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FEDERAL EMPLOYEE REDRESS

A System in Need of Reform

Statement for the Record of
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Federal Employee Redress: A System in Need of Reform

Summary

The purpose of the redress system for federal employees is to uphold the merit system principles by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. But how well is the redress system working, and does it add to or detract from the fair and efficient operation of the federal government? In response to these questions, GAO makes three points:

- First, because of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.
- Second, because the system is so strongly protective of the redress rights of individual workers, it is vulnerable to employees who would take undue advantage of these protections. Its protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems. Further, the demands of the system put pressure on employees and agencies alike to settle cases—regardless of their merits—to avoid potential costs.
- Third, alternatives to the current redress system do exist—in the private sector and in some parts of the federal government. These alternatives, including a variety of less formal approaches collectively known as alternative dispute resolution, may be worth further study as Congress considers modifying the federal employee redress system.

Leading private sector and nonfederal employers have told GAO that managers in their organizations are held accountable for treating people fairly but are also given the flexibility and discretion to make the tough decisions that are an inevitable part of managing well. These organizations recognize that a balance must be struck between individual employee protections and the authority of managers to operate in a responsible fashion. To the extent that the federal government's administrative redress system is tilted toward employee protections at the expense of the effective management of the nation's business, it deserves congressional attention.

Statement

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to discuss the administrative redress system for federal employees. The current redress system grew out of the Civil Service Reform Act of 1978 (CSRA) and related legal and regulatory decisions that have occurred over the past 16 years. The purpose of the redress system is to uphold the merit system principles by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. Today, as more voices are heard calling for streamlining or consolidating the redress system, I would like to address the question of how well the redress system is working and whether, in its present form, it contributes to or detracts from the fair and efficient operation of the federal government. My comments reiterate views first expressed in testimony in November 1995, with some updating based on work GAO has done since then.[1]

I have three points to make:

- First, because of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.
- Second, because the system is so strongly protective of the redress rights of individual workers, it is vulnerable to employees who would take undue advantage of these protections. Its protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems. Further, the demands of the system put pressure on employees and agencies alike to settle cases—regardless of their merits—to avoid potential costs.
- Third, alternatives to the current redress system do exist—in the private sector and in some parts of the federal government. These alternatives, including a variety of less formal approaches collectively known as alternative dispute resolution, may be worth further study as Congress considers modifying the federal employee redress system.

I would like to make one additional observation: Leading private sector and nonfederal employers have told us that managers in their organizations are held accountable for treating people fairly but are also given the flexibility and discretion to make the tough decisions that are an inevitable part of managing well. These organizations recognize that a

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

balance must be struck between individual employee protections and the authority of managers to operate in a responsible fashion. To the extent that the federal government's administrative redress system is tilted toward employee protection at the expense of the effective management of the nation's business, it deserves congressional attention.

My observations today are based on a body of work examining how the redress system operates and how agencies deal with workplace disputes. We interviewed officials at the adjudicatory agencies, the Office of Personnel Management (OPM), the now defunct Administrative Conference of the United States, and a number of executive branch and legislative agencies; analyzed data on case processing provided by the adjudicatory and other agencies; and reviewed the redress system's underlying legislation and other pertinent literature.[2] In addition, my observations draw upon a symposium GAO held in April 1995 at the request of Senator William V. Roth, Jr., then Chairman of the Senate Governmental Affairs Committee, with participants from the governments of Canada, New Zealand, and Australia, as well as private sector employers such as Xerox, Federal Express, and IBM.[3] The proceedings added to our awareness and understanding of current employment practices inside and outside the federal government.

A Complex and Duplicative System

Today, executive branch civil servants are afforded opportunities for redress at three levels: first, within their employing agencies; next, at one or more of the central adjudicatory agencies; and finally, in the federal courts. Although one of the purposes of CSRA was to streamline the previous redress system, the scheme that has emerged is far from simple. Today, no fewer than four independent agencies hear employee complaints or appeals. The Merit Systems Protection Board (MSPB) hears employee appeals of firings or suspensions of more than 14 days, as well as other significant personnel actions. The Equal Employment Opportunity Commission (EEOC) hears employee discrimination complaints[4] and

[2]My comments focus on the redress processes available to individual employees, both within and outside of collective bargaining units, but not on the collective bargaining processes under which unions can appeal agency actions affecting the groups they represent.

[3]Transforming the Civil Service: Building the Workforce of the Future—Results of a GAO-Sponsored Symposium (GAO/GGD-96-35, Dec. 26, 1995).

[4]Complaints may be filed for unlawful employment discrimination on the bases of race, color, religion, sex, national origin, age, or handicap.

reviews agencies' final decisions on complaints.[5] The Office of Special Counsel (OSC) investigates employee complaints of prohibited personnel actions—in particular, retaliation for whistleblowing. For employees who belong to collective bargaining units and have their individual grievances arbitrated, the Federal Labor Relations Authority (FLRA) reviews the arbitrators' decisions.[6]

While the boundaries of the appellate agencies may appear to be neatly drawn, in practice these agencies form a tangled scheme. One reason is that a given case may be brought before more than one of the agencies—a circumstance that adds time-consuming steps to the redress process and may result in the adjudicatory agencies reviewing each other's decisions. Matters are further complicated by the fact that each of the adjudicatory agencies has its own procedures and its own body of case law. All but OSC offer federal employees the opportunity for hearings, but all vary in the degree to which they can require the participation of witnesses or the production of evidence. They also vary in their authority to order corrective actions and enforce their decisions.

What's more, the law provides for further review of these agencies' decisions—or, in the case of discrimination claims, even de novo[7] trials—in the federal courts. Beginning in the employing agency, proceeding through one or more of the adjudicatory bodies, and then carried to conclusion in court, a single case can take years.

An Inefficient System: the Mixed Case Example

The most frequently cited example of jurisdictional overlap in the redress system is the so-called "mixed case." A career federal employee who has been fired (or who has experienced any of several other major adverse actions such as a demotion) can appeal the agency's decision to MSPB. Likewise, a federal employee who feels that he or she has been discriminated against can appeal to EEOC. But a career employee who has been fired, and who feels that the firing was based on discrimination, can essentially appeal to both MSPB and EEOC. The employee first appeals to MSPB, with hearing results further appealable to MSPB's three-member Board. If the appellant is still unsatisfied, he or she can then appeal MSPB's decision to EEOC. If EEOC finds discrimination where MSPB did not, the two agencies try to reach an accommodation. If they cannot do so—an event

[5]In addition, EEOC receives and investigates employment discrimination charges against private employers and state and local governments.

[6]In addition, employees can appeal position classifications to OPM.

[7]In a de novo trial, a matter is tried anew as if it had not been heard before.

that has occurred only three times in 16 years—a three-member Special Panel is convened to reach a determination. At this point, the employee who is still unsatisfied with the outcome can file a civil action in U.S. district court, where the case can begin again with a de novo trial.

The complexity of mixed cases has attracted a lot of attention. But two facts about mixed cases are particularly worth noting. First, few mixed cases coming before MSPB result in a finding of discrimination. Second, when EEOC reviews MSPB's decisions in mixed cases, it almost always agrees with MSPB. In fiscal year 1994, for example, MSPB decided roughly 2,000 mixed case appeals. It found that discrimination had occurred in just eight. During the same year, EEOC ruled on appellants' appeals of MSPB's findings of nondiscrimination in 200 cases. EEOC disagreed with MSPB's findings in just three. In each instance, MSPB adopted EEOC's determination.

One result of this sort of jurisdictional overlap and duplication is simple inefficiency. A mixed case appellant can—at no additional risk—have two agencies review his or her appeal. These agencies rarely differ in their determinations, but an employee has little to lose in asking both agencies to review his or her case.

A Costly System, With Many Costs Unknown

Just how much this multilevel, multiagency redress system costs is hard to ascertain. We know that in fiscal year 1994—the last year for which data on all four agencies are available—the share of the budgets of the four agencies that was devoted to individual federal employees' appeals and complaints totaled $54.2 million (see table 1). We also know that in fiscal year 1994, employing agencies reported spending almost $34 million investigating discrimination complaints. In addition, over $7 million was awarded for complainants' legal fees and costs in discrimination cases alone.[8] But many of the other costs cannot be pinned down, such as the direct costs accrued by employing agencies while participating in the appeals process, arbitration costs, the various costs tied to lost productivity in the workplace, employees' unreimbursed legal fees, and court costs. All these costs either go unreported or are impossible to clearly define and measure.

[8]Consists of legal fees and costs (1) paid by agencies in discrimination complaints resolved by administrative procedures and (2) paid from the Judgment Fund, which provides a permanent indefinite appropriation to pay certain settlements and judgments against the government arising out of lawsuits.

Table 1: Portion of Budgets for Adjudicatory Agencies Devoted to Individual Federal Employee Appeals and Complaints, Along With Cases Received in FY 1994

Agency	Budget (millions $)	Cases received
MSPB	24.7	10,341[a]
EEOC	19.4	16,637[b]
OSC	8.0	1,837[c]
FLRA	2.1	97[d]
Total	**54.2**	**28,912**

[a]Total of initial appeals and petitions for review of initial appeals.

[b]Total of requests for hearings before an administrative judge and appeals to the Commission of agency final decisions.

[c]These complaints contained 3,471 separate allegations of prohibited personnel practices.

[d]Number of appeals of arbitration awards decided in FY 1994.

Source: OMB data, agency data, and agency estimates.

A Time-Consuming System, Especially in Discrimination Cases

Individual cases can take a long time to resolve—especially if they involve claims of discrimination. Among discrimination cases closed during fiscal year 1994 for which there was a hearing before an EEOC administrative judge and an appeal of an agency final decision to the Commission itself, the average time from the filing of the complaint with the employing agency to the Commission's decision on the appeal was over 800 days.[9]

One reason it takes so long to adjudicate a discrimination case is that the number of discrimination complaints has been climbing rapidly. As shown in table 2, from fiscal years 1991 to 1994, the number of discrimination complaints filed increased by 39 percent; the number of requests for a hearing before an EEOC administrative judge increased by about 86 percent; and the number of appeals to EEOC of agency final decisions increased by 42 percent. Meanwhile, the backlog of requests for EEOC hearings increased by 65 percent, and the inventory of appeals to EEOC of agency final decisions tripled.[10]

[9]EEOC processed requests for hearings before an administrative judge in an average of 154 days. The Commission processed appeals of agency final decisions in an average of 185 days. Cases before MSPB are processed more quickly but still take a long time. In fiscal year 1994, MSPB processed initial appeals in an average of 81 days and processed appeals of initial decisions to the three-member Board in an average of 162 days.

[10]EEOC officials told us that they had undertaken an assessment of discrimination complaint processing for federal employees and had expected to complete the study in early 1996. As of mid-April 1996, the study was still under way.

Table 2: Increase in Discrimination Complaints, FYs 1991 to 1994

	FY 1991	FY 1994	Percent increase
Complaints filed with employing agencies	17,696	24,592	39.0
Requests for EEOC hearing[a]	5,773	10,712	85.6
Appeals to EEOC of agency final decisions	4,167	5,925	42.2

[a]These caseload data do not include mixed case appeals to MSPB.

Source: EEOC.

Implications of the Focus on Employee Rights

One reason Congress placed employee redress responsibilities in several independent agencies was to ensure that each federal employee's appeal, depending on the specifics of the case, would be heard by officials with the broadest experience and expertise in the area. In its emphasis on fairness to all employees, however, the redress system may be allowing some employees to abuse its processes and may be creating an atmosphere in which managing the federal workforce is unnecessarily difficult.

As things stand today, federal workers have substantially greater employment protections than do private sector employees. While most large or medium-size companies have multistep administrative procedures through which their employees can appeal adverse actions, these workers cannot, in general, appeal the outcome to an independent agency. Compared with federal employees, their rights to take their employer to court are also limited. And even when private sector workers complain of discrimination to EEOC, they receive less comprehensive treatment than do executive branch federal workers, who, unlike their private sector counterparts, are entitled to evidentiary hearings before an EEOC administrative judge, as well as a trial in U.S. district court.

Another characteristic of the redress system for federal employees is that certain kinds of complaints receive more prominence or attention than others. OSC, for instance, was established primarily to investigate cases in which federal employees complain of retaliation against them for whistleblowing. If OSC findings support the employee and the employing agency fails to take corrective action, OSC's findings become part of the employee's appeal before MSPB. OSC's investigation is done at no cost to the employee. If OSC's findings do not support the employee, he or she may

proceed with an appeal to MSPB as if no investigation had ever been made.[11] The OSC investigation, therefore, is not just cost-free to the employee, but risk-free as well.

Discrimination is another kind of complaint to which the redress system gives fuller or more extensive protection than other complaints or appeals. Clearly, more administrative redress is available to employees who claim they have been discriminated against than to those who appeal personnel actions to MSPB. For example, workers who claim discrimination before EEOC—unlike those appealing a firing, lengthy suspension, or downgrade to MSPB—can file a claim even though no particular administrative action has been taken against them. Further, those who claim discrimination are entitled, at no cost, to an investigation of the matter by their agencies, the results of which are made part of the record. Further still, if they are unsatisfied after EEOC has heard their cases and any subsequent appeals, they can then go to U.S. district court for a de novo trial, which means that the outcome of the entire administrative redress process is set aside, and the case is tried all over again.

What are the implications of the extensive opportunities for redress provided federal workers? Federal employees file workplace discrimination complaints at more than 5 times the per capita rate of private sector workers. And while some 47 percent of discrimination complaints in the private sector involve the most serious adverse action—termination—only 18 percent of discrimination complaints among federal workers are related to firings.

Another phenomenon may be worth noting. Officials at EEOC and elsewhere have said that the growth since 1991 in the number of discrimination complaints by federal employees is probably an outgrowth of passage of the Civil Rights Act of 1991, which raised the stakes in discrimination cases by allowing complainants to receive compensatory damages of up to $300,000 and a jury trial in District Court.[12]

Vulnerability to Misuse

Officials from EEOC and other agencies have said they are burdened by cases that are not legitimate discrimination complaints. We were told that some employees file complaints as a way of getting a third party's

[11]In addition, the employee who complains of retaliation for whistleblowing can appeal matters to MSPB that ordinarily would not be appealable to that agency.

[12]Figures on compensatory damage awards are not available. These amounts are not reported separately but are, instead, lumped together with figures for back pay awards. Back pay awards increased nearly threefold from $8.2 million in fiscal year 1991 to $24.1 million in fiscal year 1994.

assistance in resolving a workplace dispute. We were also told that some file frivolous complaints to harass supervisors or to game the system.

All sorts of matters become the subject of discrimination complaints, and they are accorded due process. Here are two examples, drawn from the newsletter Federal Human Resources Week: A male employee filed a formal complaint when a female co-worker with whom he had formerly had a romantic relationship "harassed him by pointedly ignoring him and moving away from him when they had occasion to come in contact." Another claimed that he was fired in part on the basis of his national origin: "American-Kentuckian."

We are not in a position to judge the legitimacy of these complaints. We note, however, that EEOC's rulings on the complainants' appeals affirmed the agency's position that there was no discrimination. We would also make the point that federal officials spent their time—and the taxpayers' money—on these cases.

Inhibiting Managers and Encouraging Settlements

At the employing agency level, the prospect of having to deal with lengthy and complex procedures can affect the willingness of managers to deal with conduct and performance issues. In 1991, we reported that over 40 percent of personnel officials, managers, and supervisors interviewed said that the potential for an employee using the appeal or arbitration process would affect a manager's or supervisor's willingness to pursue a performance action.[13]

At the adjudicatory agency level, one effect of complex and time-consuming redress procedures has been to spur the trend toward settlements. About two-thirds of the adverse action and poor performance cases at MSPB were settled in 1994 instead of being decided on their merits. Similarly, during the same period, about one-third of the discrimination complaints brought before EEOC were settled without a hearing. Employing agencies settle many more complaints before they ever get that far.

While the trend toward settling cases has helped avoid a lot of adjudication, there is some concern about the larger implications of the practice. In a given employee's case, the possibility of avoiding the potential costs of seeing the process through to the bitter end—costs that include not just time and money but human endurance—may be driving

[13]Performance Management: How Well Is the Government Dealing With Poor Performers? (GAO/GGD-91-7, Oct. 2, 1990).

the inclination to settle. Federal officials, in deciding whether or not to settle, must weigh the cost of settling against the potential loss of more taxpayer dollars and the time and energy that would be diverted from the business of government.

There is some concern that policies encouraging the contending parties to compromise on the issues may conflict with the mission of the adjudicatory agencies to support the merit principles and may set troublesome precedents or create ethical dilemmas for managers.[14] Further, there is concern that settlements may be fundamentally counterproductive, especially in discrimination complaints, where settlement policies may in fact encourage the filing of frivolous complaints.

In Search of Alternatives

At a time when Congress and the administration are considering opportunities for civil service reform, looking in particular to the private sector and elsewhere for alternatives to current civil service practices, organizations outside the executive branch of the federal government may be useful sources for ideas on reforming the administrative redress system.

In most private sector organizations, final authority for decisions involving disciplinary actions rests with the president or chief executive officer. Some firms give that authority to the personnel or employee relations manager. But others have turned to some form of alternative dispute resolution (ADR), especially in discrimination complaints.[15] Many firms use mediators to resolve these matters. Some firms use outside arbitrators or company ombudsmen. Still others employ committees or boards made up of employee representatives and/or supervisors to review or decide such actions. We have not studied the effectiveness of these private sector practices, but they may provide insight for dealing with redress issues in a fair but less rigidly legalistic fashion than that of the federal redress system.

In the same regard, some federal agencies are exploring alternatives to rigid, formal grievance processes. The particular approaches vary but

[14]An example is the occasional settlement agreement not to give the separated employee a bad employment reference. The supervisor who argued for the employee's dismissal may not be allowed to give good-faith answers to a prospective employer who calls for a reference.

[15]For a discussion of ADR methods private sector employers use, see our report Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution (GAO/HEHS-95-150, July 1995).

include the use of mediation, dispute resolution boards, and ombudsmen. The use of ADR methods was called for under CSRA and underscored by the Administrative Dispute Resolution Act of 1990, the Civil Rights Act of 1991, and regulatory changes made at EEOC. Based not only on the fact that Congress has endorsed ADR in the past, but also that individual agencies have taken ADR initiatives and that MSPB and EEOC have explored their own initiatives, it is clear that the need for finding effective ADR methods is widely recognized in government.

Our preliminary study of government ADR efforts, however, indicates that ADR is not widely practiced and that the ADR programs that are in place are, by and large, in their early stages. Most of these involve mediation, particularly to resolve allegations of discrimination before formal complaints are filed. Because ADR programs generally have not been around very long, the results of these efforts are sketchy, but some agencies claim that these programs have saved time and reduced costs. One example is the Walter Reed Army Medical Center's Early Dispute Resolution Program, which provides mediation services. From fiscal year 1993 to fiscal year 1995, the number of discrimination complaints at the medical center dropped from 50 to 27—a decrease that Walter Reed officials attribute to the Early Dispute Resolution Program. Moreover, data from the medical center show that since the program began in October 1994, 63 percent of the cases submitted for mediation have been resolved. Walter Reed officials said that the costs of investigating and adjudicating complaints have been lessened, as has the amount of productive time lost on the part of complainants and others involved in the cases.

Other areas that may be worth studying are those segments of the civil service left partially or entirely uncovered by the current redress system. For example, while almost all federal employees can bring discrimination complaints to EEOC, employees in their probationary periods, temporary employees, unionized postal workers, Federal Bureau of Investigation (FBI) employees, and certain other employees generally cannot appeal adverse actions to MSPB. In addition, FBI employees, as well as certain other employees, are not covered by federal service labor relations legislation and therefore cannot form bargaining units or engage in collective bargaining. What are the implications of the varying levels of protection on the fairness with which these employees are treated? Are there lessons here that might be applied elsewhere in the civil service?

Finally, it should be noted that legislative branch employees are treated differently from those in the executive branch. For example, under the Congressional Accountability Act of 1995, since January 1996 congressional employees with discrimination complaints have been required to choose between two redress alternatives, one administrative and one judicial. The administrative alternative allows employees to appeal to the Office of Compliance, with hearing results appealable to a five-member board. The board's decisions may then be appealed to the U.S. Court of Appeals for the Federal Circuit, which has a limited right of review. The other alternative is to bypass the administrative process and file suit in U.S. district court, with the opportunity to appeal the court's decision to the appropriate U.S. court of appeals. The intent of this arrangement is to avoid the opportunity for the "two bites of the apple"—one administrative, one judicial—currently offered executive branch employees. It is too early to tell if the act will accomplish its purpose in this area, but Congress may find that once in operation, the new system may be instructive for considering how best to provide employee redress.

An Opportunity to Improve the Way Government Operates

Today, in the face of tight budgets and a rapidly changing work environment, the civil service is undergoing renewed scrutiny by the administration and Congress. In the broadest sense, the goal of such scrutiny is to identify ways of making the civil service more effective and less costly in its service to the American people. With so many facets of the civil service under review—including compensation and benefits, performance management, and the retirement system—no area should be overlooked that offers the opportunity for improving the way the government operates. To the extent that the federal government's administrative redress system is tilted toward employee protections at the expense of the effective management of the nation's business, it deserves congressional attention.

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