

**ESTABLISHING A COMMISSION TO RECOMMEND
IMPROVEMENTS FOR THE FEDERAL EMPLOYEES
APPEALS PROCESS**

HEARING

BEFORE THE
SUBCOMMITTEE ON THE FEDERAL WORKFORCE
AND AGENCY ORGANIZATION
OF THE
COMMITTEE ON
GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JULY 11, 2006

Serial No. 109-226

Printed for the use of the Committee on Government Reform



Available via the World Wide Web: <http://www.gpoaccess.gov/congress/index.html>
<http://www.house.gov/reform>

U.S. GOVERNMENT PRINTING OFFICE

34-234 PDF

WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON GOVERNMENT REFORM

TOM DAVIS, Virginia, *Chairman*

CHRISTOPHER SHAYS, Connecticut	HENRY A. WAXMAN, California
DAN BURTON, Indiana	TOM LANTOS, California
ILEANA ROS-LEHTINEN, Florida	MAJOR R. OWENS, New York
JOHN M. McHUGH, New York	EDOLPHUS TOWNS, New York
JOHN L. MICA, Florida	PAUL E. KANJORSKI, Pennsylvania
GIL GUTKNECHT, Minnesota	CAROLYN B. MALONEY, New York
MARK E. SOUDER, Indiana	ELIJAH E. CUMMINGS, Maryland
STEVEN C. LATOURETTE, Ohio	DENNIS J. KUCINICH, Ohio
TODD RUSSELL PLATTS, Pennsylvania	DANNY K. DAVIS, Illinois
CHRIS CANNON, Utah	WM. LACY CLAY, Missouri
JOHN J. DUNCAN, Jr., Tennessee	DIANE E. WATSON, California
CANDICE S. MILLER, Michigan	STEPHEN F. LYNCH, Massachusetts
MICHAEL R. TURNER, Ohio	CHRIS VAN HOLLEN, Maryland
DARRELL E. ISSA, California	LINDA T. SANCHEZ, California
JON C. PORTER, Nevada	C.A. DUTCH RUPPERSBERGER, Maryland
KENNY MARCHANT, Texas	BRIAN HIGGINS, New York
LYNN A. WESTMORELAND, Georgia	ELEANOR HOLMES NORTON, District of Columbia
PATRICK T. McHENRY, North Carolina	BERNARD SANDERS, Vermont (Independent)
CHARLES W. DENT, Pennsylvania	
VIRGINIA FOXX, North Carolina	
JEAN SCHMIDT, Ohio	
BRIAN P. BILBRAY, California	

DAVID MARIN, *Staff Director*

LAWRENCE HALLORAN, *Deputy Staff Director*

TERESA AUSTIN, *Chief Clerk*

PHIL BARNETT, *Minority Chief of Staff/Chief Counsel*

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

JON C. PORTER, Nevada, *Chairman*

JOHN L. MICA, Florida	DANNY K. DAVIS, Illinois
TOM DAVIS, Virginia	MAJOR R. OWENS, New York
DARRELL E. ISSA, California	ELEANOR HOLMES NORTON, District of Columbia
KENNY MARCHANT, Texas	ELIJAH E. CUMMINGS, Maryland
PATRICK T. McHENRY, North Carolina	CHRIS VAN HOLLEN, Maryland
JEAN SCHMIDT, Ohio	

EX OFFICIO

HENRY A. WAXMAN, CALIFORNIA

RON MARTINSON, *Staff Director*

ALEX COOPER, *Clerk*

MARK STEPHENSON, *Minority Professional Staff Member*

CONTENTS

	Page
Hearing held on July 11, 2006	1
Statement of:	
Bransford, William L., general counsel, Senior Executives Association; Colleen M. Kelley, national president, National Treasury Employees Union; John Gage, national president, American Federation of Govern- ment Employees, AFL-CIO; and Karen Heiser, vice president, Federal Managers Association Chapter 88	55
Bransford, William L.	55
Gage, John	70
Heiser, Karen	90
Kelley, Colleen M.	63
McPhie, Neil A.G., chairman, Merit Systems Protection Board; William Tobey, Deputy Solicitor, Federal Labor Relations Authority; Cari M. Dominguez, Chair, Equal Employment Opportunity Commission; Scott Bloch, special counsel, U.S. Office of Special Counsel; Nancy H. Kichak, Associate Director, Strategic Human Resource Policy Division, Office of Personnel Management; and Scot Beckenbaugh, acting deputy direc- tor, Federal Mediation and Conciliation Service	8
Beckenbaugh, Scot	42
Bloch, Scott	28
Dominguez, Cari M.	21
Kichak, Nancy H.	37
McPhie, Neil A.G.	8
Tobey, William	16
Letters, statements, etc., submitted for the record by:	
Beckenbaugh, Scot, acting deputy director, Federal Mediation and Con- ciliation Service, prepared statement of	44
Bloch, Scott, special counsel, U.S. Office of Special Counsel, prepared statement of	30
Bransford, William L., general counsel, Senior Executives Association, prepared statement of	58
Cabaniss, Dale, chairman, Federal Labor Relations Authority, prepared statement of	18
Dominguez, Cari M., Chair, Equal Employment Opportunity Commission, prepared statement of	24
Gage, John, national president, American Federation of Government Em- ployees, AFL-CIO, prepared statement of	72
Heiser, Karen, vice president, Federal Managers Association Chapter 88, prepared statement of	93
Kelley, Colleen M., national president, National Treasury Employees Union, prepared statement of	65
Kichak, Nancy H., Associate Director, Strategic Human Resource Policy Division, Office of Personnel Management, prepared statement of	39
McPhie, Neil A.G., chairman, Merit Systems Protection Board, prepared statement of	11
Porter, Hon. Jon C., a Representative in Congress from the State of Nevada, prepared statement of	4

ESTABLISHING A COMMISSION TO RECOMMEND IMPROVEMENTS FOR THE FEDERAL EMPLOYEES APPEALS PROCESS

TUESDAY, JULY 11, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY
ORGANIZATION,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2247, Rayburn House Office Building, Hon. Jon C. Porter (chairman of the committee) presiding.

Present: Representatives Porter, Davis, Norton, Cummings, and Van Hollen.

Staff present: Ron Martinson, staff director; Chad Bungard, deputy staff director; Jessica Johnson, chief counsel, OPM detail; Alex Cooper, legislative assistant; Brian Chatwin, intern; Mark Stephenson and Tania Shand, minority professional staff members; and Teresa Coufal, minority assistant clerk.

Mr. PORTER. I would like to bring the meeting to order, and thank you all for being here today. We are going to be called to vote in a few moments. I know you have experienced that phenomenon in the past. I think about 2:15 or 2:20, we are probably going to be called to vote, and I think we have a series of three or four votes.

Today's hearing is Establishing a Commission to Recommend Improvements for the Federal Employees Appeals Process. Again, I would like to thank everyone for being here today to discuss the formation of a Federal Employees Appeals Commission.

In a previous hearing, Justice Delayed is Justice Denied, there appeared to be general recognition by the agency stakeholders and the members of the subcommittee that problems exist in the Federal employee appeals process. The current system, implemented as a result of the 1978 Civil Service Reform Act, is complex, often confusing and may have outlived its original purpose.

The GAO once had this to say about the current system: "Because of the complexity of the system and the variety of redress mechanisms it affords Federal employees, it is inefficient, expensive and time-consuming." In hopes of examining and potentially reforming the process, I have disseminated a draft legislative proposal to establish a commission whose purpose would be to study the challenges in the current Federal employee appeals process,

and the many potential solutions available to increase the efficiency and fairness of the process.

In the first hearing, we shed light on some of the more glaring problems with the current system generally: appeals take too long, are handled inefficiently and are oftentimes frivolous. Federal employees and managers do not always receive a timely resolution of their disputes, although the Merit Systems Protection Board [MSPB], the Equal Employment Opportunity Commission [EEOC], and the Office of Special Counsel [OSC], and the Federal Labor Relations Association [FLRA], all conduct their fiduciary duties admirably and are consistently striving for improvement.

I anticipate that by working together, these agencies can better meet their administrative needs and the needs of the employees and managers in assuring that justice is available to all.

In 1978, the current Federal employees appeals process was created with the expectation that splitting adjudication of employee disputes into multiple agencies would resolve the problems with the appeals system. Almost 30 years later, the current system has improved little upon the same problems that spurred the original changes. The current catalyst for change is the continuing inexcusable delays in the system.

Last year, this subcommittee looked at only one possible approach to improving the Federal employees appeals process by consolidating appeals and filtering them through a one-stop shop agency or Federal court with the responsibility for employee appeals. Today, we are going to discuss the formation of a commission to look at other possible approaches to fixing the flaws in this system.

The commission would be charged with exploring a whole realm of options and solutions to repair a somewhat broken promise. The goal here today is to discuss the form and the function of this commission. Our overall intent is not to curtail rights but rather to expedite justice, to ensure fair grievance procedures by eliminating its inefficiencies.

For instance, I find it most unfortunate if our current belabored system acts as a deterrent to aggrieved employees because they fear it is a waste of time and not worth the risk involved in waiting years for a resolution, while they often continue to work in the same environment that gave rise to the claim in the first place.

Written testimony submitted by the National Treasury Employees Union [NTEU], and the American Federation of Government Employees [AFGE] at last year's hearing expressed a need for reform of the current appeals process. NTEU explicitly stated it would be appropriate for the subcommittee to concentrate on exploring proposals to streamline the Federal sector EEO process. The AFGE praised the subcommittee's efforts, stating, "Streamlining the employee appeals process is a laudable goal for the subcommittee, and we admit there is room for some improvement in this present system." AFGE called the current system hopelessly complex and expressed displeasure with the lengthy appeals routes in our current system, which splits jurisdiction and requires overlapping review.

The commission's membership that I am suggesting that we form would be composed of 10 members, including representatives from each of the stakeholder agencies and organizations represented by

the distinguished witnesses from whom we will hear shortly. With the formation of this commission, all of you here today have an opportunity to study the problems and recommend solutions that will best meet the needs of employees and managers seeking resolutions of employee grievances.

I expect the commission will offer recommendations for streamlining the process to benefit both employees and managers. Additionally, the commission may want to explore how claims and disputes are reviewed in the initial stages of agency review, how improvements at this stage may improve efficiency in the appeals process. And in a June 2006 report the GAO found little evidence of coordination at the operating level between EEOC and OPM developing policy, providing guidance and exercising oversight, despite overlapping responsibilities in Federal workplace EEO.

Coordination or lack thereof may need to be examined at every stage of the process. The emphasis would be to focus on the process and recommend program changes and legislative fixes, if necessary. By establishing a commission, I wish to bring together representatives from the primary stakeholders, those who are best situated to analyze what does and does not work within the current Federal employees appeal system.

You are the experts, and I hope the visionaries who will have an opportunity to advise Congress as to how the Federal employee appeals process can be improved and streamlined at all levels. The subcommittee needs your assistance to build on a solid foundation to create a more efficient and effective model to reserve the valuable rights of Federal employees. There are many tools at your disposal: institutional knowledge of what has and has not worked well in the past; employees and managers who have been through the process and see room for improvement; vast advancements in technology; alternative dispute resolution with the potential for resolving employee disputes early in the process; and countless other resources to draw upon.

This commission will have the opportunity to work together and recommend improvements to better meet the best interests of us all. I commend you for being here today and for your willingness to continue to work together to tackle a complex issue. We need to enhance our approach to achieving a just, efficient and effective employee appeal system. I am confident with your expertise we can reserve the rights of Federal employees while at the same time increasing the efficiency and effectiveness of the Federal employees appeals process.

[The prepared statement of Hon. Jon C. Porter follows.]

TOV DAVIS, VIRGINIA
CHARRYAN
CHRISTOPHER SHAYS, CONNECTICUT
DAN BURTON, INDIANA
LEAHY ROSLEHT SEN, FLORIDA
JOHN M. MURPHY, NEW YORK
JOHN L. WOLFF, FLORIDA
JUL BOUTROUCH, MINNESOTA
MARK E. SOUDER, INDIANA
STEVEN C. LATOURETTE, OHIO
TODD RUSSELL PLATT, PENNSYLVANIA
CHRIS CANNON, UTAH
JOHN J. DUNCAN, JR., TENNESSEE
CANDICE MILLER, MICHIGAN
MICHAEL R. TURNER, OHIO
DARRILL ISSA, CALIFORNIA
VIRENIA BROWN-WHITE, FLORIDA
JON C. PORTER, NEVADA
KENNY MARCHANT, TEXAS
LYNNA WESTMORELAND, GEORGIA
PATRICK T. McHENRY, NORTH CAROLINA
CHARLES W. BENT, PENNSYLVANIA
VIRGINIA FOXX, NORTH CAROLINA

ONE HUNDRED NINTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

Members: (202) 225-5676
Facsimile: (202) 225-2974
E-mail: (202) 225-4651
TTY: (202) 225-4482
<http://reform.house.gov>

HENRY A. WAXMAN, CALIFORNIA
MARK ROSS, NEW YORK
TOM LANTOS, CALIFORNIA
MADON S. GONCALVES, NEW YORK
EDOLPHUS EAGAN, NEW YORK
PAUL F. GALLAGHER, PENNSYLVANIA
CAROLYN B. MALONEY, NEW YORK
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. WOODHURST, OHIO
DANNY K. DAVIS, ILLINOIS
ROY LUTCHFELD, MISSOURI
DANIE E. WATSON, CALIFORNIA
STEPHEN V. LYNCH, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
LUCIA T. SANCHEZ, CALIFORNIA
C. BOYTON PIPERSBERGER, MARYLAND
BRANDY ROGERS, NEW YORK
ELEANOR HOLMES NORTON, DISTRICT OF COLUMBIA
BERNARD SANDERS, VERMONT
INDEPENDENT

*“Establishing a Commission to Recommend Improvements for the
Federal Employees Appeals Process”*

Subcommittee on the Federal Workforce and Agency Organization
Chairman Jon C. Porter

July 11, 2006

I would like to thank everyone for being here today to discuss the formation of a Federal Employees Appeals Commission.

In a previous hearing—“Justice Delayed is Justice Denied”—there appeared to be general recognition by the agency stakeholders and the Members of this Subcommittee that problems exist in the federal employee appeals process. The current system, implemented as a result of the 1978 Civil Service Reform Act, is complex, often confusing, and may have outlived its original purpose. The GAO once had this to say about the current system:

“[B]ecause of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.”

In hopes of examining and potentially reforming the process, I have disseminated a draft legislative proposal to establish a Commission whose purpose would be to study the challenges in the current federal employee appeals process and the many potential solutions available to increase the efficiency and fairness of the process.

In the first hearing, we shed light on some of the more glaring problems with the current system—generally, appeals take too long, are handled inefficiently, and are often-times frivolous. Federal employees and managers do not always receive a timely resolution of their disputes. Although the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), the Office of Special Counsel (OSC), and the Federal Labor Relations Association (FLRA) all conduct their fiduciary duties admirably and are consistently striving for improvement, I anticipate that, by working together, these agencies can better meet their administrative needs and the needs of the employees and managers in assuring that justice is available to all.

In 1978, the current federal employees' appeals process was created with the expectation that splitting adjudication of employee disputes into multiple agencies would resolve the problems with the appeals system. Almost 30 years later the current system has little improved upon the same problems that spurred the original changes. The current catalyst for change is the continuing inexcusable delays in the system.

Last year, this subcommittee looked at only *one* possible approach to improving the federal employees' appeals process by consolidating appeals and filtering them through a one-stop-shop agency or federal court with the responsibility for employee appeals. Today, we are here to discuss the formation of a Commission to look at *other* possible approaches to fixing the flaws in the system. The Commission would be charged with exploring a whole realm of options as solutions to repair a somewhat broken process.

The goal here today is to discuss the form and function of this Commission. Our overall intent is not to curtail rights, but rather to expedite justice to ensure fair grievance procedures by eliminating inefficiencies. For instance, I find it is most unfortunate if our current belabored system acts as a deterrent to aggrieved employees because they fear it is a waste of time and not worth the risks involved in waiting years for a resolution while they often continue to work in the same environment that gave rise to the claim in the first place.

The Commission membership would be composed of ten members, including representatives from each of the stakeholder agencies and organizations represented by the distinguished witnesses from whom we will hear shortly. With the formation of this Commission, all of you here today have an opportunity to study the problems and recommend solutions that will best meet the needs of employees and managers seeking resolutions of employee grievances. I expect the Commission will offer recommendations for streamlining the process to benefit both employees and managers. Additionally, the Commission may want to explore how claims and disputes are reviewed at the initial stages of agency review, and how improvements at this stage may improve efficiency in the appeals process. In a June 2006 report, the GAO "found little evidence of coordination at the operating level between EEOC and OPM in developing policy, providing guidance, and exercising oversight, despite overlapping responsibilities in federal workplace EEO." Coordination or lack thereof may need to be examined at every stage of the process. The emphasis would be to focus on the process and recommend program changes and legislative fixes if necessary.

By establishing a Commission, I wish to bring together representatives from the primary stakeholders—those who are best situated to analyze what does and does not work within the current federal employees' appeals system. You are the experts and, I hope, the visionaries who have an opportunity to advise Congress as to how the federal employees appeals process can be improved and streamlined at all levels. The subcommittee needs your assistance to build on a solid foundation to create a more efficient and effective model to preserve the valuable rights of federal employees. There are many tools at your disposal: institutional knowledge of what has and has not worked well in the past; employees and managers who have been through the process and see room for improvement; vast advancements in technology; alternative dispute resolution with the potential for resolving employee disputes early in the process; and countless other possible resources to draw upon. This Commission will have the opportunity to work together and recommend improvements to better meet the best interests of us all.

I commend you for being here today and for your willingness to continue to work together to tackle a complex issue. We need to enhance our approach to achieving a just, efficient, and effective employee appeals system. I am confident that with your expertise, we can preserve the rights of federal employees and at the same time increase the efficiency and effectiveness of the federal employee appeals process.

With that said, I invite our first panel to share their comments on the draft proposal to establish a Federal Employees Appeals Commission.

Mr. PORTER. With that said, I would like to invite our first panel to share some of their comments. But first, I would like to acknowledge that we now have a quorum present. Our meeting is in full compliance. I would also like to recognize the ranking minority member, Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman, and let me thank you for calling this hearing. I also want to thank all of the witnesses who have agreed to come and testify today.

Mr. Chairman, last year the subcommittee held a hearing on a proposal by the Senior Executive Association [SEA], to streamline procedures for hearing Federal employee allegations related to personnel practices. SEA proposed the creation of a Federal Employee Appeals Court, which would combine most adjudicatory functions currently performed by the Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority and the Office of Special Counsel. Under the proposal, the decisions of this court would be final and not subject to appeal, except in the case of employment discrimination.

During consideration of the SEA proposal, one of the witnesses, MSPB Chairman Neil McPhie, proposed as an alternative the creation of a commission of relevant stakeholders that would suggest changes to the system. Creation of such a commission is the subject of today's hearing. However, we need to be clear about what the problem is before a commission is created to solve it.

There does not seem to be much complaint with the process with regards to the MSPB or FLRA with the exception of so-called mixed cases, which involve both MSPB and the EEOC. If that is the case, it would be better if the commission focused on the current process for resolving discrimination complaints in the Federal work place.

Another concern is that the commission would be made of six political employees that represent the MSPB, FLRA, the EEOC, OSC, OPM and the Federal Mediation and Conciliation Services. Two of the commission's representatives would be Federal supervisors or managers and only two union representatives would sit on the commission. This is particularly troublesome because it is not clear whether the commission would have to reach a consensus on the final report or recommendations, or if there would be just a report of dissenting views.

I need only think of the processes used to develop the Department of Defense and Department of Homeland Security personnel systems to know what happened when at the end of the day, the majority does not have to reach a consensus with the minority on how to proceed. Of course, all of us want to make sure that there is fairness, that there is equity, and that we arrive at the best resolution of problems, so that we can keep them to a minimum.

I look forward to hearing from the witnesses on how to best address the concerns raised and the Federal appeals process. Again, Mr. Chairman, I thank you for calling this hearing, also for the efficient manner in which you start. I noticed that you were already going as I got here. [Laughter.]

And again, we thank the witnesses and thank you very much, and I yield back.

Mr. PORTER. Thank you for the kind words of support. [Laughter.]

Just remember, we are going to start meeting in Las Vegas instead of here at the Capitol, and so make sure you are on time, OK? [Laughter.]

Thank you very much.

Mr. DAVIS. There's a heavy discussion going on right now about that, that involves Las Vegas and Internet gaming.

Mr. PORTER. Yes, there is, as a matter of fact. What happens in Vegas stays in Vegas. [Laughter.]

What happens in Rayburn stays in Rayburn, right? [Laughter.]

Thank you. We do have some procedural matters. I ask unanimous consent that all Members have 5 legislative days to submit written statements and questions for the hearing record. Any answers to the written questions provided by the witnesses will also be included in the record. Without objection, so ordered.

I ask unanimous consent that all exhibits, documents, and other materials referred to by Members and witnesses may be included in the hearing record, and that all Members be permitted to revise and extend their remarks. Without objection, so ordered.

It is also the practice of this committee to administer the oath to all witnesses. So if you would all please stand and raise your right hands.

[Witnesses sworn.]

Mr. PORTER. Let the record reflect the witnesses have answered in the affirmative.

I would like to get the first panel started, and then make sure everyone is at the table, so the witnesses now will be recognized for their opening statements. We ask you to summarize your testimony in 5 minutes. Your full statement may be added to the record.

We are going to be going to vote in about 7 or 8 minutes, so possibly we can have possibly two, so you don't necessarily have to wait around. We will hear from Mr. Neil McPhie, Mr. Bill Tobey, Cari Dominguez, Scott Bloch, Nancy Kichak and Scot Beckenbaugh. We will start with Mr. McPhie.

STATEMENTS OF NEIL A.G. MCPHIE, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD; WILLIAM TOBEY, DEPUTY SOLICITOR, FEDERAL LABOR RELATIONS AUTHORITY; CARI M. DOMINGUEZ, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; SCOTT BLOCH, SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL; NANCY H. KICHAK, ASSOCIATE DIRECTOR, STRATEGIC HUMAN RESOURCE POLICY DIVISION, OFFICE OF PERSONNEL MANAGEMENT; AND SCOT BECKENBAUGH, ACTING DEPUTY DIRECTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE

STATEMENT OF NEIL A.G. MCPHIE

Mr. MCPHIE. Good day, Chairman Porter, Ranking Member Davis and other members of the subcommittee.

My name is Neil McPhie. I am the chairman of the U.S. Merit Systems Protection Board. Thank you for permitting me to appear today to testify about the proposal to establish a commission to

study the Federal employee appeals system. I commend the members of this subcommittee for their vigilance in exploring ways to improve the procedures for processing challenges to personnel actions in the Federal Government.

I respectfully submit my written statement to the committee and will use this time to provide some information and address some areas of concern.

Recently, as you previously mentioned, the Senior Executive Association [SEA], proposed the consolidation of the existing complaint, appeals and grievances processes into a single system to be administered by a Federal Employees Appeals Court. During last year's hearing on that proposal conducted by this subcommittee, I suggested that SEA's proposed and other recommendations warranted further study. I am pleased to have the opportunity to discuss the committee's proposed mechanism for conducting such a study.

As you know, Congress and the administration have placed significant focus on reform of the Federal personnel system. As such, I believe the committee's proposal presents a timely opportunity to study the procedures used to resolve disputes arising in the Federal workplace. In recent years, Congress has granted both the Department of Homeland Security and the Department of Defense the authority to establish new human resource systems. The administration has drafted a bill known as the Working for America Act that would change pay, performance management and collective bargaining rules for the rest of Government.

More recent legislation has been introduced addressing the employee performance appraisal process and the establishment of training programs. I am not here before this subcommittee to speak for or against any of those initiatives. As I have said time and time again, the Merit Systems Protection Board is prepared to play the role that policymakers designate for it, whatever systems that emerge.

There is a perception that the multiplicity of laws and regulations that govern the Federal Government employment relationship make the current dispute resolution processes too complex, confusing and time consuming. As I discussed in the earlier hearing, a single personnel action may give rise to many different legal claims that may be asserted before several different bodies. A study that examines, among other things, the nature and extent of any overlap in the responsibilities or authorities of the multiple agencies that consider such claims is a crucial first step in identifying ways to improve the effectiveness of the Federal employee redress system as a whole.

In this regard, the EEOC recently issued a detailed report on the processing of Federal sector discrimination complaints, suggesting that system improvements in that area may warrant consideration. Any study of complaint appeals and grievance processes would include a review of the operations of the Merit Systems Protection Board.

And let me just touch upon some of the ways in which the Board handles its own business. We have worked at the Board aggressively to reduce our backlog and our average case processing times. The Board reduced its inventory of pending cases by 48 percent in

fiscal year 2005, and by an additional 16 percent in the first 8 months of fiscal year 2006.

Average processing time for administrative judges in the first 8 months of fiscal year 2006 was 88 days. The average case processing time for headquarters decisions was 265 days in fiscal year 2005, and that figure has been reduced substantially in the first 8 months of fiscal year 2006 to 154 days. We continue to identify ways through enhanced technology and resource development to work more efficiently and effectively.

All the members of the Board are committed to seeing the Board carry out its designated role fairly and efficiently in whatever dispute resolutions systems policymakers devise. The proposed commission to study improvements to current complaint appeals and grievance processes is certainly timely and will serve to provide the critical data and information by which legislators can base their decisions.

In my view, the proposed members of the commission, to include representatives from all stakeholders, to include Government agencies and labor, appears well suited to accomplish the objectives outlined in the bill. The proposed agenda and tasks are ambitious and will require necessary time commitments from all members. I am truly grateful to this subcommittee for recognizing the need and importance of a study and for designating the chairman of the Merit Systems Protection Board to chair the commission.

I look forward to this unique opportunity and challenge, and I want to thank you for it. I will be happy to answer any questions the Members may have. Thank you.

[The prepared statement of Mr. McPhie follows:]

11

Hearing Testimony
Submitted by
Neil A. G. McPhie, Chairman
U. S. Merit Systems Protection Board

Before the
House Government Reform Subcommittee on the Federal
Workforce and Agency Organization

Establishing a Commission to Recommend Improvements
for the Federal Employees Appeals Process

The Honorable Jon Porter, Chairman
The Honorable Danny K. Davis, Ranking Member

July 11, 2006
Room 2247 Rayburn House Office Building

Good morning Chairman Porter, Ranking Member Davis, and Members of the Subcommittee.

My name is Neil McPhie and I have the honor of serving as Chairman of the U.S. Merit Systems Protection Board. Thank you for the opportunity to appear before you to testify about the proposal to establish a commission to study the federal employee appeals system. I commend the members of this subcommittee for their vigilance in exploring ways to improve the procedures for processing challenges to personnel actions in the Federal government. As you know, the SEA, or Senior Executives Association, recently proposed the consolidation of the existing complaint, appeals, and grievance processes into a single system to be administered by a Federal Employees Appeals Court. During last year's hearing on that proposal conducted by this subcommittee, I suggested that SEA's proposal and other recommendations warranted further study. I am pleased to have the opportunity to examine the specific mechanism for conducting such a study with this Subcommittee and with my fellow panel members.

The current focus that Congress and the Administration have placed on reform of the federal personnel system presents a timely opportunity to study the procedures used to resolve disputes arising in the federal workplace. In recent years Congress has granted both the Department of Homeland Security and the Department of Defense the authority to establish new human resources systems. The Administration has drafted a bill known as the Working for America Act that would change pay, performance management, and collective bargaining rules for the rest of the government. More recently, Senator Voinovich has introduced legislation that would link annual performance appraisals with pay increases. Senator Akaka has introduced legislation to establish certain training programs for federal supervisors. The Senate has amended the

2007 National Defense Authorization bill by adding language intended to enhance protections for federal employees who reveal waste, fraud, and abuse. I am not here to speak for or against any of these initiatives; as I have said before this subcommittee in the past, the Merit Systems Protection Board is ready to play the role that policymakers designate for it in whatever systems emerge. It is clear, however, that Congress and the Administration are keenly interested in a comprehensive review of federal personnel systems.

There is a perception that the multiplicity of laws and regulations that govern the federal employment relationship make the current dispute-resolution processes too complex, confusing, and time-consuming. As I discussed at the earlier hearing, a single personnel action can give rise to many different legal claims that may be asserted before several different bodies. A study that examines, among other things, the nature and extent of any overlap in the responsibilities or authorities of the multiple agencies that consider such claims is a crucial first step in identifying ways to improve the effectiveness of the federal employee redress system as a whole. In this regard, the Equal Employment Opportunity Commission recently issued a detailed report on the processing of federal-sector discrimination complaints suggesting that system improvements in that area may warrant consideration. [*See Annual Report on the Federal Work Force Fiscal Year 2005* (EEOC June 28, 2006).]

Any study of complaint, appeals, and grievance processes would include a review of the operations of the Merit Systems Protection Board. In that vein, I would like to give a brief report on how the Board is performing. During fiscal year 2005, the Board's administrative judges issued approximately 6,800 initial decisions, with an average case processing time of 92 days. Average processing time for administrative

judges in the first 8 months of fiscal year 2006 was 88 days. At the headquarters level, the Board members issued approximately 1,600 decisions in fiscal year 2005, most of which were on petitions for review of decisions issued by the administrative judges. The Board reduced its inventory of pending cases by 48% in fiscal year 2005, and by an additional 16% in the first 8 months of fiscal year 2006. The average case processing time for headquarters decisions was 265 days in fiscal year 2005, and that figure has been reduced substantially in the first 8 months of fiscal year 2006 (to 154 days).

The improving picture at the Merit Systems Protection Board has been accomplished with no loss of quality, despite the growing complexity of the law and the changing makeup of the Board. The Court of Appeals for the Federal Circuit left unchanged 94% of the Board decisions that were appealed to the Court.

In addition to accomplishments in the adjudication of cases, the Board has continued to enhance its use of alternative dispute resolution techniques. The Board has expanded its voluntary Mediation Appeals Program (MAP) to include all regional and field offices and completed mediation training for new mediators. Approximately 48% of the cases processed through MAP in fiscal year 2005 settled, and the figure for the first half of fiscal year 2006 is comparable.

The Merit Systems Protection Board has also implemented a number of electronic initiatives that have borne fruit in terms of reducing case processing times. Two such initiatives include e-Appeal (whereby individuals may file appeals online) and the provision of online access to case files to all Board members.

All of the members of the Merit Systems Protection Board are committed to seeing the Board carry out its designated role fairly and efficiently in whatever dispute-resolution systems policymakers devise. The proposed Commission to study improvements to current complaint, appeals, and grievance processes is certainly timely. The proposed membership of the Commission, to include representatives from all stakeholder groups, appears well-suited to accomplish the objectives outlined in the bill. I am truly grateful to this subcommittee for recognizing the importance of the study, and for choosing the Chairman of the Merit Systems Protection Board to Chair the Commission. I look forward to this unique opportunity and challenge. Thank you. I would be happy to answer any questions the members of the subcommittee might have.

Mr. PORTER. Thank you, Mr. McPhie. We appreciate your being here.

Next we will have Mr. Tobey, who is Deputy Solicitor of the Federal Labor Relations Authority.

STATEMENT OF WILLIAM TOBEY

Mr. TOBEY. Thank you, Chairman Porter, Ranking Member Davis and members of the subcommittee. I am William Tobey, Deputy Solicitor of the FLRA, here today to provide a statement on behalf of Chairman Dale Cabaniss. Chairman Cabaniss asks that I relay her apologies to you for being unable to attend today due to unavoidable scheduling and travel conflicts.

If you do have specific questions for the FLRA, I will be happy to take those back to the chairman, so that we can followup with you in a timely manner. I will now turn to the chairman's statement.

Chairman Porter, Ranking Member Davis, and members of the subcommittee, thank you for the opportunity to appear before you this afternoon, as you examine the idea of creating a Federal Employees Appeal Commission to study the challenges in the current Federal employee appeals process and the realm of possible solutions available to increase the efficiency and effectiveness of the process. I applaud your continuing interest and efforts to evaluate ways to improve Government operations, while retaining important due process rights for Federal employees.

We were pleased to appear before you last November to share with you some background about our particular agency, its structure, and case processing. One of the issues that we were asked to address at that time with respect to the employee appeals process was the potential overlap of jurisdiction and the opportunity to raise issues in alternative forums. In our experience and under our statute, although there are examples of overlap, which I have reproduced as an attachment to this testimony, the issue of overlapping jurisdictions has not been a significant issue at the FLRA.

Previously I noted, and I am sure we would all continue to agree, that there is room for continuous improvement, administratively and operationally. Both the President and the Congress have promoted, encouraged, and challenged us all to strive to ensure we are using taxpayer dollars and Government resources wisely, whether through the President's management agenda, OMB's program assessment rating tool, or Government Performance Results Act reporting and committee efforts such as this one.

The Federal Employees Appeals Commission is one way for the numerous stakeholders here today to address possible improvements in the current process. One alternative the committee may wish to consider, however, is to seek the assistance of an independent entity or organization to accomplish the work of the commission, rather than the stakeholders themselves. I believe this would enable all stakeholders to participate fully while also enhancing the objectiveness of the final work product. For instance, the National Academy of Public Administration, or a similar organization, not only is structured to undertake such an effort, but also could provide a wealth of knowledge and experience from its many resources, including former Cabinet officers, Members of Congress,

managers, scholars, and others who could provide additional insight or perspective.

Mr. PORTER. Excuse me, Mr. Tobey, but we are down to about 4 minutes for a vote. So if you would hold your thoughts.

Mr. TOBEY. I am actually finished now. Thank you very much.
[The prepared statement of Mr. Cabaniss follows:]

STATEMENT
OF
DALE CABANISS
CHAIRMAN
U.S. FEDERAL LABOR RELATIONS AUTHORITY

Before the

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

On

*Establishing a Commission to Recommend Improvements for the Federal
Employees Appeals Process*

July 11, 2006

Chairman Porter, Ranking Member Davis, and Members of the Subcommittee:

Thank you for the opportunity to appear before you this afternoon as you examine the idea of creating a Federal Employees Appeals Commission to study the challenges in the current federal employee appeals process and the realm of possible solutions available to increase the efficiency and effectiveness of the process. I applaud your continuing interest and efforts to evaluate ways to improve government operations, while retaining important due process rights for Federal employees.

We were pleased to appear before you last November to share with you some background about our particular agency, its structure, and case-processing. One of the issues that we were asked to address at that time with respect to the employees appeals process was the potential overlap of jurisdiction and the opportunity to raise issues in alternative forums. In our experience and under our Statute, although there are examples of overlap (which I have reproduced as an attachment to this testimony) the issue of overlapping jurisdictions has not been a significant issue at the FLRA.

Previously I noted, and I am sure we would all continue to agree, that there is room for continuous improvement, administratively and operationally. Both the President and the

Congress have promoted, encouraged, and challenged us all to strive to ensure we are using Taxpayer dollars and government resources wisely, whether through the *President's Management Agenda*, OMB's program assessment rating tool, or Government Performance Results Act (GPRA) reporting and committee efforts such as this one.

The *Federal Employees Appeals Commission* is one way for the numerous stakeholders here today to address possible improvements in the current process. One alternative the committee may wish to consider, however, is to seek the assistance of an independent entity/organization to accomplish the work of the commission, rather than the stakeholders themselves. I believe this would enable all stakeholders to participate fully while also enhancing the objectiveness of the final work-product. For instance, the National Academy of Public Administration, or a similar organization not only is structured to undertake such an effort, but also could provide a wealth of knowledge and experience from its many resources, including various former Cabinet officers, members of Congress, managers, scholars, and others who could provide additional insight or perspective.

Thank you again for the opportunity to appear this afternoon. I would be pleased to respond to any questions that you may have at this time or provide you any additional information you may seek.

Examples of Potential Jurisdictional Overlap with the FLRA

The issue of overlapping jurisdictions has not been a significant issue at the FLRA, however, there are some instances, described briefly below . . .

- With employment matters such as hiring, firing, and the failure to promote, the employee must decide whether to raise the action under a grievance, which would be subject to the jurisdiction of the MSPB, or as an unfair labor practice, which would be subject to our jurisdiction. Issues, which can properly be raised under an appeals procedure, generally may not be raised as an alleged unfair labor practice.
- If a group of employees were to be terminated from federal service, they may appeal that termination to the MSPB. Depending on the factual situation, at the same time, the union representing that bargaining unit may file an unfair labor practice charge with the FLRA alleging the agency failed to follow the collective bargaining agreement in effecting the employment action. The two cases are related, but because they raise different legal issues, there is the possibility of different rulings in different forums.
- If a bargaining unit employee was terminated from federal service (for example, for insubordination resulting from his or her refusal to accept an overtime assignment) the bargaining unit employee could appeal the termination from federal service to the MSPB, and, at the same time allege an EEO violation for how he or she was treated during the investigation of the incident. At the same time, the union representing the particular bargaining unit the employee belongs to, may file an unfair labor practice charge alleging the employee was ordered to take the overtime assignment in reprisal for the employee's union activity. Because each piece of litigation raises a separate legal issue, each piece of litigation will operate independently of each other.

Mr. PORTER. My apologies for that. Thank you very much. There is, I think, a series of about 3 votes, so it should be about 30 minutes, if things go well. Thank you. We will be in recess.

[Recess.]

Mr. PORTER. I would like to bring the meeting back to order. Our 30 minutes was Federal time, about 55 minutes. So thank you for your patience.

Mr. Tobey, is there anything you would like to conclude with?

Mr. TOBEY. No, I am finished, thank you.

Mr. PORTER. My apologies for that.

Next we will have the Honorable Cari Dominguez, Chair, Equal Employment Opportunity Commission. Thank you for your patience. It is good to see you again.

STATEMENT OF CARI M. DOMINGUEZ

Ms. DOMINGUEZ. Thank you, it is good to see you.

Thank you very much, Chairman Porter and Congressman Davis and members of the subcommittee. I very much appreciate the opportunity to be invited back today to testify on this very important topic. I am Cari Dominguez, the Chair of the U.S. Equal Employment Opportunity Commission.

Mr. Chairman, I do have a few comments to make, but request that my full written testimony be made part of the official record.

As I have stated in previous testimony before this subcommittee, I welcome and support your efforts to find ways to improve the efficiency and the effectiveness of the Federal EEO complaint and appeal processes. This afternoon we meet to discuss a draft bill that would establish a Federal Employees Appeals Commission. As I understand it, the commission would be charged with reviewing the current appeals and grievance systems for Federal employees, as administered by the EEOC, the Merit Systems Protection Board, the Federal Labor Relations Authority and the Office of Special Counsel. The focus of the proposed commission's review would be on identifying redundancies or overlaps of responsibility or authority by these agencies, as well as any procedural ramifications of such overlaps.

The proposed commission would also look at timeliness issues, particularly the amount of time it takes the subject agencies to process matters brought before them. And of course, at the end of this review, the commission would present to the President and the Congress a report containing recommendations along with their findings.

When I appeared before the subcommittee last November, my testimony described the role of the EEOC and the complaint processes that we administer. I offered then my firm belief that there is an urgent need to reform the Federal sector complaint processing system. The current system is not ideal and Federal sector employees clearly deserve better.

I have shared, expressed concerns that the Federal EEO complaint process is too slow and cumbersome and subject to real or perceived conflicts of interest. Unlike the processes of most of the other agencies which receive complaints and grievances directly, an EEO complaint is filed with and initially processed by the agency that is accused of discrimination, and not the EEOC. The Federal

agency accused of discrimination investigates the complaint against it. EEOC is not at all involved unless the complainant requests an administrative hearing before one of our administrative judges.

Almost always, the complaint has languished for more than 180 days at the agency where it was filed before the employee comes to EEOC to request a hearing. And even then, the complaint must return to the agency for final disposition. Thus, EEOC's ability to affect the processing of the complaint is extremely limited until late in the game when the matter is finally presented to us.

As I also noted in my earlier testimony before this subcommittee, I believe that the primary area of EEO complaint processing most urgently in need of reform is the initial processing conducted by the agency where each complaint originates. It is the systems lapse, and not any jurisdictional overlaps or redundancies associated with the missions of any of the agencies here represented, which adversely affects overall complaint processing and certainly undermines public confidence in the system. Even the mixed cases we have talked about so often involving both EEOC and MSPB affect fewer than 3 percent of the cases which come before us.

Notwithstanding the obvious internal control problems associated with Federal agencies conducting their own investigations, many Federal agencies have made real improvements in the timeliness of processing EEO complaints. For example, in fiscal year 2004, it took Federal agencies on average 469 days to close an EEO complaint. The average processing time for closure this last fiscal year was 411 days, a 12 percent reduction, but still considerably more than the 270 days allowed by EEOC's regulations for complaints without a hearing.

Agencies are also becoming far more efficient in investigating EEO complaints. In fiscal year 2004, the average time for investigating a complaint was 280 days. In 2005, it was 237 days. So I am very, very encouraged that many of the Federal agency heads, to whom I have directed my concerns about internal complaint processing, have been receptive.

The recent trends in decreased investigative times and enhanced resolution efficiencies are indeed good signs of progress. However, we need more work in this area. Only 55 percent of agency investigations were timely completed in fiscal year 2005, and only 25.5 percent of the agencies met the regulatory timeframe.

At EEOC, we have significantly reduced the processing times for the majority of the cases that have come before us. Our average processing time for hearings has declined to 249 days, almost a 30 percent reduction from fiscal year 2004. And the average processing time for the appeal closures has dropped from 207 days in fiscal year 2004 to 194 days in fiscal year 2005. We are really working hard to address resource and operational constraints which can affect the efficiency of our case processing. But there are no indications of any impediment posed by any purported duplication of effort by our sister agencies, MSPB, FLRA and the OSC. Yet in spite of these gains, I am convinced that the EEO complaint process can be further scrutinized for greater efficiencies and enhanced performance.

With respect to the draft bill, while I would welcome an independent review of these systems, I would propose another alter-

native. I would recommend that any commission studying this issue include independent, external experts who would bring to bear their extensive knowledge and expertise gained in a variety of settings, both public and private sectors. The National Academy of Public Administrators, the only congressionally chartered organization of its kind, would be ideally suited to examine this issue. Other appropriate consultative entities include Excellence in Government and the Partnership for Public Service. These reputable organizations not only apply higher-order thinking to these issues, but also remove any questions or doubts pertaining to potential conflicts of interest or perceived self-interest.

Again, I thank you very, very much for the opportunity to comment on this draft bill, and greatly appreciate your leadership and support in this important aspect of our work. I will be happy to answer any questions that you might have.

[The prepared statement of Ms. Dominguez follows:]

**Statement of
Cari M. Dominguez, Chair
U.S. Equal Employment Opportunity Commission
before the
Subcommittee on the Federal Workforce and Agency Organization
Committee on Government Reform
House of Representatives
Hearing on
Establishing a Commission to Recommend Improvements for the Federal
Employees Appeals Process
July 11, 2006**

Chairman Porter, Congressman Davis, Members of the Subcommittee. Thank you for inviting me to testify today on this very important topic. I am Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission (EEOC). As I have stated in previous testimony before this Subcommittee, I welcome and support your efforts to find ways to improve the efficiency and effectiveness of the federal EEO complaint and appeal processes.

We meet today to discuss a draft bill that would establish a Federal Employees Appeals Commission. The proposed Commission would be charged with reviewing the current appeals and grievance systems for federal employees. The systems to be studied include those used by the EEOC, Merit Systems Protection Board (MSPB), Federal Labor Relations Authority (FLRA) and the Office of Special Counsel (OSC) to enforce the various statutes encompassed by these agencies' respective missions. The focus of the proposed Commission's review would be on identifying redundancies or overlaps of responsibility or authority by these agencies, as well as any procedural ramifications of such overlaps. The proposed Commission would also look at

timeliness issues, particularly the amount of time that it takes the subject agencies to process matters brought before them. Twelve months after the Commission's first meeting, a report would be issued to the President and Congress containing recommendations on ways to improve the federal employee appeals and grievance systems, and other related areas.

When I appeared before this Subcommittee last November, my testimony described the role of the EEOC and the complaint processes we administer. I offered my firm belief that there is an urgent need to reform the federal sector complaint processing system. The current system is not ideal. Federal sector employees deserve better.

I share expressed concerns that the federal EEO complaint process is too slow, cumbersome and subject to real or perceived conflicts of interest. Unlike the processes of most the other agencies which receive complaints and grievances directly, an EEO complaint is filed with and initially processed by the federal agency accused of discrimination, and not the EEOC. The federal agency accused of discrimination investigates the complaint against it. EEOC is not involved unless the complainant requests an administrative hearing before one of our administrative judges. Almost always, the complaint has languished for more than 180 days at the agency where it was filed before the employee comes to EEOC to request a hearing. Even then, the complaint must return to the agency for final disposition. Thus, EEOC's ability to affect the processing of the complaint is extremely limited until late in the game when the matter is finally presented to us.

As I also noted in my earlier testimony before this Subcommittee, I believe that the primary area of EEO complaint processing most urgently in need of reform is the initial processing conducted by the agency where each complaint originates. It is this system lapse,

and not any jurisdictional overlaps or redundancies associated with the missions of the EEOC, MSPB, FLRA and OSC, which adversely affects overall complaint processing and undermines public confidence in the system. Even “mixed cases” involving both the EEOC and the MSPB affect fewer than 3% of the cases which come before us.

Notwithstanding the obvious internal control problems associated with federal agencies conducting their own investigations of discrimination complaints filed against them, many federal agencies have made real improvements in the timeliness of processing EEO complaints. In fiscal year 2004, it took federal agencies, on average, 469 days to close an EEO complaint. The average processing time for closures last fiscal year was 411 days, a 12% reduction, but still considerably more than the 270 days allowed by EEOC’s regulations for complaints without a hearing. Agencies also are becoming more efficient in investigating EEO complaints. In FY 2004, the average time for investigating a complaint was 280 days. The average for FY 2005 was 237 days. I am very encouraged that many of the federal agency heads to whom I have directed concerns about internal complaint processing have been receptive. The recent trends in decreased investigative times and enhanced resolution efficiencies are good signs of progress. Considerable work remains, however. Only 54.9% of agency investigations were timely completely in FY 2005, and only 25.5% of agencies met the regulatory time frames.

At EEOC, we have significantly reduced the processing times for the majority of cases that come before us. Our average processing time for hearings has declined to 249 days, a 29.9% reduction from FY 2004. Likewise, the average processing time for appeal closures dropped from 207 days in FY 2004, to 194 days in FY 2005. We are working to address resource and operational constraints which can affect the efficiency of our case processing, but there are no

indications of any impediment posed by any purported duplication of effort by our sister agencies MSPB, FLRA and the OSC. Yet, in spite of these gains, I continue to believe that the EEO complaint process can be further scrutinized for greater efficiencies and enhanced performance.

With respect to the draft bill, while I would welcome an independent review of these systems, I would propose another alternative. I would recommend that any commission studying this issue include independent, external experts who would bring to bear their extensive knowledge and expertise gained in a variety of settings, both in the public and private sectors. The National Academy of Public Administrators, the only Congressionally-chartered organization of its kind, would be ideally suited to help examine this issue from a comprehensive, independent, yet most knowledgeable perspective. Other appropriate consultative entities include Excellence in Government and the Partnership for Public Service. These reputable organizations not only apply higher-order thinking to these issues but also remove any questions or doubts pertaining to potential conflicts of interest or perceived self-interests.

Again, I thank you for the opportunity to comment on this draft bill, and greatly appreciate your leadership and support in this important aspect of our work.

I will be happy to answer any questions you might have.

Mr. PORTER. Thank you very much.
Next we will have the Honorable Scott Bloch, Special Counsel,
U.S. Office of Special Counsel. Welcome.

STATEMENT OF SCOTT BLOCH

Mr. BLOCH. Thank you, Mr. Chairman, ranking member, and members of the committee, and my distinguished colleagues on the panel. I thank you for the opportunity to come before you and to weigh in on this important issue of how do we best address complexities in the appeal system and possibly streamline it.

One of the problems I think that we confront in our agencies is when we are not efficient, when we have too much complexity, too many Kafkaesque layers of review. Then people lose faith in the system, and the cynicism creeps in, where managers don't really take seriously the rights of employees, and employees don't feel that their rights are going to be observed, even if they file actions.

I believe the committee has properly located the questions that are important in this issue. OSC itself is no stranger to these issues. Because we have thousands of complaints in a variety of enforcement areas that we receive every year, and we are a small agency, we realize the importance of utilizing proper procedures and of streamlining.

In the past several years, my agency had a significant backlog of cases, as did many of my colleagues' agencies here. In the first year of my tenure, we cut by half or more the processing times for complaints in our screening unit. And we set up procedures to have cases that took 2 to 4 years on average through the whole process to take about a year.

How did we do this? Well, we set up a special projects unit [SPU], to study problems and ways of streamlining and to utilize best practices. At the same time, we also brought in an outside management consulting firm that did a stem to stern analysis of all our procedures and all of the acts that we go through in order to process all of our complaints. And then they created these charts, which I called snake charts, that resembled what we used to call the Rube Goldberg puzzles because they were so complicated.

But we eliminated the backlogs within 18 months and slashed our average processing time in our screening unit from 6 months down to under 40 days and the prosecution, as I said, to about a year. During this backlog reduction process, we more than doubled our percentage of positive cases that go for further investigation and prosecution to our what we call our IPD unit, and also doubled the number of whistleblower disclosures that go to agencies for investigation, while eliminating that backlog as well. The point being that one can streamline and at the same time not only protect employee rights at the level you have been doing, but actually improve the protections of employee rights. That is a challenge that I would issue to the committee, and to all of us if we are going to be involved in the process, that not only do we streamline, but we improve results for the work force.

As you remember, Mr. Chairman, bipartisan staff teams sent by this committee exhaustively reviewed our backlog reduction procedures last year, along with yourself and Chairman Davis, had very

kind words for our efforts and for our results for whistleblowers. I think this all bears on the issue at hand, whether to establish a commission to study the ability to improve the Federal employee grievance process. I think this is a very important project.

A well regulated system to handle complaints and appeals must exist to protect the integrity of Government, because it ensures that employees receive due process, and it ultimately preserves the principles of the merit system. OSC will be proud to be a part of finding solutions.

Now, one thing I wanted to point out to the committee is I prepared a chart, working with my excellent staff, and put it on one page, and I believe all the committee members and others on the panel have a copy of this, just how is it that an employee comes through our system and comes to MSPB, what types of cases and in what circumstances. And to show that yes, there is complexity, but there is some method to the madness. And also to demonstrate that I think there is some benefit to having visualized the process in its entirety.

Now, this doesn't include the FLRA, this doesn't include all the EEOC's process or the agency's EEO process. But one could do that, and you could put it all on one chart and you could actually see where things are coming and where they are going, where the choke points are, where the bottlenecks are, where the problems might exist and what if you lifted this or moved this around. So that is one thing I think we can do that is concrete is to put together an understanding, both visually as well as written out, as to what constitutes the nature of the problem.

But I want to caution the committee as well that we don't want to engage in draconian solutions that in any way remove employee rights. I think we want to be careful not to be so anxious to reform the system that we take away rights. I don't think we have to do that, I don't think that is going to be necessary. I think that remedies can be fashioned and new approaches and streamlining can be engaged in that are going to benefit agencies as well as employees, as well as all of the members here at the table.

And with that, I will conclude and be happy to answer any questions you may have.

[The prepared statement of Mr. Bloch follows:]

Statement of Special Counsel Scott Bloch U.S. Office of Special Counsel

July 11, 2006

Thank you, Mr. Chairman and members of the subcommittee. My name is Scott Bloch and I am the Special Counsel of the U.S. Office of Special Counsel (OSC). I want to thank you for the opportunity to submit my views on the issue of establishing a commission to determine ways to streamline employee appeals.

Nineteenth Century British statesman William Gladstone's adage, "Justice delayed is justice denied" is a truism that applies when process is placed above results and procedures build up over time, through accretion, into a burdensome, Kafkaesque castle that blinds us to our purpose. I have spoken often to my agency of the need for swifter justice. If the appeals process fails to dispense timely justice by having needless layers of review, then our federal employee rights are compromised and people lose faith in the system.

I believe the committee has properly located the questions concerning how to provide timely justice for federal executive employees, and by examining average processing times for various types of complaints alleging prohibited personnel practices and whether there are duplicative or needlessly confusing avenues for relief in the system as it now stands.

OSC is no stranger to these questions on account of the volume of complaints we receive for such a small agency. We receive about 2,000 complaints a year from federal employees alleging Prohibited Personnel Practices. We also operate a secure channel for whistleblowers to make their disclosures directly to us for review and possible referral to the agency for an investigation and receive about 600 disclosures per year. Our Hatch Act Unit

handles about 250 cases annually and gives 3,000 or more advisory opinions to federal agencies to help prevent violations. Finally, our USERRA unit, which protects returning service members' jobs, handles about 200 cases a year now. One important statutory function we serve is to inform the federal workforce and agency manager through our outreach program about prohibited personnel practices, alternative dispute resolution, whistleblower protections, and Hatch Act prohibitions. Through this, we try to dispel misnomers and clear up confusion about rights and avenues for relief.

In the past several years, my agency had a significant backlog of cases, as did many of the other agencies testifying before you on this issue. We asked the very questions this committee is asking. We cut by half or more the processing times for complaints in our screening unit, and we set procedures to have cases that once took two to four years take on average one year or less.

This resulted in our study of the problem, a creation of a new unit, the Special Projects Unit or SPU, to act as a laboratory or study center of new practices, streamlining, and ways of handling claims in a way that was effective in increasing outcomes and delivering justice but also was much quicker. We also commissioned a management consulting firm to do a stem to stern analysis of each function and act that we go through in processing complaints in each of our units. Some of the snake charts, as I called them, resembled the famous Rube Goldberg puzzles or the Byzantine circuits of computer chips.

One of the big discoveries we made through this internal and external study was the ways in which we duplicate efforts that do not add anything to the delivery of due process, and also the ways that bottlenecks occur in the process. Sometimes the bottlenecks are a direct result of something going back through a channel of review multiple times over minor issues. This was a great tool for

learning what works, as well as tapping into employee creativity and innovation.

During this process, when we dusted off old files that had been sitting on shelves for up to three years or more, we found that some claimants or whistleblowers had died, others had simply forgotten they filed anything, and some did not care any longer, or the matter had already been resolved through time or another complaint channel.

I also instituted many new management initiatives and... a lot of old-fashioned elbow grease and through the efforts of our redoubtable staff, we were able to reduce the backlog to a manageable level within one year and eliminate it as of eighteen months into my tenure. As a bonus, we also eliminated within one year a nagging backlog of FOIA requests that had piled up over time, and now we are even efficient in that area that plagues most agencies. Our average processing time for prohibited personnel practice and whistleblower retaliation cases in our screening unit is now down to under forty days. It used to be over six months. We have reduced our average time for prosecution and resolution of claims from over two years to under one year. Our USERRA cases are resolved in approximately six months or less.

We achieved all of these results without compromising quality, and in fact during the backlog effort doubled our finding of positive cases that go for further investigation or prosecution to our IPD unit that prosecutes cases. We also doubled the number of cases in that year that go to agencies for investigation in our whistleblower disclosure unit while eliminating a thorny backlog that had been growing for years.

As you may remember, Mr. Chairman, a bipartisan staff team sent by this committee exhaustively reviewed our backlog reduction procedures last year and, along with yourself and Chairman Davis, had very kind words for our efforts and product.

All of this bears directly on the issue at hand: whether to establish a commission to study ways to improve the federal employee grievance process, and my use of the word grievance here is meant to include all types of complaints subject to review by the agencies testifying here, including EEO complaints, appealable actions, and prohibited personnel practice complaints, as well as grievances under the negotiated procedures.

It is an important project: a well-regulated system to handle complaints and appeals must exist to protect the integrity of government because it ensures that employees receive due process and it ultimately preserves the principles of the merit system.

We are very interested in this idea and would be pleased to participate. Obviously, there will be differences of opinion on the best way to enhance and streamline the ability of federal workers to get relief. But I believe the potential is there for a productive report, and, possibly, legislation.

As has been noted before, the current system can be complex and confusing: jurisdictional overlap means personnel actions can be challenged before multiple bodies that apply different law. The attached flow chart shows how prohibited personnel practice cases are handled by OSC or by employees at the MSPB, and it is divided between original jurisdiction and appellate jurisdiction cases.

Congress has enacted myriad laws and rights for federal executive employees. The system allows employees to take advantage of those laws and to assert their rights. OSC helps to enforce those laws. This mirrors the civil law system in which alternative theories exist and can be pleaded by a plaintiff in court, from civil rights violations, to breach of implied contract, to torts of intentional infliction and so on. Having many rights or even having alternative theories that have differing legal standards is not

something that a new appeals process could change. To change this would require that Congress take away rights.

It would be a mistake to simply jump to the conclusion that a draconian solution is in order: eliminate all perceived complexity by removing alternate avenues for review of personnel actions. There are reasons why the Office of Special Counsel exists, but we do not think that it would be good, for instance, to foreclose the alternative channel for employees to come to OSC or go directly to MSPB if they so choose.

I would point out that the current system does have safeguards intended to prevent inconsistent decisions. For example, by statute, an employee who believes that a personnel action was taken against him because of his whistleblowing must make a binding election among three possible review mechanisms: A grievance; a direct appeal to the MSPB; or a complaint for corrective action before the Office of Special Counsel. A choice of any one of these avenues theoretically forecloses the other two but we need to implement systems to ensure that each agency knows whether another remedy has already been chosen or more than one agency may still end up investigating and adjudicating the same grievance/prohibited personnel practice allegation.

Let us take another example: an action that is pursued to a final grievance decision that is reviewable by the Federal Labor Relations Authority is excluded from MSPB jurisdiction, and conversely, an action that is appealable to the MSPB is excluded from FLRA jurisdiction. Without going into further examples, I would simply observe that the current system is not designed to reach inconsistent decisions.

As to the concern of delayed justice, part of the resolution may lie in enhanced application of streamlined screening procedures. The legal propriety of our Complaints Examining Unit and its winnowing out of cases without merit or jurisdiction was

upheld by the federal courts as sufficient due process investigation. Whether this is achieved by an intake unit as we have, or a show cause hearing, the end result may speed introductory review that separates the good cases, which will receive expedited processing, from the rest, which can also be resolved expeditiously. At least the complaining employees will know sooner rather than later that their cases have been determined not to meet the requirements for further investigation or adjudication.

This too constitutes justice for both the losing party as well as the party with a good claim. Our goal should be to get to the meritorious cases immediately and lessen the drag on their resolution by having to wait in line behind cases without merit.

Mr. PORTER. Thank you. We always like charts. [Laughter.]

Actually, it does help follow the flow. I appreciate it. Thank you very much.

Next we have Nancy Kichak, Associate Director, Strategic Human Resource Policy Division of OPM. Welcome. It is good to see you again.

STATEMENT OF NANCY H. KICHAK

Ms. KICHAK. Thank you.

Mr. Chairman, Congressman Davis and members of the subcommittee, I appreciate the opportunity to represent the U.S. Office of Personnel Management and Director Linda Springer here today to discuss the idea of establishing a commission to study the challenges in the current Federal employee appeals process and the realm of possible solutions available to increase the efficiency and effectiveness of the process.

While the dispute resolution and appeals process is only one aspect of OPM's interest in good government, it is an important one. Workplace disputes with employees, agency actions taken against employees and the dispute resolution processes that follow have implications that can impact the morale and effectiveness of individual employees and their agencies. Central to any discussion of consolidating and streamlining dispute resolution processes should be the goal of making the Federal work force more effective and efficient while retaining its fundamental underlying principle of merit.

Federal employees work hard and expect to be treated like professionals. The vast majority of Federal employees will never be involved in the dispute resolution process. But they want to know that it is there and functioning effectively. They want to know that whatever dispute they bring to the process will be adjudicated in a timely, fair and impartial manner.

The current system for adjudicating workplace disputes has been criticized as time-consuming, complex and producing inconsistent decisions. The proposed legislation would create a commission to study the current appeals processes and issue a report in 12 months with recommendations on a minimum of seven significant topics. We agree that this is an issue that deserves attention and we appreciate your leadership in exploring ways to address these longstanding criticisms and improve the efficiency and effectiveness of the process.

We do have some concerns regarding the proposal to establish a commission to study and make recommendations. Our first concern involves the short period of time provided, 12 months after the commission's first meeting, to study 4 broad areas and make recommendations on at least 7 distinct and substantial issues. We recommend that the period provided for the commission's work be extended to at least 18 months after the commission's first meeting.

We also believe that if a commission is established, the enabling legislation should encourage the commission to consult with other Federal agencies and independent organizations, not reflected in the current draft bill, that have unique roles or expertise in the Federal employee appeals process.

Finally, the proposal would provide the commission with a director and staff. It does not, however, specify how the director would be appointed. Since that official would presumably have a key role in the administration and the ultimate success of the commission, we suggest that the legislation clearly describe how that individual is to be selected and who has the authority to make the appointment. Perhaps a majority vote of the commission would be required.

In sum, we agree there is room for improvement of the Federal employee appeals process. We appreciate your leadership in this area, and we look forward to continuing the dialog on this and other important personnel issues. Mr. Chairman, thank you for the opportunity to testify before you and the subcommittee today. I will be happy to answer any questions.

[The prepared statement of Ms. Kichak follows:]

STATEMENT OF
NANCY H. KICHAK
ASSOCIATE DIRECTOR
U.S. OFFICE OF PERSONNEL MANAGEMENT

Before the

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY
ORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

On

ESTABLISHING A COMMISSION TO RECOMMEND IMPROVEMENTS FOR
THE FEDERAL EMPLOYEES APPEALS PROCESSES

July 11, 2006

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to represent the U.S. Office of Personnel Management (OPM) and Director Linda Springer here today to discuss the idea of establishing a Commission to study the challenges in the current Federal employee appeals process and the realm of possible solutions available to increase the efficiency and effectiveness of the process.

While the dispute resolution and appeals process is only one aspect of OPM's interest in good government, it is an important one. Workplace disputes with employees, agency actions taken against employees, and the dispute resolution processes that follow have implications that can impact the morale and effectiveness of individual employees and their agencies. Central to any discussion of consolidating and streamlining dispute resolution processes should be the goal of making the Federal workforce more effective and efficient while retaining its fundamental underlying principle of merit.

Federal employees work hard, and expect to be treated like professionals. The vast majority of Federal employees will never be involved in the dispute resolution process. But they want to know that it is there and functioning effectively. They want to know that whatever dispute they bring to the process will be adjudicated in a timely, fair, and impartial manner.

The current system for adjudicating workplace disputes has been criticized as time-consuming, complex, and producing inconsistent decisions. The proposed legislation would create a Commission to study the current appeals processes and issue a report in 12 months with recommendations on a minimum of seven significant topics. We agree that this is an issue that deserves attention and we appreciate your leadership in exploring ways to address these longstanding criticisms and improve the efficiency and effectiveness of the process.

We do have some concerns regarding the proposal to establish a commission to study and make recommendations. Our first concern involves the short period of time provided – 12 months after the Commission’s first meeting - to study four broad areas and make recommendations on at least seven distinct and substantial issues. We recommend that the period provided for the Commission’s work be extended to at least 18 months after the Commission’s first meeting.

We also believe that if a commission is established, the enabling legislation should encourage the Commission to consult with other Federal agencies and independent organizations, not reflected in the current draft bill, that have unique roles or expertise in the Federal employee appeals process.

Finally, the proposal would provide the Commission with a Director and staff. It does not however specify how the Director would be appointed. Since that official would presumably have a key role in the administration and the ultimate success of the Commission, we suggest that the legislation clearly describe how that individual is to be selected and who has the authority to make the appointment (perhaps a majority vote of the Commission would be required).

In sum, we agree there is room for improvement of the Federal employee appeals processes. We appreciate your leadership in this area and we look forward to continuing the dialogue on this and other important personnel issues. Mr. Chairman, thank you for the opportunity to testify before you and the Subcommittee today. I am prepared to answer any questions you or other Members may have.

Mr. PORTER. Thank you very much.
 Next we will have Scot Beckenbaugh, acting deputy director, Federal Mediation and Conciliation Service. Welcome.

STATEMENT OF SCOT L. BECKENABAUGH

Mr. BECKENBAUGH. Thank you, Chairman Porter, Ranking Member Davis and members of the subcommittee.

Before I begin, I would like the full written statement of my testimony to be submitted into the record at your pleasure.

I am Scot Beckenbaugh, the acting deputy director of the Federal Mediation and Conciliation Service, and a career mediator with the agency. On behalf of the Service, I want to thank you for the opportunity to speak today regarding the proposal to establish the Federal Employees Appeals Commission.

FMCS has reviewed the draft bill that has been circulated, and again, welcome the opportunity to make several points regarding the draft to the subcommittee. To do that, I first need to provide you with some background, as a small Federal agency, about what we do and how we do it. Our mediators provide conflict resolution services to our Nation's employers and their unionized employees with the goal of preventing or minimizing economically disruptive work stoppages and improving the labor-management relations throughout this country.

Outside of the collective bargaining arena, FMCS provides employment mediation services, primarily in the Federal sector. These Federal cases arise from allegations of workplace discrimination, non-contract covered disciplinary actions, adverse action appeals and in some instances, Merit Systems Protection Board claims. In fiscal year 2005, we mediated approximately 1,200 employment disputes for Federal agencies.

We were created by Congress as an independent and autonomous agency by the Labor Management Relations Act of 1947. From its inception, a hallmark of this agency has been the strongly held value and belief that the agency's mission requires absolute neutrality, confidentiality and acceptability to the parties who participate in the mediation process. As I am sure all of you know, mediation is an entirely voluntary process that is done with the consent of the parties in a dispute. And that the success or failure of the mediation process is dependent upon the mediator's ability to gain credibility with the parties and to win their trust.

Throughout our near 60 years of history, we have avoided taking part in legislative and public debates on labor-related matters of policy, out of concern that by doing so we would jeopardize our position as neutrals on collective bargaining issues. If we are perceived as having taken a position that is hostile to the interests of either labor or management on public policy issues, we risk losing the credibility and acceptability of those parties and thus our effectiveness as mediators in their disputes.

As a neutral dispute resolution agency, we believe that we can be effective only so long as neither labor nor management has reason to believe that we favor or disfavor policies or procedures or proposed changes in those that are in their interest.

In appearing here today, I respectfully ask for the subcommittee's understanding of our agency's very unique position as a medi-

ation agency. We wish to support and assist in the work of the subcommittee as well as the commission, if it is established, but would respectfully request a modification of the current draft proposal.

We do have substantial experience at FMCS in the design and development of dispute resolution systems. In fact, it is a part of what we do every day. If the proposed commission on appeals process is established, we believe our proper function would be to work with the commission in a technical assistance capacity. We can provide facilitation services for the commission, and if necessary, assist in hearings, fact-finding and debate. The commission itself can draw upon our knowledge of dispute resolution systems.

However, I hope the members of the subcommittee do understand our strong belief that serving as a member of the commission and being called upon to make recommendations or to endorse whatever policy recommendations the commission might make would likely compromise our credibility as neutrals and potentially impinge on our ability to work effectively as neutral mediators.

We thank you again for the opportunity to state our views on this proposal. I hope the subcommittee will take our comments into consideration as you proceed on this legislation on the proposed commission. And I would be honored to answer and take any questions you may have.

Thank you.

[The prepared statement of Mr. Beckenbaugh follows:]



**Testimony by Scot L. Beckenbaugh, Acting Deputy Director
Federal Mediation and Conciliation Service**

**Subcommittee on the Federal Workforce and Agency Organization
Committee on Government Reform
United States House of Representatives**

July 11, 2006

Mr. Chairman and Members of the Subcommittee:

I am Scot Beckenbaugh, and I am Acting Deputy Director of the Federal Mediation and Conciliation Service. On behalf of the service, I want to thank you for this opportunity to speak to you today regarding a proposal to establish the Federal Employees Appeals Commission. We have reviewed the draft bill that has been circulated, and I do have several points that I would like to make to the Subcommittee.

To do that, however, I first need to provide you with some background about what we do and how we do it.

Our mediators provide conflict resolution services to our nation's employers and their unionized employees with the goal of preventing or minimizing economically disruptive work stoppages and improving labor-management relations. Our core activity is collective bargaining mediation, and we mediate some 5,000 collective bargaining negotiations across the country each year. As I'm sure you all know, mediation is an entirely voluntary process that is done with the consent of both parties in the dispute. The success or failure of the mediation process depends on a mediator's ability to gain credibility with the parties and to win their trust. Both parties must have confidence that a mediator is neutral in their negotiations and is impartial to labor and management when assisting them toward resolution.

Outside the collective bargaining arena, FMCS provides employment mediation services to the federal sector and to state and local governments. These mediation services include resolution of employment-related disputes. The Administrative Dispute Resolution Act of 1990, the Negotiated Rulemaking Act of 1990, and the Administrative Dispute Resolution Act of 1996 expanded FMCS's role as a provider of these services. The legislative design was to expand the use of alternative dispute resolution throughout

the federal government, reduce litigation costs, and promote better government decision-making. FMCS provides consultation, training, dispute resolution systems design and facilitation services to many federal, state and local agencies. These cases arise from allegations of workplace discrimination, non-contract-covered disciplinary actions, adverse action appeals, and, in some instances, Merit System Protection Board claims. In fiscal 2005, we mediated approximately 1,200 employment disputes for federal agencies.

In the federal government, our customers have included agencies such as the departments of Homeland Security, Health and Human Services, Defense, State, Transportation, Agriculture, Education, Housing and Urban Development and the Interior as well as the Internal Revenue Service, the Federal Bureau of Investigation, the Post Office and the Administrative Court Services. This is just to name a few.

As you can see from this partial list, we are active throughout the federal government, and we believe we are accomplishing the mission that was envisioned for us in the enabling statutes in helping to reduce the costs of processing employment disputes as well as promoting and assisting in the resolution of these disputes.

The Federal Mediation and Conciliation Service or FMCS was created by Congress as an independent agency by the Labor-Management Relations Act of 1947. This was in response to a period of intense labor turmoil in the country, marked by a series of massive, economically damaging strikes and lockouts. Before that time, the mediation function had been performed by the U.S. Conciliation Service, which was then part of the U.S. Department of Labor. However, many Members of Congress viewed the Conciliation Service within the Department of Labor as biased and complained that it failed to function impartially. To remedy this perceived problem, the Taft-Hartley Act of 1947 removed the Conciliation Service from the Department and established it as an independent agency reporting directly to the President. In fact, protecting the neutrality of the Agency was such an issue that when the return of the FMCS to the Department of Labor was proposed to Congress during the Truman Administration, the first director of this Agency, Cyrus Ching, strongly opposed it for this reason; and Congress agreed with him.

So from its inception, a hallmark of this agency has been the strongly held value and belief that the Agency's mission requires absolute neutrality, confidentiality, and acceptability to customers. Our neutrality is a value that is strongly held across our organization and one that we zealously guard. Each of our mediators is instilled with the absolute necessity of maintaining his or her neutrality as well as the confidentiality of the proceeding that he or she is mediating. Our neutrality was established with the creation of this agency by Congress nearly 60 years ago and it is at the heart of what we do. In our history, we have avoided taking part in legislative and public debates on labor-related issues precisely for this reason.

To safeguard our neutrality and to maintain our credibility with both management and labor, throughout our history, we have avoided advocacy or making policy statements regarding statutory changes that could be interpreted by one side or the other—

management or labor—as favoring or disfavoring their interests. As a neutral, dispute resolution agency, we believe we can be effective only so long as neither management nor labor has reason to believe that we favor or disfavor policies or procedures that they perceive are in their interests. If we are perceived as having taken a position that is hostile to the interests of either management or labor, we lose our credibility and acceptability with that party, and we lose our effectiveness as mediators in their disputes.

This is as true in the federal sector as it is anywhere that employees have workplace disputes with their employers.

This brings me to the current proposal for a commission that will be tasked to review and make recommendations for the federal employees appeals process. Because it is likely that proposals for change will be favored or opposed by representatives of federal managers and employee unions, we believe it would be inappropriate for this agency to endorse recommendations that are favored by one side or the other for the appeals process. This would put us precisely in the position that we as neutral mediators seek to avoid, which is that either federal unions or federal managers will see our position as being hostile to their interests.

In appearing here today, I ask for the subcommittee's understanding of this agency's unique position as a mediation agency. We wish to support and assist the work of this subcommittee, but would respectfully request a modification in the current draft proposal.

We have substantial expertise at the FMCS in the design and development of dispute resolution systems; this is a part of what we do every day. If the proposed commission on the appeals process is established, I believe our proper function would be to work with it in a facilitative capacity. We can provide facilitative services for the commission, if necessary, for hearings and fact-gathering and debate. It can draw upon our knowledge of dispute resolution systems. However, I hope the members of the subcommittee will understand our strong belief that serving as a member of the commission and being called upon to endorse whatever recommendations it may make for reforming the federal employee appeals process would likely compromise our credibility as neutrals and our ability to work effectively in this arena.

Thank you again for the opportunity to state our views on this proposal, and I hope the subcommittee will take these comments into consideration as you craft legislation on the proposed commission.

Mr. PORTER. Thank you very much.

Congresswoman, do you have any statements you would like to make before questions?

Ms. NORTON. Mr. Chairman, I appreciate what you are trying to do. I do want to say for the record that the last hearing was enough to make everybody want to throw up their hands and give it to somebody other than us to try to figure this out.

My own sense is that we have drawn in the whole herd here to deal with a problem that doesn't involve all of them, the mixed case problem involving MSPB and EEOC mainly. I can understand, though, Mr. Chairman, your desire to be, as long as one is going to deal comprehensively about it, I continue to believe that the up-front problem is far more important than the appeal problem. Many of these cases shouldn't get to appeal. We need to look at these agencies as to how they are funded. There is a \$4 million cut in the EEOC. I don't care what they do, they are going to have problems dealing with cases of every kind.

But even apart from funding, agencies which accept complaints are likely to become inefficient unless they are constantly streamlining from the front end. Then of course, we would know what we have to deal with in the appeal process and would probably have a simpler problem.

Mr. Chairman, I must say that I do think that some group should be given this problem. But I would have a very hard time voting for a commission that had to go through the House and the Senate. I mean, normally, the Government should be simply putting people, if we want the insiders to do this, we should simply direct them to get together and in fact do it. I don't see why a statute would be necessary.

If we wanted to set up a commission, you don't set up a commission, I say, with all due deference, Mr. Chairman, of insiders. You might set up an independent commission who then would have the cooperation of these agencies, so that you get some fresh eyes to look at this problem. What you would now get, it seems to me, are people ensconced in the problem, some of them wish they had never heard of the problem and will simply want to just get it over with. Others will have to deal with it.

You will get uneven participation. I agree with you, sir, about the Federal Mediation Service. The last thing you want is your fingerprints on any of this. And it may be that we don't have the fingerprints of any of the agencies on it. There are going to be problems with whatever we come forward with.

I felt I had to be here today, despite an urgent problem, because I am one of those who has to confess as guilty, it is the case that this system has been designed by the agencies and by Congress to preserve as many rights as possible. In the process of preserving as many rights as possible, we have ballooned up things for employees.

Mr. Chairman, I just want to say right from the beginning, that as I see this commission, and you have tried to go down and just get kind of representatives of everybody, I have a real difficulty with the composition of the commission, with first of all the people who get all messed up are employees. So they get two representatives. That is token representation, it seems to me, because if there

doesn't have to be some kind of consensus, then they aren't even going to matter, they just will come in and testify, because their "votes" won't matter. You have the SES and the managers, I have no idea where they come out on this, poor souls, because they have to handle much of this.

And then you have the people at the top of the agency, their special assistants or whatever, who, Mr. Chairman, I must tell you, will have to learn this stuff first. Because they don't deal with these things. They are going to have to find somebody in their agency who is knowledgeable enough to sit at the table with others.

So my own sense is that if we wanted to do something as fancy as a whole big commission, instead of having an order from the chairman to go and do what is necessary to fix this problem, then my own suggestion would be that it would be an independent commission, fresh eyes, perhaps, I don't know, academics, people who we pay to study their navels to come in and tell us what is best who have no dime in that dollar and might give us objective opinions that none of the agencies would have to fuss about, because they would know that they had not come from inside, and they would know that we hadn't given more attention or more weight to one agency rather than the other, because it might be more or less involved.

Thank you very much, Mr. Chairman.

Mr. PORTER. Thank you. I think because of all the rains, we were looking for Noah's Ark. We have two of everybody, we could make sure we had everyone's interests addressed.

Ms. NORTON. Two of us, too.

Mr. PORTER. Yes, your point is well taken. Thank you.

Mr. Cummings, anything you would like to add in a statement?

Mr. CUMMINGS. I will be very brief, Mr. Chairman.

Just two questions. Ms. Dominguez, you noted in your testimony that the mixed cases, we are seeking in the mixed cases, we are seeking to streamline representing fewer than 3 percent of the cases that come before EEOC, is that right?

Ms. DOMINGUEZ. That is correct, yes, sir.

Mr. CUMMINGS. I think that is noteworthy. You further suggested that the problem lies with the Federal processing system. How would you recommend we reform it?

Ms. DOMINGUEZ. Mr. Cummings, I believe, as I have stated both today and in my earlier testimony last November, that we really do need to look at the investigative phase at the earlier stages of the process, looking at how one takes in EEO complaints, and being able to dispose of those complaints that have no basis before they start getting into the system and really bottleneck the complaints that do have merit.

So our whole interest here is to try to streamline the process, looking at it from the beginning, from the time an employee is concerned about certain practices or perceived discriminatory treatment that requires attention, and then take the process. At the moment, for example, the agency against which the complaint is filed investigates itself, then they may come to the Commission toward the tail-end of the process, then they may go back to the agency for a final agency decision, at which point it could come back to an appeal.

So the process is extremely cumbersome. And really, I think the victim in this whole scheme is the complainant.

Mr. CUMMINGS. That is all I have, Mr. Chairman.

Mr. PORTER. Thank you.

I think sometimes lost in this debate is the employee. I think someone mentioned that earlier in their opening statement.

The bottom line is, the employee who has a legitimate complaint—what can we do to make sure that they can have proper help and assistance in a very reasonable, timely fashion? I think we each have our own areas of expertise, and as we were compiling ideas for this legislation, we were trying to address as many concerns in these different areas as possible.

But the bottom line is, there are employees that need assistance and need it rapidly and need it efficiently so they can take care of their problem. I have heard lots of different suggestions from the panel regarding makeup. And if we were to do a commission approach, I have heard numerous folks suggest that maybe we should use an independent commission.

I guess I would just like to get an idea, from the independent side, how many of you think we should just do an independent panel?

[Show of hands.]

Mr. PORTER. One. OK. How many of our panel today thinks that we should have an independent commission? One person. I would like to now take a moment, I have heard all of you suggest some changes to the existing legislation as far as who you think should be on the board. Can we just take a moment, Mr. McPhie, what was your suggestion on the makeup of the board? Did you have one?

Mr. MCPHIE. I thought the stakeholders who are present. If there are stakeholders who are not present, they should be present. When we were talking about this and a board member asked the question, well, what about the other employees who aren't represented by a group, a union or whatever. And we scratched our heads and we asked ourselves, who represents them? The fact is, they are not represented.

Mr. PORTER. The groups other than those listed, is what you are saying?

Mr. MCPHIE. Well, I said those listed appear to be the stakeholders.

Mr. PORTER. The employee groups?

Mr. MCPHIE. Yes. If you don't get the stakeholders involved, I submit that implementing anything is going to be tough.

Mr. PORTER. Mr. Tobey, what do you think?

Mr. TOBEY. Chairman Cabaniss' suggestion was to consider employing the services of an independent organization like the National Academy of Public Administration to lend credibility to the final work product of the commission.

Mr. PORTER. I think independent is your suggestion.

Mr. Bloch.

Mr. BLOCH. Well, I backed into a solution when we were talking earlier during the break of a hybrid, of having both the stakeholders on the commission but also having the independent entity that would fashion and oversee the process. I think you need both.

Mr. PORTER. Ms. Kichak.

Ms. KICHAK. We think the process could be expanded to include other agencies that are involved in the appeals process, plus the Department of Justice. We do think independent organizations should be consulted. But we think that the agencies involved in the process, such as EEO and Merit Systems Protection Board are a vital part of any board that is going to reach a solution on that.

Mr. PORTER. Mr. Beckenbaugh.

Mr. BECKENBAUGH. Certainly as an organization that deals with dispute resolution process design, our only encouragement would be regardless of how you decide to proceed to include as broad a range of actual stakeholders, people who are going to be impacted by outcome with the idea of getting the greatest buy-in in terms of the outcome of the process. That is certainly when we facilitate regulatory negotiations as a neutral body in those processes or a public policy dialog, which is a service we provide. Those are certainly our recommendations pretty uniformly across the board in these kinds of scenarios.

Mr. PORTER. Personally, I like the Congresswoman's suggestion that I tell you to go fix it. [Laughter.]

And you have 3 weeks.

But I know that is not reasonable, at least the timeframe, not that we shouldn't come back with a suggestion. That is the end of my questions for the moment. Mr. Davis.

Mr. DAVIS. My approach to problem solving has always been to try and learn as much about the problem as I possibly can. Then I know what I am trying to solve. I have heard speculation, I have heard possibilities, I have heard that we could do this, we would have to do that.

Is there anybody who sees a definitive problem?

Yes, we have had problems with this mic all afternoon. So we never know when it is working or what makes it work.

But is there anyone who would delineate a definitive problem with the system and the process that we currently use? What is a problem? Is there something that we need more of? Is there someone definitively left out who needs to be in? Is there some approach that could be used or should be used that we are not using? Do we need more mediation? Do we need whatever? Is there anyone who would have a definitive approach?

Ms. DOMINGUEZ. Yes, Congressman Davis, if I may, from an EEO perspective, there are numerous problems with the system the way it is currently designed. It takes too long to dispense justice. When someone comes in, alleging discrimination, and justice delayed, as we know, is justice denied. So the system takes too long. The system is very cumbersome. There are too many levels of review, too much going back and forth from the agency to an adjudicatory body back to the agency. The system is very cumbersome.

And the system has also been criticized for the questions about conflicts of interest. When you have an agency, for example, investigating itself, no matter how much effort is taken to make sure that those processes are clean and removed from any conflict, there is still that perception of conflicts of interest.

So from an EEO perspective, I can say without a doubt that we just have too many cases languishing and that it needs to be looked

at. We need an overhaul and we need to start from the beginning phase of the process.

Mr. DAVIS. In my opening comments, I mentioned the fact that there seemed to be not enough. I have some concerns relative to the amount of union representation. Do we feel that there is enough stakeholder spread or that there is the stakeholder balance that we need to have in order to have greater assurance of a level of equity in decisionmaking?

Mr. MCPHIE. I testified I think you do. AFGE and NTEU are two very big, very important unions. They are at the table. I hesitate to come forward and tell you I know the answer, because I think if I knew the answer, why not just tell it to you and we could all go home and we wouldn't need a commission. I think the areas that the committee chose to study are good areas. I think embedded in those areas are problems that we ought to address. If you focus on the expectation of the employee filing a complaint, seems to me that person deserves an answer, up or down, within a reasonable period of time.

To the extent that does not happen, we have to put our heads together and come up with a system that preserves the opportunity to get a fair shake of that complaint. But also, is that person, the resolution of that complaint, quicker than we do it now?

Mr. DAVIS. So you are saying that the structure is very important, because otherwise, I mean, everybody can have a different opinion or a different point of view, or can see things differently. But if the structure is correct, then in all likelihood, the appropriateness of the solution will be balanced?

Mr. MCPHIE. Yes, I think part of it is a systems analysis. We know we have issues with employees, we have employees, we have employers, we have this job to do. We know we have issues, we know people sometimes complain about different things. It seems to me we have to devise a system that accommodates a resolution of those issues. And we have to ensure that whatever we do, people's rights are protected. They have a right to a hearing, for example. People forget, before the board, they get a due process hearing, which is contained in the due process clause of the constitution. These things are important.

So whatever we do, we can't forget that. The question is, how do we do it efficiently?

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

Mr. PORTER. Congresswoman Norton.

Ms. NORTON. Let's try to take this vexing problem down to its size. Mr. McPhie I guess would be the person to ask. What percentage of cases are mixed cases in the system in the first place?

Mr. MCPHIE. Well, I wouldn't question what Chair Dominguez says.

Mr. PORTER. What is that number?

Ms. DOMINGUEZ. Three percent.

Mr. MCPHIE. She said 3 percent.

Ms. NORTON. Are we talking about 3 percent of all the cases?

Mr. MCPHIE. But don't forget, there are real people behind those cases.

Ms. NORTON. Well, there are real people—

Mr. MCPHIE. Every one of those persons deserves, in my opinion, a response to their case. That case is important to them. Three percent of a sizable number means there are a lot of people out there in that 3 percent. I chose to think of it as a people issue, and not necessarily only as a numbers issue.

Ms. NORTON. Well, the people have thought to think of it as a numbers issue, though, because they can't get through the system for a very long time. The reason I concentrate on how many cases we are talking about is, we are talking about a whole big commission to deal with 3 percent of the cases. And I am just looking for a way to deal with the chairman's concern that might be more efficient and economical.

Let me ask this question. Mr. Tobey, do you know anything about mixed cases? I am not asking this to embarrass you. In the course of your professional work, have you had occasion to learn much about mixed cases?

Mr. TOBEY. That kind of work has not come in my direction at the FLRA too much. We have a somewhat different situation with regard to our relationship to the other agencies. There might be situations which give rise to disputes that would be heard in a different forum, but there is not the same sort of a mixed case situation.

Ms. NORTON. If we are dealing primarily with mixed cases, there would be a limited contribution you would have to make if you were on this commission, I take it?

Mr. TOBEY. That is correct.

Ms. NORTON. How about you, Ms. Kichak? Do you know much about mixed cases in your work at the Strategic Human Resource Policy Division of the OPM?

Ms. KICHAK. Yes. One thing I know is that what has brought us here today is not just mixed cases. Even though mixed cases are very complex, the process for resolving disputes is not timely even for cases that are not mixed cases. If the only problem with employee disputes was mixed cases, then you are right, you wouldn't need this many folks. But many of the problems previously described at EEO, I shouldn't say problems, but the time that certain cases take to reach resolution are not mixed cases. There is a timing problem in other kinds of cases also.

Ms. NORTON. So you think the commission is necessary to deal with slow processing of cases throughout the Federal Government?

Ms. KICHAK. That is correct.

Ms. NORTON. Do any of you think that the best way to deal with that problem would be to create a Federal appeals court? Does anybody there want to raise a hand for a Federal appeals court? All right, I see by process of elimination we know one thing that won't be in the final recommendations if this is to be the group.

Do any of you yourselves feel that if this task were given to you as Federal agencies that you could solve the problem?

Ms. KICHAK. I will say we at OPM do not feel we could solve this problem alone.

Ms. NORTON. Then I don't know why you ought to be on the commission. The commission consists of nothing except you all. Now, if you don't think you can solve the problem if we gave it to you as a group, then why should we give it to you as a commission?

Mr. MCPHIE. I am not certain that I agree that the problem cannot be solved. I think it can be solved.

Ms. NORTON. I am asking you, if we were to say to this group, and here I am leaving out the chairman's time limit, go, sit together for—

Mr. PORTER. Ms. Norton, you are sounding like a Republican, so keep talking, you are doing fine. [Laughter.]

Ms. NORTON. Go, and a year from now, report back to us on your solution to this problem. Do you feel that you could do that?

Mr. MCPHIE. I think it is a difficult task, but it can be done.

Ms. NORTON. I am asking you if you feel this group could do it, sir. We are not asking if this is a task that was beyond any human being to do. I am asking whether or not this group as a group, if they were charged to do it, as a group, could do it.

Mr. MCPHIE. Well, since the group hasn't met as a group, it is very difficult to predict what is going to happen.

Ms. NORTON. So you don't know if the group could do it or not?

Mr. MCPHIE. I think with the expertise, with a true willingness to solve it, and a true willingness to report back, and of course it is the will of the Congress, they can take the recommendations and do whatever the Congress wants to do with it. But I think you will get from this group an honest evaluation and suggestion.

Ms. KICHAK. Excuse me. If you asked me could OPM do it alone—

Ms. NORTON. No, that is not my question.

Ms. KICHAK. Well, I am sorry, but I misunderstood your question.

Ms. NORTON. Could you, this group, the assembled group at the table, could you do it if you were charged to do it within a year?

Ms. KICHAK. I think the assembled group at this table could make suggestions to improve the process substantially. Personally, we recommended more than a year, but I think within a reasonable amount of time, this group collectively could make substantial recommendations, recommendations that would improve the process.

Ms. NORTON. Ms. Dominguez.

Ms. DOMINGUEZ. I would say that one of the alternatives that I recommended would be to have an independent group with input from all the stakeholders here. I don't think you can do it by yourself. But I do think that we are so enmeshed in our day to day issues, and all of us here are working very hard at management reforms, and to do the things that we can do within the constraints of the laws and the regulations that we administer.

So I think that we certainly can provide input. But I would like to see it led by an independent body that would then involve all of us and also do some independent evaluations of other good practices and benchmarks that exist.

Ms. NORTON. Yes, I kind of heard, I appreciate your comment, Commissioner Dominguez, because I kind of heard in an earlier response a concern at the table that if you weren't doing it somehow your input would not be sufficient in this process, and one really wonders about that.

Let me ask you this. Does the assembled group think that a group like this would be helped if there were some independent members added to the group?

Ms. KICHAK. Yes.

Ms. NORTON. Anybody disagree with that?

Mr. MCPHIE. In fact, I think I observed a little bit earlier that I don't see it as an either-or proposition. I think the involvement of groups like NAPA is very good, there is no question about that. They have expertise, Max Dyer's group, and so on. There is no question.

But I don't know why it is one or the other. I believe if the stakeholders can agree, it doesn't matter what the experts say, the recommendations are not going to be consensual, and that is going to be the trick.

Ms. NORTON. Do you think, in light of the fact that people are ensconced in their own agency, have no reason to want to figure out how these, have had no reason except as they may have arisen anecdotally, to want to figure out how your agency does something, do you think the involvement of so many agencies with different degrees of concern and interest would affect the outcome? Some agencies are more heavily implicated than others. Some will have to speak far more often.

In light of that, do you think that a consensus process, rather than a vote by some kind of majority, if you had some kind of process involving you it would be better?

Mr. MCPHIE. I think we should strive real hard to give you all a consensus position. I don't think this whole effort is best served by having minority reports and majority reports and sub-minority reports and so on. The whole purpose is to try to get stakeholders to identify ways in which they can improve the systems they administer, period.

So the goal is consensus. It has to be.

Ms. NORTON. Well, thank you, Mr. McPhie. I must say that anything other than that would simply transfer the burden to a partisan group called the Congress of the United States. So without a consensus, which would mean that all of you have had to compromise to some extent, which means recognizing that the other agency has to be considered, without that kind of process, one wonders whether you would be making more problems than you would solve. I appreciate your views.

Mr. PORTER. Mr. Van Hollen, it is a good thing you got here, because we are going to put you in charge of a committee. [Laughter.]

Thank you for being here. We appreciate it.

Mr. VAN HOLLEN. Let me just first of all apologize for being late. I serve on another subcommittee of the Government Reform Committee, and there is a hearing ongoing right now. I am afraid I am going to have to get back to that. But I just wanted to come by and thank everyone on this panel for this testimony and the people who are coming on the next panel. I do look forward to reading the testimony and trying to weigh the different issues. I was listening to my colleague here talking about some of the very important questions that have been raised, and I look forward to trying to get the answers from all of you on some of the questions that she and others have raised.

Again, I apologize for being late, and I apologize for having to leave early. We have been unfortunately double booking some of

these hearings on the same Government Reform Committee and trying to jump back and forth. Thank you, Mr. Chairman.

Mr. PORTER. Thank you very much. We appreciate your schedule and the challenges. Thank you for being here.

I would like to thank the panel. We appreciate your input. Thank you.

And we will have panel two. We will be vacating the room at approximately 5 o'clock. We appreciate your patience.

Next on our panel will be Mr. William Bransford, the general counsel, Senior Executives Association; Ms. Colleen Kelley, national president of the National Treasury Employees Union; Mr. John Gage, national president of the American Federation of Government Employees, AFL-CIO; Ms. Karen Heiser, vice president of FMA Chapter 88, Federal Managers Association.

Welcome and thank you for your patience. I know that you have been very patient with us in the past, and we appreciate it again today. Thank you.

Mr. Bransford, welcome.

STATEMENTS OF WILLIAM L. BRANSFORD, GENERAL COUNSEL, SENIOR EXECUTIVES ASSOCIATION; COLLEEN M. KELLEY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; JOHN GAGE, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AND KAREN HEISER, VICE PRESIDENT, FEDERAL MANAGERS ASSOCIATION CHAPTER 88

STATEMENT OF WILLIAM L. BRANSFORD

Mr. BRANSFORD. Thank you, Mr. Chairman, members of the subcommittee.

I appreciate your invitation to testify on behalf of the Senior Executives Association about establishing a commission to recommend improvements for the Federal employee appeals process. I testified before this subcommittee 7 months ago on behalf of SEA regarding its proposal for a Federal employee appeals court, a central place to seek redress for legitimate Federal employee workplace complaints. As general counsel of SEA, I was pleased to put forward our proposal as one idea to fix a longstanding problem.

The impetus for SEA's proposal is the broken state of the Federal employee appeal and complaint system. The hearing last November revealed widespread consensus among the stakeholders in the system that significant problems exist with the current Federal employee system, which must be fixed to ensure fair and timely treatment for both the employee who files an appeal or complaint and those who are accused of wrongdoing.

SEA believes that reform of this broken system must occur and applauds this subcommittee for its work to develop the concept of this commission. For many years, Federal managers and other employees have labored under a complaints mechanism that allows employees numerous bites of the apple, a multitude of different paths to pursue and the ability to tie up management for years with what are often frivolous complaints. Some Federal employees abuse the complaints and appeals process with impunity, slowing down the system for those cases that truly need consideration.

The current system has also made the Federal manager an easy and convenient target. With pressure from both higher level management and subordinates, the Federal manager is often perplexed about how and when to do the right thing. While Congress has occasionally grappled with this issue, we now have an opportunity to develop a consensus on improvements from the stakeholders, employees, managers and agencies. We all acknowledge that problems exist. The proposed legislation will provide a framework for real discussion on change, which will lead to real solutions.

Having the key stakeholders in the Federal employee appeal and complaint system around one table to study these issues will provide a healthy forum for resolving the myriad problems being discussed today. SEA is pleased that the MSPB will use its leadership to chair this proposed commission and SEA is hopeful the commission to study the employee appeals process will soon become a reality.

While SEA has proposed a central place to seek redress for legitimate Federal employee workplace complaints, we believe there is more than one path to appropriate reform, and we look forward to working with other stakeholders to solve this vexing problem. The question are: what needs to be changed and what needs to be uniformly incorporated across the system? Several facts are clear already and provide a good starting point.

The MSPB has performed well with employee appeals and we believe it provides a model for reform of the system. The board has rapidly processed cases and is generally supportive of reasonable management efforts to discipline problem employees and to respond to poor performance while at the same time preventing abuses of the merit system.

Contrast the MSPB's performance with what happens in a typical EEO case. According to the EEOC's 2005 report, which shows improvement over previous years, cases still take too long to resolve. EEO professionals often candidly admit that employees sometimes mis-use the EEO process to raise complaints of job dissatisfaction when they lack evidence of discrimination because it is perceived as the only forum available in which a matter can be raised effectively and heard outside the agency. This is reflected in the fact that only 1.5 percent of the total cases filed result in findings of discrimination.

One reason the EEO process is so clogged is that a very high percentage of those 23,153 complaints are fully investigated, even though it is apparent to any informed observer that the complaint lacks merit. Why are blatantly frivolous complaints so meticulously investigated? Federal agencies are required to investigate themselves when an EEO complaint is filed, which is an obvious conflict of interest. To address concerns about a process that has inherent conflicts of interest, the Federal sector EEO system responds by fully investigating and processing every EEO complaint, even though it is obvious that it lacks merit from the outset.

And of course, some complaints do have merit. There is nothing more frustrating for a Federal employee than to prevail in an EEO complaint many years after it has been filed, and then to realize that justice cannot be attained because circumstances have changed in the lengthy time span during which the complaint was

processed. Similarly, for those managers in the approximately 17,000 EEO complaints filed annually that lack merit, the burden of managing those subordinate employees over the long period of the complaint life span is unreasonable and should be relieved.

Thank you for the opportunity to testify. We look forward to working with you and your staff and this proposed commission to find common sense solutions to these complex problems.

[The prepared statement of Mr. Bransford follows:]



P.O. Box 44808 • Washington D.C. 20026 • (202) 927-7000 • Fax (202) 927-5192 • www.seniorexecs.org

TESTIMONY

of

WILLIAM L. BRANSFORD

General Counsel

SENIOR EXECUTIVES ASSOCIATION

Before the

HOUSE GOVERNMENT REFORM COMMITTEE,
SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

July 11, 2006

Chairman Porter, Ranking Member Davis, and Members of the Subcommittee:

I appreciate your invitation to testify on behalf of the Senior Executives Association (SEA) about *Establishing a Commission to Recommend Improvements for the Federal Employees Appeals Process*. As you know, SEA is a professional association that represents the interests of career federal executives in the Senior Executive Service (SES) and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions. This career senior executive corps provides the consistent leadership, skills and institutional knowledge necessary both to accomplish the everyday work of the federal government and to ensure the effective and efficient functioning of government through times of crisis. On their behalf, SEA advocates for improving the efficiency, effectiveness and productivity of the federal government.

I testified before this committee seven months ago on behalf of SEA regarding a proposal for a Federal Employees Appeals Court, which would combine all the adjudication powers of the MSPB, EEOC, FLRA, and labor arbitration, as well as the investigative powers of the Office of Special Counsel and the equal employment opportunity program in federal agencies. The impetus for such a proposal was the broken state of the federal employee grievance system. While SEA received some support for its proposal from federal management groups, unions were opposed to the suggested changes. Yet the hearing last November revealed widespread consensus among the stakeholders in the system that significant problems exist with the federal employee appeal and grievance system, which must be fixed to ensure fair treatment and justice for both the employees who file appeals and grievances and those who are accused of wrongdoing.

SEA believes there are several reasonable solutions to fixing this broken system, and applauds Chairman Porter for his work to develop the concept of this Commission. For many years, federal managers and other employees have labored under a complicated and mostly broken appeals mechanism that allows employees numerous bites of the apple, a multitude of different paths to pursue, and the ability to tie up management for years with what are often frivolous complaints. Some federal employees abuse the complaint and appeals processes with impunity, slowing down the system for those cases that truly need consideration. A sound process for complaints and appeals is necessary for the protection of the integrity of government because it prevents the abuse of employees and preserves the merit system. There must be a logical, coherent system in place that provides for fair and efficient justice for all.

The complicated and seemingly endless process that currently exists causes even the best manager to think carefully before deciding to take an action or even to engage in frank day-to-day conversations about performance and workplace conduct that must be a part of successful management. For a manager, the most difficult step in dealing with a problem employee is often the first step that invites adversity, often in the form of an EEO complaint. It is no wonder that some managers come to the unfortunate and mistaken conclusion that it is better to ignore a problem employee rather than to invite potential EEO complaints and union grievances that may follow from doing the right thing and confronting the employee. Yet, inaction is the worst course because future actions to deal with a continuing problem will be more difficult, and avoidance contributes to the workplace and public perception that problem employees are

tolerated in the federal civil service.

The current system has made the federal manager an easy and convenient target. With pressure from both higher level management and subordinates, the federal manager is often perplexed about how and when to do the right thing.

The questions are—what needs to be changed and what needs to be uniformly incorporated across the grievance system? The Merit Systems Protection Board (MSPB) has performed well with employee appeals and we believe provides a model for reform of the system. The Board has rapidly processed cases and generally is supportive of reasonable management efforts to discipline problem employees and to respond to poor performance, while at the same time preventing abuses of the merit system. In most years the MSPB upholds management actions about 80 percent of the time and decides most cases in less than 100 days. Coupled with MSPB's efficiency, the Board has developed a sophisticated and relatively predictable body of law concerning the rules of the workplace. It has also gained a reputation for a speedy and impartial resolution of cases.

Contrast the MSPB's performance with what happens in a typical EEO case. According to the 2005 report, a case which involves an EEOC Administrative Judge takes an average of 669 days from the day the complaint is filed to the day it is resolved. That's almost two years. When an Administrative Judge is not involved, the average is still approximately a year and three months.

While neither EEO average is acceptable, these are only averages. There are numerous EEO complaints that go on for many years. EEO professionals often candidly admit that employees sometimes misuse the EEO process to raise complaints of job dissatisfaction when they lack evidence of discrimination because it is perceived as the only forum available in which a matter can be raised effectively and heard outside the agency. This is reflected in the fact that only 1.5 percent of the total cases filed result in findings of discrimination. That's only 345 out of the 22,947 cases closed for the fiscal year ending last September. One reason the EEO process is so clogged is that a very high percentage of those 23,153 complaints are fully investigated, even though it is apparent to any informed observer that the complaint lacks merit.

Why are blatantly frivolous claims so meticulously investigated? Federal agencies are required to investigate themselves when an EEO complaint is filed, which is an obvious conflict of interest. To address concerns about a process that has inherent conflicts of interests, the federal sector EEO system responds by fully investigating and processing every EEO complaint even if it obviously lacks merit at the outset.

These investigations are supposed to take 180 days. The average investigation in 2005 took 237 days. The EEOC cites "poorly staffed EEO offices, unnecessary and time-consuming procedures, delays in obtaining affidavits, and inadequate tracking and monitoring systems" as reasons why. Removing the investigative duties to an independent agency with a strong, efficient and professional staff would free agencies from the conflict of interest concern and would allow for effective screening of EEO complaints, permitting greater focus and resources

on the complaints that have merit. The result would be more expeditious resolution for those employees who are, in fact, victims of discrimination.

Perhaps the most sardonic part of the entire process is that after a federal employee with an EEO complaint has exhausted the lengthy and complicated administrative process discussed above, the employee can then go to federal district court and start all over, sometimes many years later. SEA believes this process should only happen once, with subsequent review being limited to the Circuit Court of Appeals for the Federal Circuit, to assure that a uniform body of rules of the workplace is available to federal managers as they engage in the day-to-day work of managing the government.

As stated above, stakeholders agree that the current system cries out for reform. As an immediate improvement, SEA has proposed changes in the existing EEO process so that managers are assured of rights during the process. We propose statutory assurances that managers accused of discrimination be informed of the accusation, allowed access to accusatory documents, be permitted representation during meetings and investigations, be consulted before a settlement of an EEO complaint becomes final, and be considered for reinstatement of lost promotions or awards and reconsideration of other negative personnel actions that occurred because of an EEO complaint that was ultimately found to lack merit. While some agency investigatory practices generally include these, other agencies leave managers in the dark and in a perilous position. Such assurance for managers is only a first step, though—a band-aid on a process that needs intensive surgery.

As we have presented in this testimony, the current systems for dealing with federal employee grievances are redundant, wasteful and complex. Most of all, it simply takes too long. There is nothing more frustrating for a federal employee than to prevail in an EEO complaint many years after it has been filed and then to realize that justice cannot be attained because circumstances have so changed in the lengthy time span during which the complaint was processed. Similarly, for those managers in the approximately 17,000 EEO complaints filed annually without merit, the burden of managing those subordinate employees over the long period of the complaint lifespan is an unreasonable burden that should now be relieved.

Congressional and Administration proposals for reform of the federal performance management system mention the importance of manager and employee accountability. SEA is working with Congress to ensure that managers receive the tools to manage and the training required to use them properly. SEA has worked with Senators Voinovich and Akaka who have presented bills which include extensive requirements for supervisor and management training and periodic retraining. We hope the House will follow suit. However, even with potent management tools and training on how to use them, managers still must have a federal employee grievance system that works efficiently and effectively, allowing them to deal with employees appropriately without fear of a frivolous EEO or IG complaint, taking up a substantial amount of their time and threatening to label them unfairly.

While Congress has occasionally grappled with this issue before, never have they been able to receive a consensus on improvements from the stakeholders: employees, managers, and

the agencies. However, we all acknowledge the same problems, and I would wager a guess we are not so far afield in our opinions of what would make for sensible reform of the system. This legislation will provide a framework for real discussion on change, which will lead to real solutions. Having the key stakeholders in the federal employee grievance system around one table to study these issues will provide a healthy forum for resolving the myriad of problems being discussed today. SEA is pleased MSPB Chairman McPhee will use his leadership to Chair this commission, and I look forward to working with him and the other members of the commission on improving the federal workplace and its grievance processes. While SEA has proposed a central place to seek redress for legitimate federal employee workplace complaints, the Federal Employees Appeals Court, we believe there is more than one path to appropriate reform, and look forward to working with other stakeholders to solve this vexing problem.

Our broken appeals and grievance system is a problem that affects the entire federal employee community and also impacts the functioning and efficiency of the federal government. We can help ourselves and all Americans by having those who know the system best sitting down and identifying means to solve the problems we all know exist and are stated in this legislation. These are issues of jurisdiction, efficiency, transparency and fairness, and can all be solved with the practicality and creativity of those that know and understand the system best. After all, we all have the same goal: providing reasonable protections for federal employees in a more efficient system that is simpler and faster.

I would like to conclude by thanking you for the opportunity to testify and simply stating that the condition of the current system strikingly points to the need for a fairer, faster and simpler solution. On behalf of SEA, I thank you for holding this important hearing and we look forward to working with you, your staff and this proposed Commission to find common sense solutions to these complex problems.

Mr. PORTER. Thank you. We appreciate it, Mr. Bransford.
Ms. Kelley, welcome.

STATEMENT OF COLLEEN M. KELLEY

Ms. KELLEY. Thank you, Chairman Porter, Congresswoman Norton. It is a pleasure to be here on behalf of NTEU and the 150,000 Federal employees who we represent in 30 agencies.

NTEU has worked for over 65 years to improve and defend Federal employee protections, rights and benefits. We take very seriously the proper adjudication of the statutory and contractual rights of our members, and any acts of discrimination or unfair treatment toward them.

Last year, the subcommittee considered a proposal by SEA for the establishment of a new court to be known as the Federal employee appeals court, intended to combine all appeal processes for Federal employees into one forum. NTEU strongly objected to this proposal. We have provided a detailed explanation as to the reasons for our objections to the subcommittee.

NTEU agrees that complaints should be resolved quickly without compromising justice or fairness. We feel, however, that the proposed Federal employee appeals court is misguided. NTEU also believes that the proposal for a commission to recommend legislative or structural changes to the appeals process misses the real issue.

The proposed legislation asks the commission to review consolidation of operations or agencies. We do not believe that replacing or consolidating agencies with specialized expertise with a new entity that will have no particular expertise will improve the appeals processes. The jurisdictions of the various affected agencies cover complex subject matters and the career staff has built up significant expertise.

The proposed legislation also charges that the commission has two other duties: to look at organizational, procedural and structural changes; and to look for ways to reduce the time for appeals. It appears as though a concern with the processing of equal employment opportunity issues is the main force driving the desire for change in the complaint and appeal process.

The answer is not study commissions or legal structural changes. The answer is adequate funding and staffing at the EEOC and at other agencies, so that they have the resources and the personnel to do their job in a fair and a timely process. As we sit here today and as we have heard referenced earlier, the administration is making moves to cut the budget of the EEOC by \$4 million. The EEOC is understaffed. My understanding it has been under a hiring freeze since 2001, and the agency projects that its backlog of cases will continue to grow again next year, as it did from the past year.

It is totally understandable that neither employees nor managers are pleased when cases linger on for ever-increasing lengths of time. Congress should not be waiting for a commission study to make a report when Congress has the authority to correct the problem this year. The EEOC budget should not be cut by \$4 million, but should be increased, so that additional staff may be hired. EEOC funding should be at such a level that its backlog of cases not only does not increase, but that it is actually reduced.

It seems that this study commission is being charged with fixing a car when the only problem is that the gas tank needs to be filled. NTEU's position is that these agencies should first be given the resources they need to do their job. Only then, if problems still exist, should we explore structural, legislative and procedural changes.

And finally, Mr. Chairman, establishing a commission to recommend changes in the Federal employees processes is relay an unnecessary waste of taxpayer money. NTEU and other interested parties have given their views on the SEA proposal, and I am sure that we will be happy to work with the committee on any other alternatives that improve the process without diminishing any party's rights, such as winning adequate funding for the agencies that need it.

I would also just add that the comments made about employees' mis-use of the existing systems, you could make a long list of many things that are abused, including many managers and executives who may abuse the authority they have when dealing with employees. I don't see anyone taking away the authority that managers and executives have when they mis-use it, so I don't see that employee rights should be taken away from them under the guise of a commission to streamline a process when the known problems with the process are not being dealt with.

Thank you, and I look forward to any questions you may have.
[The prepared statement of Ms. Kelley follows:]



**STATEMENT OF COLLEEN M. KELLEY
NATIONAL PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION**

on

**ESTABLISHING A COMMISSION TO RECOMMEND
IMPROVEMENTS FOR THE FEDERAL EMPLOYEES APPEALS
PROCESS**

presented to

Federal Workforce and Agency Organization Subcommittee

Committee on Government Reform

U.S. HOUSE OF REPRESENTATIVES

July 11, 2006

**STATEMENT OF COLLEEN M. KELLEY, NATIONAL PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION
on
ESTABLISHING A COMMISSION TO RECOMMEND IMPROVEMENTS FOR
THE FEDERAL EMPLOYEES APPEALS PROCESS**

July 11, 2006

Chairman Porter, Ranking Member Danny Davis and members of the House Government Reform Subcommittee on the Federal Workforce and Agency Operation, my name is Colleen M. Kelley and I am National President of the National Treasury Employees Union (NTEU). I appreciate the opportunity to present this statement on behalf of NTEU on the proposal to establish a commission to recommend improvements in the federal employees appeals processes.

The National Treasury Employees Union represents some 150,000 workers in 30 government agencies, making it the largest independent non-postal federal labor union. NTEU has worked for over 65 years to improve and defend federal employee protections, rights, and benefits. We take very seriously the proper adjudication of the statutory and contractual rights of our members and any acts of discrimination or unfair treatment towards them.

Last year, the Subcommittee considered a proposal by the Senior Executives Association (SEA) for the establishment of a new Article I trial level court, akin to the Court of Federal Claims or the Tax Court, to be known as the Federal Employee Appeals Court. This Court was intended to combine "all" appeal processes for federal employees into one forum. NTEU strongly objected to this proposal. We have provided a detailed explanation of the reasons for our objections to the Subcommittee, but let me briefly review our concerns.

The proposed Court would be, in effect, a super-agency, folding under one umbrella the functions of several independent agencies. Thus, we would have an enormous unwieldy conglomerate agency, like DHS, to perform all of the diverse administrative and review functions of many separate agencies. This would be a bureaucratic nightmare. The Court

would transform administrative functions into judicial ones, creating a process that would become excessively legalistic. Cases that now are handled pro se or by non-lawyer representatives would instead be more likely handled before the Court by lawyers.

Such a court would be particularly ill-suited to handle thousands of complaints arising throughout the country. While the MSPB and the FLRA, for example, have regional offices to advise employees, and their adjudicators conduct hearings close to the workplace, this Court is likely to be based in Washington. Centralization would work a hardship on employees. They and their witnesses would have to travel to be heard, representing a considerable expense. In addition, they would be far removed from those able to provide guidance and investigation of their complaints.

NTEU agrees that complaints should be resolved quickly without compromising justice and fairness. We feel, however, that the proposed Federal Employee Appeals Court is misguided. NTEU also believes that the proposal for a commission to recommend legislative or structural changes to the appeals process misses the real issue.

The proposed legislation asks that the Commission review consolidation of operations or agencies. We do not believe that replacing or consolidating agencies with specialized expertise with a new entity with no particular expertise will improve the appeals processes. The jurisdictions of the various affected agencies cover complex subject matters, and the career staff has built up significant expertise.

The proposed legislation also charges the Commission with two other duties – to look at organizational, procedural and structural changes and to look for ways to reduce the time for appeals. It appears as though a concern with the processing of equal employment opportunity issues is the main issue driving the desire for change in the complaint and appeal process. NTEU has a very strong and firm response to this. The answer is not study commissions or legal or structural changes. The answer is adequate funding and staffing at the Equal Employment Opportunity Commission (EEOC) and other agencies so that they have the resources and personnel to do their job in a fair and timely process. Mr. Chairman,

as we sit here today, the administration is making moves to cut the budget of the EEOC by \$4 million. The truth is that the EEOC is understaffed. It has been under a hiring freeze since 2001 and the agency projects that its backlog of cases will continue to grow again next year as it did from the past year. It is totally understandable that neither employees nor managers are pleased when cases linger on for ever increasing lengths of time. Congress should not be waiting for a study commission to make a report when an obvious and large part of the answer is staring it in the face, which Congress has the authority to correct this year. The EEOC budget should not be cut by \$4 million but should be increased so that additional staff may be hired. EEOC funding should be at such a level that its backlog of cases not only does not increase, but that is actually reduced. Mr. Chairman, I feel that this study commission is being charged with fixing a car when the only problem is that the gas tank needs to be filled. NTEU's position is that these agencies should first be given the resources they need to do their job; only then, if problems still exist, should we explore structural, legislative and procedural changes.

In addition to the inadequate funding at EEOC, let me mention problems of a different nature at the Office of Special Counsel, another agency charged with protecting employee rights. Here, in NTEU's judgment, the issue is not resources nor structural problems but a lack of commitment by the Office's leadership to vigorously enforce law and regulation. Because of the Special Counsel's actions against its own employees and its restrictive view of federal employees' rights, we have no confidence in the Special Counsel's leadership. We believe federal employees should have a Special Counsel which they can have trust in to fairly and vigorously defend their rights.

Finally, Mr. Chairman, establishing a commission to recommend changes in the federal employees appeals processes with paid staff and other expenses is an unnecessary waste of taxpayer money. NTEU and other interested parties have given their views on the SEA proposal and I'm sure would be happy to work with the Committee on other alternatives that improve the process without diminishing any parties' rights. We particularly stand ready to work with the Committee to win adequate funding for agencies such as the EEOC.

Mr. Chairman, NTEU appreciates your consideration of our viewpoint and we are happy to assist you and the other members of the Subcommittee regarding this matter in any way we can. Thank you.

Mr. PORTER. Colleen, I like you, because you always tell me what you think. I appreciate that. [Laughter.]

Thank you very much.

Mr. Gage.

STATEMENT OF JOHN GAGE

Mr. GAGE. Thank you, Mr. Chairman.

On behalf of the more than 600,000 employees represented by AFGE, I want to thank you for this opportunity to present our views on the issue of creating a commission to study streamlining employee appeals.

The proposed commission would be charged with studying and proposing revisions to the current Federal employees grievance and appeals system, having four main duties: one, identifying overlaps between the jurisdiction of these four agencies; comparing the average processing times of the various types of cases in agencies; identifying impediments to the fair and timely investigation of adjudication of such cases; and finally, presenting recommendations for improvements in seven specific areas, to include possible consolidation of agencies and/or organizational, procedural or other changes in order to improve the efficiency, effectiveness and fairness of their appeal system.

AFGE cannot support the commission as proposed. It is too large, has too broad a mandate, would take too long to deliberate, and would lack any real credibility because its makeup is too heavily weighted in favor of political appointees. Despite our opposition to the commission as currently proposed, we appreciate the subcommittee's expressed willingness to act in this area and certainly believe there is room for improvement in three of the areas identified in the bill. These are: adequately funding the EEOC to reduce its case backlogs, both Federal sector and private sector; improving the EEOC investigation process, which presently takes much too long and involves a built-in conflict of interest; and last, reforming appeals of mixed cases, or those cases which involve two elements, adverse action along with discrimination or other prohibited personnel practices.

I will discuss each of these problems briefly and discuss ways to fix them which do not require additional study and which would be cheaper, easier, more fair and better for all involved. If a commission is to be established, its charge should be limited to these three areas. First, the EEOC must be adequately funded in order to reduce its huge backlogs, both in the Federal sector cases processing and Federal sector appeals, as well as in the private sector. Since 2001, budget cuts and hiring freezes have crippled the agency, increasing backlogs numbering in the tens of thousands. Despite this growing backlog, the agency has already lost 20 percent of its work force, and has been unable to replace experienced investigators, lawyers, paralegal and clerical staff because of a hiring freeze in effect since 2001.

The remedy for the backlog is simple: provide the EEOC with adequate funding so they can hire the additional staff needed to process its Federal sector discrimination cases in a timely manner. Any available funding should be put directly into the EEOC's budget and earmarked for reducing case backlogs.

AFGE would also support a proposal to remove the authority to investigate EEOC charges from the employing agencies, and transfer this function to the EEOC itself. However, Congress would have to allocate substantial funding to go along with this substantial workload, so that the EEOC could hire adequate staff or arrange for details or transfers of EEO investigators from the various agencies to a new central office or regional office.

The goal of the transition would be to complete all investigations within the statutory mandate of 180 days. Such a reform could significantly improve both the quality, timeliness and the perceived credibility of the Federal employee investigative process, and could lead to better decisionmaking and fewer hearings in the long run. However, the already overburdened EEOC should not be reassigned this responsibility without ensuring adequate funding. That would be worse than the status quo.

The most pressing issue to reform is the cumbersome and duplicative appeal process for mixed cases, which involves two separate causes of action, an adverse action coupled with allegations of discrimination or other prohibited personnel practices. Under current rules, such cases could be heard in at least two separate administrative agencies and two separate courts. The solution to the problem identified in the Government employee appeals process is not to merge the highly dissimilar MSPB, EEOC, FLRA and OSC into a single super-agency. Instead, the real challenge is to cut down on the number of multiple forums that employees can or in some cases must use when attempting to process a single appeal to finality, especially the dreaded mixed case.

The solution to the problem of extraordinary delays and procedural confusion and processing of mixed cases is to simplify and streamline the Federal appeals process by permitting employees to choose a single forum to decide all issues in accordance with established law. Law and regulation could be revised to eliminate any layer of cross-appeal among arbitration decisions, the EEOC and/or the MSPB, no matter where the case arose. Similarly, employees who elect to file cases with MSPB or EEOC in the first instance should expect finality in their administrative appeals while retaining the right to seek de novo judicial review in appropriate cases.

Mr. Chairman, let me conclude my remarks by emphasizing that the committee needs to redirect its streamlining efforts, one, away from any proposal to create a commission, and two, toward the heart of the confusion: the backlogs at the EEOC and the overlapping jurisdiction of the MSPB and EEOC, where simple discrimination cases can languish for years and where employees are forced to file numerous appeals of the same case. Once an employee and an agency get wrapped up in a mixed case, it may be years before they see the light of day.

That concludes my statement, I will be happy to answer any questions.

[The prepared statement of Mr. Gage follows:]

72

STATEMENT BY

**JOHN GAGE
NATIONAL PRESIDENT**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

**THE SUBCOMMITTEE ON FEDERAL WORKFORCE
AND AGENCY ORGANIZATION**

HOUSE COMMITTEE ON GOVERNMENT REFORM

ON

ESTABLISHING A FEDERAL EMPLOYEES APPEALS COMMISSION

JULY 11, 2006

Mr. Chairman and members of the Subcommittee, my name is John Gage and I am the National President of the American Federation of Government Employees, AFL-CIO. On behalf of the 600,000 employees represented by AFGE, I want to thank you for the opportunity to submit our views on the issue of creating a Commission to study streamlining employee appeals.

The proposed Commission would be charged with studying and proposing revisions to the current Federal employees grievance and appeals system, including charges, cases and appeals now investigated by, litigated by and/or decided by the Merit Systems Protection Board ("MSPB"), the Federal Labor Relations Authority ("FLRA"), the Equal Employment Opportunity Commission ("EEOC"), and the Office of Special Counsel ("OSC"), respectively. It would be made up of six political appointees (the directors of each affected agency, the Office of Personnel Management ("OPM"), and the Federal Mediation and Conciliation Service ("FMCS"), two representatives of supervisors and managers and two union representatives. It would be charged with four main duties:

- 1) identifying overlaps between the jurisdiction of these four agencies,
- 2) comparing the average processing times of the various types of cases and agencies,
- 3) identifying impediments to the fair and timely investigation or adjudication of such cases, and
- 4) presenting recommendations for improvement in seven specific areas, to include possible consolidation of agencies, and/or organizational, procedural, or other changes in order to improve the efficiency, effectiveness, and fairness of their appeals system.

AFGE CANNOT SUPPORT THE COMMISSION AS PROPOSED.

It seems to us that any employee-oriented organization, regardless of its particular constituency, should be supportive of the broad, general goal of improving employee appeals. This is particularly true in the federal sector, where a fired employee is off the payroll and out the door and a suspended employee is forced to serve a suspension long before the appeals process runs its course. In this context, it is clearly in everyone's interest to have a fair, straightforward, and expeditious appeal process that does not consume the limited resources of the employee, the agency, and the taxpayer in years of expensive litigation. Streamlining the employee appeals process is a laudable goal for this subcommittee, and AFGE and its members would welcome certain improvements in the federal employees appeal system.

However, we cannot support the Commission as proposed. It is too large, has too broad a mandate, would take too long to deliberate over unnecessary recommendations, and would lack any real credibility because its make-up is too heavily weighted in favor of political appointees.

For example, our experience with the A-76 Commission in 2001-02, was not a positive one. There, the Commission was used as an excuse against undertaking legislative efforts to reform the OMB privatization agenda, while at the same time, the administration was proceeding full speed ahead with its privatization plans. Spending time "studying" and "recommending" proposals

when the administration has already embarked on a different course of action simply wastes everyone's time.

Another concern is whether the commission would be required to reach consensus or otherwise respect the views of the minority, for example by including a minority report or dissenting views in addition to the main recommendations. All too often, such Commissions, like the recent Social Security Reform Commission and Tax Reform Commission, are stacked with administration officials with pre-determined viewpoints. Such bodies result in an enormous waste of time and taxpayer dollars, since they invariably end up simply rubber-stamping the proposals of the majority.

AFGE RECOMMENDS INSTEAD THAT ANY BILL BE NARROWLY TAILORED TO FOCUS ON CRITICAL IMPROVEMENTS TO THE EEOC AND MIXED CASE PROCESSES.

Despite our opposition to the Commission as currently proposed, we appreciate the Subcommittee's expressed willingness to act in this area, and certainly believe there is room for improvement in three of the areas identified in the proposed bill.

These are:

- A. adequately funding the EEOC to reduce its huge case backlogs, both federal sector and private sector;
- B. improving the EEOC investigative process, which presently takes much too long and involves a built-in conflict of interest, and
- C. reforming appeals of "mixed cases," or those cases which involve two elements: adverse actions, along with allegations of discrimination or other prohibited personnel practices, and currently have to be heard in at least two separate administrative agencies and two separate courts.

I will discuss each of these problems briefly, and suggest ways to fix them which do not require any additional study, and which would be cheaper, easier,

more fair, and better for all involved: employees, employing agencies, and taxpayers. If a Commission is to be established, its charge should be limited to these three issues.

A. The EEOC must be adequately funded in order to reduce its huge backlogs, both in federal sector case processing and federal sector appeals, as well as in the private sector.

AFGE is very concerned about the crisis in staffing and funding which has developed in recent years at the EEOC. As you well know, the EEOC is the nation's discrimination watchdog, tasked with protecting employees and job applicants from illegal discrimination and harassment, both by federal government employers and by private sector employers. Since 2001, the Bush administration has imposed budget cuts and hiring freezes that have crippled the agency, increased backlogs, and made it very difficult for it to carry out its mission by investigating cases and resolving appeals in a timely manner. For every victim of discrimination caught in this backlog, justice delayed is justice denied.

The EEOC is experiencing significant staff attrition and has a backlog of cases numbering in the tens of thousands. The agency's own budget projections estimate that its backlog of private sector discrimination charges will rise from 33,562 in fiscal 2005 to nearly 48,000 in fiscal year 2007. Despite this growing backlog, the agency has already lost 20 percent of its workforce, and has been

unable to replace experienced investigators, lawyers, paralegal and clerical staff because of a hiring freeze in effect since 2001.

Despite the EEOC's glaring need for additional staff and other resources, the administration has proposed cutting its budget for next year by an additional \$4 million over the already inadequate level. To add insult to injury, the agency itself is spending its limited funds on a privatized call center and a reorganization plan which has downgraded local offices and reduced staff, which could further slow down case processing. These changes would weaken access to the EEOC for thousands of federal employees who suffer discrimination every year, and should be reversed.

In addition, the proposed personnel changes for the Departments of Defense and Homeland Security are likely to lead to a dramatic increase in EEOC charges filed by federal sector employees over the next few years, as more and more employees challenge the new "performance payouts" proposed by the two departments.

Given its reduced budget and exodus of experienced workers to retirement, we fear that the EEOC will be unable to reduce its backlog of discrimination cases. The cause of the backlog is simple: without proper funding to hire badly needed staff members, the agency cannot schedule hearings in discrimination cases, Administrative Judges cannot issue decisions, and federal employee appeals cannot be resolved, meaning many cases must languish for years and millions of federal employees are left unprotected.

The remedy for the backlog is also simple: provide the EEOC with adequate funding so that it can hire the additional staff needed to process its federal sector discrimination cases in a timely manner. All federal employees are entitled to a prompt, full and fair hearing of their discrimination claims, especially at a time when the workforce is aging rapidly and both disability and sexual harassment claims continue to increase. Any available funding should be put directly into the EEOC's budget and earmarked for reducing case backlogs, rather than used to fund more studies.

B. AFGE does support transferring authority for EEO investigations from employing agencies to a central, independent agency (the EEOC itself), as long as sufficient funding is provided to support the transfer and hire the necessary investigators.

AFGE agrees with the Committee's suggestion that it would be more efficient to have a central, independent agency (the EEOC itself), conduct the initial investigation of EEO complaints against federal agencies, as long as sufficient funding is provided to support the transfer and hire the necessary investigators.

Allowing agencies to investigate their own EEO charges as they do now takes much too long and presents an inherent conflict of interest. Although federal regulations require that such investigations be completed within 180 days, agencies took an average of 280 days in FY 2004 and 237 days in FY 2005. Overall, the average processing time for closing complaints at the agency level was 469 days in FY 2004, and 411 days in FY 2004.

AFGE would support a proposal to remove the authority to investigate EEOC charges from the employing agencies, and transfer this function to the EEOC itself. However, Congress would have to allocate substantial funding to go along with this substantial workload, so that the EEOC could hire adequate staff (or arrange for details or transfers of EEO investigators from the various agencies to the new central office or regional offices). The goal of the transition would be to complete all investigations within the statutory mandate of 180 days. Such a reform could significantly improve both the quality, timeliness and the perceived credibility of the federal employee investigation process, and could lead to better decision-making and fewer hearings in the long run. However, the already-overburdened EEOC should not be reassigned this responsibility without ensuring adequate funding. That would be worse than the status quo.

C. The overlapping jurisdictions and double exhaustion requirements for mixed cases should be abolished.

The most pressing task for this committee, or for a Commission if one is to be created, should be to reform the cumbersome and duplicative appeal process for "mixed cases" which involve two separate causes of action: an adverse action coupled with allegations of discrimination or other prohibited personnel practices, or violations of *both* a collective bargaining agreement and law. Under current rules, such cases have to be heard in at least two separate administrative agencies and two separate courts.

While we admit there is room for some improvement in the present system, AFGE cannot support any Commission charged with merging the MSPB, EEOC,

FLRA, and/or OSC into a single "superagency," nor do we believe that any changes to the collectively bargained grievance and arbitration process are needed at this time. For the last 25 years, since the passage of the Civil Service Reform Act ("CSRA") and the establishment of the federal employee appeals system, there has been a clear, significant, and valid jurisdictional distinction between the cases heard by these separate agencies. The MSPB hears individual employee appeals from agency personnel actions. Employees have the right to appeal to the Board if they are removed, demoted or suspended for misconduct or poor performance, subject to certain Reductions in Force (RIF) actions, or denied retirement or certain insurance benefits. The EEOC hears only cases involving discrimination on the basis of race, color, sex, national origin, religion, age or handicap. OSC investigates and sometimes prosecutes whistleblower cases, Uniformed Services, Hatch Act, and other very specialized cases.

In contrast, the FLRA, unlike these other agencies, is not a "personnel" agency. The FLRA handles representation issues and labor-management disputes between agencies and unions (and between unions and employees, or other unions), not disputes between employees and their employing agencies. Like the National Labor Relations Board in the private sector, the FLRA has specialized expertise in complex bargaining issues, unit representation issues, negotiations, labor unions, review of arbitration awards, and cooperative labor-relations programs. No other federal agency has the experience or capacity to handle such labor-management matters.

The solution to the problems identified in the government's employee appeals processes is not to merge these five highly dissimilar agencies into a single "super-agency." Instead, the real challenge is to cut down on the number of

multiple forums or steps that employees can or, in some cases must, avail themselves of in attempting to process a single appeal to finality, especially the dreaded "mixed case" -- by definition, an appeal of an adverse action (or serious discipline) coupled with a claim that the agency action was motivated by discrimination. The simultaneous and overlapping jurisdiction of the EEOC and MSPB over these cases creates a situation where multiple steps are required to process some appeals.

For example, a "mixed" case can BEGIN with either an EEO charge, an MSPB appeal, or a grievance under the negotiated procedure. The problem, as we see it, occurs after the original forum issues its decision. Rather than being "bound" by a final decision of the selected administrative tribunal, employees may be forced to file a second appeal in another administrative tribunal, resulting in seemingly endless appeals.

Thus, when critics complain about the confusing and circuitous path that an employee appeal can take as it winds its way to a final decision, and the lengthy time such appeals may take, they are normally addressing "mixed cases." These cases arise as follows:

Most federal employees have three alternative avenues for pursuing claims of unfair or illegal treatment in the workplace. However, they cannot complain about the same issue both through the grievance process and in a statutory process such as the EEO or MSPB -- electing one forum operates as a waiver of the other. 5 U.S.C. § 7121(d); 29 C.F.R. 1614.301(a).

1. *The Grievance/Arbitration Route*: The Courts have recognized that "[t]he negotiated grievance procedure is much simpler" than most other employee appeals systems. *AFGE Local 2052 v. Reno*, 992 F.2d 331, 333 (D.C. Cir. 1993).

Under the CSRA, the negotiated grievance procedure for an employee covered by a collective bargaining agreement is generally the exclusive avenue for any bargaining unit federal employee to resolve a grievance. 5 U.S.C. § 7121(a). A typical collective bargaining agreement defines a grievance as "a complaint . . . concerning his or her conditions of employment," and may assert a violation of the contract itself or of "any law, rule or regulation affecting conditions of employment." Many contracts also contain broad Equal Employment Opportunity (EEO) obligations which prohibit discrimination on the basis of age, sex, race, religion, physical handicap, color or national origin. In such cases, a claim of illegal action or discrimination can be filed as a grievance (by either the employee or by the Union) and resolved by an arbitrator. Normally, the arbitrator's decision is final and binding, and the case will end there.

However, if the employee is subject to an adverse action or separate statutory rights are involved, such as the right to be free of employment discrimination or of "prohibited personnel practices," such as retaliation, favoritism, and cronyism, the grievant retains the right to request review of the arbitrator's final decision from either the EEOC or the MSPB, if the case could have been filed with that agency in the first instance. See 5 U.S.C. § 7121(d) ("mixed cases"), (e) (adverse actions), (f) (other prohibited personnel practices, whistle-blowing).

2. *The EEOC Route*: In the alternative (but not at the same time), the employee could file an EEO complaint with his or her agency and then seek a

hearing before the EEOC, as set forth in 42 U.S.C. Sec. 2000e-16 and 29 C.F.R. 1614, with or without Union assistance. In brief, an employee choosing this route must first seek "EEO counseling" within 45 days of the allegedly discriminatory event, then normally must file a "formal complaint" within 15 days after the end of the counseling period, after which the agency must investigate. After waiting at least six months, the employee may request a hearing before an EEOC administrative judge, after which the judge will issue a tentative decision, which the agency can accept or appeal.

The employee may also choose to appeal an adverse decision in one of two ways – either through an appeal to the EEOC's Office of Federal Operations, which acts as an appellate review body, or by filing a lawsuit in district court, which hears the case *de novo* – as though for the first time. 42 U.S.C. § 20003-16(c); 29 C.F.R. § 1614.401. The EEOC process was improved and simplified in 1999, so that an Administrative Judge may now award compensatory damages in addition to back pay, front pay, reinstatement and other "appropriate remedies," even if the plaintiff chooses not to file in court.¹

3. *The MSPB Route*: The third venue for federal employees to raise claims of unfair treatment, retaliation and/or discrimination claims is as a challenge to an adverse action such as a suspension, reduction in grade, or removal with the Merit

¹ *West v. Gibson*, 527 U.S. 212 (1999). Before passage of the 1991 Civil Rights Act, private and federal employees' compensatory damages for Title VII, the ADA and Rehabilitation Act violations were limited to back pay. The CRA expanded these damages to include full compensatory damages, including pain and suffering, for both federal and private plaintiffs. Revisions to the federal sector appeals process in 1999 also improved case processing times and efficiency and encouraged settlement.

Systems Protection Board. If the employee asserts that the action was taken as a result of discrimination, the case is treated as a "mixed case." See 5 U.S.C. § 4303 (performance-based actions), 5 U.S.C. § 7512 (actions to promote the efficiency of the service); 5 U.S.C. § 7701 (MSPB jurisdiction). As with the EEOC procedures described above, an employee may challenge such an action through the grievance procedure instead of appealing to the MSPB, but may not do both. 5 C.F.R. 1201.3 (c).

THE MULTIPLE APPEAL PROBLEM

Most of the time, the employee must make a binding choice and can only file one case, in one forum. In other words, they can file "under the statutory procedure or the negotiated procedure but not both." 5 U.S.C. § 7121(d). However, arbitration of discrimination cases and "mixed cases" present additional hurdles.

Arbitrations Involving Discrimination

For example, if the employee selects the grievance/arbitration route for a case which includes a claim of discrimination, his or her appeal route case differs. Rather than proceeding directly into court, the employee must then exhaust a second administrative review by proceeding first to the EEOC. The absurdity of requiring an employee to file a costly and duplicative administrative appeal with the EEOC after he or she has already arbitrated her case was the subject of a court case in *Johnson v. Peterson*, 996 F.2d 397 (D.C. Cir. 1993).

In *Johnson*, AFGE argued that the passage of the CSRA was intended to streamline these layers of appeal. However, the U.S. Attorney's Office was able to convince the U.S. Court of Appeals for the D.C. Circuit that Congress intended to

require employees to exhaust an EEOC appeal *after* completing their arbitration case, *before* they could proceed to court. *Johnson*, 996 F.2d at 399-400, citing 5 U.S.C. § 7121(d). This rule is absurd, expensive and pointless, since the agency is already aware of the EEOC issue and has already litigated the matter once.

Adverse Action Appeals/EEO Charges Involving Discrimination

For a "mixed case" (appeals of removals or suspensions greater than 14 days coupled with a claim of discrimination), the CSRA establishes a special, even more complex procedure. See 5 U.S.C. § 7702(a)(1). As noted above, the aggrieved employee must make an initial, binding choice. He may seek relief either under a statutory procedure (MSPB or EEOC) or under the negotiated grievance procedure, but not under both. 5 U.S.C. § 7121(d).

Under the statutory procedure, the employee may first file the complaint with his employing agency which has 120 days to reach a decision. 5 U.S.C. § 7702(a)(2). If the agency decides against the employee, the employee may either appeal to the MSPB or seek direct judicial review. 5 U.S.C. § 7702(a). If an employee appeals to the MSPB, it must reach a decision within 120 days, at the end of which period the employee may either proceed directly to court or seek further administrative review. 5 U.S.C. § 7702(a)(3). An employee who wishes to follow the administrative route may appeal the MSPB's decision to the EEOC which, under the statute, has 30 days to decide whether to hear the case. 5 U.S.C. § 7702(b)(1).

If the EEOC rejects the case or if it accepts the case and agrees with the MSPB's decision, the employee may then proceed to court. 5 U.S.C. § 7702(b)(5)(A). If the EEOC accepts the case but disagrees with the MSPB,

however, it must remand the case to the MSPB for further consideration. 5 U.S.C. §§ 7702(b)(3)(B), (b)(5)(B). Upon reconsidering the case, the MSPB issues an opinion that either agrees with the EEOC or rejects the EEOC's findings. If the MSPB agrees with the EEOC, the employee may seek judicial review. 5 U.S.C. § 7702(c). If the MSPB rejects the EEOC's findings, however, the statute calls for the creation of a *special panel* to make a final decision. 5 U.S.C. § 7702(d)(1). The special panel's final decision is then subject to one final judicial review. 5 U.S.C. § 7702(d)(2)(A).

As with the double appeals in the arbitration-EEOC mixed case noted above, such a tortuous path is both bizarre and inefficient, and benefits neither the employee nor the agency. Nevertheless, in *AFGE Local 2052 v. Reno*, 992 F.2d 331, 333 (D.C. Cir. 1993), which involved a "mixed case" brought under the negotiated grievance procedure and heard by an arbitrator, the U.S. Attorney's Office was once again able to convince the U.S. Court of Appeals for the D.C. Circuit, *over AFGE's objections*, that such an appellant had to file a costly and duplicative administrative appeal, this time with the MSPB, prior to seeking judicial review. The Court criticized "the complex yet ultimately ascertainable procedural scheme that emerges from the language of the CSRA," noting that there are six different administrative stages prior to a final decision in the processing of a mixed case that provide employees with an opportunity to go directly to court with their appeal. *AFGE Local 2052*, 992 F.2d at 336. In the end, the Government's position made it extremely difficult, expensive and time-consuming for employees to navigate this Byzantine system.

CONCLUSION

To rectify the extraordinary delays and procedural confusion which characterize the processing of mixed cases, AFGE recommends that the federal appeals process be simplified and streamlined by permitting employees to choose a *single forum* (MSPB, EEOC, or arbitration) to decide all issues in accordance with established case law. Experience has shown that employees may properly select a single, appropriate forum in which to pursue their discrimination claims for a particular case, and bring to an end the labyrinthine process that currently exists.

Finally, AFGE has attempted to work with both the Department of Homeland Security and the Department of Defense to ensure that their new proposed appeals systems preserve due process and fairness, while simplifying and speeding up the appeals process. In both cases, we were unfortunately forced to obtain court injunctions in order to ensure due process and to preserve employee's ability to seek review from an independent third party, such as an arbitrator or an MSPB or EEOC Administrative Judge. We agree with the courts that it is absolutely critical that any such system remain fair and independent, both in perception and in reality, so that it may continue to serve the essential purpose of safeguarding and protecting the merit system from discrimination and abuse, and so that it retains the trust and confidence of employees, managers and agencies and unions alike.

Mr. Chairman, let me conclude my remarks by emphasizing that the Committee needs to redirect its streamlining efforts: (1) away from any proposal to create a Commission and (2) toward the heart of the confusion -- the backlogs at the EEOC and the overlapping jurisdiction of the MSPB and EEOC, where simple discrimination cases can languish for years, and where employees are forced to file

numerous appeals of the same case. Once an employee and an agency get wrapped up in a mixed case, it may be years before they see the light of day.

Rather than creating yet another Commission to study the problem, this Subcommittee could fix the problem by revisiting the Court's decisions in *Johnson and AFGE Local 2052*. For example, the Committee could revise the law and regulations to expressly eliminate any layer of cross-appeal between arbitration decisions, the EEOC and/or the MSPB, no matter where the case arose. Similarly, employees who elect to file cases with MSPB or EEOC in the first instance should expect finality in their administrative appeals, while retaining the right to seek *de novo* judicial review in appropriate cases.

The FLRA, the MSPB, the OSC, and the arbitration systems, by contrast, are functioning well and should be exempted from any Commission. EEOC backlogs, agency investigations and mixed cases are the three black holes of employee appeals. By contrast, the FLRA, the MSPB, the OSC, and the arbitration systems, by contrast, are functioning well and do not require intervention by this Committee at this time, no do they require "study" by a Commission. There is no need to appoint their Directors to any Commission, nor to tinker with their functioning, except perhaps to allocate more additional funding so that they can continue to process cases and carry out their mandates, especially the FLRA. In particular, AFGE is unaware of any delays in processing time for arbitration cases, except where agencies intentionally delay cases in an effort to game the system. Such situations can easily be resolved by the individual arbitrator assigned to the case, and do not require any action by this Subcommittee or by any Commission.

AFGE thanks the Committee for the opportunity to share our views. Our members look forward to working with both the House and Senate to enact laws that improve protections for federal employees.

This concludes my statement. I will be happy to respond to any questions the members may have for me.

Mr. PORTER. Thank you, John. You are pretty mellow today.

Mr. GAGE. Yes, I am. [Laughter.]

I just got back from Alaska. It is mellow up there.

Mr. PORTER. We will talk about that. Thank you for your comments.

Ms. Heiser.

STATEMENT OF KAREN HEISER

Ms. HEISER. Chairman Porter, Ranking Member Davis, on behalf of the nearly 200,000 managers and supervisors in the Federal Government whose interests are represented by the Federal Managers Association, allow me to thank you for the opportunity to present our perspective on the need for reforms in the employee appeals process.

We are pleased to comment on the draft legislation to establish a commission to review jurisdictional and procedural issues and make recommendations to Congress for improvement. The established systems for employees to address grievances against a manager or agency are inconsistent in their ability to respond to a complaint in a timely manner and to weed out frivolous claims. Employees have a broad range of avenues available to them. They can present appeals to multiple independent organizations and even send letters to the congressional representatives. We support the mission of all these agencies and respect them as independent bodies, established to help maintain the integrity of the Federal work force.

However, at the hearing before this subcommittee on November 9, 2005, it became clear there was a disparity in the efficiency and effectiveness of these agencies. The point was made that managers and supervisors must weigh as equal burdens the choice to make the right decision and the likelihood of going through the process of appeals and potential retaliation. As was pointed out in the testimony of the Senior Executives Association, employees can file claims without merit and maneuver through the appeals processes for years. In the meantime, managers are passed over for career-advancing opportunities in the face of mostly un-meritorious claims.

More importantly, this same resolution limbo allows claims of merit to linger for years as an employee works with a boss who has taken unwarranted action against them. In either scenario, entire work groups suffer in this dysfunctional work environment.

Under the current EEOC process, an employee can file a claim with little or no substantiation. Then, due to the enormous volume of cases, EEOC often puts pressure on settlement to avoid adding to the backlog. According to its 2005 annual report, the EEOC seems to be moving in the right direction to improve the timeliness of investigations, hearing receipts and merit decisions. We commend the commission for their efforts to improve the process, address the backlog and reduce the overall time line for responses.

However, much still needs to be done. Of the 22,974 cases closed in 2005, only 345 were found to have discrimination involved, as per the EEOC annual report. That means 1.5 percent of the cases were found to be meritorious in their claims of wrongful action,

which is slightly more than the 1.3 percent of cases in 2004 that were found to have the same statistics.

The other independent agencies do not seem to have the same backlog or process problems, but remain in need of review. The Merit Systems Protection Board is closer to the mark in their timeliness of processing claims and percentage of decisions rendered. On average, the board renders decisions within 100 days of filing and supports the actions of managers and supervisors 80 percent of the time. In practice, however, MSPB encourages settlement over full processing of the claim, which somewhat invalidates these results.

It is clear to us that the entire appeals process offers too many options to employees looking to file frivolous claims against managers trying to address poor conduct, under-performance or other problems. The EEOC process must be streamlined and more stringent standards must be placed on claims filed by employees. We also believe that managers' rights need to be taken into consideration due to the excessive number of frivolous claims determined each year by EEOC decisions.

The legislation proposed by you, Chairman Porter, to establish a commission to review the Federal employee appeals process presents a thoughtful and deliberate balance in the effort to address these issues by first identifying the current state. This will allow agency employee representatives to sit down in an open dialog and discuss reform proposals in the light of a thorough assessment of all the Federal employee appeals outlets and their missions. The proposal of a commission to study these issues takes us a step forward in addressing the failures of the Federal employee appeals process and opens the door to understanding proper solutions to remedy the problem.

For too long, managers, supervisors and employees have suffered at the hands of lengthy processes and broken systems, disconnected options and eventually unsatisfactory decisions. For the manager working with an employee who is a frequent filer or an employee working with a discriminatory supervisor, resolution must come at a quicker pace.

We support the efforts of Chairman Porter and believe this legislation would take us closer to fixing the broken system that currently exists in the Federal employee appeals process, and we are honored to be included in this hearing and the proposed legislation.

If I could offer a couple of comments that are not in my written statement, but in response to issues that came up during the first panel, there was discussion over commission membership, independent observers or independent oversight authority and the question was put to the last panelist whether they felt they could solve this problem. I would put to you two thoughts for consideration regarding any type of independence. The involvement of organizations like the Center for Excellence, etc., as resources is certainly valuable. As far as any type of independent oversight, we feel GAO would be the most appropriate body.

However, in following Mr. Bloch's thoughts, my home base has been engaging in a very aggressive continuous improvement campaign the last few years involving this same type of thing where we have disconnected bodies of people who contribute to a problem.

And I would put to you that this process has to be facilitated by someone from outside the Government who is an expert—top-notch at resolving these problems. The idea of charting isn't necessarily Power Point presentations, it is called value stream mapping, so that each organization has a golden opportunity here to improve what they are responsible for, and together perhaps improve the entire process of resolving employee disputes and issues.

There is a lot of good material out there, it is organizational quality improvement stuff, and I think it is right on point with your efforts. Congressman Davis, you had asked if anyone was not represented. I have some food for thought on that. Due to no lack of effort on the part of my fellow panelists, Mr. Gage and Ms. Kelley and their peers in the labor community, there are a lot of unrepresented, non-bargaining unit Federal employees that don't have an outlet in this voice.

And I don't like to offer problems without suggested solutions. The best one I could come up with right now is perhaps a detailed posting by OPM for 1-year assignments to this commission for your thoughts.

Thank you very much. I am happy to answer any questions you have.

[The prepared statement of Ms. Heiser follows:]



Testimony
Before the United States House of Representatives
Committee on Government Reform
Subcommittee on the Federal Workforce and Agency Organization
July 11, 2006

Federal Employee Appeals Processes

Establishing a Commission to Recommend Improvements for the Federal Employees Appeals Process

**Statement of
Karen Heiser
Vice President
Federal Managers Association
Chapter 88 Watervliet Arsenal**

1641 Prince Street ■ Alexandria VA 22314-2818 ■ Tel: (703) 683-8700 ■ Fax: (703) 683-8707
■ E-mail: info@fedmanagers.org ■ Web: www.fedmanagers.org



Chairman Jon Porter, Ranking Member Danny Davis and distinguished members of the House Government Reform Subcommittee on the Federal Workforce and Agency Organization:

On behalf of the nearly 200,000 managers and supervisors in the federal government whose interests are represented by the Federal Managers Association, allow me to thank you for the opportunity to present our perspective on the need for reforms in the employee appeals process and the draft legislation to establish a commission to review jurisdictional and procedural issues and make recommendations to Congress for improvement. We are pleased to offer our perspective and honored to be included in the establishment of a commission to study the employee appeals processes.

Established in 1913, FMA is the largest and oldest Association of managers and supervisors in the federal government. FMA originated in the Department of Defense, but has expanded to include the interests of supervisory professionals in some 35 different federal departments and independent agencies. We are a non-profit advocacy organization dedicated to promoting excellence in public service and creating an efficient and effective federal government.

I serve as the Vice President of FMA Chapter 88 in Watervliet, N.Y. where I manage organization development programs at Watervliet Army Arsenal just outside Albany, N.Y. I have an MBA in Human Resources with considerable experience in labor relations and quality programs. I served as an Equal Employment Opportunity compliance office in the manufacturing and health care industries for a number of years prior to my 18 years of federal service.

The established systems for employees to address grievances against a manager or agency official for discrimination, violation of a labor agreement, infringement of merit systems principles, whistleblower protections or other acts against the rights of employees are inconsistent in their ability to adequately respond to a complaint in a timely manner and weed out frivolous claims. Between the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), the Federal Labor Relations Board (FLRA), and the Office of Special Counsel (OSC), employees have a broad range of avenues available to them to take appeals actions to independent organizations established solely to ensure their rights as civil servants are protected. We do not dispute the merits of



these agencies and believe in them as independent bodies established to help maintain the integrity of federal workforce.

At the hearing before this Subcommittee on November 9, 2005, there were discussions about an apparent disparity in the ability of those decision-making bodies to respond quickly and offer employees speedy due process in their claims of wrongdoing against a manager. While some agencies seemed to work as models of efficiency, others presented broken systems and excessive backlogs. Regardless, the point was clearly made that managers and supervisors remain subject to a system that forces them to question making decisive management decisions against a problem employee for fear of retaliation in the federal employee appellate system.

As was pointed out in the testimony of the Senior Executives Association (SEA), employees can file unmeritorious claims and maneuver through the appeals processes for years due to the delays, backlog, and lack of a streamlined process for claims. In the meantime, managers are passed over for career-advancing opportunities in the face of mostly unmeritorious claims. More importantly, meritorious claims are left lingering for years while an employee works in an environment with a boss who has taken unwarranted action against them. Most notably the EEOC process demonstrates the perfect example of the opportunities for an employee to seek retribution against a manager by filing frivolous claims.

Under the current EEOC process, an employee completes a form alleging the category of discrimination that he/she believes has occurred. The EEOC counselor must then accept this in-take form and begin an investigation without requiring any information from the employee on what occurred and without the authority to reject obviously baseless claim such as an employee claims discrimination based on a disability without any documentation of having a disability. Once the counselor completes the interviews, he/she reports back to the employee the findings. If the counselor determines that the interviews do not document a case of discrimination based on the initial round of investigation, the employee has three options: drop the complaint, pursue the complaint formally with the EEOC or file a grievance. For an employee unsatisfied with their manager or supervisor's response to their conduct or performance, this could go on for quite sometime.



Should the EEOC counselor determine there may be discrimination based on the initial round of interviews, the case is formally referred to the EEOC. Due to the enormous volume of cases, however, the EEOC managers often put pressure on the agencies to consider settlement and avoid adding to the backlog. In one case of one of our members, an employee was hired for a two-year temporary appointment with the explicit contractual understanding that the employee must meet acceptable quality and quantity levels of performance to be eligible for a permanent assignment. The temporary employee consistently fell short of his required standards of performance and was not offered a permanent position of employment. At which point, the temporary employee filed an EEO complaint alleging race discrimination. EEO pressured the agency to make a settlement offer because of the considerable backlog of cases. So, the Agency made an offer of \$500. The claimant turned down the settlement, and the agency eventually won the case before the EEOC. This scenario demonstrates a dangerous precedent for future frivolous claimants.

According to the 2005 Annual Report of the Equal Employment Opportunity Commission, the EEOC seems to be moving the right direction to improve the timeliness of investigations, hearing receipts, and merit decisions. The number of timely investigations improved from 42% of cases being investigated on time in 2004 with an average of 280 days to 55% being investigated on time in 2005 for an average of 237 days – the lowest average days for investigation in the past five years. We commend the Commission for their efforts to improve the process, address the backlog and reduce the overall timeliness of responses. However, this is still well above the required 180 days for an investigation to be completed and a report to be issued to the complainant.

Even more troublesome is the inability to head off frivolous claims from being taken through the process. Of the 22,974 cases closed in 2005, only 345 were found to have discrimination. That means 1.5% of the cases were found to be meritorious in their claims of wrongful action, which is slightly more than the 1.3% of cases in 2004 that were found to have the same statistics. Moreover, roughly 20% of claims were settled out of the system, but as we explained in our example that could possibly be the result of a backlogged system needing relief and not the indication of legitimate claims being quelled. Based on those numbers, of the 18,017 EEO complaints filed this year roughly 270 will likely be found to have legitimate discrimination, and under the current time constraints they could take up to six years to be settled.



The other independent agencies do not seem to have the same backlog or process problems. The Merit Systems Protection Board is closer to the mark in their timeliness of processing claims and the percentage of decisions rendered finding violations of the merit systems principles. On average, the Board renders decisions within 100 days of filing and supports the actions of managers and supervisors 80% of the time. Furthermore, we do not perceive any glaring problems with the timeliness of FLRA arbitration decisions or the OSC investigation, review and decision making processes.

A proposal has been offered by the Senior Executives Association (SEA) to address this disparity through the consolidation of the various independent appellate agencies into one Federal Employee Appeals Court, which would ideally allow for better triaging of claims filed against a manager and faster decision making of frivolous actions that clog up the system. We support the spirit of the proposal by the SEA and believe that something must be done to address the problem managers, supervisors and employees face with a broken appeals process. However, we remain uncertain that the major federal agency reorganization proposed by the SEA to create a Federal Employee Appeals Court adequately addresses the problems with the current processes or simply consolidates them into a larger federal agency. We are unsure whether the issue is remedied through addressing a lack of proper authorization and funding for the necessary staff to investigate, review and decide on a claim or if the overarching issue is one of a faulty process needing major legislative reforms.

It is clear to us, however, that the entire appeals process offers too many options to employees looking to file frivolous claims against managers trying to address poor conduct, under performance or other problems with employees. The EEOC process must be streamlined and more stringent standards must be placed on claims filed by employees. We also believe that managers' rights need to be taken into consideration due to the excessive numbers of frivolous claims determined each year by the EEOC decisions. As we consider establishing a Commission to study the entirety of the employee appeals process, there must be a focus on the need for someone to have the initial authority to dismiss allegations of management wrongdoing when there is clearly no merit to the allegation and allow only an appeal of that decision by one other body.



The legislation proposed by Chairman Porter to establish a Commission to review the jurisdictions involved in the federal employee appeals process, any overlap between independent agencies, the time and process involved for each complaint filed, and any barriers to the process presents a thoughtful and deliberate balance in the effort to address these issues. The legislation would require within one year's time recommendations on structural and process changes, any consolidation reforms, independent versus internal agency investigations of claims, the process time, and better ways to address mixed cases, encouraging use of alternative dispute resolution, and the overall ability to improve public reporting. This will allow members of the Commission and affected parties the opportunity to properly review the SEA proposal in the light of a thorough assessment of all the federal employee appeals outlets and their mission.

The proposal of a Commission to study the issue takes us a step forward in addressing the failures of the federal employee appeals process and opening the door to understand the proper solution to remedy the problem. For too long, managers, supervisors and employees have suffered at the hands of lengthy processes, broken systems, disconnected options and eventually unsatisfactory decisions. For the manager working with an employee who is a frequent filer or an employee working with a discriminatory supervisor, resolution must come at a quicker pace.

We support the efforts of Chairman Porter and believe this legislation would take us a step closer to fixing the broken system that currently exists in the federal employee appeals process. Any reforms can then be discussed in an open format at later hearings and a dialogue can be opened to consider various reform options. It is critical that the process be improved. The managers and employees currently subjected to it deserve nothing less.

Mr. PORTER. Thank you very much.

You mentioned 22,000 cases and 300 and some. This is really a question for everyone on the panel today. Of the 22,000, a figure for the comment, how many of those are filed where they actually know that they are not a legitimate complaint, would you guess?

Mr. GAGE. I am really glad you asked that, because I hear this frivolous complaint issue. Here is what this is about. And a lot of it is right up front, due to timeframes. Someone will come into the union office, had my leave denied. OK. We have 2 more days, you have 15 days to file union grievance, maybe this happened 2 weeks ago. But I think they didn't do it because I don't think they like me because I am a woman or I am a Black person or whatever.

So now, we have a discrimination complaint. Or we have an allegation. Perhaps the union steward will put that into a counselor—that is the first step—the 45 day counselor. Now, after the counselor's report, it could be that this is not an EEO case. This should have been handled under the contract and under the grievance procedure, but you can't get back to the grievance procedure, because the timeframe is gone.

Mr. PORTER. Yes, we have finished that 45 days.

Mr. GAGE. Yes. And I think a lot of these cases that are termed frivolous are not EEO cases, but they are legitimate cases that should be handled.

Mr. PORTER. Going on the wrong path.

Mr. GAGE. It is going on the wrong path. Now, we have negotiated some things where we would apply the grievance timeframe after the 45 day of the counselor. So I don't think it is in anybody's interest that you have a case in the wrong forum. Management has to go and investigate the thing and do all that, when right up front, that matter can be taken care of, if there was some time for a little investigation just to make sure the person was in the right forum. And I will bet you that is half of your frivolous cases.

Mr. PORTER. John, let me go back to that a second. So somebody walks in with a problem. Explain to me how it is assigned.

Mr. GAGE. Well, the steward has to advise the person of their rights. You have 15 days to file a grievance, 2 days if it is a leave issue. But then the person might say something that sounds discriminatory. Now, the steward then is really caught between a rock and a hard place about giving the person proper rights. And many times, they will throw the thing, saying, go to a counselor, or see if it is EEO, I can't tell right now, but all I do know is I have 1 day to decide.

Mr. PORTER. So they may err on the side of safety to put it into the system?

Mr. GAGE. Exactly. And I think a lot of employees do that, too.

Ms. HEISER. I think that brings up a huge problem, or a huge, I shouldn't say problem, but an issue with any resolution of issues like this, is that there is really no baseline data. This EEO report, which happens to be the only one I have, is filled with huge numbers. And huge numbers lead to huge questions. I don't know that there is any baseline data as to exactly where all these cases do come from and if there are any common threads in them. I think that would have to be done as any type of an improvement process these folks engage in.

Ms. KELLEY. I would also suggest, Mr. Chairman, that you really have to look behind each case to see what drove the conclusion. Many of them are settled. There is a lot of push to settle. And there is an interest in both parties, everyone involved, to bring it to a conclusion. I can tell you from the issues that NTEU deals with in this forum that our goal is to get this resolved sooner rather than later for everyone involved, so that it is not just hanging out there.

I don't think there is really a solid way to measure what is frivolous. There are easy allegations to make, but I have never seen data that first defines what that means, what it means to an individual, and then second, what the criteria are that could even be measured against, rather than just kind of a general framing that really sets a bad tone and implies that those who come to the system for help are doing a bad thing. It should be an avenue of appeal for them to feel safe and not to be charged with being frivolous because they have questions they can't get answered, and this is an available forum.

Mr. BRANSFORD. Mr. Chairman, if you look at the EEOC statistics, 23,000 cases, a little over 20 percent are settled, 345 cases had findings of discrimination, my calculation is about 17,000 cases that were not settled, that were not findings of discrimination. Now, a good percentage of those I think are frivolous, and I think Mr. Gage makes an excellent point when he says that people file EEO complaints because they are unhappy with something that happens at work, even when they have no evidence whatsoever of discrimination.

And I think that gives rise to the need for an effective grievance procedure, an effective complaint procedure. I think because of the complexity of the time limits and the going back and forth, sometimes you can, sometimes you can't, it is very legalistic, I think that is one of the reasons why the Senior Executives Association put forth the idea of going to one place with one time limit, you bring an employee issue there and you bring your points in and then somebody takes a look at it early on and makes a decision whether there is merit to go forward with it, or whether there is no merit, whether you don't set forth a claim. I think you could get a handle early on on some of these frivolous cases and get them out of the system before they clog it up.

Mr. PORTER. It does seem to me the term frivolous, we have to be careful with that. Because many times, it sounds like it is just the direction or the decision on which course to take may have sent it on the wrong path. That doesn't make it frivolous. And I understand that first party is going to be as cautious as possible and try to make sure they do have all the checks and balances.

And again, I appreciate this being very informal, I think everyone here wants the same thing, we want to help the employee. Without creating another organization, if I were to put together a suggestion as the Congresswoman mentioned, but that suggestion would be that there be a screening panel made up of stakeholders that would help with that first step. Not creating another whole organization or another whole layer of Government, but a coordinated effort between the different agencies of a clearing panel. I can give an example—maybe I am oversimplifying it—but in Ne-

vada, we are not sure if we still do, but we had a screening panel for lawsuits for medical liability claims where there was a panel made up of doctors and lawyers and stakeholders that would look at lawsuits before they could go forward to have proper findings.

But it seems to me that if we could help with a clearinghouse for the first step, that would really help the process, just have a screening panel that would help decide which avenue to take. What do you think about that?

Mr. GAGE. I think it is in everyone's interest to get in the right forum, first of all.

Mr. PORTER. Yes, because that has to save a lot of time.

Mr. GAGE. It absolutely would. And I really feel just from practical experience, when our union tries to prosecute EEO cases that really are good grievances, they are not EEO. And that has to be up front. And there has to be a process up front to be able to really get the employee, first of all, in the right direction. Regarding screening processes, I would like to hear more what you think.

Mr. PORTER. I am thinking out loud, and I would like to spend a little more time on this, but I am just looking for other ideas. Thank you.

Mr. Davis.

Mr. DAVIS. The idea of a screening panel is kind of interesting. Of course, a question would be, how do you arrive at decisions? I mean, if you are seeking consensus, I think that is one process. If you are going to be willing to end up with a partisan kind of voting process, that is another process. I just don't know how well that works when where you stand often determines the outcome.

Or another way to put it is where you sit I find in life often determines where you stand. Some people will see this glass as half filled and somebody else will look at as half empty. And trying to get consensus becomes very difficult. Although I think it would be great if we could actually work toward that.

My question is, though, Mr. Bransford, you support, that is the Senior Executive Association sees some merit in the concept of a Federal appeals process, right? And with some tweaking and some additions or subtractions or deletions that you could see it having some merit.

Mr. BRANSFORD. Congressman Davis, that is our proposal to solve the problem. First and foremost, we think there is a problem and we think that the commission as proposed and some of the ideas discussed here today, if they could be added to the legislation to get the input of other groups, to issue a report to solve this problem, I feel that a consensus could be reached, and I think a consensus should be reached. I don't see or envision an idea of minority reports or dissenting opinions or anything like that.

So I would hope that these stakeholders, people of good faith and a lot of knowledge and experience with the system, could come together and make recommendations for effective reform.

Mr. DAVIS. Ms. Kelley, if I understand your position, you are not as optimistic about that.

Ms. KELLEY. That is true. I am not. I have been a member of a panel like this before, where the hope and intent was consensus. It ended up exactly, Congressman Davis, as you described, as rather a partisan report with dissenting views. And that was in large

part, in my view, based on how the group was made up from the very beginning, which I know is a point of interest to you as to what the makeup should be, and the fact is, as it is proposed, even though NTEU is very clear that we are opposed to the commission, we don't think it is even necessary.

But if there were to be anything, the idea that two seats of eight, I believe, would be union representatives surely is important to have our voice there in the conversation. I would rather be in the conversation than on the outside, sending in messages or notes.

However, if the die is cast because of the makeup of the group, then that casts a question about the hope and the intent of putting the group together in the first place. So I do have concerns.

Mr. DAVIS. And Mr. Gage, you are even less optimistic, if I read you correctly.

Mr. GAGE. I am always more optimistic than Colleen. [Laughter.]

But I agree with her right down on the line on this. We have been in this movie before, when we tried to really solve a problem and it comes down to employees losing rights, rather than a protection of their rights. We have seen that in a couple of other forums in this town.

Ms. DAVIS. Ms. Heiser, your organization does see merit.

Ms. HEISER. We think the problem is not clearly enough defined to set a target to find a solution. We think that the problems need to be explored a little more thoroughly. There are very different approaches that MSPB and EEO see. And we certainly did not use the term frivolous lightly. We think that, for instance, the EEO process is less structured and that it is easier for an employee to file something, and the promise of settlement is there for every single process. We think that facet of EEOC hurts legitimate claims.

So we think that the problem really needs to be defined more before aiming for a solution.

Mr. DAVIS. The interesting thing that I find is that we all represent employees. All of you represent employees. Yet you see this somewhat differently. I wonder if anybody would be interested or willing to venture to speak to why you might see it differently. Although the bottom line is that all of you represent employee groups, but different groups of employees, I guess, have different experiences. And based upon their experiences, sort of see things differently. And therein lies also a problem of not being able to just say, this is a labor management, Black or White kind of issue. But there are other factors involved in the process of determining the outcome.

If there were more representation from stakeholders in the proposal, Mr. Gage, Ms. Kelley, would either of you see yourself moving closer to support of the proposition?

Ms. KELLEY. I think it would depend on a lot of other things, about how the commission was framed, what the mission statement or whatever the charter was, what the decisionmaking process would be. If there were to be facilitation, if that would be to truly move toward a new solution rather than everyone defending turf or just assuming that the process is not just to streamline the process, but to streamline employee rights. And I don't hear the subcommittee saying that.

The interest in maintaining rights has been stated over and over. But that is not what I hear from everyone who would be involved in this. And if that was the goal, if it was stated up front, employee rights will not be decreased, and the goal is to figure out how to have a better process, a streamlined process that does not decrease employee rights, that is a different conversation than a lot of what I am hearing from some involved in this process.

Mr. DAVIS. Would any of you be willing to just give your rights away to an independent commission, say, we put our faith in the old independent commission, and whatever you arrive at, we think you are going to be fair, we think you are going to be just, and we are going to get our just view and go on about our business?

Mr. GAGE. No, I don't think that would happen. It is just of—I don't know, it is tough for the unions to step out there and some would distrust us at this point in time. So I think that we would really have to have this guarantee that this would not be a forfeiture of employee rights and it is to truly to streamline a system and making justice a key word.

Mr. BRANSFORD. I think, Congressman Davis, first and foremost, that SEA's proposal is to protect employee rights and not diminish them. We were on the forefront of protecting the Merit Systems Protection Board appeal rights when those were challenged in the initial proposals for reform at the Department of Homeland Security and the National Security Personnel System. And there was, some of those initial proposals would have been a far greater diminishing of employee rights than ultimately occurred. We believe that is a very, very important part of this process.

But I think there are a lot of things. And one of the first things to do is to take the EEO system out of the agencies. This is something that was, I think Ms. Dominguez, Chair Dominguez was getting at, and Chairman Porter's idea of a screening panel. These are all things this commission can discuss. How do we get the EEO system out of the agencies so that there is no conflict of interest, so that the people are comfortable getting rid of these cases where employees complain, raise an EEO complaint because their supervisor did not say hello to them that morning. Those kinds of complaints are filed and they are investigated and they do clog up the system.

Ms. KELLEY. But I would also say that taking the investigation process out of the EEOC can be done without forming a new commission to look at how processes can be streamlined. I mean, if everyone agrees that is an issue that needs to be looked at, I think we have heard from a lot of different parties that is an ongoing issue for employees at every level of the organization, then that can be addressed. We don't need a commission to do that. Let's just focus on that, acknowledge it is a problem.

My concern over the idea of an independent group coming up with something that we just all accept is that I know there are a lot of, and a lot of them have been mentioned, very highly qualified independent groups who I think would be very valuable participants in the commission, if it were formed, even though NTEU is opposed to it being formed.

But I have to tell you, when I hear the references that I hear to why this process needs streamlined, it is that only some small

percentage of EEO cases are ever found to be valid and 17,000 of them are frivolous and that the MSPB rolls 80 percent of the time in favor of management are not compelling issues to me, that give me any comfort that if those are the kinds of facts or the foundation that anybody is going to be looking at as a criteria for the future, that does not bode well for front line employees who are depending on a fair and credible process.

And you will not find those kinds of decisions and numbers in negotiated grievance and arbitration processes that we pursue for the majority of issues that employees face in the workplace today. Because it a much more, it is a fair, open process, it is not about a lot of things we have heard described here today. So that would be my concern over just saying yes to anyone.

Mr. DAVIS. Thank you all very much, and Mr. Chairman, I want to thank you. I know that Solomon has been looking for a running buddy for a long time. [Laughter.]

Mr. PORTER. One last question, and you don't need to elaborate. And I hate to admit it, but I am going back to what John said, I don't want to give John too much credit, but I will for the moment.

How many of these 97 percent or whatever are really just mis-directed from the beginning to the system?

Mr. GAGE. I did one look at one particular local, and it was over half.

Mr. PORTER. I wouldn't doubt it. At a minimum probably half.

I am going to leave you with one thought. If there was a panel that provided guidance, not a mandate, but just a recommendation on the steps to follow, and certainly leave it to the employee to make the final decision, but if I were an employee and I had a problem, I would just like to know where to go for help. And I would like to know that I am going the right pathway. I would like to know that I am not wasting my time or anybody else's. I think most folks would want that option.

They may disagree with that guidance, and if we allowed the option to continue down the path, I still think we would free up a lot of time and help the employee in a much more rapid response and proper direction. I am going to be looking at different options, because again, I think everyone is looking for the same thing. But I wouldn't want to take away any of the employee's rights. I would actually like to enhance the tools they have available to them, so they can get it resolved quicker.

So with that, let me say thank you all very much for your testimony. We appreciate your all being here, and the meeting is adjourned. Thank you very much.

[Whereupon, at 5:05 p.m., the subcommittee was adjourned.]

