highlight the progress the Commission has made in improving the federal sector complaint process and to discuss further changes needed to ensure that the federal government is a model employer.

As you know, EEOC has oversight of the equal employment opportunity (EEO) complaint process in the federal sector, including the hearings and appellate processes. Accordingly, it is the Commission's responsibility to provide guidance and assistance to the EEOC administrative judges who conduct hearings on discrimination complaints filed against agencies. The Commission also adjudicates appeals of federal agency decisions on discrimination complaints and ensures agency compliance with decisions issued on those appeals. Moreover, the Commission oversees federal agencies' programs of affirmative employment through a review process which includes agencies filing annual reports and EEOC

review of those reports and the conduct of technical assistance or on-site visits. The office delegated responsibility to oversee these activities is the EEOC Office of Federal Operations, for which I am the Acting Director reporting directly to Chairwoman Castro.

When Chairwoman Castro assumed leadership of the EEOC in 1998, she immediately began a series of significant changes to the federal sector EEO process. She made clear from her first day on the job that the EEOC would bring substantive improvements to federal sector processes, much like those efforts underway to reshape EEOC's private sector enforcement processes. Reform was clearly needed because of the significant increases in hearings and appeals inventories in recent years. It is a fact that federal employees wait too long for their complaints to be processed at almost every stage of the federal EEO complaint process. Therefore, the Chairwoman made reform of the federal sector process one of her top priorities. As a result, we can report today that a number of changes have been implemented to improve this process and make the federal government a model employer.

1614 REGULATORY REFORM ACCOMPLISHED

First, we are happy to report that the rule on Federal Sector Regulatory Reform became final on November 9, 1999. This rule, in particular, implements several important reforms in the federal sector that are designed to streamline and significantly improve the process. We expect these changes will result in a more efficient and fair complaints process at all federal agencies. The revised regulations will have a positive impact on the entire federal sector process, both at the agency level and at the Commission's hearings and appeals stages.

There are several major changes to the regulations which will impact all federal agencies. One change which is critical to our mission's success is the requirement that agencies institute Alternative Dispute Resolution (ADR) programs which will be available to resolve disputes throughout the complaint process. This is wholly in keeping with the congressional mandate that all executive agencies promote the use of ADR as set forth in the Administrative Dispute Resolution Act of 1990, 5 USC Section 571-583. As you know, this Act requires each agency to: 1) adopt a policy that addresses the use of alternative means of dispute resolution; 2) designate a senior official to be the dispute resolution specialist of the agency; 3) provide ADR training on a regular basis; and 4) review each of its standard agreements for contracts, grants, and other assistance to encourage the use of alternative means of dispute resolution. In 1996, the Congress permanently reauthorized this Act and called for the creation of an Interagency ADR Working Group to facilitate and encourage agency use of alternative dispute resolution.

On May 1, 1998, President Clinton issued a Memorandum directing agencies to promote the use of ADR, and appointed Attorney General Janet Reno to chair the Statutory Interagency ADR Working Group to assist agencies in making the goals of the Act and the Presidential memorandum a reality.

Moreover, EEOC's requirement for ADR parallels our efforts to encourage the use of ADR in the private sector, such as the Commission's recently launched national mediation program. Through our private sector experience, we have learned that mediation is a fair and efficient voluntary mechanism that resolves discrimination claims to the satisfaction of both

parties. It prevents undue delays and brings matters to closure quickly and fairly, benefitting both the employee and the employer. We are confident that ADR in the federal process will have similar beneficial results.

Another important 1614 regulation change significantly enhances the authority of EEOC Administrative Judges. Federal agencies' may no longer issue final decisions where there has been a hearing before an administrative judge . Now, agencies must issue orders stating whether they will fully implement the judge's decision and, if they do not intend to, they must also appeal to the Commission.

In addition to these changes, new provisions reduce case fragmentation and eliminate multiple appeals in single cases; the class action process is revamped, making it more feasible for class claims to be resolved in the administrative process; and finally, the reconsideration process is streamlined. All of these changes improve the complaint process by eliminating unnecessary layers of review and addressing systemic unfairness.

To ensure agencies understand the impact of the new regulations, we conducted a government-wide program of outreach and technical assistance to agencies and stakeholders to ensure that accurate information on the new regulation was widely disseminated. We provided several one-day training seminars at over a dozen locations across the country between November and mid-January, 2000. These seminars provided education on the legal and technical revisions to the regulations. Moreover, we have issued a comprehensive revision to EEOC

Management Directive-110 (MD-110) to explain and provide guidance to agencies, complainants and practitioners regarding the revision to the EEO regulations. In the MD-110 there is extensive guidance on processing EEO complaints, fragmentation and a full chapter on ADR in the federal EEO process.

We believe that these significant and substantive changes will have a positive impact in the processing of federal EEO complaints at all levels in the government. As with any new change, it will take some time before we are able to adequately assess the overall effect the regulations will have on the federal sector workload.

COMPREHENSIVE STRATEGIC ENFORCEMENT MODEL

In addition to the regulatory reform, EEOC has instituted a comprehensive strategic approach to link the hearings and appeals programs with strong oversight, technical assistance and educational initiatives. This comprehensive enforcement model for the federal sector will provide a strategic approach to federal sector reform and will promote discrimination prevention strategies by linking improved data analyses, outreach and technical assistance activities aimed at the root causes of discrimination, and a streamlined process for addressing EEO complaints. Specifically, through onsite reviews and technical assistance visits, the program monitors and assists agencies in implementing changes to the federal complaint system; provides stakeholders and agency staff with enhanced training, outreach, and technical assistance; and fosters innovative practices such as a joint interagency task force on the federal sector EEO process with the Administration's National Partnership for Reinventing Government (NPR).

As part of this effort, we held a federal sector conference in August, 1999 which brought together EEOC's federal staff from across the nation for the first time to ensure our staff are working with a common purpose to implement the new regulations, MD-110, and ensure the delivery of high quality service to federal employees and employers.

NPR/EEOC INTERAGENCY FEDERAL EEO TASK FORCE

In addition to reforms of the regulation governing the federal sector EEO process and internal program reforms, Chairwoman Castro is co-sponsoring with the National Partnership for Reinventing Government, a task force representing stakeholders in the federal sector EEO process. The task force has a mandate to identify and develop innovations that will enhance the fairness, efficiency and effectiveness in the federal sector as agencies adapt to the new regulation and look at other options to improve federal sector processes.

In keeping with Chairwoman Castro's philosophy of pursuing customer service excellence through inclusion and open dialogue, members of the task force include representatives of the EEOC, NPR, Cabinet Departments and agencies, stakeholder groups, federal employee unions and other organizations. The NPR/EEOC Interagency Federal EEO Task Force has brought together a cross-section of federal officials in several teams that are addressing ways to improve federal sector data, identify best practices, and test pilots in areas such as prevention of workplace disputes; early dispute resolution, and computerized methods for tracking and monitoring cases. Those most familiar with and involved in the day-to-day

operations of the federal sector EEO process are articulating how best to bring about and advance reform to all facets of the process.

In addition to the Task Force, EEOC has taken additional steps to improve data collection. As Acting Director of the Office which produces the Federal Sector Report on EEO Complaints Processing and Appeals, I have been an active member of the Task Force. We also plan to have our Fiscal Year 1999 Federal Sector Report on EEO Complaints Processing and Appeals ready for publication much earlier this year, while making every effort to make certain the data is accurate. The Task Force is making additional recommendations on fiscal year 2001 data, particularly on means to ensure timeliness and validity and recommendations for electronic transfer of data and the use of a universal docketing number to track complaints throughout the EEO process.

RESPONSE TO GAO CONCERNS REGARDING DATA COLLECTION

EEOC has also taken a number of steps to respond to the concerns raised by the General Accounting Office in its report entitled *Equal Employment Opportunity: Data Shortcomings Hinder Assessment of Conflicts in the Federal Workplace, May 4, 1999.* This report highlighted problems in the collection and reporting of data in Federal employment discrimination cases. Upon learning of concerns raised in the report about data collection, we expedited our efforts to clarify instructions on data collection. EEOC also urged agencies to give higher priority to the accuracy of their EEO data collection, tabulation and analysis efforts to provide the information their managers and decision-makers need to the address the cause of workplace conflicts.

Additionally, EEOC assessed agency practices by conducting reviews at eleven agencies to determine what steps they use to ensure reliability of bases and issues data, and the availability of data to answer other questions raised by GAO. These eleven agencies processed the bulk of the EEO complaints filed in the federal sector. We have also participated in the joint EEOC/National Partnership for Reinventing Government's Interagency Task Force to develop innovative practices to increase the fairness, efficiency, and effectiveness of the federal sector EEO process and eliminate discrimination in the workplace. We will use the work done by the NPR task force, stakeholders, agencies and advocacy groups as away of getting feedback on this vital issue of data collection.

Finally, we have also revised and updated our EEOC Form 462, Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints, used to collect data from federal agencies on their EEO complaints. These revisions will provide for collecting the kinds of data mentioned by GAO such as the number of individuals who file complaints. As a result of these efforts we can report that for fiscal year 1999, not including the Department of the Treasury, 21,847 people filed a total of 25,177 complaints or an average of 1.2 complaints per person.

PILOT PROGRAMS -- A SUCCESS STORY

We are pleased to report that EEOC has undertaken pilot programs with other federal agencies to improve processing of complaints on an experimental basis. One of the pilots which has demonstrated initial success is the 2000 Decennial Census EEO Complaint Processing

Project. During the fiscal year 2000 decennial census count, it is projected that there will be an increase in the number of complaints filed at Census because of the employment of temporary Census employees. In the Census pilot, EEOC has undertaken two functions during the EEO complaint process: intake and early neutral evaluation. The EEOC staff responsible for doing intake on formal complaints evaluates the EEO complaints of temporary Census employees and applicants for temporary employment to determine which complaints are suitable for dismissal and which indicate a potential cause of action. As a measure of our initial successes, of 192 complaints filed to date, EEOC has identified 45 which are suitable for processing. In addition, after an investigation is completed, EEOC conducts a sufficiency review of the investigation. Once it is found sufficient, an EEOC Administrative Judge, acting as a third party neutral, assesses the strengths and weaknesses of the case for both the complainant and the agency. Through the early neutral evaluation process, the Administrative Judge tries to settle the case. The initial successes shown by this pilot prompted the Department of Commerce to request its extension.

ONSITE EVALUATIONS

Another way in which EEOC carries out its oversight functions is through on-site visits and technical assistance and outreach efforts. In 1999, EEOC Headquarters and Federal Affirmative Action Units went on-site to 34 agencies' facilities and conducted 233 technical assistance visits. Staff also reviewed 415 agency affirmative employment accomplishment reports filed with EEOC by federal agencies. By way of outreach, EEOC staff provided 75 speakers and presenters to external organizations.

This year we are fully implementing the prevention components of the Comprehensive Enforcement program for the federal sector to ensure a fair, efficient and effective federal EEO process for federal employees and agencies. As part of this effort EEOC plans to conduct at least 14 on-site reviews of federal agency EEO programs.

Moreover, EEOC has initiated a comprehensive, strategic enforcement approach to its onsite reviews of federal agencies. This means that:

- We bring together all sources of information within EEOC, as well as information from stakeholder groups, where appropriate, when selecting specific agencies for onsite reviews.
- We view onsite reviews as one tool among many (technical assistance, outreach, education, adjudication) that we can use to help agencies comply with the law.
- We are more tightly focusing our onsites so as to use our limited resources to conduct as many effective onsite reviews as possible.
- Some onsite reviews focus on potential problems that have been identified through complaints at the hearings or appeals stage or by employees.
- We offer technical assistance and conduct follow up visits after our onsite reviews to ensure that agencies comply with our recommendations.

TOWN HALL MEETINGS SCHEDULED

EEOC is also hosting three town hall meetings for agency stakeholders. The first meeting was held in St. Louis, Mo., this past Wednesday. I was at that meeting and can report that there was a good exchange among the participants, yielding a great deal of useful information as we continue to move forward with our efforts to bring meaningful reform to federal sector EEO complaint processes. The other meetings will be held in Los Angeles, Calif., on April 5, and in

Washington, D.C. on April 25. These town hall meetings will help foster a constructive and open dialogue between staff of the EEOC and those individuals with a vital interest in preventing and remedying employment discrimination at federal agencies. Federal employees and managers are welcome at the meetings, which will feature representatives from unions, civil rights groups and community organizations.

TRAINING

Another important aspect of our outreach efforts is the provision of training. We are pleased to report that the Commission is developing computer-based training (CBT) for the new federal sector regulations. The CBT is one of the tools the Commission intends to use in its efforts to provide the required training to the Federal community as early as possible.

This accomplishment is notable for two reasons, first because this is the first time the Commission will use the technology of designing training through this media, which will be accessible to people with disabilities, and second, the self-paced training program will allow the Commission to train in a very short period of time thousands, through the use of the employees' desktop personal computers, of Federal employees who work in Federal sector EEO programs, located in agencies' field installations. This will significantly enhance EEOC's ability to provide training to agency employees.

The EEOC is also in the midst of developing EEO Counselor and EEO Investigator Training Courses in line with the requirements in the MD-110 that agencies ensure that their

Counselors and Investigators receive the requisite new or continuing EEO Counselor and Investigator Training. We anticipate being able to offer training for counselors and investigators by the summer or certainly by the fall of 2000.

CRITICAL PERFORMANCE MEASURES ESTABLISHED

In addition to these foregoing efforts, EEOC has developed performance measures, under the Government and Performance Results Act, to assess the revisions to the federal sector EEO process. These measures for fiscal year 2000 include the following:

- Five percent reduction in the number of hearings cases over 180 days old.
- Twenty percent of total closures will be from the oldest group of appeals.
- Ten percent of appeals received during the fiscal year will be resolved within 180 days.
- Providing technical assistance to at least 5 federal agencies to develop an ADR program
- Conducting 14 on-site evaluations of federal agency EEO programs.

TECHNOLOGICAL ENHANCEMENTS

EEOC has also developed a comprehensive website which can be accessed over the internet at www.eeoc.gov. We have put our Digest of Equal Employment Law, an electronic journal which reports on important developments in federal EEO cases and law, on our website. We are also planning to place our federal appeals decisions on our website this year.

PRODUCTIVITY IMPROVEMENTS AND RESOLUTIONS

Hearings

With regard to the productivity of our Hearings program, the Commission in 1999 was able to stem the rate of increase in our hearings inventory. Hearings resolutions increased from fiscal year 1998 to fiscal year 1999 by almost 16% (from 10,426 to 12,056). Administrative Judges issued over 22% more decisions addressing the merits of a claim in this same time period (4,285 compared to 3,512). By the end of fiscal year 1999, the hearings inventory was 12.7 months, a 37% reduction from the 20.8 months at the end of fiscal year 1998.

Appeals

With regard to the productivity of our Appellate program, the inventory was reduced to 11,548 cases, a one month reduction from the end of fiscal year 1998. Appeals attorneys resolved 8,108 appeals in fiscal year 1999, more than an 8% increase from 7,494 appeals resolved in the prior year. Benefits to complainants reported as a result of compliance monitoring of appellate decisions stood at $9.8 million in fiscal year 1999 compared to $5.7 million for fiscal year 1998. Appellate attorneys issued over 200 findings of discrimination in fiscal year 1999 with almost $10 million in benefits to over 250 individuals.

CONCLUSION

Mr. Chairman, I believe that these initiatives will significantly enhance the Federal EEO complaint process and will assist in our mission of making the federal government the model employer. There will be additional opportunities for EEOC to improve this process and we will be looking for opportunities to find avenues to implement these improvements. For example, the

agency's fiscal year 2001 budget request of $322 million includes an initiative focused toward further improving the service of our federal sector operations. We look forward to working with the Committee as we carry out our mission.

Thank you. I will be happy to answer any questions you may have.

Mr. SCARBOROUGH. Mr. Brostek.

Mr. BROSTEK. Mr. Chairman and members of the subcommittee, I am pleased to have this opportunity to discuss the Equal Employment Opportunity complaint process for Federal employees and the Equal Employment Opportunity Commission's role in protecting Federal workers from unlawful employment discrimination.

I will summarize my testimony and ask that the full testimony be inserted in the record.

Mr. SCARBOROUGH. Without objection.

Mr. BROSTEK. In recent years, the complaint process and EEOC's role in eliminating discrimination in the workplace have been targets of criticism because of the rising number of complaints, growing backlogs of unresolved cases, and the increasing amount of time that it has been taking to bring cases to a close.

Discrimination complaints and the workplace conflicts that underlie them not only disrupt the lives of the employees involved, but also can undermine the efficient and effective delivery of services to the public.

The EEO complaint process depends on actions taken by both the employing agencies and EEOC. In accordance with regulations and policies promulgated by EEOC, agencies receive complaints, investigate them, and make decisions on their merits.

EEOC conducts hearings on complaints and adjudicates appeals. Processing hearings and appeals, although fundamental to EEOC's mission, is only part of that mission, which also includes eradicating discrimination in the workplace.

With these thoughts in mind, I would like to make three brief points.

First, the number of discrimination companies by Federal employees grew during the 1990's, overwhelming the ability of agencies and EEOC to process cases in a timely manner. My full testimony identifies those caseload trends in more detail.

Second, we found that the kinds of data that EEOC collected did not provide answers to such basic questions as the number of employees filing complaints, the kind of discrimination they were alleging, and the specific conditions or events that caused them to file those complaints in the first place. We also found reliability problems with the data that the agencies were providing to EEOC and that were then reported to the public.

Third, although EEOC has focused considerably on the processing of complaints, the second half of their mission—going out and investigating the causes of those complaints—has, in the past, perhaps received a little less attention, and we are encouraged to see that there is more attention going in that direction.

That is a segue to the second portion of my statement. There is encouraging news today. Actions have been taken or are in development, as Mr. Hadden has mentioned, that address each of these three issues. I will briefly summarize some of those actions.

The regulations that EEOC implemented last November, are one of the principal initiatives to try to deal with the rising case load. Several provisions in the regulations are intended to reduce the number of complaints, including provisions allowing agencies and EEOC to dismiss spin-off complaints, eliminate fragmentation of

complaints, and encourage the consolidation of complaints by the same individual.

In addition, the regulations require agencies to make alternative dispute resolution available during the informal and formal stages of processing a complaint. This requirement may pay large dividends in caseload reduction.

For instance, Postal Service complaints going to EEOC have declined significantly and Postal officials attribute that reduction to their increasing use of ADR.

EEOC data problems are also beginning to be addressed. As we just heard, EEOC is now trying to actually get an unduplicated count of the number of complainants that have filed, and EEOC is working with the agencies on improving the reliability of the data and with the NPR task force on thinking through what are the best kinds of data to collect and to analyze in order to understand the problems that we face.

Finally, EEOC has announced various other initiatives that may lead to reductions in the case loads. For instance, EEOC plans to look at their hearings and appeals and extract lessons learned from those processes and use those lessons learned to help provide guidance and assistance to agencies and to target onsite visits to agencies.

In addition, the inter-agency task force that I mentioned has focused on examining dispute resolution strategies and best practices, with the hope of creating a model EEO climate and a model EEO complaint system.

In conclusion, the history of rising complaints, increases in case backlogs, and the substantial increases in the time taken to resolve EEO complaints has been unfair to employees whose lives have been disrupted and have distracted attention from carrying out the missions of agencies.

Having studied these issues for some time, we are encouraged that attention is now being paid to looking at the quality and validity of the information available. We are also encouraged about the various initiatives to improve the processing of EEO cases and on identifying the root causes of the conflicts that get surfaced in the EEO complaint system.

Nevertheless, most of these initiatives are in their formative stages; therefore, we believe that sustained attention to these issues by EEOC and the Executive agencies is a necessity. This hearing and similar expressions of congressional interest can help ensure that adequate follow-through occurs to make sure that these initiatives are successfully implemented.

That concludes my statement. I would be happy to answer questions.

[The prepared statement of Mr. Brostek follows:]

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Civil Service
Committee on Government Reform
House of Representatives

For Release on Delivery
Expected at
10:00 a.m. EST
on Wednesday
March 29, 2000

EQUAL EMPLOYMENT OPPORTUNITY

Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention

Statement of Michael Brostek, Associate Director
Federal Management and Workforce Issues
General Government Division

GAO/T-GGD-00-104

Statement

Equal Employment Opportunity: Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to discuss the equal employment opportunity (EEO) complaint process for federal employees and the Equal Employment Opportunity Commission's (EEOC) role in protecting federal workers from unlawful employment discrimination. In recent years, the complaint process and EEOC's role in eliminating discrimination in the federal workplace have been targets of criticism because of the rising number of complaints, growing backlogs of unresolved cases, and the increasing amount of time it has been taking to bring cases to a close. Discrimination complaints—and the workplace conflicts that underlie them—not only disrupt the lives of employees but can also undermine the efficient and effective delivery of government services to the taxpayers.

The EEO complaint process depends on actions taken by both the employing agencies and EEOC. In accordance with regulations and policies promulgated by EEOC, agencies receive complaints, investigate them, and make decisions on their merits. EEOC conducts hearings on complaints and adjudicates appeals. Processing hearings and appeals, although fundamental to EEOC's mission, is part of a broader charge to enforce antidiscrimination laws to eradicate discrimination in the workplace.

With these thoughts in mind, I would like to make three points today:

- First, the number of discrimination complaints by federal employees grew during the 1990s, overwhelming the ability of their agencies and EEOC to process cases in a timely manner. Recent changes in the regulations that govern the discrimination complaint process may improve the management of these caseloads; but, by and large, the effects of the changes are not yet clear.

- Second, we found that the kinds of data EEOC collected did not provide answers to such basic questions as the number of employees filing complaints, the kinds of discrimination they were alleging, or the specific conditions or events that caused them to file. We also found problems in the reliability of the data EEOC received from the agencies and reported to the public. In response to our findings, EEOC has begun taking steps to address these data shortcomings so that Congress and other stakeholders will have the complete and reliable data needed for informed decisionmaking.

- Third, although EEOC traditionally has focussed on complaint processing and adjudication, it is important to remember that EEOC identifies its broader mission as eradicating discrimination in the workplace. EEOC has recently announced a program to help lessen the number of federal employee complaints by addressing their underlying causes: discrimination and other sources of conflict. However, this initiative—like the recent changes in the complaint process and EEOC's attention to its data shortcomings—is still in its early stages and will require sustained attention on the part of EEOC to achieve meaningful results.

Our observations today are based on a body of work examining the dispute resolution and administrative redress processes, in particular the EEO complaint process, available to federal employees. In testimony before this Subcommittee in November 1995, we said that the redress systems, especially the EEO complaint process, were inefficient, expensive, and time-consuming.[1] Since that time, we have analyzed trends in complaint caseloads, developed information about decisions made by EEOC administrative judges, and examined the quality of complaint data collected from agencies and reported by EEOC.[2] Further, we have studied how some federal and private sector organizations used alternative dispute resolution approaches to resolve EEO complaints.[3]

Rising Federal Sector Discrimination Complaint Caseloads and Processing Times

I would first like to address trends over the past decade in complaint caseloads at the agencies and EEOC. The 1990s saw an overall rise in the number of discrimination complaints that federal employees filed with their agencies and in the number of hearing requests and appeals that complainants filed with EEOC. The rise in the number of complaints caused growing backlogs of unprocessed cases. The net effect has been that complaints, and the conflicts underlying them, have been left unresolved for increasingly longer periods of time.

Rising Number of New Cases

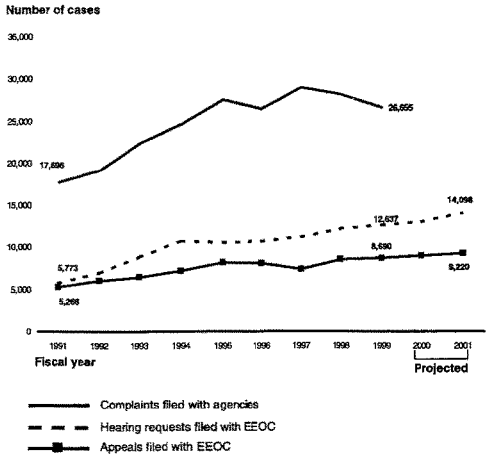
As shown in figure 1, from fiscal year 1991 through fiscal year 1999, both the agencies and EEOC saw an increase in the number of new cases.

[1] Federal Employee Redress: An Opportunity for Reform (GAO/T-GGD-96-42, Nov. 29, 1995).

[2] Equal Employment Opportunity: Rising Trends in EEO Complaint Caseloads in the Federal Sector (GAO/GGD-98-157BR, July 24, 1998); Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations on Future Trends Unclear (GAO/GGD-99-128, Aug. 16, 1999); Equal Employment Opportunity: Data Shortcomings Hinder Assessment of Conflicts in the Federal Workplace (GAO/GGD-99-75, May 4, 1999); Equal Employment Opportunity: Administrative Judges' Recommended Decisions and Agencies' Actions (GAO/GGD-98-122R, June 10, 1998).

[3] Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace (GAO/GGD-97-157, Aug. 12, 1997).

Figure 1: Increase in the Number of Complaints Filed With Agencies and Hearing Requests and Appeals Filed With EEOC, Fiscal Years 1991-1999



Source: GAO analysis of EEOC data.

In fiscal year 1999, federal workers filed close to 27,000 complaints with their agencies, 50 percent more than they did in fiscal year 1991, when they filed fewer than 18,000 complaints.[4] Figure 1 also shows some encouraging news—a recent decline in the number of new cases at agencies. I will address this point later in my testimony.

With the surge in new cases at the agencies, hearings and appeals caseloads grew at EEOC. EEOC received over 12,600 hearing requests from complainants in fiscal year 1999, about 120 percent greater than the number it received in fiscal year 1991. In addition, the nearly 8,700 appeals filed with EEOC in fiscal year 1999 were 65 percent higher than the number filed in fiscal year 1991. EEOC projects that these figures will rise further, with about 14,000 hearing requests and more than 9,000 appeals estimated for fiscal year 2001. (See figure 1.) These estimates, however, do

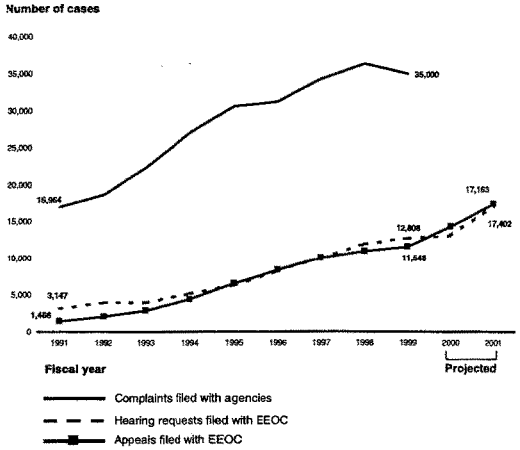
[4] Agency complaint data for fiscal year 1999 provided by EEOC are preliminary.

not take into account the decline in the number of new cases at agencies in fiscal year 1999.

Growing Inventories of Unresolved Cases

Neither agencies nor EEOC were able to keep up with the influx of new cases. Simply put, the number of new cases outpaced the number of cases closed. As a result, the inventories of unresolved complaints increased, as figure 2 shows.

Figure 2: Increase in the Inventory of Complaints at Agencies and Hearing Requests and Appeals at EEOC, Fiscal Years 1991-1999



Source: GAO analysis of EEOC data.

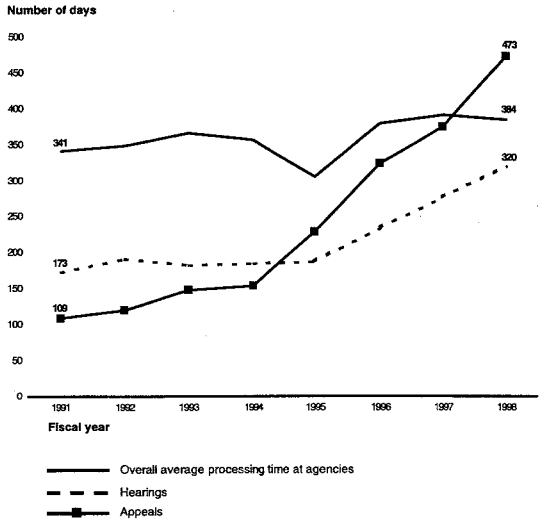
Agencies' complaint inventories more than doubled from fiscal year 1991 through fiscal year 1999, rising to 35,000 cases. The growth in inventories, however, was more dramatic at EEOC. During this period, EEOC's backlog of hearing requests increased by over 300 percent, to nearly 13,000. At the same time, the agency's appeals inventory grew by almost 700 percent, to more than 11,500. EEOC projects that without additional administrative judges and attorneys to adjudicate cases, new cases will continue to

outpace closures, and by the end of fiscal year 2001, the hearings and appeals inventories will both climb to over 17,000 cases. (See fig. 2.)

Case Processing Times Increasing

With growing inventories, both the agencies and EEOC began to take longer on average to process cases.

Figure 3: Average Processing Time for Complaints at Agencies and Hearings and Appeals at EEOC for Fiscal Years 1991 -1998



Source: GAO analysis of EEOC data.

In fiscal year 1998, the agencies took an average of 384 days to process a case, compared with 341 days in fiscal year 1991. This average, however, includes all types of cases, from those that agencies dismiss or settle more quickly to those involving a written decision by the agency on the merits of each of the issues raised in a complaint. Cases in which a complainant requests a hearing and appeals an agency's decision, in particular, take

longer, and this figure has been rising. The average time EEOC took to process a hearing request increased to 320 days in fiscal year 1998, from 173 days in fiscal year 1991, even though EEOC's own regulations stipulate that EEOC issue a hearing decision in 180 days.[5] There was also a sharp increase in the average time EEOC took to process an appeal. This figure grew to 473 days in fiscal year 1998, from 109 days in fiscal year 1991.[6] It is significant to note that according to fiscal year 1998 data, a case traveling the entire complaint process—from complaint filing at the agency through hearing and appeal at EEOC—could be expected to take 1,186 days (3 years and 3 months). As recently as fiscal year 1995, this figure stood at 801 days (2 years and 2 months).[7]

Implications of Caseload Trends

The logjams at EEOC and agencies will persist as long as agencies and EEOC receive more new cases than they process and close. EEOC projects that despite productivity gains and recent additions to its staff, hearings and appeals inventories will grow and cases will remain in inventory longer. Consequently, cases will take longer to process, adding further to the overall length of time it takes for a case traveling the entire complaint process.

Factors Behind the Rise in the Number of Complaints

The work we have done over the last several years has identified a number of factors contributing to the rise in the number of complaints.

Our July 1998 report about rising trends in complaint caseloads discussed several factors related to a changing economic and legal environment that contributed to increases in the number of complaints.[8] One of these factors was downsizing, which resulted in complaints about job losses and reassignments. A second factor was the Civil Rights Act of 1991, which motivated some employees to file complaints by allowing compensatory damage awards of up to $300,000 to be made. A third factor was the Americans With Disabilities Act of 1990, which made federal workers more

[5] The 180-day requirement for issuing a decision may be extended if an EEOC administrative judge makes a written determination that good cause exists for such an extension.

[6] Unlike for hearing requests, there is no time standard for processing appeals specified in regulation. In response to a recommendation that we made in GAO/GGD-99-128 that an acceptable level of timeliness be established for the processing of appeals, the EEOC Chairwoman said that 180 days is an appropriate goal. Although not established in regulation, EEOC's Fiscal Year 2001 Performance Plan contains a goal of resolving 10 percent of appeals received in fiscal year 2001 within 180 days.

[7] In fiscal year 1999, the time EEOC took to process a hearing increased to 330 days, from 320 in fiscal year 1998, and appeals processing time decreased slightly to 461 days, from 473.

[8] GAO/GGD-98-157BR.

aware of existing protections. Finally, program regulations implemented in October 1992 made the complaint process more accessible to employees.

In another report we issued in May 1999, we said that a number of factors indicated that the increase in the number of discrimination complaints over the past decade did not necessarily indicate an equivalent increase in the number of individuals filing complaints.[9] Several factors support this premise. First, an undetermined number of federal employees have filed multiple complaints and, according to EEOC and other federal officials, account for a disproportionate share of the complaints that are filed. There is a crucial distinction to be made between the number of persons filing complaints and the number of complaints filed. The trend in the number of employees filing complaints and the number with multiple complaints is not known, for reasons that I will discuss later. Second, as an EEOC workgroup reported, the number of cases in the system was "swollen" by "spin-off complaints"—new complaints challenging the processing of existing complaints. Third, the workgroup also reported that the number of complaints was "unnecessarily multiplied" by agencies fragmenting some claims involving a number of different allegations by the same employee into separate complaints. Finally, there has been an increase in the number of complaints alleging reprisal, which, for the most part, involve claims by employees who allege that they have been retaliated against for filing a complaint.

In addition to these factors, in past reports and testimonies, we noted, among other things, that the discrimination complaint process was burdened by a number of cases that were not legitimate discrimination complaints. Some employees file frivolous complaints to harass supervisors or "game" the system. Others file a complaint in an attempt to get a third party's assistance in resolving a workplace dispute unrelated to discrimination.[10] In the same vein, EEOC reported in its 1996 study that a "sizable" number of complaints might not involve discrimination issues but instead reflect basic communications problems in the workplace.[11]

[9] GAO/GGD-99-75.

[10] Federal Employee Redress: An Opportunity for Reform (GAO/T-GGD-96-42, Nov. 29, 1995); Federal Employee Redress: A System in Need of Reform (GAO/T-GGD-96-110, Apr. 23, 1996); and Civil Service Reform: Redress System Implications of the Omnibus Civil Service Reform Act of 1996 (GAO/T-GGD-96-160, July 16, 1996).

[11] ADR Study, U.S. Equal Employment Opportunity Commission, Office of Federal Operations, Oct. 1996.

Although the rise in caseloads has been substantial, it should not be looked upon as a reliable indicator of discrimination in the federal workplace because of the reasons just discussed. Although there are no aggregate figures on the proportion of complaints that are meritorious, the outcomes of EEOC hearings are instructive in this regard. It is interesting to note that as caseloads have risen, the proportion of EEOC hearing decisions containing findings of discrimination has declined. In fiscal year 1991, about 15 percent (266) of the 1,800 hearing decisions contained findings of discrimination; in fiscal year 1998, about 7 percent (254) of the 3,512 hearing decisions contained findings of discrimination.

EEOC Efforts to Reduce Caseload Growth

Faced with ever-growing caseloads, EEOC adopted a number of revisions to regulations, implemented in November 1999, intended to reduce agencies' and its own caseloads and improve case management.

The revisions allow agencies and EEOC to dismiss spin-off complaints and eliminate the fragmentation of complaints that I referred to earlier. Similarly, other changes to the regulations are intended to reduce caseloads by weeding out nonmeritorious cases—for example, by allowing agencies and EEOC to dismiss cases in which there is evidence of misuse of the complaint process.

Other regulatory revisions designed to bring about case management efficiencies may also reduce the number of cases that agencies and EEOC handle. One change allows a complainant to amend an existing complaint by adding issues or claims that are like or related to it, rather than opening a separate complaint. Another new provision requires agencies and EEOC to consolidate two or more complaints filed by the same complainant. This provision has paid dividends at EEOC, where the number of hearing requests in inventory at the beginning of fiscal year 2000 was reduced by 18 percent when multiple complaints from the same complainants were consolidated.

EEOC also hopes to stem the flow of new cases through the new requirement that agencies make alternative dispute resolution (ADR) approaches available to employees during both the informal and formal complaint processes.[12] Our August 1997 report discussed the benefits agencies had experienced in using ADR processes to resolve EEO disputes.[13] We reported that two federal agencies we studied—the Postal

[12] According to EEOC, 57 (52 percent) of 109 agencies responding to a 1998 survey already made ADR services available.

[13] GAO/GGD-97-157.

Service and the Walter Reed Army Medical Center—found that ADR processes, by resolving discrimination complaints in their early stages, had reduced the number of formal complaints filed, as well as the time required for seeing them to resolution. Data from two other federal agencies we studied—the Air Force and the Department of Agriculture—showed that the use of ADR had brought about speedier dispute resolution.

More recently, the benefits of ADR have been particularly evident at the Postal Service. In August 1999, we reported Postal Service statistics showing that there were about 17 percent fewer complaints filed in the first 10 months of fiscal year 1999, compared with the same period in fiscal year 1998—7,050 versus 8,522.[14] In fact, EEOC attributes the overall decline in the number of federal sector complaints in fiscal year 1999, compared to fiscal year 1998 (28,147 versus 26,655), to fewer formal complaints being filed by postal workers. Postal Service officials attributed this reduction primarily to the Service's ADR program. The Postal Service data showed dramatic differences in outcomes in cases in which mediation—the ADR technique of choice at the Postal Service—was employed, compared with those cases in which it was not. Of the 6,252 cases mediated in the counseling or pre-complaint phase, only 17 percent (1,081) went on to become formal complaints. In contrast, about 72 percent (5,969) of the 8,314 cases not mediated resulted in a formal complaint being filed. We also reported that the Postal Service was expanding ADR to formal complaints awaiting a hearing before EEOC. A Service official had told us that about one-third of the cases reviewed in pilot programs were candidates for settlement and one-third were candidates for mediation, while the remaining one-third would probably go to hearing.

The Postal Service's experiences with ADR are significant for several reasons. First, they show that an agencywide ADR program to resolve disputes at an early stage can reduce the influx of formal complaints. Second, because postal workers account for about half of the federal sector EEO complaints, a substantial reduction in the number of formal complaints by postal workers could mean a reduction in EEOC's hearings and appeals workload. Third, the Postal Service's limited experience of applying ADR to cases awaiting a hearing show that some portion of this inventory can be resolved without using EEOC resources. Finally—and perhaps most important—the Postal Service's experiences with ADR underscore the importance of resolving workplace disputes expeditiously

[14] GAO/GGD-99-128.

and allowing federal employees to give their full attention to serving the taxpayers.

Effects of Regulatory Changes Need to be Closely Tracked

Although EEOC designed its changes to program regulations and procedures to reduce the flow of new cases, it did not estimate the likely effect of these changes on the volume of complaints. However, with the application in November 1999 of the new regulations to all new and existing cases, the effects of the changes should be emerging. Because there may be significant and rapid changes in the caseloads, it is important for EEOC to closely track these developments for strategic planning purposes. Further, we believe that such information would enable EEOC to develop estimates for Congress of the resources needed under various time frames to reduce hearings and appeals processing times and inventory levels to acceptable levels.[15]

Data Shortcomings Hinder Assessment of Workplace Conflicts

The rising trends in complaint caseloads and increasing processing times raise some fundamental questions, such as:

- How many federal employees are filing discrimination complaints?
- What kinds of discrimination are they complaining about?
- What kinds of issues in the workplace are triggering their complaints?

Answers to such questions would help decisionmakers and program managers discern trends in workplace conflicts, understand the sources of conflict, and plan corrective actions. However, EEOC has not been collecting relevant data in a way that would help answer these fundamental questions.

As I stated earlier, discrimination complaint caseloads have risen, in part, because an undetermined number of federal employees have filed multiple complaints. The reason this number is unknown is that EEOC had not been collecting data on the number of employees who file complaints, nor on how often individual employees file complaints. For the first time, however, and in response to concerns we raised in our May 1999 report, EEOC asked agencies to provide data on the number of individual employees who filed complaints in fiscal year 1999.[16] According to EEOC,

[15] GAO/GGD-99-128.

[16] GAO/GGD-99-75.

agencies reported that 21,847 individuals filed formal complaints.[17] In other words, nearly 1 in every 5 of the 26,655 complaints in fiscal year 1999 was filed by an employee who had already filed a complaint that year. This number, however, was not further broken down to account for spin-off complaints and other claims relating to earlier complaints.

Another problem with EEOC's data gathering is that it does not provide usable information to answer questions about the kinds of discrimination employees are claiming or the specific issues cited in their complaints. As you know, an employee's discrimination complaint cites both the basis (or bases) for the complaint and the specific issue(s)—that is, the condition or event—that triggered it. The bases for complaints can include discrimination due to race, color, national origin, sex, religion, age, or disability, as well as retaliation for making an earlier complaint. The issues that can be cited include such things as harassment or adverse personnel actions.

The flaw in this regard lies in the format EEOC has prescribed for agencies to report data on complaint bases and issues. This particular format does not allow data collected about the bases and issues cited by employees to be related to the number of complaints. For example, there is no way of telling from EEOC's data the number of complaints citing racial discrimination as the basis or harassment as the issue. As a result, it is impossible for decisionmakers to discern trends that would reveal which particular groups of employees may feel aggrieved or the conditions or events giving rise to their complaints.

It is also clear that some of the data collected and reported by EEOC have lacked reliability. We found, first, that agencies did not report their data consistently, completely, or accurately; and second, EEOC did not have procedures that ensured the data were reliable. These are important shortcomings because a clear-cut and reliable picture of complaint trends and sources of conflict is necessary if EEOC, Congress, and other stakeholders are to make informed, fact-based decisions.

In response to the concerns we raised in our May 1999 report about the accuracy and usability of its data, EEOC has undertaken a comprehensive review of its data collection methodology and made an assessment of needed improvements, according to the agency. EEOC also reported that it is expediting its efforts to revise the form it uses to collect complaint data from federal agencies. In addition, EEOC's Fiscal Year 2001 Performance

[17] Treasury did not report the number of individual complainants.

Plan shows that EEOC intends to develop a standardized federal EEO Complaint Collection and Reporting System to improve data collection and provide more efficient reporting of federal EEO complaints.[18] Further, EEOC is addressing data shortcomings as part of an interagency task force on the EEO complaint process. These are encouraging steps, although they cannot be expected to yield improved data for decisionmaking for at least 2 or 3 years.

Movement Toward a Systematic Approach to Dispute Prevention

At the heart of the matter of rising caseloads is the need not just to make the complaint process better but to prevent disputes from becoming formal complaints in the first place by dealing with their underlying causes. EEOC has begun initiatives under its Comprehensive Enforcement Program to do this. Although we have not examined these efforts, they are clearly a step in the right direction.

EEOC's Fiscal Year 2001 Performance Plan outlines a systematic approach—first announced in August 1999 as part of the Comprehensive Enforcement Program—to pursuing the eradication of discrimination in the federal workplace. In the past, EEOC focused primarily on adjudicating cases rather than on eliminating their underlying causes. The performance plan outlines steps to help eliminate the causes of conflict by expanding oversight of the agencies and providing technical assistance, outreach, and training to the agencies and other stakeholders. EEOC said, however, that pursuing these goals effectively will depend on its receiving additional resources.

EEOC's plans include using what it learns from hearings and appeals cases for training and oversight purposes. We believe that much can be gleaned from hearings and appeals cases, not only about the kinds of discrimination alleged and issues being raised, but also about agencies' approaches to dispute resolution. EEOC said that it would establish regular opportunities for hearings and appeals attorneys and affirmative employment staff at agencies to share information and discuss systemic issues.

EEOC also said that under its Comprehensive Enforcement Program, it intends to use its hearings and appeals experiences to identify persistent issues at the agencies. This knowledge, combined with other information known about agencies, their EEO processes, and their historical complaint records, will be used to target specific agencies for on-site reviews. EEOC said it considers on-site reviews to be one of the most important vehicles

[18] The performance plan is required under the Government Performance and Results Act of 1993.

to correct the root causes of discrimination. In its performance plan, EEOC says that in fiscal year 2001 it intends to conduct on-site reviews of 14 agencies representing a substantial share of the federal workforce. The on-site reviews will help pinpoint identifiable problem areas at an agency and enable EEOC to provide technical assistance that may be needed. The performance plan does not indicate whether EEOC intends to ask agencies, where appropriate, to develop corrective action plans that would specify steps and time frames or whether it would ask agencies to explicitly address complaint process improvement and prevention strategies in their affirmative employment program plans.

Another feature of the Comprehensive Enforcement Program is the requirement EEOC has put in place for agencies to make ADR available to a complainant before and after a formal complaint is filed. I talked earlier about how ADR has helped resolve cases more quickly in their early stages. It is especially useful because, as EEOC and others have noted, many EEO complaints arise out of poor communication in the workplace. We have learned from our work that the benefits of ADR go beyond simply quicker and earlier resolution of disputes. ADR not only assists in resolving the dispute at hand, it also equips the disputants with communication and conflict management skills that can help them avoid future disputes among themselves or with others.

Interagency Federal EEO Task Force

Another initiative under its Comprehensive Enforcement Program is EEOC's cosponsorship, with the National Partnership for Reinventing Government (NPR), of the Interagency Federal EEO Task Force. The task force has brought together representatives from EEOC and other federal agencies with the overall objective of improving the fairness and efficiency of the federal sector EEO complaint process and stimulating changes that will prevent discrimination.

The task force includes three teams—one charged with examining dispute prevention strategies, another with studying early dispute resolution methods, and a third identifying best practices. As I mentioned earlier, there is a fourth team—the data collection team—to address data shortcomings, in keeping with a suggestion we made that EEOC develop a working group of federal agency representatives to revise data collection requirements. The task force is expected to issue a report in July 2000, according to an NPR official.

The importance of this task force lies not only with its immediate objectives but also for what it can hold for the future. The Office of Personnel Management and the Merit Systems Protection Board both have

interagency advisory groups helping in the formulation and implementation of policy. The Interagency Federal EEO Task Force may provide a starting point for similar strategic partnerships between EEOC and the agencies.

Summary

Following a decade of rising discrimination complaint caseloads, growing backlogs, and lengthening delays in processing individual cases, EEOC has begun taking steps, under new regulations, to better manage the complaint process. In addition, the agency has begun to address shortcomings in the completeness and reliability of the data it collects from the agencies and reports to the public. Both efforts are part of EEOC's Comprehensive Enforcement Program, announced in August 1999. At the broader level, the program includes plans to help address the root causes of employee complaints: discrimination and other sources of conflict in the federal workplace. All of these efforts are encouraging, but they will require a sustained commitment and follow-through on the part of EEOC if the agency is to achieve meaningful results.

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions you or other Members of the Subcommittee may have at this time.

Contact and Acknowledgements

For further information regarding this testimony, please contact Michael Brostek, Associate Director, Federal Management and Workforce Issues, at (202) 512-8676. Individuals making key contributions to this testimony included Stephen Altman, Anthony P. Lofaro, and Sharon Hogan.

Mr. SCARBOROUGH. I want to echo what you just said. You are correct. You have been studying this for some time. In fact, in 1995 you testified that to EEO process was "inefficient, expensive, and time-consuming." I want to ask both of you gentlemen the following questions:

Do you all agree with us that that is still an accurate description of the EEO complaint process 4 years later? Mr. Hadden, would you still term the process, what Mr. Brostek said in 1995—inefficient, expensive, and time-consuming?

Mr. HADDEN. I think the regulations which took effect in November are going to be very important. To say that, it is still the state of affairs. The regulations took effect in November 1999, and I think we are on the road to changing that reality and making the process much more efficient and effective.

Mr. SCARBOROUGH. Mr. Brostek, how do you compare what you see today in 2000 to what you saw in 1995?

Mr. BROSTEK. Well, certainly, in some regards the situation is materially worse. It is taking considerably longer to work cases through the entire system, and that is because the number of cases that have been generated have been in excess of those that the agencies or EEOC have been able to process each year. So we have a much larger inventory of cases in place, and the average amount of time to deal with those cases has been expanding fairly dramatically, even since 1995.

So I think that the conclusion that we reached in 1995 is still a valid conclusion.

Mr. SCARBOROUGH. In fact, you said it takes longer and there is a larger backlog. Let me ask you, do you agree with Mr. Hadden that the regulations that were implemented in November may be helpful?

Mr. BROSTEK. I think they are a step in the right direction. I think they have attempted to address a number of the issues that have arisen about the efficiency of the processing of cases.

I also believe that the ADR requirement, as I mentioned in the statement, has a lot of potential to help us out here.

If other agencies are as successful as the Postal Service appears to have been in the past year or two in reducing the number of complaints that get into the formal system due to ADR, we won't have that rising case trend that we have had in the past, and that should enable agencies and EEOC to begin working down those inventories of backlogged cases.

Mr. SCARBOROUGH. Do both of you agree that ADR is probably the single best chance right now to make this process a bit more streamlined?

Mr. HADDEN. I think ADR is an important component; however, I think that—it is not just ADR, but it is in the context of what we are doing at the Commission in terms of taking a very broad, comprehensive approach to our mission to eradicate discrimination.

But, to answer the question and be responsive, I think ADR is a very important tool which, used appropriately, can help us identify the cases which are most suited for an alternate process and let us use our resources to eradicate discrimination. But I think ADR is an important tool, but in the context of a broad-based, com-

prehensive approach in partnership with Federal agencies and our stakeholders.

Mr. SCARBOROUGH. Mr. Brostek, what do you think? Have you seen great advances in using ADR?

Mr. BROSTEK. Well, I don't know that we have seen great advances yet. We have a couple witnesses who will be on later who have successful programs or appear to have successful programs. I am not sure that that is true across the board yet. We are starting to make progress. These requirements that are in the regulations should help out.

I believe that ADR will, as Mr. Hadden said, be a very important component in improving this situation, but I think another important component is using the data, as has been suggested by Mr. Wynn, and I think by yourself, Mr. Scarborough, to help identify where the sources of the problems we are facing are. Who is doing the complaining? Why are they complaining?

Once we can analyze the situation, we can take corrective measures to head off complaints in the future. We might find that what we need is an educational program of some kind, and we can target that to the agencies who are having the biggest problems with promotion processes or unfair assignments of individuals.

The analysis of that data and follow-through I think is as important as the ADR process.

Mr. SCARBOROUGH. Now, speaking of who is filing complaints, oftentimes you hear the argument that, well complaints may be up, but it is just a small number of people that are filing these complaints, it is based on personality conflicts and not really discrimination.

Do you all have any evidence and do the numbers bear that out, that a small percentage of people file a disproportionately large number of complaints, or is that really a red herring?

Either one of you want to answer this question?

Mr. HADDEN. We are pointing at each other.

Mr. SCARBOROUGH. Yes, you are you are pointing at each other. You all can't see it out there. What does that mean?

Mr. HADDEN. I think that clearly the point is that we do need to have better data to answer those precise questions which are legitimate questions, and I believe those are, in fact, some of the questions that Congressmen Cummings and Wynn asked the General Accounting Office to address.

I would be uncomfortable saying with any certainty, to you, what the answer to that is other than we are moving in the right direction and getting the data to address that.

Mr. SCARBOROUGH. Mr. Brostek, were you able to find any evidence through your studies that a small number of people file a large number of complaints?

Mr. BROSTEK. Nothing that we could really quantify.

Mr. SCARBOROUGH. OK.

Mr. BROSTEK. There are certainly plenty of allegations that that is the situation. I think that the information that is now beginning to be collected on the number of individual complaints filed each year will help us out to try to track that.

Mr. SCARBOROUGH. I am about 45 seconds over, but I want to ask one final question very quickly.

You talked about the use of technology, that you thought technology could be used. Does it not seem possible to both of you that there is some way that we ought to be able to give EEOC the resources where they can almost put instantaneously up on the Internet who is filing the complaints, what is the basis of the complaints, what are the numbers, the macro, what are the numbers of the agencies having complaints filed, and what are the bases? Is it race discrimination, sex discrimination, age discrimination? I mean, that shouldn't be so difficult, should it?

Mr. HADDEN. It should not be difficult, and I would say that the NPR/EEOC task force, the data team, in fact, I think, has had some very good discussions about what options are available to the Federal Government. That is one reason why the task force is such a great tool, because we have all the agencies at the table.

But, to answer your question very succinctly, technology is there. I think that certainly it is something we could look at. I mean, we have learned at EEOC, although we are coming late, because, you know, of the resource issue, but we are improving our technological extent and reach, and that is something. We would like to continue that dialog with our stakeholders of how we can do that.

Mr. SCARBOROUGH. Great.

Mr. BROSTEK. We certainly haven't analyzed that issue. It would seem to me that it would be feasible to do that. The important thing, I would think, is, once we are able to, that we also have the analytic capacity to analyze it and determine what it is telling us so that we can use it and take corrective action.

Mr. SCARBOROUGH. Thanks.

Mr. Cummings.

Mr. CUMMINGS. Thank you.

I tell you, this whole discussion has just been fascinating, this back and forth here.

Let me start with the last question that Mr. Scarborough asked.

Mr. Hadden, are you saying that the capability is there to do what he just said?

Mr. HADDEN. Technology, absolutely. Sure it is there. The question—it is there.

Mr. CUMMINGS. So if the Congress mandated it, it could be done?

Mr. HADDEN. Absolutely.

Mr. CUMMINGS. OK. Because that is what we may have to do. See, maybe I am missing something, but, I mean, I have seen some of these forms, and I thought the forms—now help me, but I thought the forms—you have got to tell what your basis is, right?

Mr. HADDEN. Right.

Mr. CUMMINGS. And then basically the form is supposed to tell what the issue is; is that right? Is that right?

Mr. HADDEN. That is correct.

Mr. CUMMINGS. And so it is a matter of gathering this information from some forms. I know I am missing something, so tell me what I am missing.

Mr. HADDEN. Well, the forms are gathered and collected by the Federal agencies.

Mr. CUMMINGS. Right.

Mr. HADDEN. And the EEOC in the past would ask for those for the data to be combined, compiled, and given to us at the end of the fiscal year.

The problem comes that the data which agencies are giving us we find is not always the correct data, is not reliable data, so that is partly where the problem comes in.

One option that we certainly had considered or have thought about that the chairwoman had alluded to is what we call a "universal docketing number," which could allow the EEOC and all the agencies to track a complaint as it goes through the system. We think that would help us. The question is whether we want a live data system or a static data system.

Mr. CUMMINGS. So you have the capability of doing that right now, what you just said, that universal number?

Mr. HADDEN. The Commission does not have the capability. We have to engage in a—our data system does not currently allow us to do that.

Mr. CUMMINGS. But you were about to say you have to engage in a——

Mr. HADDEN. Discussion or dialog with agencies about——

Mr. CUMMINGS. That is what I thought you said.

Mr. HADDEN [continuing]. That whole issue. We have done that with the task force. I mean, technology will let us do pretty much what we want to do.

The question is, as I indicated in the beginning of my testimony, this is a shared process.

Mr. CUMMINGS. Right.

Mr. HADDEN. The Commission, its relationship with our agency stakeholders is one in which, you know, we have to engage in dialog and the certification and reliability of data is, in large part, in their hands.

As you know, the question is how much attention does the head of the agency give it. That will help and hopefully determine the accuracy of the data that we get from the agencies.

Mr. CUMMINGS. What can we do to help you help us? In other words, is there anything that we can do? I tell you, sometimes when I—after I got elected, sometimes I wonder about the power that we do have. I hate to say that, as a Congressman, but I am just wondering, is there anything that we can do to help you? Is there something that we could pass or something that we could demand? I mean——

Mr. HADDEN. Well, I am trying to avoid the natural instinct to say resources is clearly an issue for us, but, in all seriousness, it is an issue for the Commission in terms of what the Congress can do.

I know that, in the past, the Commission has been the beneficiary of an increase, but that is certainly one thing.

I think the other is this kind of dialog and attention to the problem, and I think that helps. The task force is also helpful.

Mr. BROSTEK. I would like to followup on that. I think we are having this hearing today, in part, due to what you and Mr. Wynn have done, by asking us to do a series of assignments, to analyze the situation, and determine what the facts are for the situation. I think is a reasonable expectation for you to also have of the agen-

cies and EEOC provide you some fact-based analysis of what the problems are, what their work load is, what kind of resources they need to deal with that work load.

I think asking for that kind of information from the agencies and EEOC will help you make more-informed decisions about what kind of resources ought to be made available.

Mr. CUMMINGS. Well, Mr. Brostek, I am so glad you said that, because I want to pick up where the chairman started.

He started by asking you all about some things that may have been stated back in 1995. Here we are, going on 6 years later, and I am just wondering—you know, I think one of the things that is so frustrating for us a lot of times is that we don't like to think that we are meeting just to be meeting, and we like—in order for us to feel that we are making some progress, it is nice to have some type of measuring tool to figure out did we accomplish something or didn't we or would it have been better off for us to be playing golf somewhere instead of wasting everybody's time.

I am very serious about that.

So the question is: if we come here a year from now, I mean, what should we expect to see? And I would like to be able to focus—just like the chairman quoted from 1995, I would like to have a quote so that whoever is here can sit and say, "Now, back there in March 2000 you said."

Now where are we? What can we expect? You have told us about the regulations from November in answer to the chairman's question. I mean, you did say that the situation was worse than a few years ago.

Mr. BROSTEK. It certainly is in terms of the number of cases and the backlog.

Mr. CUMMINGS. Right. So now the things that you said are worse—Mr. Hadden talked about the optimism coming from the regulations in answer to the same question. So now the question becomes: what should we reasonably expect within a year from now so that we can quote you and say, "You said we would be here. We should be here by now?"

The reason why I am asking that question is I am not trying to mess with you. I guess it is so that we don't keep doing the same things over and over again.

There was a song way back when in my younger days that said, "You have got me going in circles," and in some kind of way we have got to get off the circle because lives are being affected every day.

So if you could tell us, give us a nice statement so that we could have a nice measuring tool, so that, if it is you, or whoever is sitting in your position a year from now, we can take it—load the statement up on a big screen and say, "Have we accomplished this and where are we? And, if we haven't accomplished it, why haven't we?"

I am listening.

Mr. BROSTEK. Well, I don't think it is really the——

Mr. CUMMINGS. I would like to hear from both of you, by the way.

Mr. BROSTEK. I don't think it is really the General Accounting Office's role to set the goal for the EEOC or the agency, but I would certainly think that what you have been told——

Mr. CUMMINGS. What would you hope for? And then I will ask my friend, Mr. Hadden, another question.

Mr. BROSTEK. I would hope that the beginning decline in the number of cases going into the system would continue to be the trend—that we wouldn't see it going up any longer; we would see the number of new cases going down.

I don't know what we can expect next year for the EEOC caseload, because they still have this huge inventory of cases out there they have got to work on, but you certainly would want the initial cases coming in to continue going down, and you wouldn't want to see too long before the trend in EEOC, itself, with the hearings and appeals workload start going down. I just don't know whether that is reasonable next year.

I think you would also reasonably expect that by this time next year there would be some clear resolution to the data problems and clear identification of the data that EEOC and the agencies will track to determine what the causes of the conflict are that underlie these complaints.

Mr. SCARBOROUGH. OK.

Mr. HADDEN. I would add I agree with all of that. I think that certainly is reasonable. But I think, in a more broad brush, what you should see next year is, as a result of the partnerships that we have with the stakeholders, identification of some of the best practices of Federal agencies, and also on the private side. That is one of the teams that we have on this task force.

I think that will be very helpful to know. What are the best practices? What are the prevention strategies which we know work? Those are, I think, important measures.

The numbers certainly, you know, count, but for the Commission I go back to its mission of eradication of discrimination. And I hope that we will next year this time be able to get to the point of using ADR much more efficiently and effectively throughout the Federal community so that we can focus on those egregious cases which we don't want to see. We do want to see the Federal Government truly become a model employer.

Mr. CUMMINGS. Last question: would it be helpful for us to set some goals so that when you go back to your task force you can say, "Well, this is what the Congress has said they want to see within a certain period of time?"

I mean, I understand that there are pressures coming from all around, and that sometimes it is helpful to go back with something saying, "Look, I just left the Congress, and this guy, Cummings, was going crazy, and so this is one of the things he and the chairman said and Ms. Norton, and they are very upset, and so this is what they have asked us to do." Would that help you?

Mr. HADDEN. I can only tell you that anything helps in terms of getting the message out, but I think that we at the Commission have been on message in terms of recognizing the flaws with this EEO process and have been driven in short order to make some changes in dramatic fashion. That certainly would help. But I

think that, more importantly for us, it is a resource question in terms of what we ultimately can deliver for the Congress.

Mr. CUMMINGS. Thank you.

Mr. SCARBOROUGH. Thank you, Mr. Cummings.

Mrs. Morella.

Mrs. MORELLA. Thank you, Mr. Chairman.

I think this is an important meeting. It is kind of like deja vu all over again, because it is not the first hearing that we have had on this issue. I think we assumed that we had given adequate tools and mechanisms for streamlining the process, since we had all heard from constituents about backlogs and not feeling that anybody was paying attention.

I was surprised also to find, up to this point—and I say "up to this point" because I think we are going to look ahead at what can be done and should be done, but I am surprised that we didn't have an actual analysis and statistical numbering of the number of cases, the causes. I know you are starting to do that, but I kind of had assumed that this was automatically being done.

All right. In July of last year, my office met with Patricia Crawford and Ida Castro to talk about what needed to be done, what the problems were facing the EEOC, and it was their goal to implement the changes to the problems that I know that Congressman Wynn earlier addressed and that you have heard here today, too.

The discussion had to do with agencies will be no longer able to rewrite the decisions of the administrative judges. They may now only accept or reject; improved FMLA claims—family and medical leave claims—now they will be approached as a whole and the agency may not fragment the claim; EEOC will take part in the claim throughout the process, instead of coming in at the end, which would minimize the agency's ability to delay; and hiring 19 administrative judges and 14 appellate, because the President had given more money for that.

Now, I am wondering, looking at some of those changes, if you would—I know I guess they started in November, as you have said. How successful do you see these changes as being? And are there other remedies? I want to ask you another question after that, but are there other remedies that you are addressing? I know you talked about the alternative dispute resolution and the inter-agency committee.

Mr. HADDEN. Just to clarify, we do have reports to do the analysis of, agency-by-agency, the number of complaints filed, the number of cases for which discrimination is found, but we want to improve the accuracy and reliability of that data, and we want to certainly start counting the number of individuals, so we have that data available.

In terms of the success of those things that you have mentioned, it is—and I hate to keep saying it. I feel like I am dodging the question, but it is March and we began in November.

We are excited and think that they will, in fact—certainly the resources which were provided us by the Congress have made a tremendous difference in terms of, if not reducing the inventory, reducing the time it takes to handle complaints.

But when you are talking about a reduction of perhaps a month in the inventory, it seems somewhat small, and so I don't like to talk too much about those, but those resources have made a tremendous difference.

I think a lot of this can hopefully be turned around with the dialog with our stakeholders—and our stakeholders include Congress—in terms of what is it that your goals are and how is it that the Commission can go about doing those.

Mrs. MORELLA. Would you like to comment on that, Mr. Brostek?

Mr. BROSTEK. We really haven't looked at the effect of these recent changes.

Mrs. MORELLA. So you think it is pretty early. That is what you are both sort of saying. We have got the goals, we are going to do it. We are going to reduce that time element, too, and that backlog. You mentioned you have the resources, so that is not a problem. You have the will?

Mr. HADDEN. Right.

Mrs. MORELLA. And you think you have the recommendations to do that. Did you want to comment?

Mr. BROSTEK. If I could, just for a second. It kind of goes back to Mr. Cummings' point about what goals should we set. You know, there is the Government Performance and Results Act process——

Mrs. MORELLA. Yes.

Mr. BROSTEK [continuing]. That requires agencies, themselves, to set goals, and you are intended to be consultants with the agencies as those goals are being set, and then it is legitimate for you to hold the agencies accountable for reaching those goals or explaining why they haven't done that.

I would suggest that looking at the strategic plan and the annual performance plan of EEOC, as well as the agencies, to see whether they set those goals and you are satisfied with them would be a good technique.

Mrs. MORELLA. That is an excellent point, because it is a very important law that we have and we need to do the oversight on it.

A final point. I know that mentioned in the testimony—I think it was probably yours, Mr. Brostek—was the fact that EEOC also has a responsibility to try to eliminate discrimination in the workplace, and I guess, from what I understand, not that much has been done in that regard, maybe because of the backlog or bureaucratic difficulties that were faced. But I am wondering about whether you have some programs in mind, what you are doing in terms of a program to eliminate this discrimination, certainly reduce it significantly.

Mr. HADDEN. Our comprehensive approach, in terms of using all the tools, we have a complaint investigation which agencies use, and also the hearings and appeals, but what we are hoping will happen is, through onsites of Federal agencies, where we go out and actually visit with the agencies and employees, will lead us and put us in the posture of preventing complaints from arising in the first place.

I think we have had some very good successes, in terms of the mission, itself, the appeals staff who write the cases and actually have to make judgments, as well as our administrative judges, in

terms of eradicating the discrimination. I mean, that is kind of a reactive posture.

What we want to do is use everything—use our outreach, use our technical assistance for all of our stakeholders to talk about these very issues.

I think, by having a dialog with all of the parties, including the administration and the agencies, we will make some dramatic implementations.

Mrs. MORELLA. Do you find that there is a preponderance of cases from some agencies more than others? Do you have a record of that?

Mr. HADDEN. Well, we know that the Postal Service is one of our biggest stakeholders. And, generally, if you start looking at the Defense agencies, it pretty much follows where the large number of Federal employees are.

Mrs. MORELLA. So you give the greatest interest and concern and remediation to those agencies, I would assume?

Mr. HADDEN. We try to take an approach of not just looking where the numbers are, but where the problems are, and what we hear from our constituents and from our stakeholders. It may be, in fact, a much smaller agency that may, in fact, deserve our attention.

Again, to use the question of where do we target our resources, we have a lot of requests to come and visit an agency and do an onsite review. We don't have the staff, so we have to choose, and we choose based upon an assessment of the information that we have, looking at the reports we have gotten in the past in terms of complaints and other information that we may have received. So it is not necessarily the number of employees that dictates where we go.

Mrs. MORELLA. A subsequent meeting of this subcommittee will be great when we analyze what has happened since this meeting. Thank you very much.

Thank you, Mr. Chairman.

Mr. SCARBOROUGH. I thank you, Mrs. Morella.

You know, hearing Mrs. Morella ask the questions, I started thinking about the people that are up in the Civil Service panel, and I believe all of us that are here today are probably within the top five of Members with Federal employees in their District. I know I come in at a strong three or four, and I know Mrs. Morella is at the top. Ms. Norton, you probably represent one or two, yourself, don't you, in D.C.

I would like to open it up for any questions you may have for our panel.

Ms. NORTON. Thank you, Mr. Chairman.

First, let me say, Mr. Hadden, that I think the agency is to be congratulated on the work it has done to improve its processes, and particularly to begin to use ADR to look at and listen to the complaints about its processes and try to correct them.

I also recognize that there is a fatal flaw in the EEOC process, and it is a flaw that comes from the 1960's, and it is intolerable this late in the day that complaints of Federal employees are processed differently from complaints of private sector employees, so that if I happen to work for AT&T or McDonald's, I come to the

EEOC office and I say, "Tell me one way or the other, has there been discrimination." If I work for the FCC, or God help me if I work for the Congress of the United States, which has even a worse process, and I come and say, "I have to talk to the people who I am accusing," that is a fatal flaw. It is structural discrimination that is built into the process as it affects Federal employees.

Let me say to you, Mr. Hadden, nobody is going to be able to break through that here in the Congress, as we have tried to do for years, unless the EEOC can, first of all, show the that it can deal with what it has got. Nobody is going to say, "OK, you can now handle all the Federal employees" unless they can see that the agency is, in fact, able to digest what it has.

I want to look at the ADR process. I agree with the rest of the panel that it is key to moving cases in a fair and expeditious way.

I look at page 9 of your testimony, in which the EEOC seems to me quite appropriately has used a test process. I am not sure why you used the Census as the test process. I think it is OK, but it seems to me that it would have been more suitable to use a section or department of a Federal agency, since these are temporary employees, probably unrepresentative of the Federal Government.

First, let me ask you, except for the fact that they were going to be here today and gone tomorrow, why did you use Census employees instead of employees of some Federal agency or a section of some Federal agency?

Mr. HADDEN. We were approached by the Department of Commerce/Census to partner with them, and that is principally——

Ms. NORTON. See, that is what I mean. You have got to be proactive, it seems to me, if you want to improve your processes. They came to you.

Mr. HADDEN. Right.

Ms. NORTON. It seems to me that, in keeping with the concerns about data, the first thing to do would have been to be as scientific as possible if you are trying to implement a new system, and, therefore, to look for some small part of an agency that was fairly representative of Federal employees, because this is not going to tell me whether this system works, because, if anybody is unrepresentative of Federal employees, there are people who are, many of them, temporary people, out of work. If we try to recruit some today at a job fair at the Convention Center, they are fine people, but nobody would claim that they represent Federal employees.

So the first thing I would ask you is to do a real test somehow, and you are in the best position to do this, to find us a representative group of employees from some agency. It doesn't have to be a lot of agencies.

I applaud your notion of going at this slowly.

Now, I look at what you say that you did. You looked—you know, as a measure of your initial success, you say, of 192 complaints filed to date, EEOC has identified 45 which were suitable for processing. Why is that a measure of success, that a quarter of the cases that were filed were deemed suitable for process? Whose success does that represent, the success of the complainant, success of the agency, success of the agency that is alleged being discriminated against? How are we judging success here?

Mr. HADDEN. When we described that as a measure of success, I think the question is—going back to the point that you may have made earlier, Congresswoman, in terms of identifying and focusing our resources on those cases for which we think there is something there that needs to be focused on. And the statement that it is the measure of success is an acknowledgement that there are some issues which don't really lend themselves to the full investigation.

For us, the attraction of the Census is that it is a neutral party that is doing the assessment early on in the process.

Ms. NORTON. Excuse me? Any more neutral than any other Federal agency doing initial assessment?

Mr. HADDEN. Well, the question is: if the party in interest, which is a Federal agency, is doing the intake of the complaint, is neutral, there is a concern that a person may be more reluctant to share what they know if they see the agency doing the intake of the complaint.

Ms. NORTON. Who is doing the intake? When filing against the Census, itself, who is doing the intake?

Mr. HADDEN. I am sorry. The EEOC's Washington field office is doing the intake of the complaint.

Ms. NORTON. I see. You are doing the intake?

Mr. HADDEN. Yes, ma'am.

Ms. NORTON. In eliminating three-quarters of the complaints, which may be entirely appropriate, what happened to the complaints eliminated?

Mr. HADDEN. They have the right to appeal to EEOC.

Ms. NORTON. No, what happened to them? Why were they eliminated?

Mr. HADDEN. The reasons may have varied. For example, timeliness—they were untimely complaints. They did not state a claim——

Ms. NORTON. Mr. Hadden, may I ask that you submit to—you have a small number of complaints here, 192 complaints. Would you submit for the record to this hearing the disposition of the three-quarters of the complaints that were deemed not suitable for processing?

We are not going to have any sense of—you know, one question we have is, you know, are people being discriminated against, why are people filing more complaints. If all you give us is some bottom-line figure, which is the number that you have processed, you have told us very little.

Now, I am not suggesting that the three-quarters that were eliminated should not have been eliminated, but I am suggesting, with only 192 complaints, this committee should have been told what was the reason for three-quarters not being deemed suitable for processing so we could have some sense of how the process, in fact, works, and it would have more credibility.

Now, I am interested in the administrative judge trying to settle the case. You say, through the early neutral evaluation process, the administrative judge tries to settle a case. The initial success, as shown by this pilot, prompted the Department of Commerce to request an extension. How many cases were settled?

Mr. HADDEN. We would have to get that information.

Ms. NORTON. Well, my goodness, Mr. Hadden. You say it is successful. We don't know whether or not these cases were settled. I mean, the whole point here is to try to see if ADR works. You come with testimony that tells us it is successful, but you don't tell us if even one case was settled. That is very important information for the committee to have and for the EEOC to have, and I ask that it be submitted to us and I ask that you look at the settlement, see what the settlement was.

[NOTE.—The U.S. Equal Opportunity Commission's Office of Federal Operations report entitled, "Annual Report on the Employment of Minorities, Women and People with Disabilities in the Federal Government for the Fiscal Year Ending 1998," may be found in subcommittee files.]

[The information referred to follows:]

QUESTIONS SUBMITTED BY CHAIRMAN SCARBOROUGH

1. Please provide the subcommittee with information which either substantiates or refutes the contention that minorities are placed in positions that are "dead-end employment tracks."

ANSWER: EEOC's Annual Report on the Employment of Minorities, Women and People with Disabilities in the Federal Government has indicated every year since its first publication in 1982 that, in general, the representation of women and most minority groups decreases substantially as grade levels rise. Table I-10, pp. 116-118 of the EEOC's Annual Report for FY 1998 (enclosed) provides data for the six years from FY 1993 to FY 1998. The data for each year indicate that, in general, the representation of women and most minority groups decreases substantially as grade levels rise. The same is true for American Indians/Alaskan Natives except that their representation in grades GS-13 and GS-14 is the same. The data for each year also reflect that the representation of whites increases at every grade level from GS-11 through the Senior Executive Service. However, Table I-10 also indicates that the representation of women and most minority groups within particular grades from GS-11 through the Senior Executive Service has increased between FY 1993 and FY 1998. This suggests that the problem is lessening.

The data for each year also reflect that the representation of women and most minority groups decreases at every grade level from the Senior Executive Service through GS-11.

Two studies conducted by the Merit Systems Protection Board (A Question of Equality: Women and the Glass Ceiling, 1992, and Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government, 1996) make similar findings with respect to the representation of women and minorities at higher grade levels in the federal government even when controlling for differences in education, experience and other advancement-related factors.

2. Do you believe that the Navy's Pilot Dispute Resolution Program is a useful technique that would help to alleviate the backlog of cases at the EEOC? If not, why not?

ANSWER: EEOC is currently reviewing the Department of the Navy's Pilot Dispute Resolution Program; the Commission's review of the program has not been completed.

3. GAO's August 1999 report states that EEOC has increased productivity to try and keep up with the growth in caseloads. Could you describe the processes you have in place to help insure the quality of hearings and appeals decisions, and the indicators you use to measure quality?

ANSWER: EEOC has trained each administrative judge on the requirements of the new regulations and our revised Management Directive. Last August we held a Federal Sector Conference to discuss the impact of the new regulations and provide workshops on alternative dispute resolution, fragmentation and consolidation of EEO cases. The revisions to the 29 C.F.R.

regulations have added additional authority for EEOC Administrative Judges (AJs) to dismiss cases. This permits administrative judges to spend additional time on meritorious cases.

In previous years we have provided training to the administrative judges and appellate attorneys through the National Judicial Conference on judicial management and techniques of case management. We have encouraged the judges to enhance their timeliness by providing bench decisions. We are developing standard operating procedures and encouraging the use of standard documents in both administrative judge's and appeals decisions. We hold monthly AJ conference calls where problems and solutions are discussed to resolve questions relating to administrative judges. Our appellate attorneys also often review AJ decisions on appeal and provide feedback to AJs in this manner as well. We also review a select quantity of administrative judges decisions for quality and consistency. We also review their decisions and rulings if there is a complaint from an agency.

4. Based on what GAO reported, inventories of hearings and appeals cases will remain high, meaning that people will still have to wait lengthy periods for their cases to be resolved. In its August report, GAO recommended that EEOC develop estimates of the resources that would be required under various time frames to reduce these inventories and the time to process cases to acceptable levels. If the Congress wanted to consider a short-term infusion of resources to reduce these backlogs, could you provide such estimates?

ANSWER: The GAO report raised a number of legitimate issues about EEOC's backlog, all of which the EEOC already has taken bold action to address. The EEOC has, and will continue to, structure its budget and performance objectives based on our best estimate of caseloads and the need to reduce processing time. The EEOC believes the President's FY 2001 request of $327 million, a $41 million (15 percent) increase, would allow the agency to make significant progress toward reducing the backlog and case processing time. The FY 2001 budget request includes additional resources to address both private sector and federal cases.

5. EEOC's Comprehensive Enforcement Plan is intended to help EEOC meet its goal to eradicate discrimination in the federal workplace. How will you measure progress toward this goal?

ANSWER: The federal sector Comprehensive Enforcement Program links hearings, appeals, technical assistance, education, oversight and data collection and analysis into a coherent strategy to ensure the efficient and effective utilization of EEOC's resources. Only through the integration of all federal sector program resources can the root causes of discrimination be identified and eliminated. Our approach is geared toward the prevention of discrimination. While progress toward the goal of eradicating discrimination is difficult to measure, we will assess our progress by listening to our stakeholders, by receiving other feedback and by analyzing trends in the federal government employment profiles, especially geared toward the elimination of "glass ceilings."

6. You also discussed how ADR has helped some agencies deal with their EEO and other workplace disputes, and how this could help stem the flow of new cases to EEOC. More agencies will be using ADR in more cases to meet the new requirement from EEOC. Based on the work that you have done, what are the prerequisites to a successful ADR program?

ANSWER: The prerequisites to a successful ADR program include compliance with EEOC's regulations and guidelines. EEOC's regulations require that an ADR program be available at both the pre-complaint and formal complaint stages of the process. In this regard, it is crucial for the top management officials, and especially the agency head, to support the ADR program and require full participation of their managers in the ADR program.

Chapter 3 of EEOC's Management Directive (MD) 110, enclosed in pertinent part, provides extensive guidance on ADR program development and design. While MD 110 stresses flexibility, allowing agencies to experiment with different ADR techniques, it also mandates that agencies not diminish an individual's right to pursue his or her claim should ADR not resolve the dispute. For example, an ADR program should not require an individual to waive his or her right to an investigation, a hearing, or to appeal the final decision to EEOC.

In addition to complying with EEOC's regulations and guidelines, EEOC has found that there are certain requirements that are absolutely necessary for the successful development of any ADR program. These requirements, or core principles, include fairness, flexibility, adequate training and evaluation. Fairness in an ADR program incorporates the concepts of voluntariness, neutrality, confidentiality, and enforceability. Parties must knowingly and voluntarily enter into an ADR proceeding. Both parties must also be assured that they are free to end the ADR process at any time, and that they retain the right to proceed with the administrative EEO process should resolution not be reached. In addition, an ADR proceeding must be independent of any control by either party. Using a neutral third party as a facilitator or mediator assures this impartiality. Confidentiality is an essential component of many ADR techniques, such as mediation and facilitation. The enforceability of any settlement reached through the ADR process is also a necessary component of fairness, as the parties must be able to rely on the agreements that they reach.

A successful ADR program must also include appropriate training and education on ADR for an agency's employees, managers and supervisors, as well as the neutrals engaged in the ADR process. This training should include specific information on the program employed by the agency and the availability of the program and the services it provides. In addition, an evaluation component is essential to any ADR program and should be in place before the program is implemented. The evaluation will assist in determining the success of the program in terms of participant satisfaction, whether or not the program is meeting its goals, and how it might be improved and achieve better results.

DISPOSITION OF CENSUS PILOT CASES

The Census Pilot was not intended as a test process for federal agencies' ADR programs. Rather, it was designed to handle specific problems in dealing with Census' concerns which arose during the 1990 census. EEOC was approached by Census officials in 1997 with a proposal for expedited treatment of discrimination complaints of seasonal Census workers. Census reported that in the 1990 decennial census count, it had been forced to settle several complaints because of the inability to obtain witnesses who could provide testimony regarding events surrounding the complaints. To better manage these complaints, EEOC and Census entered into a Memorandum of Understanding to implement an early neutral evaluation of complaints brought against Census. Under the terms of the agreement, EEOC staff conduct a thorough interview of the complainant and also provide early neutral evaluation on each complaint. This provides an external neutral with expertise from EEOC and is consistent with our priority charge processing procedures in the private sector.

EEOC's review of the Census Pilot complaints for the period July 1, 1999 to March 17, 2000, indicates that of a total 192 complaints, 45 were accepted for processing under the early neutral evaluation process conducted by an EEOC administrative judge. Of the remaining 147 complaints, 84 were dismissed for failure to state a valid claim or untimeliness and 63 are still pending review.

We interviewed the EEOC administrative judge who conducted the early neutral evaluations. Of those complaints forwarded to the administrative judge, 32 have proceeded through the early neutral evaluation process. Of those 32, eight complaints have settled.

EFFORTS OF THE EEOC IN IMPLEMENTING REORGANIZATION PLAN NO. 1 OF 1978

The President in his Reorganization Plan No. 1 of 1978 (which on October 1, 1978, became the subject of Executive Order 12067), abolished the Equal Employment Coordinating Council and transferred its responsibilities to the EEOC. In doing so, the President noted that:

> ...this plan places the Commission at the center of equal employment enforcement. With these new responsibilities, the EEOC can give coherence and direction to the government's efforts by developing strong uniform standards to apply throughout the government: standardized data collection procedures, joint training programs, programs to ensure the sharing of enforcement related data among agencies, and methods and priorities for complaint and compliance review.

The EEOC continues to give these coordinating responsibilities the highest priority. Housed within its Office of Legal Counsel, the EEOC has a Coordination Division dedicated solely to providing direct staff support to the Commission in the exercise of its responsibilities under Executive Order 12067, as follows:

- Reviews and coordinates the equal employment opportunity regulations, guidelines and other policy issuances of federal agencies to insure consistency and eliminate duplication of enforcement efforts.

- Initiates action to identify needs and opportunities for establishing uniformity and consistency, and eliminating the duplication of effort in equal employment opportunity enforcement policies and practices.

See EEOC Order 110.002, ***Organization, Mission and Functions*** (12/4/89).

The following are some representative examples of the work of the Coordination Division in the past year:

- Coordinated with the Department of Justice about a new government-wide Title IX rule, as well as revisions to government-wide Title VI, Rehabilitation Act (§504) and Age Discrimination in Employment (ADEA) Act rules.

- Finalized several Memoranda of Understanding with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) to coordinate processing of Title VII/Executive Order 11246 complaints.

- Coordinating, for agency and OMB review and comment, a notice of proposed rule-making which revises the Commission's substantive standards under section 501 of the Rehabilitation Act by stating that the employment discrimination standards of Title I of the ADA apply to Federal employees covered by section

501. Publishing the same in the ***Federal Register*** for public comment.

- Revising a Resource Directory of equal employment compliance information, which will list federal government EEO offices with external EEO responsibilities, the employment discrimination laws enforced by each agency, and their key staff. The goal of this Directory is to facilitate the sharing of enforcement data.

- Coordinated with the Department of Education to implement a process for dealing with related complaints being processed simultaneously by the EEOC and Education.

- Provided the Department of Labor with comments on its draft technical assistance guide on employment testing.

- Held discussions with Department of Commerce staff concerning Title VII implications of export restrictions affecting foreign-born professionals in high technology industries.

- Held discussions with Federal Trade Commission staff to discuss concerns with an FTC opinion letter subjecting Title VII sexual harassment investigations to the constraints of outside investigations under the Fair Credit Reporting Act.

In addition to the work of the Coordination Division, the Commission's Office of Federal Operations (OFO) also engages in a broad array of coordination activities concerning its federal sector responsibilities. For example, in the past year, OFO:

- On behalf of the Commission, joined with the National Partnership on Reinvention to establish a joint NPR-EEOC Interagency EEO Task Force to examine the federal sector complaints process and recommend changes to advance the fairness and efficiency of the EEO system. Members of the Task Force include representatives from the NPR, the EEOC, Cabinet departments and agencies, stakeholder groups, federal employee unions, and other organizations. The Task Force is divided into four main teams: a data collection team; an early dispute resolution team; a dispute prevention strategies team; and a best practices team. It is expected that the Task Force will report its recommendations this summer.

- Held quarterly meetings with the EEO Directors of all the federal agencies to disseminate information, share best practices and coordinate activities.

- Produced a comprehensive management directive (MD-110) for all federal agencies detailing the recent reforms to the federal sector rules governing the EEO

complaint process. This directive was finalized only after all the federal agencies were consulted, as well as members of advocacy groups, federal employee unions, and various attorney groups.

- Conducted a nationwide training program open to all federal agencies, as well as the general public, on the new federal sector regulations governing the EEO complaint process.

- Is finalizing the development of a comprehensive four-hour computer-based training program on the federal sector EEO complaint process.

- Is developing an updated and standardized training manual and program of all federal agencies for their EEO counselors and investigators.

- Provided written guidance to all federal agencies in developing their alternative dispute resolution (ADR) programs, now required by the Commission's revised regulations. In addition, OFO has provided extensive technical assistance to agencies in the development of their ADR programs.

EFFORTS TO ENHANCE TECHNOLOGICAL ABILITY

As the Subcommittee is aware, the U. S. General Accounting Office (GAO) issued a report entitled *Equal Employment Opportunity: Data Shortcomings Hinder Assessment of Conflicts in the Federal Workplace, May 4, 1999*, which criticized EEOC for its inability to provide decision makers and program managers reliable federal sector EEO complaint data.

EEOC is working jointly with the National Partnership for Reinventing Government on an interagency task force to review the current data and reporting requirements and to recommend the types of data elements to collect and method of data collection to address the GAO and Congress' concerns. Once the Task Force has completed its work and recommended the requisite data elements and method of collection, EEOC will have to institute several technological improvements such as building an automated federal sector complaint data system. In addition, the Office of Federal Operations (OFO) is in the process of reviewing the way information is used and shared internal and external to its organization.

The primary objectives in implementing technological solutions are broad. They include deriving technological solutions that will enable EEOC to find ways to (1) collect from agencies accurate, complete, and timely complaint data to answer the questions posed by GAO and Congress and to determine the status of workplace conflicts, (2) provide *ad hoc* reports to decision makers, program managers, and public citizens upon request, (3) conduct trends analyses, and (4) publish an annual *Federal Sector Report on EEO Complaints Processing and Appeals* that is both timely and useful.

Beyond the mandates outlined by the task force, EEOC will also utilize technology to provide computer-based training to agencies' officials and staff on their roles and responsibilities outlined in federal regulations. OFO will also explore how we might use automation internally to examine areas where agencies are doing well or where improvements are needed. In order for this effort to be successful, agencies will need to provide consistent and accurate data which will be identified by EEOC and the EEOC/NPR Task Force. Information comes to EEOC/OFO through a variety of media and in a number of formats. This information can be useful in determining what activities should be undertaken to help identify and respond to workplace conflicts, particularly in the EEO complaints arena.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

EQUAL EMPLOYMENT OPPORTUNITY
MANAGEMENT DIRECTIVE FOR
29 C.F.R. PART 1614 (EEO-MD-110),

AS REVISED, NOVEMBER 9, 1999

CHAPTER 3

ALTERNATIVE DISPUTE RESOLUTION

I. INTRODUCTION

Statutes enforced by EEOC and executive orders encourage the use of Alternative Dispute Resolution (ADR) in resolving employment disputes.

EEOC's revised regulations at 29 C.F.R. § 1614.102 (b)(2) require agencies to establish or make available an alternative dispute resolution program. The ADR program must be available during both the pre-complaint process and the formal complaint process. The Commission has developed an ADR Policy which sets forth core principles regarding the use of ADR. A copy of the EEOC's ADR Policy Statement is included as Appendix H to this Management Directive. EEOC regulations extend the counseling period where ADR is used. See § 1614.105 (f).

Agencies and complainants have realized many advantages from utilizing ADR. ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. ADR usually costs less and uses fewer resources than do traditional administrative or adjudicative processes, particularly processes that include a hearing or litigation. Early resolution of disputes through ADR can make agency resources available for mission-related programs and activities. The agency can avoid costs such as court reporters and expert witnesses. In addition, employee morale can be enhanced when agency management is viewed as open-minded and cooperative in seeking to resolve disputes through ADR.

EEOC will review an agency's program and its ADR policies, upon request, for consistency with 29 C.F.R. Part 1614 and is available to provide guidance to assist agencies in developing their ADR programs. If you would like assistance in the development of an ADR program from the EEOC, please contact the Director of Special Services, Office of Federal Operations, at 202-663-4599 (TDD (202) 663-4593).

II. DEVELOPING ADR PROGRAMS

A. Program Design - Flexibility and Incorporating Core Principles

Agencies may be flexible in designing their ADR programs to fit their environment and workforce, provided the programs conform to the core principles set forth in EEOC's policy statement on ADR. Additionally, programs should be designed to

provide the maximum opportunity for all parties to freely express their positions and interests in resolving disputes. Agency managers must be aware that they have a duty to cooperate in an ADR process once the agency has determined that a matter is appropriate for ADR.

Agencies must build fairness into their programs. Fairness requires voluntariness, neutrality, confidentiality, and enforceability. In addition, an ADR program must be flexible, and include training and evaluation components. These "core principles" are derived from EEOC's ADR Policy Statement (located at Appendix H) and are discussed more fully in Section VII of this Chapter.

In designing an ADR program, the following factors should be considered.

1. Choosing Among ADR Techniques

While mediation is the most popular form of ADR currently being used in the federal sector, there are numerous other forms available for consideration (see Section VIII of this Chapter). Agencies should carefully consider the needs of their workforce when selecting among techniques and choose the technique or techniques that are most likely to result in the earliest successful resolution of work place disputes.

EEOC does not mandate the use of a particular ADR technique, e.g., mediation, in an agency's ADR program. The Commission does require that, regardless of the ADR technique(s) an agency selects, the method be used in a manner that is consistent with the core principles outlined in Section VII of this Chapter. Further, the ADR program must not diminish an individual's right to pursue his or her claim under the 1614 process should ADR not resolve the dispute. For example, an ADR program may not require an individual to waive his/her right to an investigation, a hearing, or to appeal the final decision to the EEOC.

2. Time Frames

An ADR program must be designed around the time frames of the EEO regulations. For example, section 1614.105(f) provides that where an agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be ninety (90) days. This time frame must be met to be consistent with the regulation. If the dispute is not resolved in this

time frame, the aggrieved must be advised of the right to file a formal complaint and that the Part 1614 process will continue. Similarly, if an individual enters into an ADR procedure after a formal complaint is filed, the time period for processing the complaint may be extended by agreement for not more than 90 days. If the dispute is not resolved, the complaint must be processed within the extended time period.

3. Representation of the Parties

Aggrieved individuals have the right to representation throughout the complaint process, including during any ADR process. While the purpose of ADR is to allow the parties to fashion their own resolution to a dispute, it is important that any agency dispute resolution procedure provide all parties the opportunity to bring a representative to the ADR forum if they desire to do so.

4. Dealing with Non-EEO Issues

Although agency EEO ADR programs are designed to address disputes arising under statutes enforced by the EEOC, the Commission has found that many work place disputes brought to the process often include non-EEO issues. In designing their ADR programs, agencies may provide sufficient latitude for the parties to raise and address both EEO and non-EEO issues (issues that do not fall under the jurisdiction of EEO laws, statutes and regulations) in the resolution of their disputes. However, if resolution of the matter is unsuccessful in ADR, non-EEO issues and issues not brought to the attention of the Counselor cannot be included in the formal complaint unless the issue is like or related to issues raised during EEO counseling.

Nothing said or done during attempts to resolve the complaint through ADR can be made the subject of an EEO complaint. Likewise, an agency decision not to engage in ADR, or not to make ADR available for a particular case, or an agency failure to provide a neutral, cannot be made the subject of an EEO complaint.

5. Matters Inappropriate for ADR

The Administrative Dispute Resolution Act of 1996 (ADRA) and the EEOC ADR Policy Statement recognize that there are instances in which ADR may not be appropriate or feasible. See 5 U.S.C. § 572(b). Agencies have discretion to determine whether a given dispute is appropriate for ADR. Agencies may decide on a case-by-case basis whether it is appropriate to offer ADR. Agencies may also limit ADR in other ways, such as geographically (if extensive travel would be required), or by issue. However, agencies may not decline to offer ADR to particular cases because of the bases involved (i.e., race, color, religion, national origin, sex, age, disability, or retaliation).

6. Collective Bargaining Agreements and the Privacy Act

Agencies must be mindful of obligations they may have under collective bargaining agreements to discuss development of ADR programs with representatives of appropriate bargaining units. Agencies must also be mindful of the prohibitions on the disclosure of information about individuals imposed by the Privacy Act. All pre- and post-complaint information is contained in a system of records subject to the Act. Such information, including the fact that a particular person has sought counseling or filed a complaint, cannot be disclosed to a union unless the complaining party elects union representation or gives his/her written consent.

B. Offering ADR During the Counseling Stage

Under § 1614.102(b)(2), agencies are required to establish or make available an alternative dispute resolution program including during the pre-complaint processing period. As mentioned in Section III of this Chapter, § 1614.105(b)(2) requires that the agency fully inform aggrieved persons of their right to choose between participation in an ADR program and the counseling activities provided for by paragraph C of this section. (See Chapter 2 of this Management Directive for additional guidance concerning the election between EEO Counseling and ADR.)

C. ADR After the Complaint is Filed

The EEOC encourages agencies to focus their ADR programs on resolving work place disputes as early in the process as possible. Agencies must design their ADR programs to allow the parties to pursue ADR techniques after an EEO complaint is filed or during or at the end of the investigation. Section 1614.108(b) states: "Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints."

D. ADR Throughout the Complaint Process

Unless the agency has determined that a particular case is inappropriate for ADR, the agency must offer ADR at all stages of the EEO process: counseling, after filing formally and prior to a hearing. Agencies are encouraged to design their ADR programs to make dispute resolution procedures available to the parties throughout the complaint process. The Commission also suggests that agencies actively encourage the parties, particularly management, to continue attempting to resolve disputes throughout the complaint process, whether through ADR or any other means of informal settlement.

ADR attempts may also be made by EEOC Administrative Judges prior to arranging a hearing. (See Chapter 7 in this Management Directive.) ADR techniques and neutrals may be employed at this point in the process as well. ADR may even be beneficial at the appellate stage of the administrative process. These attempts also must comport with the core principles set forth in this Chapter.

E. Explanation of Procedural and Substantive Alternatives

Agency ADR programs should be designed to ensure that parties are informed of all of the various steps in the EEO process before beginning the actual ADR proceeding. An informed choice is necessary to the success of the ADR proceeding, but an additional value is that once parties choose ADR over other alternatives, they have made a commitment to its success.

The aggrieved individual has already received substantial information from an EEO Counselor about the administrative EEO process and about other appropriate statutory or regulatory forums, such as the Merit Systems Protection Board or a negotiated grievance process. Both parties need to know that litigation or further administrative adjudication generally costs more than ADR. Also, both parties should be informed that the ADR process is more flexible. In addition, the parties

should know that the outcome in other forums will be decided not by the parties but by a third person, while in ADR the parties maintain considerable control over the process and decide their own outcome.

III. PROVIDING INFORMATION

The information provided to aggrieved individuals at the counseling stage largely determines whether they will utilize the ADR process. Aggrieved individuals need information about all aspects of ADR in order to make an informed choice between ADR and the administrative process.

A. Agencies Must Fully Inform the Employees About the Counseling Process and the ADR Program

Section 1614.105(b)(2), which covers pre-complaint processing, requires that the EEO Counselor advise the aggrieved person that s/he may choose between participation in the ADR program offered by the agency and the traditional EEO counseling procedures provided for in the regulation. Before the aggrieved person makes a choice between counseling and ADR, the Counselor must fully inform the person about the counseling process and the ADR program. (See Chapter 2 of this Management Directive for additional guidance concerning the election between EEO Counseling and ADR.) If the agency's ADR program allows aggrieved individuals to go directly into the ADR process without first meeting with the Counselor, the meeting with the agency's ADR contact person will serve as the meeting with the Counselor. The ninety (90) day pre-complaint processing period will begin to run from the first contact with the ADR contact person. The agency's ADR contact person must provide to the aggrieved individual the same information EEO Counselors are required to provide to the aggrieved individuals.

An ADR contact person who serves in lieu of an EEO counselor may not serve as a neutral in those cases where s/he has provided EEO counseling and must meet all of the training requirements of an EEO counselor and fully carry out the Counselor's roles and responsibilities. (See Chapter 2 of this Management Directive for guidance on the qualifications, roles, and responsibilities of an EEO Counselor.)

B. Providing Information About the Agency ADR Program

1. The EEO Counselor should provide the aggrieved person with information about the agency ADR program, including but not limited to the following:

a. A definition of the term "Alternative Dispute Resolution (ADR)" - the definitions in this Chapter can be used;

b. An explanation of the stages in the EEO process at which ADR is available;

c. A thorough description of the particular ADR technique(s) used in the agency's program;

d. A thorough description of how the program is consistent with the ADR core principles in ensuring fairness (including the right to representation), which requires voluntariness, neutrality, confidentiality, and enforceability;

e. An explanation of procedural and substantive alternatives, as described in this Chapter; and

f. Information regarding all of the time frames involved in both the administrative process and the ADR process.

2. Information about the agency's ADR program may be provided to the aggrieved person through discussions, memoranda, video presentations, booklets or pamphlets.

C. Informing the Employee about Filing Rights

At the time the aggrieved person chooses to participate in the agency's ADR program, the person shall have been advised by the Counselor of his or her rights and responsibilities in the EEO complaint process, as set forth in § 1614.105(b).

If the agency's ADR program allows aggrieved individuals to go directly into the ADR process without first meeting with the Counselor, the meeting with the agency's ADR contact person will serve as the meeting with the Counselor. The ninety (90) day pre-complaint processing period will begin to run from the first contact with the ADR contact person. The agency's ADR contact person must also advise the aggrieved of his or her rights and responsibilities in the EEO complaint process, as set forth in § 1614.105(b) as well as determine the issues and bases of the matter and matters affecting timeliness and jurisdiction.

D. The Role of the Counselor

When an individual elects to participate in the ADR process, the Counselor who advised the aggrieved of his/her rights and responsibilities is precluded from attempting to resolve the matter.

1. If ADR is Chosen

The Counselor (or the ADR contact) of the aggrieved individual should provide the following information to the aggrieved person once ADR is chosen.

a. Successful resolution

The Counselor shall advise the aggrieved person that if the dispute is resolved during the ADR process, the terms of the agreement must be in writing and signed by both the aggrieved person and the agency. See § 1614.603.

b. Unsuccessful Resolution

The Counselor shall advise the aggrieved person that if the matter concludes without a resolution under the ADR program, or if the matter has not been resolved ninety (90) days from the contact with the EEO Counselor, the aggrieved person will receive a final interview and have the right to file a formal complaint.

In the event there is no resolution, the agency must ensure that a Counselor's report is prepared and the aggrieved person is given a final interview and informed of the right to file a formal complaint. In addition to the usual items required by the report, with respect to ADR the report must indicate that ADR failed. No other information regarding the ADR session is to be provided.

Nothing said or done during attempts to resolve the complaint through ADR, including the failure by the agency to provide a neutral, can be made the subject of an EEO complaint.

The Counselor should have no further involvement in resolving the matter until he or she is advised of the outcome of the ADR process.

2. If ADR is not chosen

The Counselor must advise the aggrieved person that if s/he does not choose to participate in the agency's ADR program, the dispute(s) about which he/she contacted the EEO Counselor will be handled through the agency's traditional EEO counseling procedures.

IV. NEUTRALS

The ADRA defines a neutral as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." 5 U.S.C. § 571(9). The Act further states that a neutral is a

> permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

5 U.S.C. § 573 (a).

A. Sources

The Commission, in its policy statement on ADR, provides that ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. An agency should also consider the aggrieved person's perception of the third party's impartiality in appointing a neutral for an ADR proceeding. In order to be effective, the participants in an ADR program must perceive the neutral as completely impartial. Therefore, agencies are strongly encouraged to go outside the agency in obtaining the services of a neutral. An external neutral provides the best assurance of impartiality and the greatest likelihood of a successful mediation. In the event that an agency uses one of its own employees as a neutral, it must assure the neutrality and impartiality of the neutral. If EEO Counselors are used as neutrals, the agency must assure that a Counselor must never serve as a neutral in the same matter in which he or she has served as a Counselor. The Administrative Dispute Resolution Act (ADRA), imposes certain requirements on neutrals which may not apply to EEO Counselors. Furthermore, agencies should also be aware that having EEO Counselors switching roles between performing traditional

EEO counseling and performing in other ADR programs can be confusing both to complainants and Counselors as to what their role is in a particular case. To avoid this confusion, agencies must clearly communicate to the complainant the function being performed by the agency employee, whether EEO counseling or ADR. To the extent possible, agencies are encouraged to designate individuals as either EEO Counselors or ADR neutrals, and limit the switching of roles between the EEO and ADR programs.

An agency may use neutrals for its ADR program, subject to their qualifications, from the following sources:

1. Other federal agencies (through a federal neutral sharing program or other arrangement); or

2. Private organizations, private contractors, bar associations, or individual volunteers.

EEOC discourages EEO Counselors from acting as neutrals because of the perception of bias in favor of the agency. Additionally, neutrals are often privy to confidential information, which may compromise their ability to serve as a Counselor. Therefore, EEOC recommends against using Counselors as neutrals except as a last resort and only where the Counselor meets the qualifications required in this directive. Counselors may not serve as neutrals in a dispute in which they have provided counseling to the aggrieved individual. Additionally, investigators may not serve as a neutral in a case they are investigating. Likewise, neutrals should not serve as Counselors or investigators in cases in which they serve as neutrals.

With increasing frequency, Federal Executive Boards (FEB) throughout the nation are developing pools of neutrals who are available for federal agency EEO dispute resolution. Information about FEBs and other associations who may be able to provide neutrals can be obtained by contacting the ADR representative in one of EEOC's District Offices. EEOC recommends that agencies disclose their source of neutrals to the parties.

B. Qualifications

1. Training in ADR Theory and Techniques

Any person who serves as a neutral in an agency's ADR program must have professional training in whatever dispute resolution technique(s) the agency utilizes in its program. The Commission will accept as sufficient such training as is generally recognized in the dispute resolution profession. For example, the Interagency Program on Sharing Neutrals administered by the Department of Health and Human Services requires the following expertise: 1) at least 20 hours of basic mediation skills training; 2) at least three co-mediations with a qualified mediator or five independent mediations and positive evaluations from a qualified trainer/evaluator; and 3) at least two references from two qualified mediators or trainer/evaluators.

2. Knowledge of EEO Law

Any person who serves as a neutral in an agency's ADR program must be familiar with the following EEO laws and areas:

a. The entire EEO process pursuant to 29 C.F.R. Part 1614, including time frames;

b. The Civil Service Reform Act and the statutes that EEOC enforces (including Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended);

c. The theories of discrimination (e.g. disparate treatment, adverse impact, harassment and reasonable accommodation); and

d. Remedies, including compensatory damages, costs and attorney's fees.

C. Role of the Neutral

In any ADR proceeding conducted under this Directive, the neutral's duty to the parties is to be "neutral, honest, and to act in good faith." EEOC Policy Statement. The neutral must also act consistently with the ADRA and:

1. Ensure that ADR proceedings are conducted consistent with EEO law and Part 1614 regulations, including time frames;

2. Ensure that proceedings are fair, consistent with the core principles in Section VII of this Chapter, particularly providing the parties the opportunity to be represented by any person of his/her choosing throughout the proceeding;

3. Ensure that an agency representative participating in the ADR proceeding has the authority and responsibility to negotiate in good faith and that a person with authority to approve or enter into a settlement agreement is accessible to the agency's representative;

4. Ensure enforceability of any agreement between the parties, including preparation of the written settlement agreement if the parties reach resolution and ensuring that the agreement includes the signatures of the appropriate agency representative and aggrieved person;

5. Ensure confidentiality, including destroying all written notes taken during the ADR proceeding or in preparation for the proceeding; and

6. Ensure neutrality, including having no conflict of interest with respect to the proceeding (e.g., material or financial interest in the outcome, personal friend or co-worker of a party, supervisory official over a party) unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

D. Promoting Trust

Trust fosters the open and frank communication between the parties that is an essential factor in reaching a fair resolution of an EEO complaint. Once the individual has chosen ADR to attempt resolution, the ADR neutral can develop the parties' trust by:

1. Providing full information about the ADR proceeding as soon as possible, including information on its impartiality, the relative merits of ADR as compared with the traditional form of complaint processing, and the confidentiality of the ADR process;

2. Giving the parties the opportunity to request and obtain relevant information from one another, so that they have sufficient information to make informed decisions; and

3. Explaining the safeguards that are in place to protect parties from pressures to resolve the complaint (see Section VII A, below).

V. RESOLUTIONS MUST BE IN WRITING

If the agency and the aggrieved person agree to a resolution of the matter, EEOC regulations require that the terms of the resolution be reduced to writing and signed by both parties in order that the agency and the aggrieved person have the same understanding of the terms of the resolution. See § 1614.603. The written agreement must state clearly the terms of the resolution and contain the procedures available under § 1614.504 in the event that the agency fails to comply with the terms of the resolution. Written agreements must comply with EEOC's Enforcement Guidance on non-waivable employee rights under EEOC enforced statutes. Additionally, any written agreement settling a claim under the Age Discrimination in Employment Act (ADEA) must also comply with the requirements of the Older Workers Benefit Protection Act of 1990 (OWBPA) Pub. L. 101- 433 (1990), the ADEA, subsection (f), 29 U.S.C. § 626(f) and EEOC's regulations regarding Waiver of Rights and Claims Under the ADEA at 29 C.F.R. Part 1625. Neither the ADRA nor EEOC's core principles require the parties to agree that a settlement must be confidential.

The agency representative shall transmit a signed and dated copy of the resolution to the EEO Director. The EEO Director shall retain the copy for one year or until the EEO Director is certain that the agreement has been fully implemented, whichever is later.

VI. OPERATION OF ADR PROGRAMS

A. Written Procedures

The agency must establish written procedures detailing the operation of its ADR program. The written procedures should include, at a minimum, the following information:

1. The type or types of ADR that the agency offers;

2. The stages of the EEO process at which ADR is being made available, e.g. at the pre-complaint stage, post-complaint stage etc.;

3. The time frames involved in both the administrative process and the ADR process;

4. The source or sources of neutrals;

5. Those matters where ADR is not available;

6. Assurance to the aggrieved party that ADR is voluntary and that she or he may terminate the ADR procedure at any time and return to the EEO process;

7. Assurance to the aggrieved party that its ADR program is fair and that she or he has the right to representation;

8. An assurance to the aggrieved party with respect to confidentiality, neutrality and enforceability;

9. An assurance that the agency will make accessible an individual with settlement authority and that no responsible management official or agency official directly involved in the case will serve as the person with settlement authority.

B. Training Managers and Supervisors

In order to encourage the successful operation of ADR throughout the agency, all managers and supervisors should receive ADR training, either through an agency-conducted program or through an external source such as another federal agency or a private contractor. The ADR training should include the following:

1. The ADR Act and its amendments, with emphasis on the federal government's interest in encouraging mutual resolution of disputes and the benefits associated with utilizing ADR;

2. The EEOC's regulations and Policy Guidance with respect to ADR: §§ 1614.102(b)(2), 1614.105(f), 1614.108(b), and 1614.603 (voluntary settlement attempts);

3. The operation of the ADR method or methods that the agency employs;

4. Exposure to other ADR methods, including interest-based mediation, if this method is not already in use by the agency; and

5. Drafting the settlement agreement, including the notice provision pursuant to § 1614.504 where the aggrieved party believes the agency failed to comply with the terms of the settlement agreement.

C. Recordkeeping

Pursuant to the EEOC's authority set forth in 29 C.F.R. § 1614.602(a) to collect Federal complaints processing data and pursuant to the agency's obligation to report EEO activity to the EEOC, the Commission requires agencies to maintain a record of ADR activity for annual reporting to the EEOC no later than October 31st of each year. This information will be provided to EEOC on Form 462.

VII. ADR CORE PRINCIPLES

Through use of ADR, it has been found that there are certain requirements that are absolutely necessary for the successful development of any ADR program. These requirements are sometimes referred to as "core principles." These core principles are derived from EEOC's ADR Policy Statement, located at Appendix H.

A. Fairness

Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the ADR proceeding by, at a minimum: providing as much information about the ADR proceeding to the parties as soon as possible; providing the right to be represented throughout the ADR proceeding; and providing an opportunity to obtain legal or technical assistance during the proceeding to any party who is not represented. Fairness also requires the following elements:

1. Voluntariness

Parties must knowingly and voluntarily enter into an ADR proceeding. An ADR resolution can never be viewed as valid if it is involuntary. Nor can a dispute be actually and permanently resolved if the resolution is involuntary. Unless the parties have reached a resolution willingly and voluntarily, some dissatisfaction may survive after the ADR proceeding. Such dissatisfaction could lead to dissatisfaction with other aspects of the workplace, or even to charges that the resolution was coerced or reached under duress.

In addition, aggrieved parties should be assured that they are free to end the ADR process at any time, and that they retain the right to proceed with the administrative EEO process if they decide that they prefer that process to ADR and resolution has not been reached. Both parties should be reassured that no one can force a resolution on them, not agency management or EEO officials, and not the third party neutral. Finally, parties are more likely to approach a resolution voluntarily when they know of their right to representation at any time.

2. Neutrality

To be effective, an ADR proceeding must be impartial and must be independent of any control by either party, in both perception and reality. Using a neutral third party as a facilitator or mediator assures this impartiality. A neutral third party is one who has no stake in the outcome of the proceeding. For example, he or she might be an employee of another federal agency who knows none of the parties and whose type of work differs from that of the parties. Or he or she may be an employee within the same agency as long as he or she can remain neutral regarding the outcome of the proceeding. The agency must ensure at all times the independence and objectivity of the neutral.

3. Confidentiality

Confidentiality is essential to the success of all ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in § 574 of ADRA, specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. Parties who know that their ADR statements and information

are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of ADR information. For implementation and reporting purposes, the details of a resolution can be disseminated to specific offices with a need to have that information. As noted above in Section V, neither the ADRA nor EEOC's core principles require the parties to agree that a settlement must be confidential.

Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution, and by any neutral third party involved in the proceeding. The EEOC encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an ADR proceeding.

4. Enforceability

Enforceability is a key principle upon which a successful ADR program depends. Section 1614.504 provides that: "Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties." The regulation sets forth specific procedures for enforcing such a settlement agreement. Agreements resolving claims of employment discrimination reached through ADR are enforceable through this procedure.

B. Flexibility

The ADR program must be flexible enough to respond to the variety of situations individual agencies face. There is not necessarily one ADR model which will work for all of an agency's programs or all of its offices within the same program. Because agencies have different missions and cultures, they have flexibility in designing their ADR programs. Agencies must also exercise flexibility in implementing the ADR program. This flexibility will allow agencies to adapt to changing circumstances that could not have been anticipated or predicted at the time the program was initially implemented.

C. Training and Evaluation

An ADR program, to be successful, will require that the agency provide appropriate training and education on ADR to its employees, managers and supervisors, neutrals and other persons protected under the applicable laws.

An evaluation component is essential to any ADR program and should be in place before an ADR program is implemented. The evaluation will assist in determining whether the ADR program has achieved its goals and will provide feedback on how the program might be made more efficient and achieve better results.

VIII. ADR TECHNIQUES AND DEFINITIONS

As stated previously, § 1614.102(b)(2) requires that all agencies establish or make available an ADR program for the equal employment opportunity process. Numerous ADR techniques are available for use by agencies in their programs. All agencies should be familiar with the following terms and techniques utilized by ADR professionals.

A. Alternative Dispute Resolution

Alternative Dispute Resolution is a term used to describe a variety of approaches to resolving conflict rather than traditional adjudicatory methods or adversarial methods. Examples of traditional adjudicatory methods include litigation, hearings, and agency administrative processing and appeals.

B. Mediation

Mediation is presently the most popular form of ADR in use by agencies in employment related disputes. Mediation is the intervention in a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision-making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of the issues in dispute.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution.

Mediators differ in their degree of directiveness or control in their assistance in disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution. Regardless of how directive the mediator is, the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

C. **Facilitation**

Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

The facilitator generally works with all of the participants at once and provides procedural directions as to how the group can efficiently move through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator focuses on procedural assistance and remains impartial to the topics under discussion.

D. **Fact Finding**

Fact finding is the use of an impartial expert (or group) selected by the parties, by the agency, or by an individual with the authority to appoint a fact finder, in order to determine what the "facts" are in a dispute. The fact finder may be authorized only to investigate or evaluate the matter presented and file a report establishing the facts in the matter. In some cases, he or she may be authorized to issue either a situation assessment or a specific procedural or substantive recommendation as to how a dispute might be resolved. If used as an ADR technique, the findings of fact must remain confidential in order to comply with the core principles mentioned above.

Fact finding used as an agency ADR technique is different from the many fact finding methods referred to in § 1614.108(b) that agencies may employ to investigate formal complaints in the administrative process. For example, oral or written communications which occur during an ADR proceeding such as fact

finding (or some other ADR technique) are generally treated as confidential. 5 U.S.C. § 574. However, information which is developed during the investigation of a complaint through the use of fact finding methods mentioned in § 1614.108(b) is not treated as confidential.

E. Early Neutral Evaluation

Early Neutral Evaluation uses a neutral or impartial third party to provide an objective evaluation, sometimes in writing, of the strengths and weaknesses of a case. Under this method, the parties will usually make informal presentations to the neutral party to highlight their respective cases or positions.

F. Ombuds

Ombuds are individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and fact finding. Usually, when an ombud receives a complaint, s/he interviews parties, reviews files, and makes recommendations to the disputants. Typically, ombuds do not impose solutions. The power of the ombud lies in his/her ability to persuade the parties to accept his/her recommendations. Generally, an individual not accepting the proposed solution of the ombud is free to pursue a remedy in other forums for dispute resolution.

G. Settlement Conferences

Settlement Conferences may be conducted by a settlement judge (for example an EEOC Administrative Judge) or referee and attended by representatives for the opposing parties and/or the parties themselves in order to reach a mutually acceptable settlement of the disputed matter. Agencies are not precluded from having their own settlement conferences without an Administrative Judge provided the parties agree. Attendance is mandatory at a settlement conference ordered by an Administrative Judge. The failure of any party to comply with an order of an Administrative Judge may result in sanctions.

The role of a settlement judge is similar to that of a mediator in that s/he assists the parties procedurally in negotiating an agreement. Such judges may have much stronger authoritative roles than mediators, since they may provide the parties with specific substantive and legal information about what the disposition of the case might be if it were to go to court or hearing. They also provide the parties with possible settlement ranges for their consideration. In the event a settlement is not

reached, the case is then processed by Administrative Judges other than the settlement judge. Because these conferences are not conducted by the Administrative Judge hearing the case on the merits, the traditional ex parte constraints are not applicable.

H. Minitrials

Minitrials involve a structured settlement process in which each side to a dispute presents abbreviated summaries of their case before the parties and/or their representatives who have authority to settle the dispute. The summaries contain explicit data about the legal bases and the merits of a case.

The process generally follows more relaxed rules for discovery and case presentation than might be found in a court or other administrative proceedings and usually the parties agree on specific limited periods of time for presentations and arguments.

I. Peer Review

Peer Review is a problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision is usually not binding on the employee, and s/he would be able to seek relief in traditional forums for dispute resolution if dissatisfied with the decision. The principal objective of peer review is to resolve disputes early before they become formal complaints or grievances.

Typically, the panel is made up of employees and managers who volunteer for this duty and who are trained in listening, questioning, and problem-solving skills as well as the specific policies and guidelines of the panel. A peer review panel may be a standing group of individuals who are available to address whatever disputes employees might bring to the panel at any given time. Other panels may be formed on an ad hoc basis through some selection process initiated by the employee, e.g., blind selection of a certain number of names from a pool of qualified employees and managers.

J. Combinations of Techniques

Often techniques may be combined to provide advantageous aspects of more than one method. For example, if in a mediation the mediator finds that the parties are able to speak directly to each other in a productive way, the mediator may utilize

the facilitator role and follow-up with the mediator role later. In some cases, fact finding may precede a facilitation or mediation session. Agencies are not limited to using only one method or technique in their ADR programs. They may find that using various methods in combination may also yield fruitful results and be very effective in reaching resolution.

Ms. NORTON. We ought to know whether the settlement was some disposition within the agency, whether the settlement was for cash. We ought to compare the kind of settlements you do with what kind of settlements are done by the agencies.

I would have thought that the GAO would want to know the same kind of information, and I would ask you that any work you look at look more closely at the details of what is reported so that we can have some basis to judge whether it is a success.

The GAO reports on a growing inventory, and it says that it is taking—you say it is taking longer to process with a growing inventory. You also say there is a sharp increase in the average time to process a case. Now, that is counter-intuitive. That is to say, if there were a growing inventory, then you would expect the effect on the agency to reduce the time to process a case. Can you explain or can Mr. Hadden explain why, with a growing inventory, that hasn't amounted to some pressure for greater efficiency or innovations that might have tried to keep up with the time to process a case?

Mr. BROSTEK. One of the things that we reported in one of our earlier reports specifically for EEOC is they have become more efficient in the sense that their judges are processing more cases per judge per year. The reason why the backlog is growing and the inventory and the time is growing is because there are more cases coming in that even a more-efficient judge can process. There are more sitting on the shelf——

Ms. NORTON. Well, that doesn't have anything to do with efficiency. I don't know whether the judges are more efficient because they are not taking lunch hours or if they are more efficient because processes that increase the efficiency are being incorporated. One would involve no more efficiency, simply more manpower, and the other would involve greater efficiency.

What I don't understand is what the agency is doing to meet the greater inventory.

Mr. BROSTEK. Mr. Hadden could address that better than I.

Mr. HADDEN. The question—I want to make sure I understand it, Congresswoman—is what is the EEOC doing?

Ms. NORTON. What I am saying, Mr. Hadden, is the pressure on you is very great because there are more of these—you can't do anything about that. There are more of these complaints filed.

The normal reaction of a bureaucracy is the more—this is the way the market is supposed to work—the more pressure I got, the greater the incentive to incorporate measures that, for example, shorten the time to process an appeal.

GAO reports sharp increase in the time to process appeal, even as the number of cases has increased. That is why I say it is counter-intuitive. It should be just the opposite—that you ought to feel such pressure that you are looking for ways to shorten the appeal time, as there is a growing inventory, according to the GAO. You would think that, instead of being, says the GAO, longer to process a case, that the growing inventory would lead to a shorter time to process a case.

I am looking for some way to explain these counter-intuitive results.

Mr. HADDEN. I think that addresses—the question of data analysis is one of the issues of why we need to do a better job at being able to answer those very questions.

The growing inventory is certainly a problem with agencies, as well as the EEOC, in terms of the inventories are growing and it takes longer.

I think what we have to do—and that is why I talked about the computer-based training—is help the agencies understand how to handle the cases, what is a proper investigation.

The bulk of the cases, I believe, you recalled was they are not that complicated in terms of EEOC has expertise in investigation of cases and we should be able to help them move those cases faster, as well as the Commission's judges and appellate staff. We need to study that.

Ms. NORTON. Yes. And, by the way, I am not suggesting—your people are probably trying also to make sure that they do a proper job. There were terrible things reported by the EEOC during the 1980's that essentially, in order to process cases quickly, they were essentially not processing them. That is the last thing I am suggesting.

Mr. HADDEN. Right.

Ms. NORTON. But I am suggesting that a greater inventory is a wonderful incentive toward greater efficiency.

Now, the ranking member asked about goals and, you know, wouldn't quite specific goals be helpful. You did not mention that on page 12 you have goals——

Mr. HADDEN. Right.

Ms. NORTON [continuing]. That I thought were rather modest, and I wonder how you reached the goals you have.

Mr. HADDEN. Sure.

Ms. NORTON. You say 5 percent reduction in the number of hearings over 6 months, 20 percent total closures in the oldest group of appeals. That must mean that it would be from the oldest, with 10 percent of appeals resolved within 180 days, etc.

How do you set goals, because it gives the appearance of just setting the most modest goal you can find in order to make sure you can reach it.

Mr. HADDEN. Our goals are set based upon our resources, and that is the fiscal year 2000 goals, I believe. We have to set goals which we are hoping to achieve, and these goals were set based upon what we know has happened and what resources we have.

Ms. NORTON. I only have one question beyond this, Mr. Chairman, but just let me say something about setting goals based on your resources.

When I came to the EEOC, the backlog was scandalous, and the way in which the EEOC handled its backlog was to come back to Congress and ask for new resources, and Congress spit in the eye of the agency, and that is because nobody—we could never give you dollar-for-dollar to match the increase in cases.

I got a 50 percent increase in resources when I was at the EEOC, and I am telling you nobody was handing out free money, and the way I did that was to demonstrate that we were going to use the process, and we put it in three separate offices, which cut the process time dramatically. We said, "If it takes you 2 years now—" this

is private sector stuff—"we will get it to 3 months." But we said, "We can only do that if you give us the resources to do it."

Congress responded, because it knew it wasn't being asked to do the impossible, to match case for dollar. Until you are able to convince us that you are not setting such modest goals based on resources, nobody is going to be responsive with resources. You have got to incorporate within your request for resources a showing of efficiencies that cut the need for ever-increasing resources.

I think that Congress has been responsive in the past and can be responsive in the future, and I cannot, in all seriousness, say to Congress that I think that whenever EEOC comes in and says it has got more caseload you ought to give them more money, because that, in fact, does not reward efficiency and it seems to me that if you show efficiency you have the credibility to get resources, but not if all you say is, "Hey, we got more cases."

I would like you to take that back to the chairman, a very good friend who understands, because I have gone to bat for her at the Appropriations Subcommittee. I tell you, the Appropriations Subcommittee tells me, "The President asks for 37 percent resources, you have got it." He negotiated it. You have got to come in now and do a quid pro quo.

Finally, let me ask you, the Congress approved an extraordinary new provision in title seven in 1978. It gave the EEOC jurisdiction to coordinate, and thereby eliminate, overlap and inefficiency among all the agencies with job discrimination responsibilities. That meant everybody from the EEOC to anybody who had something to do with job discrimination.

At the time I was at the EEOC—talking about Inter-Action Agency Task Force—nobody put out a regulation that you didn't bring to the table, so that we weren't all having different regulations and building inefficiency, because there are a number of different agencies.

You indicate that you have a inter-agency task force here, and I applaud that, but I must ask you: has this addition to the statue gone moribund, or are you engaged in coordinating all the agencies which have job discrimination jurisdiction to make them speak as one and to avoid overlap and inefficiency?

Mr. HADDEN. I would have to say I think we certainly need to do better, in terms of enforcing that provision of the statute.

The inter-agency task force is a wonderful vehicle and tool, but, notwithstanding that, the Commission has responsibility to coordinate with our Federal agencies.

We need to do better.

Ms. NORTON. That would include, of course, the agencies that, of course, feed into your system.

Mr. HADDEN. Right.

Ms. NORTON. You have the jurisdiction. It was considered one of the great new additions to title seven of the 1964 Civil Rights Act.

May I ask that you and the chairman and the Commission provide for this committee what you intend to do to fully activate the provision added in 1978 that gives you the authority to coordinate across the board, including the Federal agencies that feed into your system, all agencies having title seven or job discrimination jurisdiction?

Mr. HADDEN. OK.

Ms. NORTON. Thank you, Mr. Chairman.

Mr. SCARBOROUGH. I thank the gentlelady and certainly appreciate her coming to this hearing, being really, obviously, an expert from her position as heading this area up back under President Carter.

Again, I appreciate your time.

Mrs. Morella, do you have any followups?

Mrs. MORELLA. Just one on the ADR.

I note that the Postal Service has been employing it. You mentioned they had the greatest number of complaints because they have the greatest number of employees. They have been employing it, and, according to the testimony, it has made a significant difference.

How do you, in discussion surrounding the concept that we are trying to promote ADR in all the agencies—if, in fact, it is a matter of one's choice, what are you doing within the agencies to get people on track to employ or become part of the alternative dispute resolution situation?

Mr. HADDEN. The requirement of ADR is relatively new for EEO. We are looking at how each agency—we are giving them a lot of flexibility and we will look at what works best. The REDRESS program at the Postal Service certainly has been very effective. I think there are some broad principles that we think work—commitment from the top level of the agency, the head of the agency, a fair process. Those are some of the hallmarks that we would look for. I think those would encourage people to use ADR throughout the process.

The key is integrity and fairness, I think, in large part.

Mrs. MORELLA. Should it be mandated in some way?

Mr. HADDEN. The Commission doesn't require that, for example, if an agency chooses to have its managers, as a requirement that they go, that is a choice that an agency can make.

We have not given a lot of regulations on the ADR process, because we want agencies to have as much flexibility as possible in designing their program.

Mrs. MORELLA. Yes.

I think this will probably be coming up in another panel. Thank you, Mr. Chairman.

Mr. SCARBOROUGH. Thank you, Mrs. Morella.

Mr. Cummings.

Mr. CUMMINGS. Mr. Hadden, in light of the excellent line of questioning on the part of Ms. Norton, I hope that you all will—I mean, I know you have got your performance goals on page 12, and for fiscal year 2000, but I would hope that, when you develop them for 2001, you will take into consideration the things that Ms. Norton has said. We do see her as a leader in this area. She knows her stuff backward and forwards, and when she says that the goals are just not up to what they ought to be, you can bet your bottom dollar that carries a lot of weight with us, and so I would hope that you all would take those comments into consideration when you sit down to rate your future goals.

Thank you, Mr. Chairman.

Mr. SCARBOROUGH. Thank you, Mr. Cummings. I want to second that. I think we all pay a tremendous amount of deference to Ms. Norton's insights on this issue.

Ms. Norton, any followups?

Ms. NORTON. No, Mr. Chairman.

Mr. SCARBOROUGH. OK. Thank you.

And I am just going to submit a question. You said that it appears that minorities are placed in positions that are dead-end employment tracks, while others are allowed to be put into positions or are more likely to be put in positions that will ultimately—management spots in Federal agencies.

Again, we are going to keep it open. I want you to give us any information you may have to substantiate that claim or refute it.

[The information referred to follows:]

United States General Accounting Office
Washington, D.C. 20548

General Government Division

B-285153

April 21, 2000

The Honorable Joe Scarborough
Chairman, Subcommittee on Civil Service
Committee on Government Reform
House of Representatives

Subject: Equal Employment Opportunity: Responses to Questions Related to Equal Employment Opportunity and Dispute Resolution Issues

Dear Mr. Chairman:

On March 29, 2000, we testified at an oversight hearing the Subcommittee held on the Equal Employment Opportunity (EEO) complaint process for federal employees.[1] This letter responds to your request of April 7, 2000, in which you raised additional questions about EEO and dispute resolution issues. To respond to these questions, in addition to drawing upon our body of knowledge, we primarily reviewed (1) data published by the Office of Personnel Management (OPM) and the Equal Employment Opportunity Commission (EEOC) and (2) data from OPM's Central Personnel Data File (CPDF) on civilian federal employees. We performed our work in April 2000 in accordance with generally accepted government auditing standards. Because our work was based primarily on publicly available reports and testimonies, including our own previously published reports, we did not seek agency comment on a draft of this report. Our responses to the questions that you asked follow.

Question 1. Please provide the Subcommittee with information that either substantiates or refutes the contention that minorities are placed in positions that are "dead end employment tracks."

GAO has not done any work that specifically addresses this question. However, we reviewed data published by OPM and EEOC about the representation of minorities in the federal

[1] Equal Employment Opportunity: Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention (GAO/T-GGD-00-104, Mar. 29, 2000).

workforce. These data show that from fiscal years 1993 through 1998, the proportion of the federal workforce made up by minorities increased by 1.5 percentage points. More important to your question, both the number and percentages of minority representation in mid- and senior-level federal white-collar jobs increased.

According to the 1999 edition of OPM's fact book on the federal civilian workforce, minorities made up 29.7 percent of the federal workforce in September 1998.[2] This represented a slight increase from September 1993, when 28.2 percent of the federal workforce were members of minority groups. The percentage of Blacks in the federal workforce remained the same (16.7 percent) during this period; the percentages of Hispanics (from 5.6 to 6.4 percent), Asians/Pacific Islanders (from 3.9 to 4.5 percent), and American Indians/Alaska Natives (from 2 to 2.1 percent) all increased.

Data published by EEOC in its Annual Report on the Employment of Minorities, Women and People With Disabilities in the Federal Government for the fiscal year ending September 30, 1998, show that from 1993 through 1998, minorities increased their representation—both in number and percentage—at the mid-level and senior levels of the white-collar federal workforce.[3] These gains were made at a time when the nonpostal federal workforce was being downsized. Data about the white-collar workforce are useful in responding to your question because white-collar jobs (1) accounted for about 87 percent of the jobs in the nonpostal federal workforce in 1998 and (2) often provide career paths to mid- and senior-level positions, particularly in the professional and administrative series. For this analysis, we considered mid- and senior-level positions to be those at or equivalent to General Schedule grade 13 and higher. EEOC defined senior-level positions to include Senior Executive Service, Executive Service, Senior Foreign Service, and other employees earning salaries above that of grade 15 of the General Schedule. Table 1 compares minority representation at mid-level and senior level white-collar positions in fiscal years 1993 and 1998.

Table 1: Minority Employment at Mid-Level and Senior Level White-Collar Positions, Fiscal Years 1993 and 1998

	Fiscal Year 1993		Fiscal Year 1998	
Level	Number employed	Percent	Number employed	Percent
GS-13	26,461	16.1	34,237	19.2
GS-14	11,645	12.6	13,795	15.3
GS-15	6,192	12.0	7,617	14.8
Senior	1,151	8.5	1,715	12.1

Source: EEOC

Table I-10 of EEOC's Annual Report on the Employment of Minorities, Women and People With Disabilities in the Federal Government for the fiscal year ending September 30, 1998, provides detailed data on the number and percentage of men, women, and members of each

[2] The Fact Book (OWI-99-2, September 1999).

[3] EEOC obtained these data from the CPDF.

of the racial groups at the various General Schedule and senior pay levels for fiscal years 1993 through 1998.

Although these data show that minority representation at the middle and senior levels was rising, the data also show that, proportionately, minorities are more likely than Whites to hold General Schedule positions below Grade 13. Similarly, OPM reports that the average grade level of minority employees is lower than that of White federal workers. According to OPM, the average General Schedule grade level for White federal workers in September 1998 was 9.8; the average grade level was 8.1 for Black federal workers, 8.6 for Hispanics, and 7.8 for American Indians. Among Asian federal workers, the average grade level was 9.3.

A 1996 MSPB report analyzed the disparity in the average grade level of minorities and White men in professional and administrative jobs at that time and found that a large portion of the difference was accounted for by differences in education and experience.[4] Our preliminary analysis of data from the CPDF shows that education levels vary among the different racial groups.[5] For career federal employees on board on September 30, 1999, 43.4 percent of Whites had a 4-year college degree or higher, compared with 23 percent of Blacks, 28.8 percent of Hispanics, and 21.8 percent of American Indians. Among Asian federal workers, 51.2 percent had a 4-year degree or higher.[6] Of the career federal workers with 4-year degrees or higher in September 1999, 78.2 percent were White, 10.4 percent were Black, 5.6 percent were Asian, 4.8 percent were Hispanic, and 1.1 percent were American Indian.

MSPB also reported that although a large portion of the grade level differences between minorities and White men could be accounted for by differences in education and experience, even after controlling for these differences, the Board found that there was generally a negative effect on the careers of minorities in professional and administrative positions because of their race or national origin.

Question 2. Has GAO studied the Navy's Pilot Dispute Resolution Program, which is being used to resolve EEO complaints? If so, please provide any comments.

The Navy discussed the results of the department's experiences under its pilot program for resolving EEO complaints at a joint hearing held by this Subcommittee and the Subcommittee on Military Readiness, House Armed Services Committee, on March 9, 2000. The Navy says that its program uses a variety of alternative dispute resolution (ADR) processes. We have not studied the Navy's Pilot Dispute Resolution Program. However, we believe that it is important that any evaluation of ADR program results consider the performance under existing dispute resolution processes in order to identify the value added by the ADR

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[4] Fair & Equitable Treatment: A Progress Report on Minority Employment in the Federal Government, August 1996.

[5] In OPM's Central Personnel Data File: Data Appear Sufficiently Reliable to Meet Most Customer Needs (GAO/GGD-98-199, Sept. 30, 1998), we reported that the education data element intended to reflect the highest education level achieved by a federal worker was inaccurate in 26 (23 percent) of 113 official personnel folders we reviewed. In 24 of the 26 cases, education levels were understated in the CPDF.

[6] Of those with degrees, a higher proportion of White (35 percent) and Asian (37 percent) federal workers than Black (25 percent), Hispanic (25.6 percent), and American Indian (27.8 percent) employees had higher than a 4-year degree.

processes that are deployed. The EEO complaint process for federal employees has a pre-complaint or counseling phase during which efforts are made to informally resolve a dispute. According to EEOC, in fiscal year 1998, about 55 percent of "informal" complaints were resolved. An evaluation of ADR program results would need to consider, among other things, the extent to which there are increases in the resolution rate of informal EEO complaints when ADR processes are introduced.

Question 3. EEOC's Comprehensive Enforcement Program is intended to help EEOC meet its goal to eradicate discrimination in the federal workplace. Do you believe that EEOC will be able to measure progress toward this goal? What do you see as the strongest features of this program? The weakest?

According to EEOC, the Comprehensive Enforcement Program is a strategic approach to federal sector reform and is to promote discrimination prevention by linking improved data analyses, outreach and technical assistance activities aimed at the root causes of discrimination, and a streamlined process for addressing EEO complaints. Although we have not examined initiatives under the program, they are clearly steps in the right direction. However, sustained commitment and follow-through on the part of EEOC will be required if the agency is to achieve meaningful results.[7]

In order for EEOC to measure progress towards its goal of eradicating discrimination, there need to be reliable indicators and measures of discrimination in the federal workplace. An appropriate place to identify such indicators and measures is in the annual performance plans that agencies are to prepare in accordance with the Government Performance and Results Act of 1993. As EEOC noted in its testimony before the Subcommittee on March 29, 2000, it has developed performance measures, which are included in its Fiscal Year 2001 Annual Performance Plan. However, in our view, these measures deal with process (e.g., resolution time, eliminating older cases from inventory) and activities (e.g., number of technical assistance visits and on-site evaluations).

Measures could be developed that gauge the outcome of discrimination prevention efforts. For example, MSPB conducts the Merit Principles Survey approximately every 3 years. Questions 63 and 64 of the 2000 survey deal directly with discrimination in the workplace. Responses to such survey questions could be tracked over time. MSPB's 2000 survey instrument is available on the agency's web site (www.mspb.gov).

The strongest feature of the Comprehensive Enforcement Program, in our opinion, is the changes to complaint program regulations that were implemented in November 1999, particularly the requirement for ADR to be used, which lay the groundwork for reducing the flow of cases. Our work has found that ADR usage in federal agencies had prevented some complaints and, by resolving complaints in their early stages, bought about speedier resolution. Other changes could allow nonmeritorious cases to be weeded out and two or more complaints by the same complainant to be consolidated. If reductions in case flow

[7] GAO/T-GGD-00-104, Mar. 29, 2000.

occur, agencies and EEOC may be able to work towards reducing backlogs and the time taken to process a case.

EEOC has said that effectively pursuing its goals under the Comprehensive Enforcement Program will depend on its receiving additional resources. EEOC remains overwhelmed with hearings and appeals cases, which will limit the agency's ability to deploy existing resources for oversight, technical assistance, and prevention activities. EEOC also said that improved data analysis for identifying the nature and extent of workplace conflicts is a key component of the Comprehensive Enforcement Program. However, steps EEOC is taking to improve data analysis through its own efforts and in conjunction with the Interagency Federal EEO Task Force are in their formative stages, and results are not expected for 2 or 3 years. In addition, improvements in data collection and reporting will also depend, in part, on whether EEOC fulfills its plans to develop a standardized EEO complaint data collection and reporting system. Furthermore, because of the importance of agencies in the EEO process, EEOC's ability to achieve its goals will depend on its leadership in securing the commitment and cooperation of agencies.

As discussed above, EEOC has been overwhelmed with hearings and appeals cases. In an attempt to keep up with increasing caseloads, EEOC's administrative judges (who conduct hearings) and appeals attorneys have worked to increase the number of cases they resolve each year.[8] Increases in productivity can sometimes come at the expense of quality. However, EEOC's performance plan does not contain indicators to measure the quality of its hearings and appeals decision processes. In contrast, MSPB, its Fiscal Year 2000 and 2001 Annual Performance Plan, tracks the percent of cases upheld by the Court of Appeals for the Federal Circuit to measure performance against its objective of issuing high-quality decisions that are held to be legally sound upon review by the Board and the Courts.

Question 4. More agencies will be using ADR in more cases to meet the new requirement from EEOC. Based on the work that you have done, what are the prerequisites to a successful ADR program?

In our report on employers' experiences with ADR in the workplace, in addition to describing how organizations developed ADR capacity, we discussed lessons learned by five federal and five private organizations in making ADR work.[9] These lessons included

- the need for visible support by top management,
- the importance of involving employees in ADR program development,
- the importance of employing ADR processes early in a dispute before positions have solidified and underlying interests have been obscured, and
- the need to balance the desire to settle and close cases against the need for fairness to employees and managers alike.

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[8] Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations on Future Trends Unclear (GAO/GGD-99-128, August 16, 1999).

[9] Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace (GAO/GGD-97-157, Aug. 12, 1997).

In addition, we reported that limited attention has been given to evaluating the results of ADR programs. We believe that it is important for an ADR program to have an evaluation component. These lessons are discussed in more detail in our report (which we are providing) on pages 26 and 27, as well as in the case illustrations for each of the 10 organizations. A copy of the report is also available on GAO's web site (www.gao.gov).

As agreed with your office, we plan no further distribution of this letter until 10 days after its issuance, unless you publicly release its contents earlier. We will then send copies of this letter to Senators Daniel K. Akada, Thad Cochran, Joseph I. Lieberman, and Fred Thompson; and Representatives Robert E. Andrews, John Boehner, Dan Burton, William L. Clay, Elijah E. Cummings, Chaka Fattah, William F. Goodling, Steny H. Hoyer, Jim Kolbe, John M. McHugh, David Obey, Harold Rogers, Jose E. Serrano, Henry A. Waxman, and C.W. Bill Young in their capacities as Chair or Ranking Minority Members of Senate and House Committees and Subcommittees with jurisdiction over human capital issues. We will make copies of this letter available to others upon request.

If you or your staff need additional information, please call Anthony Lofaro or me on (202) 512-8676.

Sincerely yours,

Michael Brostek
Associate Director, Federal Management and
Workforce Issues

Mr. SCARBOROUGH. With that, I thank you for coming. I know, obviously, the questions have been difficult, but, Mr. Hadden, especially you, we look forward to seeing you again next year, when I know we are going to have some very—don't roll your eyes—we are really going to have some very positive, very, very positive statistic to show that those regulations that were just, in all fairness, implemented 6 months ago, combined with other alternative dispute resolution process, will bring the number of complaints down, and I think, more important, that we all get together and work on a bill that will make sure that you all have the resources you need to get immediate reporting of EEOC complaints on the Internet.

I thank both of you for coming, and we will go into the third panel.

OK. We are going to take a 5-minute break and be right back.

[Recess.]

Mr. SCARBOROUGH. We will call the meeting back to order.

I would like to welcome our third panel here and ask that you raise your right hands.

[Witnesses sworn.]

Mr. SCARBOROUGH. Our third panel consists of Gerald Reed, Cynthia Hallberlin, and Roger Blanchard.

Mr. Reed is president of Blacks in Government; Ms. Hallberlin is chief counsel of alternative dispute resolution at the U.S. Postal Service, and she is also the national program manager for REDRESS, the Postal Service's mediation program for resolving EEO complaints. REDRESS is an acronym for Resolve Employment Disputes, Reach Equitable Solutions Swiftly. Mr. Blanchard is the Assistant Deputy Chief of Staff for Personnel at the U.S. Air Force.

Both Ms. Hallberlin and Mr. Blanchard are accompanied by subject matter experts that will join them at the table, and I will ask each witness to identify their expert when they testify, and we have already sworn them in.

With that, why don't we start with you, Mr. Blanchard, if you could give us your testimony.

STATEMENTS OF ROGER BLANCHARD, ASSISTANT DEPUTY CHIEF OF STAFF, PERSONNEL, U.S. AIR FORCE; JOE MC DADE, ASSISTANT GENERAL COUNSEL, OFFICE OF THE SECRETARY OF THE AIR FORCE; CYNTHIA HALLBERLIN, CHIEF COUNSEL OF ALTERNATIVE DISPUTE RESOLUTION PROGRAM, NATIONAL PROGRAM MANAGER OF REDRESS, U.S. POSTAL SERVICE; AND GERALD R. REED, PRESIDENT, BLACKS IN GOVERNMENT

Mr. BLANCHARD. Mr. Chairman and distinguished members of the Civil Service Subcommittee, it is a great honor to be here representing the men and women of the U.S. Air Force and to report on the subject of alternative dispute resolution.

We have been successfully using ADR to resolve Equal Employment Opportunity complaints for 6 years, and we are thankful for the opportunity to be here and discuss it with this committee.

Joining me today is the Air Force's recognized and unequivocal expert on ADR, Mr. Joe McDade. Joe works as Assistant General Counsel in the Secretary of the Air Force's General Counsel Office, and he is responsible for assisting in the development of the Air

Force-wide ADR policy, plans, and programs. He has been affiliated with our ADR program since its inception and continues to make it the award-winning program that it is.

We would ask that our written statement be entered into the record——

Mr. SCARBOROUGH. Without objection.

Mr. BLANCHARD [continuing]. And I will summarize the written statement as follows:

Alternative dispute resolution works for us in the Air Force. We have experienced approximately a 70 percent resolution rate of cases that come before the alternative dispute resolution process. It is not a panacea. It does help to promote communications, fosters workplace harmony, and empowers employees and managers to keep complaints and communication problems to a minimum and keep formal complaints out of the EEO process.

It takes commitment. We have been at it for over 6 years. It takes senior leadership commitment, which we have enjoyed from the Secretary of the Air Force and the Chief of Staff. Over the last period of time, the Secretary of the Air Force has issued five statements of support for ADR.

It takes extensive and continuing training, not only for practitioners of alternative dispute resolution, but for supervisors and managers, as well. We have had a strong effort on that part.

Our ADR program is part of a larger effort in the conduct of our overall EEO program of education, attention, and support. It is incorporated into our program and into our EEO personnel, who are the main players in the administration of our ADR program.

With regard to the application of technology, we have worked on and are developing functionality for a system that we call EO-net, which is a data system which will provide for the collection of complaint information and, further, will provide for communication among and between EEO practitioners across the Air Force. They will be linked through this system, and we will be able to use this system for policy dissemination and discussion, including chat rooms. This is a secure, password-protected system which responds to the sensitivity, in many cases, of EEO data.

Our ADR system is critical to the effective agency operations. As you know, the Department of Defense has undergone significant downsizing, and, in the context of that downsizing, every employee performing at peak efficiency has become a premium issue.

Workplace disputes are costly to productivity, and EEO complaints are among the most contentious and difficult of workplace disputes.

We believe that ADR returns employees to productive status quickly, and thereby is critical to readiness and mission effectiveness in the Department of Defense.

I would like to conclude my brief statement on these two points: ADR is working for us, and we applaud the EEOC's efforts to require its involvement in EEO complaint resolution processes. We have collected our experiences into what we call a compendium of best practices, which is available to all on the World Wide Web through our ADR World Wide Website—not to suggest that we have all the answers, but we have collected our experiences and made them available.

We are in the process of building a 5-year ADR plan, which will continue our progress and continue to refine our processes.

We would like to conclude on those comments.

Mr. SCARBOROUGH. Thank you. We appreciate the testimony.

[The prepared statement of Mr. Blanchard follows:]

DEPARTMENT OF THE AIR FORCE

PRESENTATION TO THE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON CIVIL SERVICE
UNITED STATES HOUSE OF REPRESENTATIVES

SUBJECT: ALTERNATIVE DISPUTE RESOLUTION

STATEMENT OF: MR. ROGER BLANCHARD
ASSISTANT DEPUTY CHIEF OF STAFF,
PERSONNEL, UNITED STATES AIR FORCE

AND

MR. JOE MCDADE
ASSOCIATE GENERAL COUNSEL

29 MARCH 2000

NOT FOR PUBLICATION UNTIL RELEASED
BY THE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON CIVIL SERVICE
UNITED STATES HOUSE OF REPRESENTATIVES

INTRODUCTION

Mr. Chairman and distinguished members of the Civil Service Subcommittee, it is a great honor to be here representing the men and women of the United States Air Force to report on the subject of Alternative Dispute Resolution (ADR). We are thankful for the opportunity to discuss the Air Force's use of ADR to resolve Equal Employment Opportunity (EEO) complaints.

Fostering increased ADR use is national policy. Congress directed all executive agencies to promote the use of ADR in the Administrative Dispute Resolution Act of 1990, USC 571-583. This Act requires each agency to:

- adopt a policy that addresses the use of alternative means of dispute resolution;
- designate a senior official to be the dispute resolution specialist of the agency;
- provide ADR training on a regular basis; and
- review each of its standard agreements for contracts, grants, and other assistance to encourage the use of alternative means of dispute resolution.

In 1996, the Congress permanently reauthorized this Act and called for the creation of an Interagency ADR Working Group to facilitate and encourage agency use of alternative dispute resolution. On 1 May 98 President Clinton issued a Memorandum directing agencies to promote the use of ADR, and appointed Attorney General Janet Reno to chair the statutory Interagency ADR Working Group to assist agencies in making the goals of the Act and The Presidential Memorandum a reality.

The Air Force ADR Program seeks to promote ADR use in military and civilian personnel complaints processes as well as in acquisition and environmental disputes. Alternative Dispute Resolution is characterized by the voluntary use of a neutral third party to arrive at a

mutually acceptable resolution to disputes. The most common alternative techniques used by Air Force personnel are facilitation and mediation. Alternative Dispute Resolution is currently used most frequently in EEO complaints processing (see attachment 1), but is also used in labor and employment disputes.

We believe that effective workplace dispute resolution promotes a harmonious work life environment and contributes to productivity. We will describe several challenges that face management as a customer of the EEO complaint process and how ADR makes sense from productivity and quality of work life perspectives. We will also describe the Air Force ADR Program's results and will concentrate on the effective combination of EEO Program awareness training with ADR Program education and specialized ADR skills training. Lastly, we will summarize lessons learned by the Air Force in implementing our award-winning ADR Program.

EEO COMPLAINT PROCESS CHALLENGES AND WHY ADR MAKES SENSE

The Department of the Air Force takes the enforcement of the various statutes that seek to prohibit discrimination very seriously. We currently have 325 (111 full-time, 3 part-time and 211 collateral duty EEO Counselors) people working in our EEO Program. In FY99, the Air Force reported that it counseled 2,792 individuals and that of those counseled 821 ultimately filed a formal EEO complaint.

Focusing on the number of complaints filed that were found to have merit, of the hundreds of formal complaints that proceeded to a Final Agency Decision in FY99, the Air Force issued a finding of discrimination in only 29. Taking a broader view of the complaints that had merit, our FY99 statistics indicate we closed 348 EEO complaints by taking corrective action ranging from modifying an individual's performance evaluation to reassigning individuals to another organization. Taking the broadest measure of meritorious EEO complaint as being the total

number closed with corrective action and those final agency decisions with findings of discrimination, 13 percent of the EEO complaints filed by Air Force personnel had merit.

While the Air Force takes all EEO complaints seriously, these numbers raise a question as to how many of these complaints needed to be in the EEO process at the onset. Our statistics suggest that a large percentage of the Air Force EEO complaints did not belong in our EEO complaint processing system. As the Equal Employment Opportunity Commission (EEOC) concluded in a 1997 ADR study, "there may be a sizeable number of disputes in the 1614 process that may not involve discrimination at all. They reflect, rather, basic communications problems in the workplace. Such issues may be brought into the EEO process as a result of a perception that there is no other forum available to air general workplace concerns." Therefore, agencies need to design a dispute resolution system that meets the needs of its users. Our workplace disputes need to be addressed to ensure we have a harmonious and productive workforce; the EEO complaint process has become the default process where employees attempt to meet that need.

The need to improve the EEO complaint system takes on an added imperative when we look at the transaction costs associated with processing these EEO complaints. The Air Force Audit Agency undertook a large-scale study to answer the question of what it costs the Air Force to process informal and formal EEO complaints. They concluded that, on average, it takes the Air Force approximately 45 labor hours to process each informal EEO complaint and approximately 321 hours to process each formal EEO complaint. The Air Force Audit Agency further reviewed the grade levels of the our personnel involved in processing these complaints and generated an average cost of $1,795 to process each informal EEO complaint and $16,372 to process each formal EEO complaint. These are conservative numbers since the Air Force does

not bear all the costs of EEO complaint processing or redress under the EEO complaint processing system. However, these estimates give us a benchmark for approximating total costs. For example, assuming the Air Force processes 1,000 formal EEO complaints in FY00, based on the Air Force Audit Agency study, we estimate that the Air Force would expend 321,000 labor hours or $16.3 million to process these formal EEO complaints.

Another factor influencing our need to improve the EEO complaint system is the workforce drawdown effort. Over the past ten years, the Air Force has significantly reduced its civilian workforce, increasing the importance of high quality performance from every employee. From a strictly business perspective, the EEO complaints process diverts hundreds or potentially thousands of labor hours away from accomplishing Air Force mission. From a quality of work life perspective as EEOC pointed out, the use of ADR is often the catalyst for more effective communication in the workplace, particularly in cases where there has been a breakdown in communication between supervisors, employees, and coworkers. Therefore, we sought to make the EEO complaint process more efficient so we could capitalize on the therapeutic workplace value of ADR and minimize the loss of productivity we have experienced in processing EEO complaints, without minimizing our commitment to prohibiting discrimination. We believe that ADR provides us with the right tool to achieve these goals; this explains why the Air Force began promoting the use of ADR in 1993.

AIR FORCE ADR PROGRAM RESULTS

We have made significant progress in expanding the use of ADR within the Air Force. Last year the Office of Personnel Management (OPM) officially recognized the Air Force's achievements in this area as among the best in the Federal Government. Specifically, OPM presented two of its three Outstanding ADR Program Awards for 1999 to the Air Force. The

first award recognized the Air Force for its agency-wide ADR Program. The second award recognized the 37th Training Wing at Lackland Air Force Base as the outstanding "installation-level" ADR Program. More recently, the Air Force received a prestigious award for Outstanding Practical Achievement for 1999 from the Center for Public Resources, an organization funded by Fortune 500 companies and leading law firms from around the country.

While we have an award-winning program, we are continually striving to improve it. To date, the Air Force has empowered its personnel to employ ADR on a flexible basis and that decision has paid handsome dividends. For example, between FY98 and FY99, the Air Force ADR Program increased the number of ADR attempts to resolve workplace disputes by almost 30 percent and our ADR resolutions increased by 35 percent.

There are a number of ways to measure ADR's positive impact. One approach is to compare Air Force EEO complaint processing times with the Federal Government averages. In FY98, on average, Federal Government agencies required 384 days to bring an EEO complaint to closure, while the Air Force took 293 days – a difference of 24 percent. Similarly, Federal Government agencies settle EEO complaints, on average, in 404 days, while it takes the Air Force 258 days – a 37 percent difference. Another approach in measuring the impact of ADR is to compare Air Force EEO complaint flow-through rates – that is the ratio of employees counseled and those who file formal complaints. For example, in FY98 the Air Force counseled 4,336 individuals and received 994 formal complaints so our flow-through rate was 23 percent. The Air Force flow-through rates have historically been approximately half the Federal Government average. Effective counseling coupled with the aggressive use of ADR explains why we have one of the lowest flow-through rates of any large Federal Government agency.

The most important benefit of ADR is that it can help an organization take advantage of skilled and talented individuals. For example, in a discrimination complaint an Air Force EEO Counselor found evidence indicating that a complainant may have been discriminated against based on race. The parties agreed to mediate the matter and during the mediation, it became clear that management regarded the Asian female GS-12 as a skilled and talented worker. Accordingly, as part of the mediated settlement, the Air Force agreed to temporarily detail her into a GS-13 position for which she was qualified. Her subsequent superior performance resulted in her being competitively selected for the GS-13 position when it became vacant. Had this case not resulted in a settlement, the Air Force could have paid compensatory damages and attorneys fees; office morale and productivity would have suffered greatly; and most importantly, the Air Force would likely have lost the services of a talented employee.

Air Force personnel are increasing their use of ADR at a rapid pace. Alternative Dispute Resolution capitalizes on a human relations approach to dispute resolution; helps reduce complaint cycle times and labor hours associated with EEO complaint processing; promotes harmony in the workplace; and returns employees, supervisors and management to the level of productivity required to accomplish Air Force missions.

AIR FORCE ADR TRAINING

An ADR Program is only as successful as its education and training efforts. The Air Force has instituted an extensive ADR training program focusing on several specific areas. The Air Force has delivered ADR Program design workshops for three of our major commands (Air Education and Training Command, United States Air Force in Europe, and Air Force Materiel Command). These workshops were custom tailored to the needs of individual major commands

based on their particular facts and circumstances. We continue to provide such workshops upon request.

The Air Force has developed ADR awareness briefings that range from one hour to eight hours in length. For example, in the past year alone we provided ADR awareness training to approximately 1,000 first- and second-line supervisors at Tinker and Hill Air Force Bases. Additionally, the Air Force has the capability to provide either one-day or two-day Interest-Based Bargaining Training to our people.

An important component of our training program is ADR skills training. We offer Basic Mediation Skills Training (a four-day course), Mediation Mentor Training (4-6 hours per session), Mediation Refresher Training (a two-day course), Advanced Mediation Skills Training (a five-day course), and Negotiation/ADR Skills Course for Air Force Attorneys. We have trained over 1,000 people to be mediators.

These training initiatives and efforts are only part of a much larger effort to educate our workforce about the importance the Air Force attaches to its EEO Program and workplace conflict management in general. A 1992 Chief of Staff of the Air Force Memorandum to all major commands directed Air University, Air Education and Training Command, and the United States Air Force Academy commanders to review all formal training courses and commissioning programs. They were instructed to ensure equal opportunity and sexual harassment issues were addressed at different phase points in enlisted and officer professional military education courses and other appropriate schools.

In 1993, the Headquarters, Air Force Personnel Center developed and updated the Air Force sexual harassment lesson plan. Air Force Materiel Command tested the revised lesson

plan and directed mandatory training for all personnel. The revised curriculum was distributed to all major commands and field units.

In 1994, the Secretary of the Air Force mandated a bottom-up review of all Air Education and Training Command, Air University, and Air Force formal training courses and commissioning programs to reemphasize and determine the extent equal opportunity and sexual harassment education issues were being incorporated and taught at accession points (Basic Military Training, Reserve Officer Training Corps, Officer Training School, and the United States Air Force Academy), professional military education, wing and group commanders' courses, Judge Advocate, and First Sergeant Academy.

Also in 1994, the Secretary of Defense directed the Defense Equal Opportunity Management Institute (DEOMI) to develop a special executive EO seminar designed specifically for DoD senior military and civilian leaders. The Secretary of the Air Force mandated all Air Force senior leaders (brigadier generals and selectees, political appointees, and Senior Executive Service civilians) attend the two-day seminar on equal opportunity. This training, conducted by DEOMI, was incorporated into the Air Force Senior Leaders Orientation Course (SLOC); approximately 450 personnel have received this training.

In 1995, the Chief of Staff of the Air Force and the Secretary of the Air Force mandated the four-hour "Equal Opportunity 2000 (EO - 2000): Our Roles and Responsibilities" awareness training for all military and civilian personnel. The focus of the course encompassed commanders, supervisors, and subordinates. The Secretary of the Air Force and Chief of Staff of the Air Force were featured in the Air Force-produced video and underscored their personal commitment to eradicate discrimination and sexual harassment in the Air Force. Their active participation and involvement in Air Force EO programs reinforced their support. The EO -

2000 course addressed Air Force and DoD policy, contemporary issues of subtle discrimination, sexual harassment, reprisal, and extremist group activities. This interactive course included facilitation and use of videos, scenarios, and several exercises. Over 375,000 military and civilian employees received EO - 2000 training from 1995 - 1999.

Independent contractors measured the effectiveness of the course and provided an assessment of the course. Their evaluation noted that the course clearly impacted Air Force members' assessment of the EO-related roles and behaviors of co-workers, supervisors, and commanders. Preliminary results by the contractor and feedback from senior major command personnel indicated positive results. The participants achieved the learning objectives and the course was well received.

To manage our EEO caseload effectively and efficiently, the Air Force invested a tremendous amount of effort to provide general EEO Program awareness. Coupled with this effort, is a more targeted initiative to provide conflict management training to first- and second-line supervisors and ADR skills training to our EEO Counselors. The net result is that the Air Force has had a fully integrated EEO and ADR Program; our results demonstrate this combination works very well.

AIR FORCE LESSONS LEARNED

In terms of its effectiveness, our experience is that ADR helps resolve approximately 70 percent of the workplace disputes in which its use is attempted. There are some individual installations within the Air Force, like Tinker Air Force Base, that currently have an 85 percent resolution rate and Los Angeles Air Force base with a 100 percent resolution rate. The Air Force-wide average ADR resolution rate is currently 75 percent. Accordingly, we believe that maintaining a 70-75 percent resolution rate represents a realistic goal for ADR programs.

The Air Force applauds the EEOC for requiring agencies to develop ADR programs as part of their EEO complaint process. Based on our experience, successful implementation of ADR within an agency depends upon:

- Strong support from senior management;
- Several employees working full-time on implementing ADR initiatives as well as matching agency ADR needs with appropriate government and private-sector resources;
- Extensive ADR training and awareness briefings; and
- Financial support for ADR initiatives.

Once these elements are in place and ADR is attempted, we find successful case resolutions through ADR lead to more attempts to use ADR. As attitudes change toward ADR, its use is expanded and perpetuated. The skills taught during ADR training and developed in actual ADR proceedings make our EEO Counselors more effective at managing conflicts and, we believe, better able to serve the public.

IN CLOSING

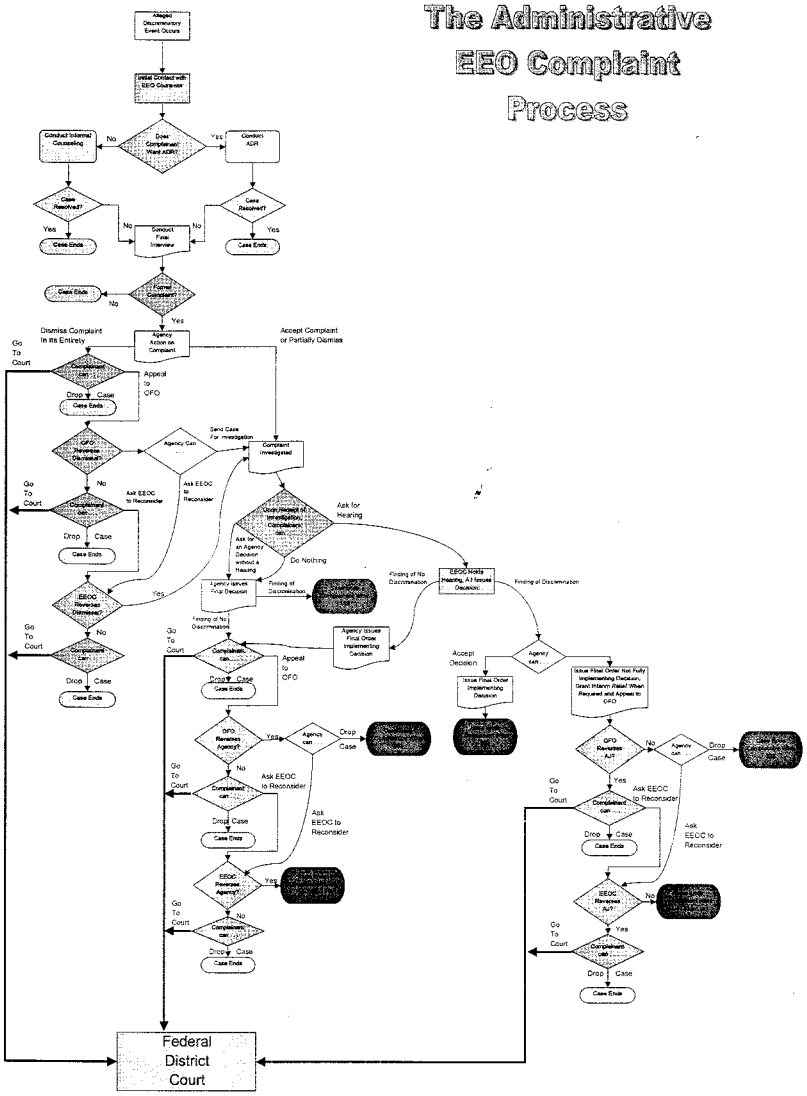
The Department of the Air Force considers ADR to be a valuable tool for resolving EEO complaints and other workplace disputes that are sometimes styled as EEO complaints. The new EEOC complaint processing regulation requiring the development of agency ADR Programs is clearly a step in the right direction. Implementing an effective ADR Program is directly linked to the amount of senior-level support and resources devoted to an agency ADR Program. For example, during the past five years the Secretary of the Air Force has issued ADR guidance on five separate occasions and recently required the Air Force to develop a five-year ADR Program

Plan. That kind of consistent high-level support and leadership, combined with a talented and dedicated workforce, is the key to our success.

Such support is all the more imperative in light of the new EEOC complaint process regulations. Under the new EEO regulations, ADR is simply part of the EEO process. There is, however, potential downside to this development. If agencies do not make the investment needed to grow effective ADR programs, we may have a number of ADR programs fall short of their intended purpose which could negatively impact the willingness of employees to use this effective tool.

Although ADR use is not solely responsible for the success of the Air Force EEO Program, it has had a significant positive effect and our EEO Counselors value it as a useful, irreplaceable tool. Continued active support of senior leadership in Federal agencies is critical to improving the EEO complaint process and sustaining ADR as a valuable tool. Effective ADR programs require involved leadership providing sufficient and dedicated resources, people, and training. This strong combination will help ensure a harmonious workplace, high quality performance, and required productivity.

The Administrative EEO Complaint Process



Developed by the Air Force Central Labor Law Office, February 2000

Mr. SCARBOROUGH. Ms. Hallberlin.

Ms. HALLBERLIN. Good morning, Mr. Chairman and other distinguished committee members.

I ask permission that my entire statement be entered into the record.

Mr. SCARBOROUGH. Without objection, so ordered.

Ms. HALLBERLIN. Thank you.

REDRESS began about 6 years ago in three cities in the northern district of Florida. Today, REDRESS is available to every postal employee across the country in the U.S. Postal Service.

I am going to focus my remarks on three things: how REDRESS works, how it is different from other mediation programs, and why it is successful.

Here is how it works: when an employee contacts an EEO counselor, he or she is offered mediation in lieu of traditional EEO counseling. If an employee chooses mediation, a professionally trained mediator, not a postal employee, brings the parties together within 2 or 3 weeks, face to face, to solve their problem.

The employee can bring any representative of their choice, which usually is a union official. The mediator acts as a facilitator and tries to help the parties understand each other and resolve their problems.

The Postal Service uses exclusively mediators that are trained in the transformative model of mediation, and this is a distinctive difference from other organizations. The best way to explain the transformative model is to contrast it to the more-traditional model of mediation that you might be more familiar with.

In a directive or valued mediation model, the mediator's role is to guide the parties toward settlement on terms that the mediator believes are best for the parties. On the other hand, in transformative mediation the mediator supports the parties' decision-making, allowing the parties to direct the process and to control the outcome of the mediation.

Transformative mediation aims at supporting and addressing communication problems between employees and their supervisors. Resolving disputes is certainly an over-arching goal, but research suggests that the process of resolving disputes in a facilitative, transformative manner rather than directive creates better and long-lasting upstream effects in the workplace.

Over the past 18 months since REDRESS was implemented, approximately 13,000 cases have gone through mediation, and 81 percent of these cases have been closed out.

What do I mean by "closed out?" They were either resolved, withdrawn, or dropped by the employee.

Another way of looking at it is that only 19 percent of mediated cases go on to become formal EEO complaints. In contrast, when complaints are not mediated, 44 percent—over twice as many—go on to become formal complaints. That is a key success factor. Of non-mediated cases, 44 percent become formal, but only 19 percent of mediated cases become formal. This is clearly not accidental.

As highlighted in our written testimony, research studies indicate there is a strong correlation between the implementation of REDRESS and a drop in formal EEO complaints, as has been alluded to here today during this hearing.

Here is how the big picture looks: between 1990 and 1997, a 7-year period, formal EEO complaints at the Postal Service doubled. They went from 7,000 cases to 14,000 cases. Then REDRESS was implemented and the trend reversed.

In 1999, for the first time in almost a decade, the number of formal EEO complaints at the Postal Service declined by 2,000 cases, and the prediction is for a further reduction of at least another 2,000 cases this year.

Another indication of success is the satisfaction shared by all the participants at the mediation table. We have analyzed over 26,000 exit surveys given to all participants at the end of every single mediation conducted at the Postal Service. Those surveys indicate that over 90 percent of supervisors, employees, and employees' representatives, who generally are union officials, are either satisfied or highly satisfied with the mediation process.

What is truly remarkable is that there is no statistical significance in satisfaction between employees and their supervisors—both equally satisfied with the entire mediation process.

REDRESS has been a significant component in the Postal Service's efforts to improve the workplace environment, as it has contributed to the reduction of formal complaints, it has closed out the majority of cases, and has satisfied nearly all the people that come to the mediation table. The Postal Service hopes to continue to expand the program and make a positive impact on the workplace.

Thank you.

Mr. SCARBOROUGH. Thank you. I appreciate your testimony.

[The prepared statement of Ms. Hallberlin follows:]

Statement of Cynthia J. Hallberlin, National Program Manager
United States Postal Service
Before the House Government Reform Subcommittee on Civil Service
On the REDRESS™ Mediation Program
March 29, 2000

Good morning Chairman Scarborough, and other distinguished committee members, my name is Cindy Hallberlin and I am the National Program Manager for REDRESS, the US Postal Service's EEO Mediation Program.

Thank you for the invitation to speak to you today about REDRESS, the Postal Service's highly successful mediation program for equal employment opportunity (EEO) disputes. An acronym for Resolve Employment Disputes, Reach Equitable Solutions Swiftly, REDRESS began with just three pilot sites in 1994 and is now available to all postal employees nationwide. The Postal Service implemented REDRESS as a faster and better way to handle EEO complaints by addressing not only the immediate conflict but the often-missed underlying issues as well.

Description of the Process

Under REDRESS, an employee who contacts an EEO counselor is offered the option of mediation in lieu of traditional EEO counseling. If mediation is chosen, a professional mediator from outside the Postal Service is brought in within two to three weeks. REDRESS is designed to be fast – so that mediation takes place early enough in the conflict to maximize the parties' ability to reach a resolution. The mediator provides a neutral environment in which the employee and the supervisor who are in conflict sit together at the table and discuss their dispute. The employee is permitted to have a representative at the mediation. The parties are not required to reach any resolution, and the mediator cannot impose any resolution. Most parties do, in fact, resolve their disputes at the mediation table. Many others withdraw, settle, or just drop their complaints shortly after the mediation.

Several aspects distinguish REDRESS from dispute resolution programs at other federal entities. First, the Postal Service uses only outside professional neutrals as mediators. This eliminates a structural bias—real or perceived—that can undermine the credibility of a mediation program. Second, the Postal Service is committed to the transformative approach to mediation as defined by professors Robert A. Baruch Bush and Joseph Folger, co-authors of *The Promise of Mediation* (1994). Transformative mediation's emphasis on facilitative

mediation, and its prohibition on the mediator taking a directive role by, for example, telling the parties what to do, provide safeguards in practice against mediator influence to obtain any particular result in mediation.

The transformative model provides a clear lens through which to articulate the unique goals of the REDRESS Program. REDRESS is part of the Postal Service's overall goal to improve the workplace climate. Transformative mediation aims to improve communication between supervisors and employees by fostering empowerment and recognition during mediation. Resolving disputes is certainly an overarching goal; but research suggests that the process of resolving disputes, in a facilitative rather than directive manner, created better and longer-lasting upstream effects in the workplace.

The Outcome

The Postal Service encourages as many complainants as possible to choose mediation in lieu of traditional EEO counseling. In fiscal year 1999, the year during which REDRESS became fully implemented, more that 8500 cases were mediated nationwide. Of the 8806 cases mediated, 61% (5336) were successfully resolved at the table with the mediator. Seventeen percent (1537) were not pursued any further by the employee and 3% (265) were formally settled or withdrawn shortly following the mediation. Thus overall 81% of the mediated cases were closed, leaving only 19% to become formal complaints. In comparison, where cases were not mediated, 44% became formal complaints. Even taking into consideration that individuals who choose mediation may be more inclined to settle their disputes, this very large drop in the percentage of formal complaints after mediation, nationwide, underscores the program's effectiveness. Current fiscal year to date data yields equally impressive results. In the first two quarters of fiscal year 2000, more than 5000 cases were mediated. Of these cases mediated, over half were resolved at the table, a quarter were not pursued any further and a small percentage were resolved after the mediation. This translates again into a very high (81%) closure rate.

Because so many cases are resolving through mediation, the flow-through rate, which is the number of informal complaints that become formal complaints, has dropped significantly since REDRESS was implemented.

Program Evaluation

Since the inception of REDRESS, the Postal Service has maintained a comprehensive tracking, research and evaluation component to measure the program's efficacy and to maintain quality control. The Postal Service collaborated with Professor Lisa Bingham, Director of the Indiana Conflict

Resolution Institute to develop this research and evaluation program. The research program, which includes extensive case tracking, exit surveys designed to gauge participant satisfaction, and interview studies, demonstrates that the program is a success on all counts.

Using regression analysis, Professor Bingham found a strong correlation between the reduction in formal complaint filings and the implementation of REDRESS in each postal district. Looking at the big picture, between 1990 and 1997 formal complaints doubled from 7,000-14,000. Fueled by changes in the law, increases in formal complaints were typical in federal agencies during this time. Formal complaints began to drop significantly (16%) in the Postal Service when REDRESS began taking hold in 1998 and 1999. And it wasn't just a honeymoon effect. Formal complaints continue to drop during Fiscal Year 2000, by an additional 20%.

As part of the ongoing evaluation of REDRESS, Professor Bingham has also tracked and evaluated the effectiveness of the program. She has gathered empirical data using exit surveys to determine participant satisfaction with the mediation process, the mediators and the mediation's outcome. Through more than 26,000 anonymous exit surveys completed by participants at the end of the mediation, Professor Bingham found that over 90% of supervisors, employees and employees' representatives (generally, union stewards) reported being satisfied or highly satisfied with the mediation process and the mediators. Moreover, nearly three-fourths of the participants reported being satisfied or highly satisfied with the outcome of the mediation. Significantly, there is no statistical difference between the satisfaction levels reported by supervisors and employees (employees' representatives are statistically slightly higher than the supervisors and employees themselves). This finding was remarkable, given the inherent imbalance of power between supervisors and employees. This high degree of satisfaction from all participants has remained steady since the program was first implemented.

Additionally, these exit surveys affirm the Postal Service's choice to use outside mediators trained in the transformative model. For three years, Professor Bingham tracked participant satisfaction using inside mediators, (meaning employees trained as mediators) as compared to outside mediators. She found that participant satisfaction was substantially higher when outside mediators were used. In fact, when looking at satisfaction in terms of just three categories - the mediator, the outcome and the lasting effects of the mediation - there was a statistically significant difference when outside mediators were used. Further, settlements were 19 percentage points higher in cases with outside mediators when compared to cases using inside mediators.

Professor Bingham's most recent research also confirms that transformative mediation fosters constructive communication between participants. Exit surveys

revealed that most complainants (72%) and supervisors (73%) agreed with the statement: "The other person listened to my views during the mediation." Similarly, when asked whether the parties acknowledged each other's perspective, 60% of complainants and 65% of supervisors agreed that this occurred during the mediation.

Finally, Professor Bingham also conducted an interview study of mediation participants 18 months after REDRESS was implemented. These interviews revealed "upstream effects" in the form of enhanced listening and conflict management skills. Supervisors reported these effects more often because they participated more frequently than employees who often file only one complaint.

These program results have been published in the Review of Public Personnel Administration (1997) and the Labor Law Journal (1997).

Program Expansion

Based on the success of REDRESS, the Postal Service's Law Department is expanding the program to include mediation of formal complaints. This new initiative, referred to as REDRESS II, will be rolled out to every legal field office in the Postal Service by the end of FY 2000. Training will be offered to attorneys and labor relations representatives who advocate in administrative EEO hearings. Included in the training will be appropriate case selection, client preparation and representation in mediation.

REDRESS is not just a postal success story; it has gained acclaim throughout the ADR community and is a national success story. In FY 1999 REDRESS received a Director's Award for Outstanding Alternative Dispute Resolution Programs from the Office of Personnel Management. Recently, the American College of Civil Trial Mediators selected REDRESS for its Institutional Award for Excellence. Serving as a model of alternative dispute resolution program implementation, the Postal Service was asked to chair the Workplace Disputes section of the Attorney General's Interagency Working Group on Dispute Resolution. Currently, in its second year as co-chair with the FDIC, the Postal Service has led a series of 26 panel discussions and interactive workshops, which were attended by more than 49 member agencies.

While REDRESS clearly addresses the human need for increased communication, it also addresses the organizational need to effectively manage conflict. If government is to reinvent itself, it must first change how it treats its most important resource—people. Mediation is and should continue to play a vital role in the transformation of the federal workplace. Based on the information that I have shared with you today, we believe that it is doing just that for the U.S. Postal Service. Thank you, Chairman Scarborough. That concludes my statement.

Mr. SCARBOROUGH. Mr. Reed.

Mr. REED. Good afternoon, Mr. Chairman.

I ask that my written statement be entered into the record.

Mr. SCARBOROUGH. Without objection, so ordered.

Mr. REED. Chairman Joe Scarborough and distinguished members of the subcommittee, I would like to thank you for this opportunity to testify.

In addition, I would also like to thank the chairman and also Congresswoman Norton and Congresswoman Morella for attending and speaking at the Blacks in Government Policy Conference last year.

It is my privilege to appear as the president of Blacks in Government to present the views of African American government employees. I call this testimony my "Nine Plus Nine Testimony"—nine potential issues and nine potential recommendations.

I thank the chairman for his leadership in this vital area of public concern, and I would also like to thank the ranking member, the Honorable Elijah Cummings, and the Honorable Albert R. Wynn, for their leadership.

I would now like to briefly summarize my written testimony.

Discriminatory behavior is no longer sanctioned by the Government. Indeed, it is unlawful. But for a brief moment let's forget about the sordid history of racial oppression in America and let's, even for a moment, forget about African Americans, but only for a moment, and let's talk about unfair and wasteful government and let's talk about the money.

In two notable cases, which clearly documented race and sex discrimination, it cost the Government a great deal of money. The Library of Congress recently paid $10 million and the Voice of America and U.S. Information Agency are about to pay more than $520 million as the result of class action race and sex discrimination lawsuits.

If someone stole $10 million from the Government, what should happen to them? If someone stole $520 million from the Government, what should be their penalty?

The executives of the Library of Congress, the Voice of America, and the U.S. Information Agency stole massive amounts of money from the public coffers. These crimes have had no cost to the Federal agencies involved and no personal penalties have been visited upon the offending parties. These title seven violations that result in losses of Federal money of any amount should be treated just like any other criminal acts and the offenders should have to pay substantial fines and/or go to jail.

That is the big picture. Here are some details concerning what is wrong with the system that tells us how and why we generate these large payments of discriminate lawsuits.

No. 1, the EEOC handles complaints in a way that makes it impossible to capture the full extent of employment discrimination in the Government.

No. 2, in particular, nefarious techniques are used by the Government to eliminate some 60 to 70 percent of the complaints alluded to by Congresswoman Norton.

No. 3, Federal agencies sabotage employees' EEO cases. Employees generally have no effective avenue for redress when this happens.

And, No. 4, if more Federal employees were financially able to bear the cost of litigation, there would be a tidal wave of title seven lawsuits in Federal court today.

And, No. 5, the programs of Government reinvention have compromised the weak EEO complaint process by providing more management autonomy, including the autonomy to discriminate without accountability.

Agencies with class action complaints awaiting certification at the EEOC, such as the Department of Commerce since 1995, are implementing new personnel systems. Such systems give managers more flexibility and no accountability.

No. 6, the EEOC does not monitor agency mismanagement of the complaint process. As an illustration, after settling the class action complaint involved in the black farmers, a recent Office of Inspector General report on the status of civil rights efforts to reduce the backlog of EEO complaints in the Department of Agriculture stated, "The problem we noted before in the complaint resolution process also continues. Civil rights data bases remains an unreliable repository of information, and its case files are too slovenly—means careless in personal appearance—to ensure the availability of critical documents. A disaffected staff and a leadership vacuum have contributed to a system that cannot ensure complainants a timely hearing of their grievances."

No. 7, EEOC timeline guidelines for processing complaints are typically ignored by the agencies, while complainants often have their cases dismissed for similar violations.

No. 8, by failing to mandate compliance with administrative procedures to end discrimination, the entire EEO process is undermined and managers have no incentive not to discriminate.

No. 9, in a vicious assault on the whole EEO process, the Federal Government now provides professional liability insurance to protect Federal managers who may be charged with violating Federal employment discrimination laws.

If Congress intends to send a clear message to Federal agencies that discrimination will not be tolerated, we urge this committee to seriously consider the following recommendations:

No. 1, Congress should totally reinvent the EEOC and make it responsive and accountable to regulatory timeline.

No. 2, the defendant agency should bear all expenses in cases in which the plaintiffs prevail.

No. 3, Congress should implement a Government-wide policy that supports employee organizations and empowers them to play a greater role in civil rights policy within the Federal agencies. It is called "diversity."

And, No. 4, Congress should require agencies' civil rights offices to be restructured so that civil rights directors answer directly to the agency head.

No. 5, Congress should give the EEOC subpoena power over retired Government employees.

No. 6, Congress should take the decisionmaking authority and the EEO complaint process away from agencies and place it in the EEOC.

No. 7, Congress should require the EEOC to impose sanctions against managers and supervisors who are found to be in violation of title seven of the Civil Rights Act of 1964.

No. 8, Congress should repeal Federal law providing for the payment of premiums for professional liability insurance for Federal managers.

Finally, No. 9, members of the committee may wish to urge the EEOC to write an amicus brief in support of Matthew Fall. Mr. Fall is a Deputy U.S. Marshal who won a discrimination case against the Department of Justice's U.S. Marshal Service. However, the landmark $4 million jury award has been decreased to $300,000. Mr. Fall is currently appealing the case, and rightfully so.

Sir and committee, I thank you for your time.

Mr. SCARBOROUGH. Thank you so much.

[The prepared statement of Mr. Reed follows:]

Testimony of Mr. Gerald R. Reed
President and CEO
Blacks in Government
before the
Committee on Government Reform and Oversight
Subcommittee on Civil Service
United States House of Representatives

March 29, 2000

Chairman Scarborough and distinguished members of the Subcommittee, thank you for the opportunity to testify. It is my privilege to appear as the President of Blacks In Government (BIG) to present the views of African-American government employees. I thank the Chairman for his leadership in this vital area of public concern, and I would also like to thank the Ranking Member, the Honorable Elijah Cummings, and the Honorable Albert R. Wynn for their leadership.

Blacks In Government (BIG) was organized in 1975and incorporated as a non-profit organization under the District of Columbia jurisdiction in 1976. We are a professional development association comprised of federal , state, and local public servants in eleven regions nationwide. We are committed to promoting equity, excellence, opportunity, and a workplace free of discrimination and retaliation.

Massive Federal Mismanagement Should Be a Criminal Offense

Though there are some remaining disagreements on matters of race and sex discrimination in our wonderfully diverse American family, there is a basic recognition in our hearts and minds that race and sex discrimination are wrong and should not be countenanced. Title VII of the Civil Rights Act is important constitution-fulfilling legislation that will be a significant feature of our social, political, and constitutional landscape for the foreseeable future. Discriminatory behavior is no longer sanctioned by the government. Indeed, it is unlawful.

Some still say that the problem before us is painfully complex. To them the issue is whether or not the gaping wound in American democracy opened by hundreds of years of oppression of African-Americans ought to be healed by assuring "equal opportunity." Is it fair to discriminate against white people of this generation for the sins of their forbears? To most of us on the receiving end of this oppression and those who have sided with us, it has always been astonishing that the issue was ever framed in this way. People should be treated fairly. That is the American way, plain and simple.

But it gets even simpler. For the moment, let's forget about the sordid history of racial oppression in America. Let's even forget about African-Americans.

And let's talk about unfair and wasteful government. Let's talk about the money.

In two notable cases, clearly documented race and sex discrimination cost the government a great deal of money. In the case of *Cook* v. *Billington*, the Library of Congress racial discrimination class action lawsuit, first filed in 1982 and decided in 1993, the government paid the aggrieved parties $8.5 million, and their lawyers more than $1.5 million, for a total of about $10 million. In the more recent case of *Hartman* v. *Albright*, the Voice of America/U.S. Information Agency class action sex discrimination lawsuit, the federal government is now committing to pay 1,100 aggrieved women some $508 million, plus at least another $12 million in legal fees for a total of at least $520 million.

If someone stole $10 million from the government, what should happen to them? If some one stole $520 million from the federal government, what should their penalty be?

The executives of the Library of Congress, the Voice of America, and the U.S. Information Agency stole massive amounts of money from the public coffers. These crimes have had no cost to the federal agencies involved, and no personal penalties have been visited on the offending parties. The monetary relief and legal costs are paid by the U.S. Treasury from its judgement fund, and the only cost of litigation borne by the agency is for the time of their staff attorneys, whose role is minimal. James H. Billington, the Librarian of Congress, remains in his position absolutely untouched by the illegal behavior that he has permitted and encouraged in the agency he heads. Though the detailed outcomes of the Voice of America/U.S. Information Agency settlement are not clear because the event is still new, the costs will not be borne by the agency, and it is doubtful if any of the discriminating officials will be adversely affected.

This is patently unfair to the outright thieves who steal our public money. If we are going to let the Title VII offenders go free and pay their legal costs, we should let others who raid the federal coffers go free and pay their legal costs. Or, they should all go to jail.

These Title VII violations that result in losses of federal money of any amount should be treated just like other criminal acts, and the offenders should have to pay substantial fines and/or go to jail.

That is the big picture. Equally important, the extent and intensity of racial discrimination in federal employment is obscured by the nature of the complaint procedure and by the cost of litigation, which is a major deterrent to would-be complainants. The following detail shows that:

- EEOC handles complaints in a way that makes it impossible to capture the full extent of employment discrimination in the government.

- In particular, nefarious techniques are used by the government to eliminate some 60 to 70 percent of the complaints, so that they do not get counted in the data on the numbers of complaints.

- Federal agencies freely adopt hidden policies to sabotage employees' EEO cases

- Employees generally have no effective venue for redress when their complaints have been sabotaged.

- If more federal employees were financially able to bear to cost of litigation, there would be a tidal wave of Title VII lawsuits filed in federal court. The government, with unlimited litigation capabilities, seeks, with the collusion of the courts, to drag out cases, sometimes for 15 to 20 years, to bankrupt plaintiffs who are ordinary citizens or who do not have the benefit of *pro bono* class action legal counsel. This prospect is a significant deterrent to filing lawsuits.

- The programs of government reinvention have compromised the weak EEO complaint process by providing more management autonomy–including autonomy to discriminate without accountability.

- EEOC does not monitor how agencies mismanage the EEO complaint process.

- EEOC timeline guidelines for processing complaints are typically ignored by the agencies, while complainants often have their cases dismissed for similar violations.

- By failing to mandate compliance with administrative procedures to end discrimination, the entire EEO process is undermined and managers have no incentive not to discriminate.

- In a vicious assault on the whole EEO process, the Federal government now provides professional liability insurance protection to federal managers who may be charged with violating federal employment discrimination laws.

Concerns About the Equal Employment Opportunity Commission

EEOC handles complaints in a way that makes it impossible to capture the full extent of employment discrimination in the government.

On June 3, 1999, the U.S. General Accounting Office released a study of the inventories of unresolved EEO complaints and trends in these complaints. The GAO study, ***Equal Employment Opportunity: Data Shortcomings Hinder the Assessment of Conflicts in the Federal Workplace***, revealed that the data reported to EEOC from

individual agencies is inaccurate, inconsistent, uncertified, and in many cases, incomplete. In fact, because of the way data is collected, it is impossible to answer fundamental questions about the nature and extent of workplace conflicts, such as: how many individuals filed complaints? In how many complaints were each of the bases for discrimination alleged? What were the most frequently cited issues in employees' discrimination complaints, and in how many complaints were each of these issues cited?

On June 29, 1999, BIG, Congressman Albert R. Wynn, and representatives from the National Association for the Advancement fo Colored People, and other civil rights organizations, convened a press conference to bring attention to the inaccuracy of data collection regarding the EEOC complaint process, and to EEOC's failure to issue and implement its proposed regulatory changes. We were appalled at the EEOC and disappointed with its inaccurate and haphazard approach to handling complaints–its *primary* function.[1] Not only is this a colossal misuse of taxpayer dollars, but it is also a disservice to the 2.7 million federal employees who serve America every day.

On October 28, 1999, Vice President Gore's National Partnership for Reinventing Government (NPR) and the EEOC launched a joint NPR-EEOC Interagency EEO Task Force on the Federal Sector to examine the federal sector complaint process. Its main objective is to "advance the fairness and efficiency of the EEO system and stimulate change that will prevent discrimination in the federal workplace."

In particular, nefarious techniques are used by federal agencies to eliminate some 60 to 70 percent of the complaints, so that they do not get counted in the data on the numbers of complaints.

The number of complaints filed in the EEO arena is not an accurate account. EEOC only requests those complaints that become formal. In some agencies, up to 60 to 70 percent of complaints filed are resolved at the informal stage; and therefore, the subject agency appears to only have a handful of complaints. Those complaints that are resolved, settled, withdrawn, or dropped before becoming formal are not included in the calculations to EEOC.

Federal agencies freely adopt hidden policies to sabotage employees' EEO cases.

Sabotage methods include: rewriting the issues, tampering with evidence, failing to

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[1]The mission of the Equal Employment Opportunity Commission (EEOC) is to promote equal opportunity in employment through administrative and judicial enforcement of laws prohibiting employment discrimination, as well as through education and technical assistance. sworn testimony by managers as a matter of routine. The EEO complaints process does not address these issues:

investigate key witnesses, tampering with witnesses, and hiring retired agency EEO management officials to investigate cases of discrimination in their former agencies. These practices explain why issues raised in the complaint process are often categorized by management as "inappropriately filed." To illustrate the point, consider these two statements:

> **Employee asserts:** " ... despite the quantity and quality of work performed, I received a lower performance appraisal than a White person because I am the only African American in the office."
>
> **Agency rewrites the issue to say:** " ... the employee received a performance appraisal that they believe they did not deserve."

The latter statement is investigated. The findings go before the Administrative Law Judge, and the judge most often finds that there has been no discrimination.

Federal employees generally have no effective venue for redress when their complaints have been sabotaged.

The EEOC has no enforcement authority over federal sector agencies. For this reason, federal employees can not turn to this agency–even with all of its problems–for help when the EEO complaint mechanisms in their agencies sabotage their quests for justice.

This lack of EEOC enforcement authority over federal sector agencies has allowed agencies to discourage, ignore, and grossly mismanage discrimination complaints with no adverse consequences. The Commission's instructions are merely directive, it does not investigate discrimination charges in the federal government. Instead, the agencies investigate themselves. The EEOC does not file lawsuits against other federal agencies in federal court. The EEOC does, however, develop guidelines. Still, they are only guidelines which are not legally binding. Agencies freely do what they want to do. At best EEOC guidelines signal the EEOC's position in future litigation. EEOC will not adjudicate any abuses of the EEO process against agencies. Clearly, this entire process is flawed. It fails to treat Federal employees, particularly African American employees, fairly. And unfairness is *not* the American way.

What is worse, once an employee has filed a complaint without success, any subsequent complaint that he or she files about the way the agency reframed the issues is defined as a "spin-off" complaint. Such spin-off complaints are treated in a special way that is detrimental to the complainant. In such cases, *Management Directive 110* directs the employee to the official charged with processing the EEO complaint. This happens to be the same official authorizing the reframing practice.

If more federal employees were financially able to bear to cost of litigation, there would be a tidal wave of Title VII lawsuits filed in federal court. The government, with unlimited litigation capabilities, seeks, with the collusion of the courts, to drag out cases, sometimes for 15 to 20 years, to bankrupt plaintiffs who are ordinary citizens or who do not have the benefit of *pro bono* class action legal counsel. This prospect is a significant deterrent to filing lawsuits.

It could be argued that well-substantiated complaints that are not treated fairly within the employee's agency can always be taken into federal court. A lawsuit is always an option, it is often said.

But it really is *not* an option in most cases. Most lawyers who take such cases do so on a contingent basis. That is, they are willing to forego a large part of their payment until the suit has been won. However, it is our experience that even in cases such as this, the plaintiff is asked to pay from $20,000 to $50,000 of the litigation expenses during the course of the proceedings. Very few federal employees are able to do this, especially those in the lower grades. In some cases, an outside organization will cover the litigation costs of class action lawsuits, which may make it possible for powerful cases involving many plaintiffs to go forward. However, this is rare.

Another consideration is the time it has taken to take Title VII lawsuits filed against the federal government to closure. If the judge is fair and even-handed, it is possible to take such an individual case to trial within four or five years of the initial complaint. But if the judge is a "government" judge, favoring the defendant, it can take more than 10 years to bring the case to closure, as was the case in the lawsuits filed against the Library of Congress and the Voice of America/U.S. Information Agency noted earlier. If few federal employees can afford to put $20,000 to $50,000 up to sue the government, still fewer can leave that amount of money in the legal proceedings for 10 or 15 years.

The defending agency, of course, cares not a whit for the suing employees, and typically does everything possible to prolong the lawsuit in the hope that the employee will be so financially burdened that he or she will give up.

There is seldom any real cost to the agency in defending itself against such lawsuits because counsel is furnished by the Justice Department and any judgement is paid out of a special fund for this purpose maintained by the U.S. Treasury. Furthermore, as noted earlier, there is seldom any punishment of agency officials who committed the unlawful acts. So why should the agency *ever* be responsive? There is absolutely no motivation to do so. Some would say that adverse publicity would be a deterrent, but our experience is that the federal agencies simply wait such publicity out, then return to their discriminating practices.

Reinvention of the Government and the EEO Complaint Process

The programs of government reinvention have compromised the weak EEO complaint process by providing more management autonomy–including autonomy to discriminate without accountability.

With government reinvention, more and more of the traditional human resources functions are being delegated to (or forced on) federal supervisors and managers. More and more complainants are asserting that their agency's participation in alternative personnel systems under a so-called "demonstration project" has made it easier for management to discriminate against federal employees in violation of federal civil rights laws because there is little accountability, opening many opportunities for abuse in the system.

Demonstration projects give managers too much authority which can be abused without oversight. Agencies with class action complaints pending at the EEOC, such as the Department of Commerce, are implementing new personnel systems. Such systems give managers more flexible authority. We must insure that those with flexible authority are truly held accountable.

What is slowly being eliminated is: accountability for adherence to merit system principles; employee protection from prohibited personnel practices; a government-wide system for determining annual adjustments to the pay structures for General schedule; and a system of due process protections for employees related to adverse actions. Several overall points should be made with respect to federal human resources and the EEO process.

- Federal personnel systems designed to protect against discrimination are being slowly dismantled by government's reinvention movement. Reinvention would eliminate the very rules and procedural constraints on government managers that are designed to strengthen accountability and fairness in the exercise of government authority.

- EEOC complaints have doubled during a period of the largest ever federal downsizing, a trend that provides evidence of systematic discrimination.

EEOC does not monitor how agencies mismanage the EEO complaint process.

An illustration of how the EEOC fails to monitor how agencies mismanage the complaint process is in order. After settling the class action complaint involving the Black Farmers, a recent Office of Inspector General report on the status of civil right efforts to reduce the backlog of EEO complaints in the Department of Agriculture stated, "The

problem we noted before in the complaints resolution process also continue. Civil rights' data base remains an unreliable repository of information, and its case files are too slovenly (means careless in personal appearance) to ensure the availability of critical documents. A disaffected staff and a leadership vacuum have contributed to a system that cannot ensure complainant's a timely hearing of their grievances."

EEOC's *Management Directive 110* states, in part, the responsibility for properly processing complaints lies with the head of the organization. No adjudication is available to complainants who believe their complaints have been mishandled, interfered with, or otherwise obstructed by EEO officials or other Agency officials. Federal agencies defend and provide legal representation to officials allegedly discriminating against employees.

General counsels for the federal agencies do not have freedom to remove themselves from representing managers when it is apparent that misconduct has occurred. No statutory or regulatory sanctions exist against agencies having policies that violate laws or regulations governing the civil rights of African American employees.

EEOC timeline guidelines for processing complaints are typically ignored by the agencies, while complainants often have their cases dismissed for similar violations.

This a very critical issue. Justice deferred is justice denied.

Appropriate sanctions identified in the 29 CFR part 1614 are not being imposed upon the agencies for blatantly not processing complaints within legal timelines. Agencies rarely adhere to the EEOC guidelines regarding timely processing of EEO complaints.

This process was created to assist employees who have been treated unfairly, but it has been implemented in a way to favor the unlawfully discriminating agency. For the employee to win the case, he or she must have witnesses, some of whom may retire before the case is adjudicated. The federal government does not have subpoena power over retired employees, even when such retirees may be critical to the case. Given the long time that the government takes to process cases–sometimes more than five years--the employee often finds it difficult to prove unlawful discrimination as a result.

By failing to mandate compliance with administrative procedures to end discrimination, the entire EEO process is undermined and managers have no incentive not to discriminate.

Most of the agencies that are not processing complaints are doing so because they can get away with it, and not because of a shortage of human resources. This practice has the effect of denying due process to federal workers who file EEO complaints. Agencies are not in compliance with 29 CFR 1614.102, which requires them to maintain a continuing

affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. Specifically, agencies generally:

- Do not provide sufficient resources to their equal employment opportunity programs to assure efficient and successful operation
- Do not provide for the prompt, fair, and impartial processing of complaints in accordance with this regulation and the instructions contained in the Commission's Management Directives.
- Do not conduct continuing campaigns to eradicate every form of prejudice or discrimination from their personnel policies, practices, and working conditions.
- Do not review, evaluate, and control managerial and supervisory performance to insure consistent vigorous enforcement of the policy of equal employment opportunity, and to provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of equal employment opportunity policies and programs.
- Do not take appropriate disciplinary action against employees who engage in discriminatory practices.

In a vicious assault on the whole EEO process, the Federal government now provides professional liability insurance protection to federal managers who may be charged with violating federal employment discrimination laws.

As we speak, managers, many who are known discriminators with six figure salaries, are procuring professional liability insurance to transfer the consequences of their discriminatory acts to a third party insurance entity. The availability of this insurance protection creates an additional powerful adversary confronting federal employees who are victims of discrimination. The insurance company will marshal massive legal and financial resources to defend discriminating officials to the detriment of the victims. Insurance profits are earned when victims of discrimination choose not to file complaints and discriminating officials are free to continue this unlawful behavior.

Now we have the specter of a victim of employment discrimination deterred from pursuing justice by monstrous entities on all sides. On one side there is the full power of the Frankenstein of the Justice Department that can litigate forever. On the other, there is now the Godzilla of the insurance industry with its massive financial and legal resources seeking profits at the expense of justice. This is a diabolical combination that must be exposed and terminated if there is to be any justice in this.

The tragedy of this situation is that the federal government is undermining its own law by paying a large portion of the insurance premiums to protect officials who are breaking the law. This insurance is not a mere managerial fringe benefit. It is a perverse and cynical assault on the democratic process itself.

The Special Issue of the Implementation of *Adarand*

The EEOC has failed to issue management directives on how federal agencies should implement the "strict scrutiny" criterion defined in *Adarand*. On June 12, 1995, in the case *Adarand Constructors, Inc.* v. *Pena,* the United States Supreme Court held that many federal affirmative action programs, under the equal protection component of the Fifth Amendment's Due Process Clause, must be reviewed by the courts using "strict scrutiny." Thus, all "racial classifications" by the government at any level must be shown to meet a "compelling governmental interest." "Racial classifications" must be "narrowly tailored to meet that interest."

This is a more demanding legal test than had previously been applied to federal affirmative action programs. In effect, *Adarand* ruled that racial preferences, whether imposed by the legislature or by judicial decree, is a remedy of last resort. It is to be reserved for "extreme cases" of "systemic" discrimination or "deliberate patterns" of racial exclusion. All "explicit" classifications of federal laws, benefitting or burdening any racial or ethnic group, must be "narrowly tailored," a constitutional standard demanding exhaustion of all race-neutral solutions before restoring to race-conscious remedies. Consequently, all racial preferences in federal statutes or regulations may stand on more precarious constitutional footing after *Adarand*.

The EEOC has the statutory authority to require federal agencies to set employment goals for minorities and women. In the absence of EEOC directives, many federal agencies devise their own guidelines on what constitutes "strict scrutiny". One agency, for example, defined "strict scrutiny" to be within three standard deviations from the mean as opposed to two standard deviations as suggested within the *Adarand* decision. Agency officials justify this extreme criterion as a preemptive measure against future litigation.

Recommendations to Improve the EEO Complaint Process

If Congress intends to send a clear message to federal agencies that discrimination will not be tolerated, and if the EEOC is to hold federal agencies accountable for discriminatory acts, we urge this committee to seriously consider these nine BIG recommendations as soon as possible.

RECOMMENDATION 1: Congress should totally reinvent the EEOC and make it responsive and accountable to regulatory timelines. The EEOC should adjudicate and find in the favor of the employee when federal department's fail to meet established (180 days) deadlines.

RECOMMENDATION 2: The defendant agency should bear all expenses in cases in which the plaintiffs prevail, instead of having these fees paid by the Treasury Department. In this way, agencies will be more motivated to take an active role in creating an environment in which fairness prevails.

RECOMMENDATION 3: Congress should implement a government-wide policy that supports employee organizations and empowers them to play a greater role in civil rights policy within Federal agencies.

RECOMMENDATION 4: Congress should require agency civil rights offices to be restructured so that Civil Rights Directors answer directly to agency heads. The rationale for this change is that there will not be any effective civil rights enforcement as long as Civil Rights Directors are put in the position of having to find that their supervisors have violated applicable federal laws. Civil Rights Directors must be given the full authority and resources to enforce civil rights laws by holding people accountable when they break the law.

RECOMMENDATION 5: Congress should give the EEOC subpoena power over retired government employees.

RECOMMENDATION 6: Congress should take the decision-making authority in the EEO complaint process away from agencies and place it in the EEOC. This change would alleviate conflict of interest. It would take agencies out of the business of judging themselves by transferring the authority for judging the merits of EEO claims from the agencies against which the claims have been filed. Federal complaints should have the same process available to state and private complainants: they should be able to file directly with the EEOC rather than going through a lengthy administrative process before they can be heard by an impartial party.

RECOMMENDATION 7: Congress should require the EEOC to impose sanctions against managers and supervisors who are found to be in violation of Title VII of the Civil Rights Act of 1964. Supervisors found guilty of illegal discrimination should be subject to disciplinary action and sanction, including demotion, termination, suspension, reassignment, and fines. Those responsible for judgements resulting in significant charges to the government's settlement fund should be subjected to large fines and/or imprisonment.

RECOMMENDATION 8: Congress should repeal federal law providing for the payment of premiums for professional liability insurance for federal managers.

RECOMMENDATION 9: Members of the Committee may wish to urge the EEOC to write an *amicus* brief in support of Matthew Fogg. Mr. Fogg, is the Deputy U.S. Marshal who won a discrimination case against the Department of Justice's United States Marshal Service. However, the landmark $4 million dollar jury award has been decreased to

$300,000. Mr. Fogg is appealing the case, and rightfully so.

Special Note on the Fogg Case (See Recommendation 8.)

The handling of this case is critical to all federal workers. It will undoubtedly direct the court's actions in setting damage awards in future discrimination cases. It will also crystalize the issue of federal agency liability. For this reason, BIG requests that the EEOC write an Amicus Brief supporting the appellant's (Matthew Fogg) assertion that the $300,000 dollar damages cap, which is a product of the 1991 amendment to Title VII law, be applied on a per claim basis rather than a per case basis.

Efforts to apply the cap on a per case basis has virtually little if any effect on curbing Federal sector discrimination. Agencies with large budget authorities are not required to pay out the funds, regardless of how nominal they may be. Furthermore, any application of the damages cap on a **per case** basis fails to fairly compensate victims for their long term pain and suffering due to *"occult racism"* (as stated in the Fogg *v.* Reno case). In this case, the plaintiff who brought charges against the Marshal Service had nine separate cases at the agency level. It is key to note, each claim could potentially award the victim of discrimination $300,000. However, in the Fogg case, rather than viewing the separate claims of discrimination as distinct acts for compensation purposes, the cap has been narrowly interpreted by the presiding judge at $300,000. Consequently a jury award of $4 million has been potentially reduced to $300,000. What kind of message does this send to large Federal departments? How will this travesty of justice change dispassionate hearts or move managers to understand the importance of equity, diversity, and fairness? How does awarding $300,000 for a case that has transpired over a 15-year period ($20,000 annually) even begin to curb discriminatory practices of Departments like Justice with budgets in the billions? Applying a damages cap of $300,000 on a per case basis is ineffective in curbing discrimination. It is as useless as a bandaid on a bullet wound.

Mr. SCARBOROUGH. I want to begin now my questions with Mr. Blanchard, and I want to commend you for the great work that the Air Force has done.

Earlier I held up a chart of the administrative process for the EEO complaint, and you had submitted that to me. Is it your testimony here today that this is actually a simplified version of this process?

Mr. BLANCHARD. It is a reflection of the process as we understand it, without all of the footnotes and details that would be necessary to fully explain each block on the chart.

Mr. SCARBOROUGH. OK. Without objection, I am going to put this into the record today. It is very interesting.

I wanted to ask you some questions regarding your successes. Certainly, you have heard the testimony of Mr. Reed and heard the testimony of others talking about how there has not seemed to be accountability from certain Federal agencies. I know especially earlier today we had Congressman Wynn talk about problems with the Department of Agriculture. Also, I believe Interior has been cited, and other agencies.

I take it when the Air Force was developing their approach, their very successful approach, you all obviously looked at what worked and what didn't work in other agencies. Is that an accurate statement?

Mr. BLANCHARD. Yes, sir.

Mr. SCARBOROUGH. Can you just give us a couple of examples of the biggest differences of your program and, let's say, Department of Agriculture or Interior's programs that have failed, and how has that accounted for your successes and their failures?

Mr. BLANCHARD. Let me answer that this way. I think our experience has been developed over about a 6-year period, and we have learned from the process as we have gone along during that 6-year period.

These are difficult cases, as I mentioned, and they involve sensitive employee management relationships within the workplace. We have attempted, in looking at other agencies' experiences, to learn what we can from them, but we have really developed what we think works within the Air Force.

Within the Air Force, I think each agency—and I guess I would argue for flexibility in agency ADR programs for agencies to develop ADR programs that are reflective of the culture of that agency. I think it is important within the culture of that agency for the agency to have the flexibility to build a program that optimizes that kind of performance.

Within the Air Force, we have tried to build a program over the years that does reflect and promote facilitation and mediation as the primary methods of ADR. We have had success with that. We are learning about it as we go along, but it doesn't stand alone. It stands in conjunction with a very deliberate attempt to educate managers, supervisors, and employees about the process.

We have trained and talked to over 1,000 supervisors. Joe McDade goes out periodically and meets with line managers to educate them about the program. We issue guidance to managers and supervisors through the formal communication process about the program. These are all parts of the central program.

We train people who do the mediation and facilitation work for us. We have developed effective training courses on mediation and facilitation in our school down in Alabama, and we continually make those courses available to people to sharpen their skills.

Each case is different. Each case requires its own effort. But that is the way our program works. That is the way we have been successful.

I think each agency has to really develop their own way here in terms of the overall organization of an ADR program.

Mr. SCARBOROUGH. Ms. Hallberlin, I wanted to ask you a question. You have given the committee some remarkable numbers about the Post Office, talking about 13,000 cases with the mediation, 81 percent closed out, only 19 percent still active. That is down from 44 percent for those cases that did not go to mediation.

What is the biggest lesson you have learned regarding mediation, ADR, or REDRESS, as you all call it, and what can we gain from that as we try to apply? What would you recommend we apply to all Federal agencies to keep their feet to the fire to make sure we come back 5 years from now and the situation is not as bad as it was in 1995?

Ms. HALLBERLIN. In answer to your first question, what is the greatest lesson I learned, I am continually amazed at the remarkable transformation or shifts that happen to people when they are brought face-to-face to talk about their problems within a few weeks of it arising. What continually surprises me is, when you bring someone to a table with someone who is acting as an outside neutral, and when they start to talk to each other, how much they can shift their impression and understand each other more and resolve what began as maybe simple and disturbing disputes, resolve them early before they go throughout and drag in the system and become complicated and entrenched and much larger.

So that is a lesson I have learned is the sooner you bring people together and support them in their own conversation and dialog, they, themselves, have tremendous capacity to resolve their problem.

What can you do for other Federal agencies? I think you can continue to support alternative dispute resolution in Federal agencies. We have seen it in the Postal Service as a tremendous device to resolve complaints early and to the satisfaction of those who have the problems.

So, to the extent that other agencies are supported in this initiative, we are very similar to my colleague here, Mr. Blanchard. We have been working at this for 6 years. It is a long process. It is complicated.

We also do tremendous outreach efforts and training. We have trained over 15,000 employees and supervisors. We trained outside mediators who come in and mediate for us. We train supervisors. We train our EEO professionals, our labor representatives. We have invited the unions.

Just as you had said, this is a comprehensive effort. You can't just drop a program on an agency. You have to build it brick by brick and always work at incorporating and partnering with all your stakeholders who are involved.

Mr. SCARBOROUGH. OK.

Let me ask you, Mr. Reed—I appreciate your testimony. Obviously, your testimony, the part that will cause most people to stand up at attention is your statement that certain violations of title seven should be criminalized. Is that an accurate reflection of your testimony? Do you think Congress should pass a lawmaking violations of title seven and also discrimination in the Federal Government a crime punishable by jail time?

Mr. REED. Exactly.

Mr. SCARBOROUGH. OK. All right. Would you like to—for those Members of Congress who may not agree with you and would want to be persuaded, could you give me a couple of examples of how you think this would help, obviously, stop discrimination in the work force?

Mr. REED. Well, the key thing to title seven is enforcement and accountability. If there is no incentive to enforce the mandate by title seven, and that is the vehicle by which these managers and/or supervisors are managing the process, then, therefore, why do you have a process in the first place?

It is an issue, as we go now into the NPR—national partnership for reinventing Government that started back in 1993, doing more for less, the No. 1 criteria in 1993 was to decrease the work force. I think the administration stated that we wanted to remove 252,000 positions, which they did. I think it is now at 386,000. But the No. 1 vehicle within that process was called "privatization," and privatization, the No. 1 vehicle is contracting out.

So when you privatize and outsource and downsize and are contracting out everyone, and not having the accountability to enforce the process by which these folks are being hit against in terms of discrimination, then where are you?

Mr. SCARBOROUGH. Yes. You know, we have heard today from testimony from the first two panels the discrimination in the work force and the EEOC's failure to redress such discrimination has been bad for some time. It was bad in the early 1990's, 1995. Somebody that testified in our second panel today said it was awful back then, inefficient, time-consuming, and he has come by and he testified a few hours ago that it is even worse today than it was in 1995.

My question is: who is to blame here? In your opinion, in this whole reinventing process, where does the blame lie? Does it lie specifically with the EEOC, or does it lie with managers, does it lie in individual agencies? Who is to blame? Somebody has got to be to blame for this. Who is it, in your opinion?

Mr. REED. The blame should lie with the ones that are circumventing the process. When you pull out the issue of fairness in the Federal EEO complaint process and then you have to go before a manager and/or a supervisor that may redress the situation in which you stated that you have an EEO case, if they come with a basis, as the ranking member stated, a basis and an issue of a complaint, they go before their EEO managers and their EEO officers, and they walk out of a room. When they went in there with one issue, they come out and present another issue, and then, when he comes before the EEOC, cases are thrown out of court.

It is just a matter of how you manage the process and how you circumvent the process. So who is to blame? Those are the ones—

the ones that are to blame are the ones that circumvent the process to their own gain.

Mr. SCARBOROUGH. I am going to have some followup questions that I can't ask right now because of time, but followup questions regarding, Mr. Reed, your proposal on the criminalization of title seven violations. I am going to send it to all three of you all and have all of you comment on the positive aspects and also what you see as some possible problems with that. And if you could respond within 2 weeks, that would be great.

Mr. Cummings.

Mr. CUMMINGS. Thank you very much.

Mr. Reed, as I was looking through your recommendations—and maybe I missed it—I didn't see anything about ADR. I don't know whether that would have been included in the whole revamping of EEOC. I was just wondering, give me your opinion on ADR.

Mr. REED. Personally, I believe the ADR is a pretty good vehicle, especially if you can satisfy the complaints early on in the process without them becoming formalized. So in my revamping of the EEOC I would also include the ADR. No question.

Mr. CUMMINGS. So, you know, as I listen to Ms. Hallberlin, what you say really makes sense of why the ADR process would work, and, coupled with what you just said, Mr. Reed, it does make some sense.

I think if you get to people early before it festers—if something is affecting my whole life then I get a chance to talk to my sister-in-law, and then the people on the job, and the next thing you know all of that adds to the whole process and it becomes much more difficult. I mean, not only that, as time goes on I see myself losing more benefits and more opportunity, and I am talking about it constantly, but I am never facing the very person who is accusing me or I am accusing of. I guess that can kind of lead to some real problems.

Is that why you say that if you can get it early?

Mr. REED. Yes, sir.

Mr. CUMMINGS. So you don't have any problem with ADR——

Mr. REED. No, I do not.

Mr. CUMMINGS [continuing]. As long as you get to it early?

Mr. REED. No, I do not. Yes, sir.

Mr. CUMMINGS. Ms. Hallberlin, just going back to some things that you said, do you find that people—do you find the morale higher? I mean, in other words, Mr. Reed was just talking about how when a person faces their accuser, then the accuser—he is talking about the hearing process—and then they go and come out and next thing you know you have got more problems. But, I mean, do you find the process here, when you go through the ADR, that you are able to get beyond that and people move forward? Or do you see—and I don't know whether you have been working with it long enough to even be able to answer this question—do you see things keep coming back and forth?

Ms. HALLBERLIN. Actually, we are looking at long-term effects of the program. We have some information now. We hope to have more later.

But what is really encouraging is that three-quarters of the participants around the mediation table indicate that they believe that

the experience of the mediation will have a long-term impact on the relationship they have with the person at the mediation table. That is very heartening to the Postal Service management, who is——

Mr. CUMMINGS. Do you mean the mediators say that? Is that what you mean?

Ms. HALLBERLIN. No. In the exit surveys I alluded to earlier, the 26,000 exit surveys, we track—we have questions that ask both the employees and their supervisors at the end of mediation, "Do you think today's experience at mediation will have an impact, a positive impact on your long-term relationship with either the supervisor or the employee?" And over three-quarters of the people that go to the mediation table respond yes, they do. That is very heartening to us.

Mr. CUMMINGS. That says a lot.

Ms. HALLBERLIN. That means that within those concentrated hours, 3 or 4 hours in which they are allowed to freely talk to each other with the assistance of an outside mediator, they have begun to understand each other more. They have heard each other. They have recognized the differences of what each other means and their intents, and they hopefully take that with them and believe that, yes, when they go back to the work on the floor things will be better.

Mr. CUMMINGS. Mr. Blanchard, is your experience similar?

Mr. BLANCHARD. Yes, sir, it is. We certainly believe there is a therapeutic effect to the ADR process in the workplace. We don't have hard data. We have anecdotal data coming from individual cases and individual case examinations of workplaces, but our experience has been very similar to Ms. Hallberlin's, as she describes it—that there is a positive effect to workplace communications, and especially if you consider that a number of the complaints that we deal with in the ADR process in the early stages, as has been indicated, may not be exactly in the right process, may not be exactly EEO kinds of complaints. They may be communications problems, but they may not be based on a protected category of activity.

The reality is that the ADR process allows those complaints to have a hearing, to have an airing, and through that process people go back to work feeling like they had their opportunity.

Our facilitation process, which involves our EEO counselors, has actually enabled them to gain stature in the workplace, as well, because they become peacemakers and end up bringing parties together around a solution, which is to the good of the overall process in the end.

Mr. CUMMINGS. You know, I would imagine that if you could come up with a win/win situation, as opposed to, "I beat you," it has got to be better, on a long-term basis, especially when you have got to work with that person every day.

Ms. HALLBERLIN. Exactly.

Mr. CUMMINGS. You spend more time with that person than you spend, a lot of times, with your own family. It just seems like that would make a lot of sense.

Let me go back to you, Mr. Reed. You had said one of your recommendations was to subpoena retired employees. Can you help us

on that one—supervisors, or—what are your recommendations? The ability to subpoena them in?

Mr. REED. A key thing—you just want to make sure, when you have a bona fide case, every entity that has input to that particular case is able to be brought to the table. And so when you have a Government employee that is no longer with the Government and the EEOC cannot bring that person back, then, of course, that is knowledge and that is testimony that you do not have that could help your particular case.

Mr. CUMMINGS. Now, when you all were here a little bit earlier, when you heard the problems about agencies not providing sufficient information to EEOC, did you all—were you all here?

Ms. HALLBERLIN. Yes.

Mr. REED. Yes, sir.

Mr. BLANCHARD. Yes.

Mr. CUMMINGS. I mean, did that surprise you? Mr. Reed.

Mr. REED. Negative.

Mr. CUMMINGS. Why not?

Mr. REED. Well, study after study after study are saying the same thing. And when you come to this table before this microphone and come before the committee and say the same things over and over again, it is not that shocking, sir.

Mr. CUMMINGS. Mr. Reed, do you have any confidence in what the gentleman from EEOC said about what we will see in a year?

The reason why I am asking you this is not to create any kind of one person going against another; it is just that when we sit down it would be nice for us to know what you would like to see, too. And so I am just curious. I mean, the testimony you heard, did it give you any confidence? And what are your concerns, if any, that when we come back here a year from now, what are you afraid that we will or will not see, and what can we do to make sure that doesn't happen? Does that make sense?

Mr. REED. Yes, sir. No. 1, I do have confidence in what the EEOC stated in terms of what is going to happen next year, because when he did refer to the stakeholders, I would like to state that Blacks in Government is one of the stakeholders. When they developed their inter-agency Federal task force, I am a member of the senior leadership committee, so I am allowed to bring issues to the table. So the key thing is—I know he alluded to resources, he alluded to this and he alluded to that. If we stay focused on what we have to do, we have all the stakeholders presenting the whole 9 yards, I believe if the stakeholders on the issues and they stay focused, in terms of what they are trying to do within the EEOC, hopefully we will see a difference next year.

Mr. CUMMINGS. Is there anything that we can do to help make that process get to where you are hoping that it will go? In other words, you know, it looks like the mechanism is set up to get it done. I am so happy to hear that you are part of the process, and apparently you feel that you are a meaningful part and viewed as a meaningful part of the process, along with others.

Now, is there anything that we can do from our side to help you all be effective? I guess that is——

Mr. REED. Is that short of an enacting legislation?

Mr. CUMMINGS. Sort of, but, I mean, if there is some legislation, we would like to know about that, also.

Mr. REED. Well, I am quite sure with my legislative team I could bring forth to this committee in written form some better recommendations.

Mr. CUMMINGS. Why don't you do that?

Mr. REED. Yes, sir.

Mr. CUMMINGS. Have you looked at the goals for the EEOC goals?

Mr. REED. On page 12?

Mr. CUMMINGS. Yes, sir.

Mr. REED. Yes, sir.

Mr. CUMMINGS. And did you have any—I mean, how did you feel about what Ms. Norton said about those goals?

Mr. REED. Ms. Norton was right on track in terms of how she expressed, because Ms. Norton has been in the process for a long time.

Mr. CUMMINGS. Yes.

Mr. REED. But you have also got to bear in mind that I know Mr. Hadden, who has only been on board for a short period of time, has inherited this process.

The fact is that Chairwoman Ida Castro—they are now bringing in the stakeholders, they are going to the communities, and I hope by what we bring to the table when we make recommendations to this committee in written form, it is taken true to light, and hopefully maybe the EEOC can act upon that.

Mr. CUMMINGS. Mr. Blanchard, last but not least, when people get through the ADR process, do you—I mean, is there any way for you all to measure the morale of your—I mean, is there any kind of analysis you do?

Mr. BLANCHARD. We are sharpening our ability to do that. We do unit climate assessments in units now that take into account the overall EEO climate within an organization, and ADR gets picked up, to some degree, in those kinds of assessments. But we also asked the Air Force audit agency to conduct a comprehensive review of our ADR program, and we have got that review. We are studying those results and looking for ways that we, as we implement our 5-year ADR program—which I have to point out applies not only to the application of ADR in employment disputes, but also in contract disputes and across the board of interaction kinds of disputes—as we develop that 5-year plan, we will incorporate metrics in that 5-year plan that will speak to measuring how ADR affects the workplace.

Mr. CUMMINGS. But you all know we can do better at EEOC. Is that a fair statement?

Mr. BLANCHARD. In this area, sir, we can always do better.

Mr. CUMMINGS. Ms. Hallberlin.

Ms. HALLBERLIN. We can always do better.

Mr. CUMMINGS. Mr. Reed.

Mr. REED. Yes, sir.

Mr. CUMMINGS. One other thing, Mr. Reed, I would like for you to submit those recommendations to us on the legislation that you talked about.

In conclusion, Mr. Chairman, it is interesting. You know, I think sometimes the solutions to the problems are easy. I mean, we know the solutions. It is like when my daughter was 2 years old and she would put her hand up to her face and play hide-and-go-seek, and she would put her hand up to her face and say, "Daddy, you can't find me," and she was standing right in front of me. Sometimes I think as adults we do the same thing. The solutions are there. The question is whether we have the will to do it. It seems like you all have—you know, at least you are going in that direction to do it.

The last thing I would just leave us with is I think we all realize we only have one life to live, and this is no dress rehearsal, and people are just trying to live the best lives that they can while they are living.

And so I would hope that, you know, maybe the things that we do, Mr. Chairman, can continue this process of trying to—sometimes we have to almost help people get married. That is what we are talking about here, this ADR stuff—we are actually causing people to sit down and look at each other and, even if they start off as being, you know, mean, by the time they end up and hear everything out and hear why one person did something, misunderstanding there, the next thing you know, you have got some type of resolution that is so very important for the whole agency.

The most important thing, I think the thing that we leave out of the formula, is that when we are able to do all of those kind of things we all benefit. The country benefits. The employees benefit. Their children benefit. Those are things that are very important.

So I just want to thank all of our witnesses for being so helpful, and we will do everything in our power to make sure that we pursue this matter aggressively.

Mr. SCARBOROUGH. Thank you, Mr. Cummings. I want to thank you, also. You and Mr. Wynn have certainly moved this process along to this point. I think it is a great start.

I want to thank our witnesses.

Let me ask you, Mr Blanchard, you had said that you have a Website that has a collection of best practices. What is the Website address there?

Mr. BLANCHARD. Let me ask Mr. McDade.

Mr. SCARBOROUGH. Ask Mr. McDade.

Mr. MCDADE. WWW.ADR.AF.MIL.

Mr. SCARBOROUGH. WWW.ADR.AF.MIL?

Mr. MCDADE. Right.

Mr. SCARBOROUGH. OK. We will go to that and look at that.

Mr. McDade, we thank you for all your help in this process.

Your father wanted to ask you some very difficult questions, but we refused to let him get a microphone under oath, going back to high school. But we want to thank you, Mr. McDade, for coming. The Congressman, obviously, has been a great man who had a long, proud, dignified career, and it is an honor just to have you up here with us.

I would thank all of you for coming and thank you for your recommendations.

We are going to leave the record open for 2 weeks for any additional questions that any Members may have or any statements.

I thank you. I thank everybody for coming today. This has been very informative, and it is beginning a process where we are going to fix this.

We are adjourned.

[Whereupon, at 1:31 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

SENIOR EXECUTIVES ASSOCIATION
P.O. BOX 44808 • WASHINGTON, D.C. 20026
PHONE: 202-927-7000 • FAX: 202-927-5192

April 7, 2000

The Honorable Joe Scarborough
Attn: Garry M. Ewing
B-371C Rayburn House Office Building
Washington, D.C. 20515

Re: EEO Complaint Problems Subcommittee Hearing

Dear Congressman Scarborough:

This letter is intended to respond to some of the issues raised during the "EEO Complaint Problems" Civil Service subcommittee hearing, which was held on March 29, 2000. We understand that the record has been held open for two weeks after the March 29th hearing, until April 12th. We request that this letter be entered into the record.

As you know, the Senior Executives Association (SEA) represents the interests of career senior executives. Since its inception in 1980, SEA is, and always has been, a strong supporter of equal employment opportunity (EEO) principles in all arenas, particularly within the Federal government. We firmly believe that discrimination on the basis of race, color, national origin, age, sex, religion, or handicapping condition has absolutely no place in the Federal workforce. We also agree that there is room for significant improvement in the way in which the federal sector EEO process is administered. However, we are quite troubled by some of the accusations and recommendations that were made during the March 29th hearing.

Our first concern is the recommendation by Blacks In Government (BIG) that would make "massive federal mismanagement," i.e., discrimination, a criminal offense, punishable by substantial fines and/or imprisonment. We vigorously oppose such a proposal.

SEA has no sympathy for federal managers and supervisors who engage in discrimination. But if managers and supervisors could be held criminally liable for discrimination, what reasonable individual would apply for and accept a position as a manager or supervisor within the federal government? The federal government has a difficult enough time as it is attracting and retaining a quality work force, without the possibility of its managers and supervisors being criminally prosecuted.

BIG may argue that federal officials could avoid this problem by not engaging in discriminatory actions. However, this is not true. The specter of facing criminal prosecution - even if it did not result in a conviction - would be more than enough to deter individuals from seeking Federal employment. Moreover, Federal managers and supervisors who remained in the workforce would be even less inclined to take any actions that could be remotely controversial to their employees, for fear of being charged criminally with discrimination. The fear of complaints, grievances and investigations is already a problem within the government. Add the specter of possible criminal liability, and you may as well tell managers and supervisors to pack up and go home.

Managers and supervisors already feel tremendous pressure not to take any adverse action against their subordinates by, for example, giving them poor performance ratings, putting them on Performance Improvement Plans (PIPs), or disciplining them for misconduct. They know that such actions often generate EEO complaints, whistleblower reprisal complaints, IG investigations, and so forth. Contrary to BIG's assertions, having complaints filed against them, or being subject to investigation, is a highly stressful and expensive proposition for managers and supervisors. Managers and supervisors don't receive free legal representation. Agency attorneys represent the agency, not the individual manager or supervisor. If managers or supervisors want representation, they have to pay for it out of their own pockets. And legal representation can easily run tens of thousands of dollars, which the average federal manager or supervisor doesn't have lying around in a "legal rainy day" fund.

In addition to the emotional and financial stress on managers and supervisors accused of discrimination, the mere accusation can often be sufficient to taint these individuals' careers. Many agencies, such as the Department of Justice, have policies in place that state that if a manager or supervisor has an EEO complaint filed against them, they cannot be promoted. Make no mistake about it - we are not saying only that managers and supervisors found to have engaged in discrimination cannot be promoted; we are saying managers and supervisors accused of discrimination cannot be promoted until the matter is resolved. And "resolution" can take years. That is a pretty powerful weapon to be wielded. And unscrupulous subordinates can use it to manipulate the process, by filing "preemptive" discrimination complaints against their bosses when their work is not up to par, or they have engaged in misconduct. It is a highly effective tactic designed to frighten their superiors into inaction.

The stakes are high, and managers and supervisors know it. On the one hand, they are expected to demand excellence and hold their employees accountable for poor performance and misconduct. On the other hand, they risk inviting an EEO complaint, and all the attendant headaches that come with it, if they do just that. It is small wonder that managers and supervisors are tempted to resolve this tension by "parking" poor performers in jobs where they can do the least harm. And it is ironic that now, just as the Administration wants to make managers and supervisors even more accountable for their employees' performance, there is this movement to raise the stakes even higher, by subjecting these individuals to criminal prosecution.

Another piece of information that was not included in BIG's testimony is the fact that managers and supervisors found to have engaged in discrimination are frequently disciplined by their agencies, and rightly so. They may suffer adverse actions ranging from a lowered performance appraisal to a disciplinary action, such as suspension without pay, demotion, or termination. To say that these individuals are not penalized is simply untrue.

The assertion that the Federal government provides professional liability insurance to their federal managers "in a vicious assault on the whole EEO process" is simply ludicrous. First, to set the record straight, the Federal government does not provide professional liability insurance to its managers and supervisors. Managers and supervisors may choose to purchase this liability insurance. If they do, their agencies are required to reimburse them for up to one-half the cost of the premiums. Why? The answer is simple, and most easily illustrated by reviewing some statistics.

In fiscal year 1998, the most recent year for which the EEOC has released statistics, EEOC Administrative Judges (AJs) issued 3,512 recommended decisions. This is 3,512 decisions in which an impartial adjudicator made a ruling after hearing all of the evidence. Of those 3,512 decisions, there was a finding of discrimination in 254 of those cases. There was a finding of "no discrimination" in 3,258 cases. This means that discrimination was found in only 7% of all the cases decided on the merits that year. It also means that there was no finding of discrimination in 93% of the cases.[1]

These statistics are important because they show that the vast majority of the EEO complaints that are filed are without merit. It is easy to file an EEO complaint. All a complainant has to do is discuss the allegations with an EEO counselor, and file a simple form. It costs the complainant nothing. If the complainant loses, he or she does not have to pay the fees and costs the vindicated manager or supervisor may have incurred while defending against the complaint. Who, then, pays these attorneys' fees and costs? The manager or supervisor, out of his or her own pocket. Managers and supervisors purchase professional liability insurance because they know that there is a significant likelihood that at some point during their careers, they are going to have an EEO complaint filed against them. And they know that they may have to pay $10,000,

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[1] The statistics for 1997, 1996, and 1995 are similar. In fiscal year 1997, there were 3,294 recommended decisions, and a finding of discrimination in only 325 cases. Thus, there was a finding of no discrimination in more than 90% of the cases.

In 1996, there were 2,962 recommended decisions issued, and a finding of discrimination in 321 cases. Therefore, there was a finding of "no discrimination" in 2,641 cases. This means that there was a finding of "no discrimination" in more than 89% of the cases.

There were 3,001 recommended decisions issued in 1995, and a finding of discrimination in 353 cases. This means that in more than 88% of the cases, there was a finding of "no discrimination."

$20,000, $30,000 or more, out of their own pockets, to defend against an EEO complaint, even if they win, even if they are found not to have engaged in discrimination. Without professional liability insurance, many managers and supervisors "lose" simply by having a complaint filed against them.

The Federal government reimburses managers and supervisors up to one-half the cost of professional liability insurance, not because it wants to encourage discrimination, but because it wants to encourage Federal managers to actually manage. Does the Federal government receive a benefit from partial reimbursement of professional liability insurance premiums? It certainly does. It gets managers and supervisors who are far less fearful of taking adverse actions against poor performers and employees who engage in misconduct, because they know that having a complaint filed against them will not spell financial ruin.

Of course discrimination should not exist in the Federal workforce. But a balance must be struck between discouraging discrimination and punishing those who discriminate, and allowing Federal managers and supervisors to do their jobs without constantly being fearful that the legitimate exercise of their job duties may cause them to be subject to criminal prosecution or financial ruin. Just as managers and supervisors should not be permitted to abuse their power by discriminating against their subordinates, subordinates should not be permitted to intimidate their managers and supervisors by threatening them with the specter of criminal prosecution or severe financial hardship. To allow managers and supervisors to be criminally prosecuted, or to repeal the statute that allows them to receive some reimbursement for professional liability premiums, tilts the scales too far.

For the foregoing reasons, we strenuously object to the proposal that would impose criminal sanctions on federal managers and supervisors, and to the proposal that would repeal the statute mandating that agencies reimburse their managers and supervisors for up to one-half the cost of professional liability premiums. We would welcome an opportunity to present the views of our members concerning the EEO process, or any other matter, before the Civil Service subcommittee.

Sincerely,

Carol A. Bonosaro
President

G. Jerry Shaw
General Counsel

cc: Jennifer Hemingway
Professional Staff Member