MEMORANDUM

TO: John U. Young, Attorney
Office of Special Counsel

FROM: Gayle M. Petersen
Former Branch Chief, Corporate Services Division (CSD)
USDA

DATE: March 23, 2015

SUBJ: Responses to Office of Special Counsel (OSC) File No. DI-14-2558

In April of 2014 I filed a whistleblower complaint with the OSC against Winona Lake Scott, that was accepted on June 26, 2014. The following issues were accepted by OSC for investigation thru the USDA Office of Inspector General (OIG):

1. The Office of Civil Rights has not taken timely action on a number of civil rights complaints filed against Ms. Scott and her deputies [OASCR Management Team];
2. The management structure of CSD violates Equal Employment Opportunity Commission (EEOC) Management Directives and agency policies; and,
3. Senior OCR [OASCR] managers have directed the deletion of complaints filed against USDA senior management.

FACTS

In July of 2014 the OIG began investigating the above stated complaint and provided a report which I received on February 7, 2015. Wrongdoers who are the subjects of whistleblower complaints actively engage in activities to cover up and hide information in order to avoid discovery and require that OIG whistleblower investigators utilize exceptional investigatory approaches and stratagems. I have read the entire OIG report and the issues raised in the April 2014, complaint are supported by the record. However, the reliability of report is questionable in some aspects because of the following deficiencies:

1. The OIG report does not use or follow the standard methodology for USDA OIG audits or reports. There is nothing in the record explaining why there is

a deviation from the customary OIG standard for reports and audits. Please see the USDA OIG website for samples of OIG standard reports and audits.

2. The OIG report does not adequately address the issues accepted for investigation by OSC, and contains inaccurate and incorrect information.
3. The OIG report does not contain the common Q&A colloquy. Although summaries are provided within the body of the report, the questions witnesses were asked have been omitted from the report. There is no way of knowing whether the interviewee is responding to the question asked, if there were any follow up questions, whether the person was asked a leading question or told what to write. It appears that the latter is the case because we do not see the questions.
4. The sworn statements of indispensable witnesses have been omitted.
5. The sworn statements of key and critical witnesses are unsigned.
6. The complaint dates for FY 2013 on page nine of the OIG report, catalogue the number of formal complaints filed, and are recorded from October 2012 to March 2013. For every other year, 2010, 2011, 2012 and 2014 the captured dates are from October to September. Hence for 2013, the data for a six month period is not included in the report and absent from the report is an explanation for the missing information.
7. The complaints of the ten witnesses interviewed by the OIG for this report had complaints against OASCR management that are over the 180 day time frame. However, page five of the OIG report states that "at least five complaints filed against SCOTT or another OASCR official, were not processed within 180 days."
8. On page six of the OIG report (my page 10) the Agent provided a note stating that, "the OSC WBC referrals specifically identified seven complaints that fell outside of the OIG review time period and are not included in the data." Since the complaints at issue are all over 180 days old, and in some cases have not been processed for five to six years, an inaccurate analysis and presentation of the problem has been offered.
9. The Federal Information Security Management Act (FISMA) requires that when federal data is lost containing personally identifiable information (PII) that a cybersecurity report be generated. Files are not lost and then ignored. The OIG report does not contain a FISMA report and the lost files constitute an unreported, undocumented breach.
10. The statement from Joe Leonard does not provide the reason why he believed that "employees were hiding files." Joe Leonard does not state why he went to the Office of General Counsel (OGC) to help him with the lost, misplaced or stolen files that were over 180 days old. The standard

operating procedure followed when there is suspected employee misconduct is to report this misconduct to the Human Resources Division (HR). The report does not contain the report to the HR Division about this matter, or why the ASCR chose to go to OGC instead of HR.

11. The OIG investigative report weighs heavily on the fact that employees were not aware that their files were deleted. Employees are not expected to know for a fact that their complaints may have been deleted. The only thing employees know is that their complaints were not being processed in a timely fashion for various reasons provided by OASCR management officials. Unless an employee worked for DRMD, ASCR, OGC or CSD, or had access to the data system they would not be aware of the deletion of complaints from the system.

Because the OIG Report does not adhere to the standard methodology for USDA OIG reporting, for clarity and organizational purposes I have numbered each page of the OIG report so my responses reference page numbers which are not in the original report.

The OIG report does show that there were a large number of complaints that were over 180 days old. As such, issue number one has been satisfied. Issue number two has been satisfied because the report confirms that a firewall was not in place between the Office of General Counsel (OGC)[1] and CSD as required by the EEOC and USDA regulations.

Issue number three of the OIG report was not fully investigated and is lacking key and critical information. The testimony of two indispensable witnesses to the investigation who were interviewed by the OIG have been omitted from the report. Ms. Corliss Patten, who was the right hand for Ms. Mary Thomas, the Director of the Data Records Management Division (DRMD) was interviewed by the OIG, but her sworn statement is not in the record. Ms. Thomas was interviewed by the OIG on more than one occasion. Ms. Thomas' sworn statement has also been omitted from the report. Ms. Thomas abruptly "retired" from USDA on January 1, 2015. The OIG report is deficient in that it lacks certified reports from MicroPact, FISMA and DRMD.

[1] OGC for purposes of this report includes individuals named in the affidavit of Joe Leonard, Fred Pfaeffle, and Winona Lake Scott.

DISCUSSION AND ANALYSIS

ISSUE I. The Office of Civil Rights has not taken timely action on a number of civil rights complaints filed against Ms. Scott and her Deputies

MD-110 Part 6, Part IV states that "The Director of Equal Employment Opportunity (Joe Leonard as the ASCR) shall ensure that individual complaints are properly and thoroughly investigated and that final actions and final decisions are issued in a timely manner in accordance with 29 C.F.R. § 1614.110. The Director also must ensure that there is no conflict or appearance of conflict of interest in the investigation of complaints."

The OIG Report establishes that there are a number of complaints under the responsibility of the OASCR which the OASCR has not taken timely action (within 180 days) in violation of civil rights laws, statutes, rules, regulations and policies.[2]

Each interviewee provides testimony about the untimeliness in the processing, investigation, adjudication, and resolution of his/her complaint(s) through the Alternative Dispute Resolution (ADR) process. From 2010 to the present, Ms. Lake Scott serves as the Contracting Officers Technical Representative (COTR) for the entities contracted to process the conflict complaints for OASCR/CSD; the

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[2] Some of the applicable regulations are:
1. DR-4300-007 – Processing of EEO Complaints;
2. 29 CFR Part 1614.106 (2) - Individual Complaints - Agency requirement to complete investigation of complaints within 180 days;
3. DR-4040-735-001 (11) (K) Prohibited Activities - Failing to take appropriate action on complaints, or proven acts of sexual harassment;
4. Principles of Ethical Conduct for Government Officers and Employees
Part I. Principles of Ethical Conduct Section 101. Principles of Ethical Conduct.
(e) Employees shall put forth honest effort in the performance of their duties;
(h) Employees shall act impartially and not give preferential treatment to any private organization or individual;
(m) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap; and,
(n) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order; and,
5. MD-110 - Agency Processing of Formal Complaints
II. The Agency Shall Also Provide Other Information and Notice of Rights
A. Agency Shall Inform the Complainant of the Agency's Obligations
To Investigate in a Timely Manner
1. The agency is required to investigate the complaint in a timely manner. The investigation must be appropriate, impartial, and completed within 180 days of filing the complaint.

United States Postal Service, USDA National Finance Center (NFC), and the Department of the Interior.

The majority of complaints identified as being over 180 days old were filed prior to October 1, 2012, when Ms. Banks was reassigned from DRMD to CSD. It is noteworthy that during Ms. Bank's tenure ALL OF THE NEW CASES FILED WERE PROCESSED TIMELY WITHIN THE REGULATORY TIMEFRAMES. On October 1, 2012, the CSD staff began addressing; the numerous unanswered requests for missing and lost files, the absence of conflict complaints in the iComplaints tracking system, and the new complaints based on retaliation for the late processing of conflict complaints (sometimes due to the inability of MSCG or CSD to locate the complaints or files in the iComplaints tracking system or hard copy files), and other problems that were passed to CSD from MSCG and the COTR. The chain of custody shows that the COTR received the files from MSCG, not CSD staff. Please see OIG Report, Exhibit 7 HY-6001-0013, 2012 MSCG WORK STOPPAGE DOCUMENTS, page 144, 146, 147, 148, 149, 151, 152.[3] There is no way of knowing what Ms. Scott did with the files and other documents once they were in her possession but it is evident that not ALL of the material intended for CSD, actually reached CSD.

Joe Leonard blames CSD staff for the failure to timely process complaints, the missing files, and the missing or lost reports of investigation (ROI) and he knew or should have known that the management of the contract, the contractors and their work product was solely the responsibility of the COTR, Ms. Scott.

The CSD staff members searched every ASCR file room, and all CSD cabinets and office space in an effort to locate the missing files. I forwarded to Ms. Bobbie Moore all email files that had been sent to me by Denise Banks. During this time we were aware that some of the MSCG files that were unaccounted for were sent to Ms. Scott in her capacity as COTR. Please see Robin Browder and Winona Scott's email communications of January 18, 2013, on pps. 146 and 149 wherein

[3] Management provided a variety of reasons to the OIG for the untimeliness of the processing of the complaints. One was that there was a problem receiving records from the Human Resource Management Division. Denise Banks states that during her tenure in CSD the OASCR failed to provide the division with essential staff, resources, equipment and other adequate materials. Bobbie Moore in her sworn statement states that there was a lack of proper oversight of the contract. The responsibility for the contracts and oversight of the other entities handling conflict complaints fell under the authority of Winona Lake Scott, who from 2010-2015 served as the COTR for these contracts.

Winona Scott directs Robin Browder of MSCG to send her (Winona Scott) the MSCG conflict files in her capacity as the COTR for the MSCG contract. **(Exhibit 1)**

The emails in the OIG Report (pages 144 -152) show the chain of custody of the files and demonstrate that Winona Scott was in receipt of the MSCG files and allowed the CSD staff to be blamed, resulting in constant emails and telephone calls from; complainants and their attorneys, union representatives, the EEOC AJs, MSPB AJs, agency representatives, agency liaisons, and OGC all searching for files that we were oftentimes unable to locate. The confusion surrounding the files, coupled with the poor working conditions in CSD generated complaints about the conditions in which CSD staff was forced to perform. **(Exhibit 2)** contains the part of my complaint applicable to this issue))

Because the CSD staff was being blamed for the problems I regularly emailed Winona Scott. In one email I wrote to advise her of the delays in the processing of the complaints where ADR had been requested. **(Exhibit 3)** After so many complaints reached the OSEC, the OASCR management officials blamed the CSD staff for the problems generated by the COTR. This is an abuse of power and authority.

Management's Response to Issue I is an Admission

The statements of management in the OIG report are replete with hearsay, and assumptions that are unsupported by the record, and misrepresent the responsibility of OASCR, OGC, MSCG and IMS for the missing, lost or deleted conflict of interest files, and the countless files that were over 180 days old. To blame staff for management's missteps is a violation of the standards of conduct upon which all members of the Senior Executive Service are held.

Joe Leonard

Joe Leonard on page 255, and Winona Scott on page 264 of the OIG Report both state the reason for the lateness of the complaints was that "we [Nadine and Gayle] were hiding the files." These are files which for the most part CSD employees, (including me), have never seen. When CSD was established and the files were sent from MSCG to USDA, they were sent to Winona Lake Scott. These files were not sent to CSD. Please see OIG Report, Exhibit 7 HY-6001-0013, 2012 MSCG WORK STOPPAGE DOCUMENTS, page 144, 146, 147, 148, 149, 151, 152.

Neither Nadine nor I, and to my knowledge no other member of the CSD staff had a motive to hide the conflict files, and could not have since the files in question were transferred to Winona Scott not CSD. Management, however did have a motive to hide some of the conflict of interest complaint files because the complaints we did see against management contained incriminating documents implicating management of wrongdoing. There were a large number of complaints against the OASCR management team. If Joe Leonard believed that we were hiding and/or destroying the files he does not offer in his statement what steps he took to take disciplinary action against us.

The concerns of Joe Leonard and Winona Scott that employees "were stealing and/or hiding files" should have been reported to HR, the appropriate department for handling employee misconduct. Instead Joe Leonard and Winona Lake Scott provide in their statements that they went to OGC with their "concerns" about employees stealing the files, and provide no reason for bypassing HR.

On page 255 of the report, line number 18 of his affidavit, Joe Leonard states, "After Denise Banks left Gayle Petersen a GS-14, was left to manage the division." This is a false statement. Bobbie Moore moved to Ms. Bank's office as the Acting Director on the same day that Denise Banks was moving out. Bobbie Moore met with Denise Banks so they could begin the process of transferring the duties and responsibilities while Denise Banks was still in her office. The transition was seamless and there was never a moment when I was "left to manage the division." This is an untrue statement, and it is unethical for the ASCR to make false statements in his capacity as ASCR.

Joe Leonard also states in his testimony states that he believes that "Nadine and Gayle Petersen gave Carol Sanders her complaint file, to make me look bad." I have never seen the Carol Sanders complaint, or complaint file. To my knowledge, Nadine Chatman, nor anyone else in CSD has seen the Carol Sanders complaint file or Report of Investigation. Joe Leonard offers no proof or documentary evidence as to why he believes that we, "gave Ms. Sanders her file complaint file." Jo Leonard gives no reason for us wanting him to look bad, and this is a very odd statement when the record reflects that the files were sent to Winona Scott – his Chief of Staff and the COTR, see Exhibit 1.

In her affidavit, on page 60 of the OIG Report, Ms. Sanders states that she filed her complaint in September of 2012 with MSCG, and has not seen her report of investigation. CSD did not open its doors until October 2012. Please see the email communications of Robin Browder and Winona Scott on pps. 146 and 149 wherein

Winona Scott directs Robin Browder to send her (Winona Scott) the files, in her capacity as the COTR for the contract. I have no knowledge of whether Ms. Scott forwarded ALL (including the files for Ms. Sanders) of the files she had received from Robin Browder to CSD, or why a great number of files were missing. This is a question for Ms. Scott and Ms. Browder that was not flushed out in the OIG Report.

Bobbie Moore in her affidavit (page 84) states on page 86 that there was a problem with the oversight of the contracts. "Ms. Scott was the contracting officer representative [COTR] for the CSD contractors, but she was not very involved in the management of the contractors work."

Joe Leonard further states on line 25 of his sworn testimony that "OGC made him aware of the [untimeliness] issue..." Denise Banks informed Joe Leonard and Winona Scott of the untimeliness issues when she became the Director of CSD and saw the severity of the problems. After Denise Banks left, I, and other members of the staff made Bobbie Moore aware of the untimely processing of complaints being handled by MSCG. Ms. Moore in turn informed Joe Leonard and Winona Scott. Joe Leonard did not need to rely on OGC's advice when he was being advised of the problems from his very own staff.

Making false statements against employees is a violation of DR-4070-735-001, Employee Responsibilities and Conduct, dated October 4, 2007.

Winona Lake Scott

Page 264 of the OIG Report begins the statement of Ms. Winona Lake Scott. On page 267, lines 36-38 Ms. Scott states, "I am not aware of anyone intentionally delaying the processing of any EEO complaints. However, I suspect that Denise Banks, Gayle Petersen and Nadine Chatman may have intentionally delayed the processing of EEOCOI [conflict complaints]. I suspect that these employees share information with one another. I suspect Banks because she had a prior complaint that was filed with the District Court and was not happy about being replaced as the CSD Director."

It is important to note that CSD employees who work together are supposed to share information with one another. It is also of note that Denise Banks prevailed in her District Court case, and it defies logic and I see no reason why a person would be a suspect because of winning a District Court case. Once Denise Banks was replaced as the CSD Director, I believe Denise Banks was happy to leave CSD because of Ms. Scott's failure to staff and fund the office.

On page 267, line 39 of her affidavit Ms. Scott states that, "Gayle had confrontations with Velasquez and Patterson when they were first assigned to CSD." This is an untrue statement unsupported by the record. There were no "confrontations" between myself, Velasquez and Patterson. Significantly, Ms. Scott does not provide documentary evidence to support her claim. Ms. Scott also does not testify as to what disciplinary action was taken against me for this alleged "confrontational behavior." Making false statements against employees is a violation of DR-4070-735-001, Employee Responsibilities and Conduct, dated October 4, 2007.

On page 264, line number 22 of her affidavit, Ms. Scott states that, "Denise Banks was moved into another OASCR division because CSD was not performing well under her leadership and a number of EEO complaints within the formal stage were exceeding the 180 day time limit." This statement by Ms. Scott is altogether false, and is refuted by the official record. Ms. Banks was only in her position as CSD Director for four months, hardly enough time to cause cases to be processed untimely[4]. Conversely, Ms. Scott was the COTR for the MSCG contract from 2010-2015, in her position as Chief of Staff, and as the Acting Director of CSD. The aged complaints that Ms. Scott has described are complaints that CSD (Ms. Banks) inherited from Ms. Scott and MSCG. Please see OIG Report pps. 105-152 entitled, "MSCG WORK STOPPAGE DOCUMENTS."

In the OIG Report on pps. 146 and 149, there are emails between Robin Browder and Winona Scott while Denise Banks was the Director of CSD, dated January 18, 2013, wherein Winona Scott directs Robin Browder of MSCG to send her (Winona Scott) the MSCG conflict files in her capacity as the COTR for the MSCG contract. And, that Winona Scott received the documents. The record is clear that as the COTR Winona Scott failed in her responsibility to manage the MSCG contract. Also, please see Exhibit 1 which outlines the grueling working conditions CSD operated under, under the leadership of Joe Leonard.

In an attempt to shield herself Ms. Scott inconceivably states in line 36 that she, "suspects that Denise Banks, Gayle Petersen and Nadine Chatman may have intentionally delayed the processing of the conflict cases." Exhibit 1 evidences that ALL of the cases provided to CSD came through Winona Scott, via MSCG/IMS. If files came to CSD at all – they came late, were incomplete and not organized or tabbed. Either Winona Lake Scott was incompetent, or the

[4] Please see page 26 of the OIG Report FY 2013 COIEEO Formal Complaints 10/4/12 – 1/29/13.

"mismanagement of the contract" was intentional. One or two, or even ten lost, missing or mismanaged files is unremarkable. In the instant case, the sheer volume of conflict complaint case files in various stages of disrepair, the personal knowledge of what happened in my own case and other cases, and Ms. Scott's promotion after the problems in CSD were exposed *is remarkable*. The circumstances lend credence to the perception that the manipulation of the complaints and the files, and the untimely processing of complaints was intentional.

Ms. Scott was promoted to the SES position of Associate Secretary for Civil Rights, after overseeing contracts for large amounts of money, (pps. 105 -107 showing a 2010 award of $456K, page 122 a payment for 600K, on page 131 a requisition payment for $505K). The agency paid for Ms. Scott as the COTR and MSCG to accumulate countless conflict of interest lost or missing files and complaints over 180 days old. Her promotion came after management knew that Ms. Scott as the COTR was responsible for the conflict program which due to poor supervision, control, oversight, management and administration on her part eventually discouraged employees from participating in the conflict complaint process and also resulted in sanctions, (page 148 of the OIG Report contains an email from Robin Browder to Denise Banks and Winona Scott dated December 28, 2012 regarding the four, and potential other motions for sanctions against the agency). In contrast CSD employees who were frantically trying to resolve the CSD problems were blamed for the catastrophe and removed from their positions. This is an abuse of power and authority exercised by OASCR <u>and</u> OGC management officials who are silent partners in the day to day affairs of OASCR and CSD.

After Ms. Scott's promotion rather than punishment for her role in the CSD catastrophe the inference is that Ms. Scott's promotion was a reward for her role in the mishandling of the conflict of interest files and records.

Pages 180 and 185 of the CSD iComplaints activity database report shows that Winona Lake Scott reviewed two complaints that were against her in violation of <u>DR-4300-007 (6) Conflicts of Interest</u>, which states, "All employment discrimination complaints will be resolved without exposure to conflicts of position, conflicts of interest, or the appearance of such conflicts." For Winona Scott to access and examine complaints against her is an abuse of power and authority.

Robin Browder, Esq.
On page 154 Ms. Browder provides an inadequate unsigned one and a half page statement. On page 155 Ms. Browder states, "In August 2012, during the first work stop order, she (Browder) provided Denise Banks all pending COIEEO [conflict of interest complaints] that MSCG was processing." Ms. Banks did not become the Director of CSD until October of 2012. In August of 2012, Denise Banks was actually in another position (DRMD), and the conflict complaints would not be sent to her. The records shows that these complaints were actually sent to Vi Hall. Please see on page 127 the September 12, 2012, email from Winona directing an MSCG employee (Sandy) to send the new complaints to Vi Hall until Denise's unit was stood up.

On pps. 146 and 149 of the OIG Report there are emails between Robin Browder and Winona Scott dated January 18, 2013, wherein Winona Scott directs Robin Browder of MSCG to send her (Winona Scott) the MSCG conflict files in her capacity as the COTR for the MSCG contract.

Absent from Ms. Browder's statement is her explanation for how the conflict of interest complaints under her responsibility were late, lost, not provided to CSD, misplaced or mismanaged. Robin Browder does not discuss the reasons for the delays in processing the conflict of interest complaints. Ms. Browder's account of what happened to the conflict of interest work under her control is significant and critical to the investigation and is omitted from her statement. Ms. Browder's unsigned statement is wholly deficient.

In addition, Ms. Browder does not provide the reasons for why some conflict complaints were not entered into the iComplaints tracking system. Winona Lake Scott states in line number 14 of her complaint that, "MSCG had access to iComplaints and were mandated per their statement of work to input complaint information into the database." Ms. Browder states in line eight that, "Currently IMS/MSCG does not input complaint data into iComplaints." Pages 171 – 245 of the OIG Report contain the CSD iComplaints activity database report reflecting that Robin Browder and Kim Camillo input complaint data activity spanning the recent past and going back several years. Robin Browder and Kim Camillo were entering complaint activity into the database in 2011, 2012, and 2013. Please see the data base activity report pages 172, 173, 177, 180, 206, 207, 209, etc. Omitted from the OIG Report is the MSCG and IMS Statements of Work.

The OIG Repot supports that the Office of Civil Rights has not taken timely action on a number of civil rights complaints filed against Ms. Scott and her Deputies.

II. The management structure of CSD violates Equal Employment Opportunity Commission (EEOC) Management Directives and agency policies

MD-110, CHAPTER I, Agency and EEOC Authority and Responsibility, states, "Agencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts. Heads of agencies must not permit intrusion on the investigations and deliberations of EEO complaints by agency representatives and offices responsible for defending the agency against EEO complaints. Maintaining distance between the fact-finding and defensive functions of the agency enhances the credibility of the EEO office and the integrity of the EEO complaints process. Legal sufficiency reviews of EEO matters must be handled by a functional unit that is separate and apart from the unit which handles agency representation in EEO complaints. The Commission requires this separation because impartiality and the appearance of impartiality is important to the credibility of the equal employment program. For example, it would be intrusive for the individual who represented the agency in an equal employment hearing to have authority to approve decisions with respect to resolution in the same or related cases. Impartiality or appearance of impartiality is undermined where members of the office where the representative is employed have the legal sufficiency function with respect to cases in which a colleague served as agency representative."

In January 2014, EEOC released proposed revisions to EEO Management Directive (MD) 110, which outlines the Commission's policies, procedures, and guidance for federal sector regulations at 29 C.F.R. Part 1614. These proposed revisions implement the 2012 changes to Part 1614, as well as detail extensive new conflict of interest provisions and other general changes to update the directive.[5]

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[5] PROPOSED DRAFT AMENDMENT TO MD-110 - CHAPTER 1
IV. AVOIDING CONFLICTS OF INTEREST
D. Separation of EEO Complaint Program from Agency's Defensive Function
Heads of agencies must manage the dual obligations of carrying out fair and impartial investigations of complaints that result in final agency determinations on whether discrimination has occurred and defending the agency against claims of employment discrimination. Only through the vigilant separation of the investigative and defensive functions can this inherent tension be managed.

Ensuring a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, and enhances the credibility of the EEO office and the integrity of the EEO complaints process.
There must be a firewall between the EEO function and the agency's defensive function. The firewall will ensure that actions taken by the agency to protect itself from legal liability will not contaminate the

This first chapter of the draft MD-110 is the section on Conflict of Interest. EEOC's placement of this chapter underscores and reflects the importance EEOC assigns to this body of work. **(Exhibit 4)**

On February 26, 2003, the EEOC conducted an on-site review to determine USDA's compliance with the statutes, rules and regulations, and the Commission's Management Directives that govern the processing of EEO complaints. This report found that, "the defensive functions of USDA's Office of General Counsel intrude on the investigation and deliberation of EEO complaints." **(Exhibit 5)**

Based on the above, management knew or should have known that involving OGC with the day to day affairs and intimate working knowledge of the conflict division was prohibited. OASCR has violated its own policies and EEOC Management Directives. Under USDA DR-4300-007(6), "all employment discrimination complaints will be resolved without exposure to conflicts of position, conflicts of interest, or the appearance of such conflicts."

Management's Response to Issue II is an Admission

In defiance of the requirement for a firewall between CSD and OGC, Winona Scott and Joe Leonard met regularly with OGC staff about the conflict of interest complaints in CSD; instructed the staff to send stoplight reports to OGC, (please see the affidavit of Joe Leonard, page 257); approved OGC's access to iComplaints, and involved OGC in every aspect of the conflict office work. Winona Scott and Fred Pfaeffle held CSD staff meetings, where staff would openly discuss the lack of a firewall between OGC and CSD. Fred Pfaeffle discusses in his statement on page 261, the involvement of Arlene Lealand and Steven Brammer (both from the OGC Litigation Division) and Tami Trost of the OGC Policy Division in discussions aimed at improving CSD by removing certain employees from CSD and creating SOPs. There were a number of emails provided

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agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

The various means of ensuring this firewall are set forth in Section E below. In addition, is it important for the EEO Director to be provided with sufficient legal resources (either directly or through contracts) so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office. EEO MD-110 2013 Management Directive 1-8.

At a minimum, however, the legal office that represents the agency in EEO complaints may not conduct legal sufficiency reviews of EEO matters. Similarly, impartiality or the appearance of impartiality is not ensured by simply rotating representatives within the same office and is undermined where the office colleagues of an agency representative are assigned the legal sufficiency function in EEO cases from the representative's caseload.

to the OIG by Nadine Chatman showing heavy involvement in the day to day affairs of CSD by OGC -- proof that there is no firewall between OGC and CSD.

Tami Trost

On page 157 of the OIG Report Ms. Tami Trost of OGC admits in her affidavit that she has access to iComplaints. The OIG report does not identify other OGC staff members who have iComplaints access. Tami Trost states, "OGC is structured into two divisions regarding EEO complaints. One division deals with litigation of EEO complaints and the other division deals with process and policy. This structure creates a firewall between the two functions so that OGC does not overreach it's authority regarding EEO complaints." This is an ineffective attempt to provide a reason why OGC has been allowed to circumvent the firewall rule. The OGC Policy and Litigation divisions are in the same building, on the same floor, in the same office suite, and are directly next to each other. There are joint meetings between each of these divisions and members of the OASCR management team, along with the conflict division staff who all meet on a regular basis. Members of the CSD staff are instructed by Winona Scott and Joe Leonard to provide the stoplight reports to OGC.

CSD staff are knowledgeable and recognize that providing OGC with the stoplight reports and OGC's access to iComplaints is a prohibited arrangement and a violation of the rules.

Ms. Trost states "I heard that Gayle Petersen did not follow instructions in a case." This statement is hearsay. Omitted from Ms. Trost's allegation is the name of the complainant in the case she refers to wherein, I "did not follow instructions," the date the failure to follow instructions allegedly took place, and the instructions I allegedly failed to follow. The OIG Report failed to provide documentation or any other evidence presented by Ms. Trost regarding this alleged failure to follow instructions. Hence, this allegation cannot be responded to with specificity.

Fred Pfaeffle (Former OGC Attorney)

On page 261 of the OIG Report he states, "I met with OGC to discuss ways in which CSD could improve, including processing timeframes for complaints. We agreed, among other things, that SOPs needed to be developed and changes in personnel. Fred Pfaeffle went to OGC to meet about action that had been pending since CSD's inception. The SOPS were written by me and were waiting approval by Winona Lake Scott and Bobbie Moore. Please see email from Winona L. Scott requesting me (Gayle Petersen) to forward the SOPs for CSD to Ms. Scott and her detailee, Anika Patterson. **(Exhibit 6)**

OASCR and OGC are defiant in that despite the agency having been instructed on numerous occasions about the requirement for a firewall between the defensive arm (OGC) of the agency and the component of the organization that processes conflict of interest complaints -- CSD. The OIG Report supports the allegation presented in Issue II, that the management structure of CSD violates Equal Employment Opportunity Commission (EEOC) Management Directives and agency policies.

III. Senior OCR managers have directed the deletion of complaints filed against USDA senior management

Pursuant to USDA DR-3080-001, 13 – Safeguarding Records, and 13d. Penalties for Improper Handling, it is a violation of federal law to falsify and otherwise tamper with federal records.

Management's Response to Issue III is Wholly Evasive

This issue was not adequately addressed and essentially disregarded in the OIG Report, and management's response to Issue III is wholly evasive. The issue in CSD was that we were unable to locate a substantial number of hard copy files, and files which were supposed to be housed in the iComplaints tracking system. The CSD staff was aware that the iComplaints files were disappearing and then reappearing and we had become hyper-vigilant about documenting the changes in the system, because we did not want to be blamed for the missing files, or inaccuracies in iComplaints. I wrote to Denise Banks about this issue in February 2013. When Nadine Chatman discovered the deletion of files in the system that she was working on she reported this to the appropriate DRMD staff. **(Exhibit 7)**

Each person interviewed by the OIG provided testimony about how their complaints were over 180 days old, but were unaware if their files had been deleted. Complainants would not be expected to be knowledgeable about deletions, unless they have access to the systems and databases housing the complaints. The standard operating procedure for when a record needed to be deleted from the iComplaints system, was for a request to be made to either Mary Thomas or Corliss Patten of DRMD. If the request was made to Mary she would routinely pass on such requests to Corliss Patten who was the person designated by Ms. Thomas to handle such matters. Omitted from the OIG report are the statements of Ms. Thomas and Ms. Patten.

Although the persons who have access to this information were interviewed, the affidavits of these individuals were omitted from the OIG Report. Ms. Mary Thomas, the Director of the Data Records and Management Division (DRMD), was interviewed by the OIG on three separate occasions[6]. Corliss Patten, who is the CSD contact for iComplaints was also interviewed by the OIG and her affidavit is also absent from the file. As the Director of DRMD Mary Thomas was responsible to for the integrity of the data of the iComplaints tracking system. Notably, Ms. Thomas abruptly retired from USDA/OASCR in January 2015, one month before the release of the OIG Report.

On page 165 of the OIG Report there is a discussion about a server failure back-up and how the USDA files were affected. There is a discussion about two case deletions blamed on a server crash, but does not state what server was down. Omitted from the report is what was found in the retrieved data from the back- up server which backs up the files during a server crash. The report says that the files were deleted due to this server crash but a server crash does not delete a file. When a server crashes all information is not lost because there is a backup tape. And if by chance a file was deleted it is restored from the backup tape.

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[6] Mary Thomas admitted certain things to me about her role in the adverse activity in iComplaints before she retired. Below is the synopsis of the conversation between Ms. Thomas and I.

"Mary: Gayle, I am not sure about all of this stuff that is going on with the OSC but my supervisor told me to block your access to iComplaints. If my supervisor asks me to do something, then I am going to do it. I do not have anything against you personally. I am telling you the truth. Everything that is happening is due to my following the orders of my superiors.
Gayle: Mary you do not have to worry about telling me the truth, you only have to tell the truth to the OIG.
Mary: I have told them the truth, and if they come back I will tell the truth again. These people know all about you before they even interview you. They knew about all of my complaint activity, everywhere I have worked, where I live, everything.
Gayle: Okay Mary, just tell the truth. If they come back again tell them the truth. But I don't feel comfortable talking in your office.
Mary: I understand and if you tell anyone what I told you, I will deny it.
Gayle: Okay."

After this I left her office, and later called OSC to report this conversation. When I got the report the first affidavit I looked for was the affidavit for Mary Thomas. When I saw there was no affidavit for Mary, I realized that the OIG purposely left it out of the report. There is also no statement for Corliss Patten who was Mary's right hand. This is a cover-up. The OIG also did not interview Casimir Bruce of Mary's staff. How can there be only one person providing a statement from Mary Thomas' group? There are several emails to Mary Thomas that are obviously cut and paste

FISMA requires that all federal agencies document and implement controls for information technology systems that support their operations and assets. Standards and guidelines have been developed and published by the National Institute of Standards and Technology (NIST). These published guidelines cover many areas surrounding: Access control, audit and accountability, incident response and system and information integrity. If there was a crash problem where is the required FISMA report surrounding this crash?[7]

Omitted from the OIG Report are records of iComplaints activity from MicroPact Engineering (the outside contractor hired to manage the iComplaints tracking system), which would actually show the deletions from the CSD files and who made them. The OIG report does not include a "CERTIFIED" Activity Report/Audit Report of iComplaints from Micropact. This Certified report would contain any deletion activity and would come directly from Micropact, not through OASCR.

The OIG Report contains a long list of records from activity in CSD, but the deletion occurred outside of CSD. File deletion requests are made to Mary Thomas who would forward the requests to Corliss Patten, not Maurice Carroll. This report is flawed. Based on the absence of witness testimony of two indispensable parties Mary Thomas and Corliss Patten, there is an inference that Senior OCR managers have directed the deletion of complaints filed against USDA senior management and that the evidence was covered with the departure of Mary Thomas.

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[7] 44 US Code, Chapter 3544, Federal Agency Responsibility
(a) In General.— The head of each agency shall—
(1) be responsible for—
(A) providing information security protections commensurate with the risk and magnitude of the harm resulting from unauthorized access, use, disclosure, disruption, modification, or destruction of—
(i) information collected or maintained by or on behalf of the agency; and
(ii) information systems used or operated by an agency or by a contractor of an agency or other organization on behalf of an agency;
§3546. Federal information security incident center
(a) In General The Director shall
ensure the operation of a central Federal information security incident center to "(1) provide timely technical assistance to operators of agency information systems regarding security incidents, including guidance on detecting and handling information security incidents;

RESPONSE TO AGENCYS REMEDIES

On page nine of the OIG Report, the last sentence of the last paragraph states, "Additionally, the analysis revealed that from October 4, 2012, through September 26, 2014, there was a significant reduction in the percentage of formal COIEEO [conflict of interest] complaints not being investigated and reported within the required 180 day time limit."

On page 267 of the OIG Report, Ms. Scott states that in 2014 she "assigned Velasquez and Patterson to CSD to assist in managing CSD, and that this significantly reduced the backlog." The over and under reporting of numbers is a common place in CSD. Ms. Velasquez gives testimony about the processing of my complaint through the formal stage. This is a false statement as I withdrew my complaint before it reached the formal stage. Please see my withdrawal letter that I have attached. **(Exhibit 8)**

More importantly, Ms. Scott fails to state how CSD was completely restructured and the bulk of the work redirected to other divisions within OASCR.

Omitted from the OIG Report is that under the latest definition of what constitutes a conflict 2/3 of the formal conflict work of CSD was transferred to; the Employment Complaint Division, under Vi Hall, EAD under Kirk Perry and EID under Ken Baisden. Therefore CSD no longer handles the previous work load of the division under Denise Banks and Bobbie Moore which contributes to the significant drop in the numbers. This is in direct contradiction to what Winona Lake Scott in line number 10 of her affidavit, "conflict complaints are handled separately from other EEO complaints that OASCR processes." Please see the statement of Pilar Velasquez on page seven of the report which discusses the restructuring of CSD. Please see email from Vi Hall, Chief of the Employment Complaints Division, describing how conflict complaints will be processed under the new definition of conflict. **(Exhibit 9)**

A natural consequence of mishandling a conflict program where files are lost, destroyed or deleted, or where key and critical documentation is removed or somehow becomes missing from the file, or files in some other way are manipulated or tampered with, is that someone will complain. Or, that there will be a significant reduction in the amount of employees who have full faith and confidence in the conflict complaint process, and lose interest in participating in a process that does not fairly process conflict of interest complaints. It is also understandable for complainants to lose interest in a conflict program once they

learn that the OASCR conflict program is not confidential. When employees realize that the responding management official whom they have filed a complaint against will have access to the complaint, and the complaint information contained in the complaint file filed against them, and their manager will more likely than not retaliate against the employee, than quite naturally employees will not be interested in engaging in "protected" activity.

A predictable result from managing a conflict program where; a) complaints are randomly closed, b) where management rarely settles cases and final agency decisions are typically not written where there is a finding of discrimination in favor of the complainant, c) and, if there is a finding of discrimination that management will change it to a no finding when called upon to do so, c) that if a complainant prevails in their EEOC case that the defensive arm will appeal the decision of the EEOC, dragging the case on forever, is that people will not use it.

It is to be expected that employees would feel hesitant to participate in the OASCR conflict program. Thirteen employees were investigated by OIG after the filing of the complaint that resulted in the OIG investigation. All interviewees testify to some mishap or other calamity in the processing of their complaint(s). Nadine Chatman identified 20 employees who were in the same or similar position with respect to the late processing of their complaints, or loss of files, however the OIG Report does not address the investigation of these employees. The OIG also did not investigate the claims of others that were forwarded to USDA from the OSC. Had these investigations taken place it would further punctuate that the USDA complaint process is compromised, severely flawed, and ineffective, and there would have been a full complement of testimony regarding how under the USDA conflict complaint process employees and complainants are routinely disappointed, dismayed, embarrassed, demoralized, marginalized, humiliated disrespected and oftentimes intimidated.

When the government ceases to function properly people lose faith in the system. OASCR, CSD and OGC have shown over and over again, and now this report confirms that there is an established credibility problem within OASCR because there is no interest in following the rules. In support of this statement please see **(Exhibit 10)** which contains email traffic from Queen Kavanaugh to Candace Glover, the current CSD Director regarding the definition of a conflict complaint. Before Ms. Kavanaugh abandoned her complaint she spent a great deal of time imploring Ms. Glover to properly process her conflict complaint against Joe Leonard, Winona Scott, Fred Pfaeffle and Cyrus Salazar through the appropriate channels to no avail).

It is not inconceivable that employees are aware that the processing of conflict cases within CSD is compromised, does not work and is designed so that there is no confidentiality, no privacy, anyone can see your complaint, even the person whom a complainant files against, that there is no integrity in the system, and that the system is rigged. Conceivably, a reason for a decline in complaint filings is that most employees would prefer to suffer in silence and wait it out for the next administration rather than take advantage of the laws that were designed to protect employees from discrimination.

The Civil Rights Act of 1964, and its Titles, were written to help employees and applicants gain access to justice through a process designed to protect the civil rights of all Americans. It was designed so that anyone irrespective of their income level or lack of a formalized education could seek redress through the administrative procedures set up to combat discrimination. Congress has mandated that all federal civil rights offices actively protect the civil rights of its employees and applicants. Because the OASCR has abandoned its purpose and the reason for its existence and become a system designed to protect management, the OASCR has failed in its duties, and abused its authority.

CONCLUSION

Executive Order 12674 of April 12, 1989 entitled, "Principles of Ethical Conduct for Government Officers and Employees," was written, "To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each Federal employee shall respect and adhere to the fundamental principles of ethical service."

The OIG report confirms the allegations made in the OSC complaint and through numerous sworn statements and affidavits it was shown that; 1) the Office of Civil Rights has not taken timely action on a number of civil rights complaints filed against Ms. Scott and her deputies; 2) that the management structure of CSD violates Equal Employment Opportunity Commission (EEOC) Management Directives and agency policies; and, but issue 3) that Senior OCR managers have directed the deletion of complaints filed against USDA senior management, cannot be addressed because the affidavits and sworn testimony of indispensable witnesses were omitted from the OIG report, and crucial documentary evidence from FISMA, MicroPact and DRMD, was also omitted from the report. Based on the absence of key and critical information an adverse inference should be drawn against the agency.

The problems in CSD became public knowledge due to the violations found in issues number one through three, and reached the attention of the Office of the Secretary (OSEC). Once this occurred OASCR management officials and OGC closed ranks against Denise Banks, Gayle Petersen, Nadine Chatman, and Bobbie Moore[8] who had individually bought to the attention of OASCR management the pervasive problems in CSD, based wholly on management's refusal to follow the rules.

OASCR and OGC management then engaged in a campaign to harm and discredit the reputations of these CSD staff members before their colleagues and the USDA community at large. Inaccurate information was fed to OSEC that was false and misleading that does not correspond to the record and the facts of the case.

Employees who implored OASCR management to follow the civil rights laws, statutes, rules and regulations were removed from their positions and subjected to reputational and professional abuses because these employees held a certain level of trustworthiness in the USDA civil rights community based on their positions. Conversely, the management officials who ignored the civil rights laws, statutes, rules and regulations were promoted. OASCR management and OGC abused their authority with respect to all of the above stated issues.

Office of Special Counsel has been provided a substandard and wholly deficient report. OSC should: a) discard the deficient investigation and start afresh in order to address the issues in the initial complaint and report; b) demand the missing documentary evidence and affidavits of key personnel which have been omitted herein in order to have a complete record; or c) declare a defacto finding against USDA for its failure to comply with a properly served investigation.

[8] Please see the affidavit of Bobbie Moore wherein she states that there was a problem with the oversight of the contracts. "Ms. Scott was the contracting officer representative for the CSD contractors, but she was not very involved in the management of the contractors work."

Chain of Custody Documents

2	Letter to Donald Sapp EEO Counselor from Gayle Peterson, dated 3/18/13
3	Memo to Bobbie Moore from Gayle Peterson dated 7/8/13
4	Applicable portion of Draft MD-110
5	EEOC Onsite Report
6	Email Traffic from Gayle Peterson to Wanda Scott re: SOPs
7	Email communications documenting deleted files
8	Withdrawal Form for Gayle Peterson 9/11/14
9	Email communication describing reduced responsibility of CSD
10	Emails between Candace Glover and CSD Chief and Queen Karandaugh

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Kelly Burks

From: Scott, Winona -ASCR [Winona.Scott@ascr.usda.gov]
Sent: Friday, October 12, 2012 12:18 PM
To: 'Robin Browder'
Cc: Kelly Garry Burks
Subject: Information on complainants

Hello Robin –

We desperately need information provided to Denise Banks on pending complaints (investigations, counselings, etc.) that are at MSCG. The EEOC has called several times asking for information and Denise (Chief of the Corporate Services Division) is unable to provide the information.

Can you also provide a list of the pending complaints and status. Thanks for your help.

Winona Lake Scott
Chief of Staff
Office of the Assistant Secretary for Civil Rights

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Sandra Maddox

From: Kelly Burks [kburks@mscginc.com]
Sent: Friday, October 19, 2012 12:46 PM
To: Sandra Maddox; Robin Browder; Kimberly Camilo
Subject: Fwd: Cases

FYI

Begin forwarded message:

From: "Scott, Winona -ASCR" <Winona.Scott@ascr.usda.gov>
Date: October 19, 2012 11:45:29 AM EDT
To: Kelly Garry Burks <KBURKS@MSCGINC.COM>
Cc: "Leonard, Joe - OSEC" <Joe.Leonard@osec.usda.gov>
Subject: Cases

Hello Kelly –

Dr. Leonard would like for you to transfer all of the cases under investigation back to USDA. Please let me know when that transfer will take place. Thanks

Winona Lake Scott
Chief of Staff
Office of the Assistant Secretary for Civil Rights

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Kelly Burks

From: Scott, Winona -ASCR [Winona.Scott@ascr.usda.gov]
Sent: Monday, October 22, 2012 1:23 PM
To: Kelly Garry Burks
Cc: Leonard, Joe - OSEC
Subject: RE: Cases

Send to my attention – thanks Kelly.

From: Kelly Garry Burks [mailto:KBURKS@MSCGINC.COM]
Sent: Monday, October 22, 2012 1:22 PM
To: Scott, Winona -ASCR
Cc: Leonard, Joe - OSEC
Subject: RE: Cases

Hello Winona,

You should receive the cases by Tuesday, October 30th. Please let us know to whom we should send cases to by forwarding their contact name and address. Thanks!

Kelly Garry Burks, RN, MBA
President
Management Solutions Consulting Group, Inc.

From: Scott, Winona -ASCR [mailto:Winona.Scott@ascr.usda.gov]
Sent: Friday, October 19, 2012 11:45 AM
To: Kelly Garry Burks
Cc: Leonard, Joe - OSEC
Subject: Cases

Hello Kelly –

Dr. Leonard would like for you to transfer all of the cases under investigation back to USDA. Please let me know when that transfer will take place. Thanks

Winona Lake Scott
Chief of Staff
Office of the Assistant Secretary for Civil Rights

Sandra Maddox

From: Latonya Dunlow [latonya@innovativemanagement.us]
Sent: Thursday, November 29, 2012 2:05 PM
To: 'Kelly Burks'; 'Kimberly Camilo'; 'Robin Browder'; 'Sandra Maddox'
Subject: RE: Cases

I thought these were sent back to USDA by the middle of this month. Are there still some outstanding?

From: Kelly Burks [mailto:kburks@mscginc.com]
Sent: Thursday, November 29, 2012 12:20 PM
To: Kimberly Camilo; Robin Browder; Latonya Dunlow; Sandra Maddox
Subject: Fwd: Cases

Please see below

Begin forwarded message:

> **From:** "Scott, Winona -ASCR" <Winona.Scott@ascr.usda.gov>
> **Date:** November 29, 2012 11:25:57 AM EST
> **To:** "'Kelly Garry Burks'" <KBURKS@MSCGINC.COM>
> **Subject: Cases**
>
> Hello Kelly –
>
> Can you please instruct Kim to transfer all cases back to USDA. Any cases that are to be investigated will be channeled through IMS. We really need all hard and electronic files. Thanks
>
> **Winona Lake Scott**
> **Chief of Staff**
> **Office of the Assistant Secretary for Civil Rights**

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Robin Browder

From: Robin Browder [rbrowder@mscginc.com]
Sent: Friday, December 28, 2012 4:13 PM
To: 'Banks, Denise -ASCR'
Cc: 'Scott, Winona -ASCR'
Subject: Investigations
Attachments: Investigations.xlsx

Denise,

Yesterday, we received a Request for Hearing and Motion for Sanctions in EEO Complaint of Discrimination. We mailed all of the relevant information to you via Fedex Express and also emailed the electronic file to you yesterday.

The complaint is one of the cases that were being investigated prior to the work stoppage but the investigation was halted when the work stoppage went into effect. As we indicated on the spreadsheet that we submitted to you previously, there are several cases that fall into this category. I am a bit concerned because the case that we sent to you yesterday was the forth case that we have seen since the work stoppage went into effect where the investigation was halted due to the work stoppage and the complainant requested a Hearing and filed a Motion for Sanctions or just requested a hearing. My concern also is that several of the complainants whose investigations were halted due to the work stoppage may also Request a Hearing and/or file Motions for Sanctions against the Agency. Pursuant to my conversation with Winona Scott yesterday, and in order to hopefully prevent this situation from happening again, I have attached a list of all of the cases that fall into this category. Please let us know if you will be sending these cases to IMS for processing. Although we have previously mailed the hard copy of these files to the agency, we will resend the electronic version of the case files to your attention.

Sincerely,
Robin T. Browder, Esq.
Management Soltions Consulting Group

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Kelly Burks

From: Scott, Winona -ASCR [Winona.Scott@ascr.usda.gov]
Sent: Friday, January 18, 2013 3:20 PM
To: Robin Browder; 'Kelly Garry Burks'
Cc: 'Kimberly Camilo'; maddoxsa@aol.com; 'Latonya Dunlow'
Subject: RE: Case Records Request
Attachments: image001.jpg; image002.gif

Thanks this is helpful.

From: Robin Browder [mailto:rbrowder@mscginc.com]
Sent: Friday, January 18, 2013 3:16 PM
To: Scott, Winona -ASCR; 'Kelly Garry Burks'
Cc: 'Kimberly Camilo'; maddoxsa@aol.com; 'Latonya Dunlow'
Subject: RE: Case Records Request

Winona,

Kim reviewed her records and the dates when everything was returned are listed below:

Box (closed cases) picked up by courier October 2, 2012

Box (Open cases) mailed to Winona Scott on Nov 5, 15, 29, December 3 and December 4

PDF versions of all files that were mailed were also sent via email from November 30-Dec 28.

We discussed this matter with Kelly, and given the fact that we are receiving requests for case files that have been sent to the Agency in hard copy form and multiple times electronically, we will copy of the files onto a flash drive and send them to the agency again, next week.

Robin T. Browder, Esq.
Management Soltions Consulting Group

From: Scott, Winona -ASCR [mailto:Winona.Scott@ascr.usda.gov]
Sent: Friday, January 18, 2013 1:24 PM
To: Kelly Garry Burks
Cc: rbrowder@mscginc.com; Kimberly Camilo
Subject: FW: Case Records Request

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Kelly –

Can you find out the definitive date when ALL files were sent to USDA from MSCG? Thanks

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From: Banks, Denise -ASCR
Sent: Thursday, December 06, 2012 11:23 AM
To: 'Kimberly Camilo'
Cc: Scott, Winona -ASCR
Subject: RE: Case Records Request

Thanks, Kim...DAB

From: Kimberly Camilo [mailto:kcamilo@mscginc.com]
Sent: Thursday, December 06, 2012 10:58 AM
To: Banks, Denise -ASCR
Cc: Scott, Winona -ASCR
Subject: RE: Case Records Request

Good morning Denise,

Attached is the file you requested.

From: Banks, Denise -ASCR [mailto:Denise.Banks@ascr.usda.gov]
Sent: Thursday, December 06, 2012 10:07 AM
To: 'Kimberly Camilo'
Subject: Case Records Request

Good morning Kim,

Please forward PDF copies of all case records in CRSD-2011-00450 at your earliest convenience today. Thanks in advance.

Denise A. Banks
Director
Corporate Services Division
Office of the Assistant Secretary for Civil Rights

Email: denise.banks@ascr.usda.gov

The information contained in this message is privileged and confidential. It is intended only for the use of the addressee. If you are not the addressee, or the person responsible for delivering it to the person to whom it is addressed, you may not copy, forward or deliver this message, its content or its attachments (if any) to anyone else. If you received this message by mistake, please notify me immediately by return email or by calling

Do you really need to print this email?

From: Petersen, Gayle -ASCR <Gayle.Petersen@ascr.usda.gov>
To: 'gayle1214@aol.com' <gayle1214@aol.com>
Subject: FW: Meeting
Date: Mon, Feb 23, 2015 2:02 pm

From: Petersen, Gayle -ASCR
Sent: Monday, February 25, 2013 8:38 AM
To: Moore, Bobbie -ASCR
Subject: Re: Meeting

Yes. There are no more documents in my possession.

From: Moore, Bobbie -ASCR
Sent: Monday, February 25, 2013 01:35 PM
To: Petersen, Gayle -ASCR
Subject: RE: Meeting

Gaye,

Thanks for the status update! I saw the messages you forwarded Friday regarding EEO documents...is that the extent of the information you possess? Bobbie

From: Petersen, Gayle -ASCR
Sent: Monday, February 25, 2013 8:33 AM
To: Moore, Bobbie -ASCR
Cc: Chatman, Nadine -ASCR; Jackson, Katrice; Graham, Paula -ASCR
Subject: Re: Meeting

Thanks. Please be advised that while teleworking today I will continue drafting the Whatley FAD.

From: Moore, Bobbie -ASCR
Sent: Monday, February 25, 2013 01:27 PM
To: Petersen, Gayle -ASCR
Cc: Chatman, Nadine -ASCR; Jackson, Katrice; Graham, Paula -ASCR
Subject: RE: Meeting

We did not meet Friday afternoon.

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Kelly Burks

From: Robin Browder [rbrowder@mscginc.com]
Sent: Friday, March 01, 2013 4:52 PM
To: 'Kelly Garry Burks'; 'Latonya Dunlow'
Subject: Request from Winona

Hello

Winona has asked us to supply electronic versions again of all of the cases that we returned to the Agency. She indicates that the agency is unable to locate the electronic versions of the case files that we previously emailed to Denise. When Kim and I spoke about the situation, we thought the best thing to do this time is to dump all of the electronic files onto a couple of travel drives. Given the fact that there are over 200 files we anticipate that it will take Kim and I approximately 70-80 hours and may require weekend work given the expedited cases that we are trying to process.

Robin T. Browder, Esq.
Management Soltions Consulting Group

Kim Camilo

From: Kimberly Camilo [kcamilo@innovativemanagement.us]
Sent: Monday, July 29, 2013 11:13 AM
To: 'Moore, Bobbie -ASCR'
Cc: 'Robin Browder'
Subject: Cases

Good morning Bobbie,

Per your conversation with Robin on Friday, July 26 about Dr. Leonard's concerns with cases falling through the cracks, here is a list of cases not sent to IMS for completion. Some of these cases may have been sent elsewhere for processing.

- CRSD-CF-2012-00008
- CRSD-2012-00623
- OCFO-2012-00637
- CRSD-2012-00646
- CRSD-2012-00669
- CRSD-CF-2012-00010
- CRSD-CF-2012-00012
- CRSD-CF-2012-00013
- CRSD-2012-00865
- CRSD-2012-00919
- CRSD-CF-2011-00006
- CRSD-2011-00610
- RMA-2011-00610
- No number provided
- CRSD-2011-01112
- CRSD-CF-2011-00010

Kimberly D. Camilo
Case Administrator

NOTICE OF RESTRICTED USAGE Access to, usage and dissemination of information pertaining to this EEO complaint file, email, etc. is **RESTRICTED** by both the Freedom of Information Act and the Privacy Act to: The COMPLAINANT, ANY GOVERNMENT OFFICIALS who must have access to the file to discharge their OFFICIAL DUTIES as well as CONTRACT EMPLOYEES, INVESTIGATORS, COUNSELORS duly authorized to process, counsel, investigate this complaint. **Willful violations of these requirements are subject to criminal penalties. 5 U.S.C. 522a(i).**

TO: **Donald Sapp**
EEO Counselor, NFC
DATE: **March 18, 2013**
RE: **Complaint of Discrimination of Gayle M. Petersen against Barbara "Bobbie" Moore contact date March 3, 2013**

Background

On October 1, 2012, Denise Banks was reassigned from her position as the Director of the Data and Records Management Division, and became the Director of the Corporate Services Division, (CSD)[1]. Denise Banks was given two employees: Me (Gayle Petersen) and Paula Graham. Nadine Chatman was assigned on October 8, 2012. In late November 2012, Katrice Jackson came to CSD from Forest Service. Katrice Jackson and Nadine Chatman became the two EEO counselors, Paula Graham was the Equal Opportunity Assistant, File Clerk, and part-time Secretary, and I wrote the FADs, managed the hearings and appeals, reviewed the ROIs, prepared controlled correspondence, managed the affairs of the office, i.e., furnishing the office with desks, chairs, filing cabinets, computers, etc., and managed our information in the USDA Detail Registry, and also created and developed the Legal Internship Program.

When we arrived in the CSD office space, it was a total mess, and what remained of the confidential files from 2009 and earlier, were strewn haphazardly on the floors throughout several offices. The files were left unsecured and had been accessible to many people from 2009 through September 2012. We did not have a printer, fax machine, scanner, working copier machine, telephone numbers or any of the basic equipment necessary to run an office, and we began receiving complaints the very first day the office opened. The majority of these callers were irate complainants who had initiated their complaints with MSCG, whom with we no longer had a contract. These callers wanted to know the status of their complaints, but because iComplaints had not been updated by MSCG, we had to call MSCG to determine the status of the complaints, and MSCG was routinely non responsive, but we managed.

In late October/early November 2012 we had to repack the office and prepare for new carpeting and painting and then unpack and set up the office again. We had to physically move heavy furniture and huge book cases left behind by the previous occupants, because the moving men failed to do so. We worked extremely hard to get the office up and running as quickly as possible by developing policies, procedures, guidelines and forms as required by regulation, inventorying the current files, repeatedly requesting the current (2009 to October 1, 2012) inventory of complaints and files from the Chief of Staff, the COTR for the contractor, MSCG, Inc., and developing an announcement and brochure on CSD services, which was never issued by the ASCR. It is important to note here, that CSD serves as the Civil Rights/Conflict Office for all of USDA, and we only had four staff members in this office as of late November 2012. Katrice Jackson did not have a computer or desk for her first thirty days and teleworked until she received these items.

[1] The OASCR CSD formerly called the Civil Rights Services Division has been set up and dismantled many, many times. It is important in the instant case for the reader to understand the "sweat equity" investment put into this current resurrection in order to get a glimpse into the sacrifice, commitment and dedication of the CSD staff; Denise Banks, Gayle Petersen, Nadine Chatman, Katrice Jackson and Paula Graham.

Unlike other complaint processing divisions, Ms. Banks was not given a Secretary, staff to conduct acceptances and dismissals, printers, computers, ink cartridges, or office supplies in general. We had to beg people for printers and a printer was loaned to us in November 2012, as well as two computers. In addition, MSCG, Inc., refused to turn the conflict files over to CSD, and had not entered the majority of cases into iComplaints, had not uploaded any files, nor updated hardly any of the cases they had managed to place into iComplaints. (We have since been tasked with updating the iComplaints database with the information that was not placed into iComplaints by the contractors, who were I assume had probably paid to perform this function, but I have not seen the statement of work. Winona Scott is the COTR).

Despite the enormous hurdles and obstacles faced by the CSD staff we overcame these impediments, and managed to process the work timely with minimal staff and equipment and no outside assistance. After all of our hard work, when the new acting chief Barbara "Bobbie" Moore came to the division and began character assassinating us and the previous manager, we could not believe it. She made bold false accusations, yelled and screamed, and accused us of hiding the files and stated that we had engaged in all manner of unprofessional behavior. She said that she had "evidence and proof to show that we were not working." As hard as we had been working, we were completely shocked, and felt totally disrespected, upset and stressed out.

We were even more shocked when Ms. Moore bought in fourteen employees from throughout OASCR to work on the Conflict cases, which are supposed to be CONFIDENTIAL. She has given them all access to the work files, the work products, and the employees/complainants files are no longer confidential. She has made sure that all of these fourteen employees have access to the iComplaints site and they all, can see it ALL. Most of them have Super User rights and can change information in the system, and do all kinds of things that now makes the integrity of the data questionable. There are already people in the agencies complaining about people who should not be looking at their files doing exactly that. There is no longer anything CONFIDENTIAL in nature about the work that is currently taking place in CSD. Anybody can see anything, about any person, at any time, and tell someone all about it, and no one on the management side seems to care or understand the CONFIDENTIAL nature of the work. Ms. Moore to my knowledge did not even bother to ask the employees who have come down to the division to work for her, to sign confidentiality agreements, not that that would make a difference, but at least people might respect that she actually understands and cares about the CONFIDENTIAL nature of the work that is taking place in the division.

Creating and Maintaining a Hostile Work Environment by Slandering and Verbally attacking the CSD Staff

On Thursday, February 21, 2013, after being in the position for two weeks, Ms. Moore called a staff meeting at 2:30 p.m., in the CSD conference room.[2]

[2] Ms. Moore also held individual one on one meetings with the CSD staff when she first arrived. During my meeting with her she vehemently complained about the "mess" in the division. I told her that she should be grateful because she had been given a great advantage since they were doing things for her that they did not do for the previous manager. I gave her several examples, i.e., all of the CSD work had been given to MSCG/IMS, and she did not have to process that work; she had been loaned additional staff from IED and EAD, and that she had been allowed full access to iComplaints without being shut out. I got the feeling that although she thought the treatment of the previous manager was unfair, she did not like the fact that this difference in treatment had been noticed, and was being discussed. She became extremely defensive.

In attendance was the original CSD staff, myself, Nadine Chatman, Katrice Jackson, and Paula Graham. Also in attendance were seven employees who have been informally detailed to Ms. Moore from the newly formed Employment Investigations Division (EID) because they had no work:

1. Tanya Mack, EID
2. Bridgette Jones, EID
3. Andre Bruce, EID
4. Tina Quarles, EID
5. Jeffery Carr was also assigned to work with Ms. Moore but was not in attendance at this meeting, and,
6. Kimberly Strickland from the Employment Adjudication Division (EAD) who was also assigned to work with Ms. Moore

During this meeting Ms. Moore began attacking Denise Banks and the CSD staff by falsely accusing us of not doing the required work of the division and by not working in general and creating a "mess," which she later clarified when asked as a backlog (which was actually created by MSCG). She also accused us of lying by stating that we had the files for a number of cases and had failed to process this work. She also accused us of hiding the work, allowing the work to lapse past critical deadlines, not updating the database, and essentially blaming us for the mistakes and failures to process the work, actually backlogged by MSCG/IMS. She stated that our work was unacceptable and later I am told by CSD staff, she met with individual members of the staff to try to get them to admit guilt for work that she claimed was late, which wasn't.

We were all totally shocked by her tirade and I was personally offended because we had worked so hard to get the division up and running. After about a half an hour into this verbal lashing I spoke up and told Ms. Moore that nothing had been processed late under Denise Banks, and that we were cleaning up the backlog made by MSCG. Because she was ranting about the files, I told her that we were not hiding the work and that I had seven electronic files on my computer, which I used to upload the hearings and appeals into the EEOC EFX system, that I could email to her. She immediately jumped on me in front of all the staff in an accusatory manner demanding that I turn over the files. I told her that if she wanted the electronic files, all she had to do was ask for them, that they were federal government property and I did not want them. We were unclear what she was looking for because during her blitzkrieg she never stated that she wanted anything, she just continued to hurl accusations.

She continued to attack us and criticize the work performance of the staff. I reminded her that what OASCR senior management was doing for her (Ms. Moore) was great because they made enormous arrangements for her to have an easy job, by funding and transferring all of the complaint processing work (intake, acceptance dismissal, EEO Counseling, ADR, ROIs, and FADs) to IMS/MSCG, assigning her additional staff (six employees) which were lent to her from EID, EAD, and ECD, and shifting responsibility for controlled correspondence to OA, none of which was done for Ms. Banks. Ms. Banks had requested assignment of staff from EID, the very same group, because it was common knowledge that they were not busy, and had since their arrival at OASCR been sitting around doing crossword puzzles, Sudoku, and taking leisurely

lunches, but her requests were denied. Ms. Moore has since been given seven more employees to assist her in the management and operation of CSD, they are;

1. Yolanda Green, EAD
2. Millie West-Wiggins, OA
3. Channing Hawkins, ECD
4. Willa Smith, OA
5. Lisa Gray, EAD
6. Anita Pitchford, CRD
7. Brian Lucas, OA

When Ms. Moore continued to complain about the lack of updates in iComplaints, I informed her that we had continuously been locked out of iComplaints for long periods of time and were unable to access or update the database. (please see attachment)

I was telling the truth and setting the record straight on everything she attacked us on, and Ms. Moore became visibly upset. I let her know that this was an OASCR top senior management problem and that they were to blame for any irregularities in the division and with the work, since they refused to respond to Denise Banks' numerous requests for assistance, e.g., permanent staff, student interns, temporary contract support, detailees, reassignments, printers, cartridges, supplies, free staff via the Detail Registry and the Legal Internship Program, and any request she sent forth. Now that the EEOC began to levy sanctions against USDA and the Secretary, they were ready to see what Denise Banks was advising them was accurate, but I think it was discrimination in her case and they wanted to mistreat her, and humiliate her.

The next day Friday, February 22, 2013, Ms. Moore summoned Joe Leonard to CSD and he talked about many things. One of the things he discussed was that files were missing and that he was prepared to give amnesty to anyone who returned the missing files by that Monday. When we came to CSD, Ms. Banks the Director of CSD, asked the contractor, MSCG, for the files, many, many times, and she never received them. We all knew that we were being accused of hiding/taking or in some other way confiscating the files that were never sent to us and were highly offended because this statement was false.

Joe Leonard also stated that when he made plans for the CSD, he thought that four (4) people was enough to staff this office and that if the EEOC issued sanctions on any of these cases, there had to be accountability and "heads would roll." We all knew that he was referring to firing Denise Banks, and possibly other members of the CSD staff. In addition, Joe Leonard also stated that Bobbie Moore had sent Reports of Investigation over to his office staff; Winona Scott and William Reid Strong, for them to review. He stated that this was unacceptable, since he knew that I was able to conduct legal and technical sufficiency reviews. I looked at Ms. Moore and stated "you never asked me to conduct a legal and technical sufficiency review for you, I could have done that." Ms. Moore starting yelling "I have been here for two weeks and that work should have been done." I then informed her that the work had already gone out during Ms. Banks' tenure. She insisted that it had not. Please see the attached email from a complainant who received his ROI for the second time from Ms. Moore, after we had already sent the ROI to him and he had requested a FAD.

Joe Leonard discussed the sequestration and how the success of the entire OASCR was dependent upon the success of the CSD. He talked about how there may be furloughs and that we had better be working. Considering all of the work we had accomplished in the division without any help whatsoever from the OASCR, I found these comments to be particularly disturbing. After the meeting one of the employees who was really upset about the comments, contacted the Office of Personnel Management (OPM) and informed OPM about the statements regarding sequestration, furloughs and RIFs. OPM personnel stated that intimidating employees by making threats of furloughs and RIFs during the sequestration period was unacceptable behavior.

Creating and Maintaining a Hostile Work Environment by Gossiping about Employees and Managers

Everyday a different person tells me that Ms. Moore is spreading rumors and gossip around the office about me and other members of the CSD staff. I have first-hand knowledge about Ms. Moore's behavior in this regard because she has made derogatory comments to me about OASCR managers. She has also made defamatory comments to me about members of the CSD staff (attachment #). I have informed Ms. Moore that I disagreed strongly with her assessment of past and present CSD staff and could tell that she did not like it when I said that her behavior was rude, unacceptable and unprofessional. I feel that her behavior falls under the category of conduct unbecoming a federal employee, but management here would never say that because they like what she is doing and how she is behaving, because she is attempting to make us look bad to save MSCG/IMS.

Creating and Maintaining a Hostile Work Environment by Pitting the Original CSD employees with other OASCR employees

Ms. Moore has consistently treated the original CSD employees in a derogatory manner in front of the EID, EAD, ECD and other employees who have been assigned to help her. She has talked down to the original CSD staff members, yelled at us all, and accused us of creating a mess and a backlog in CSD, and slandered us all mercilessly. It has been my experience, that the manager sets the tone for the office, and Ms. Moore clearly has chosen to set a tone for this office that is extremely hostile and career damaging. She has been very friendly to the EID employees, while she doubles back behind the original CSD staff members to determine if what they have stated to her is truthful and constantly checks up on them. She uses the EID, EAD and ECD employees to report on the activities of the original CSD staff members.

Before I was out of the office for two weeks due to my illness, Kimberly Strickland followed me around the office and watched my every move. If I was at the Xerox machine she would peek over my shoulder to see what I am Xeroxing. She tried to see what I had sent to the printer, attempted to listen to my conversations while I was on the phone and when I had visitors. I am sure Ms. Strickland was following orders. Other CSD staff members have indicated to me that they are having the same experience.

Failure to Provide Reasonable Accommodation

When Ms. Moore became the Acting Director of CSD, she held a meeting with the staff and she asked about the work schedules of the staff. When we discussed telework, I informed Ms. Moore in front of the staff that I am a qualified individual with a disability and when my condition is active and especially during periods of extreme heat or cold I telework as a reasonable accommodation.

On Tuesday February 26, 2013, after being sick for weeks but continuing to work, I was rushed to the emergency room at Sibley Hospital. I informed Ms. Moore that I was sick and needed to work from home per my telework agreement. She asked for a copy of the telework agreement. I asked Sequana Janifer, Telework Coordinator, OASCR, to provide my telework agreement to Ms. Moore. After she sent the Telework Agreement to myself and Ms. Moore, I received a derogatory email from Ms. Janifer instructing me about the telework rules and regulations, directing me to take leave, and in general educating me about telework. (please see attachment #) After informing Ms. Janifer of my status, I contacted her and asked her why she would send me such an email when I only asked her to provide the agreement. She said Ms. Moore instructed her to write the email to me. Ms. Janifer later wrote an email apologizing for this. (please see attachment #) Ms. Moore knew of my status as a qualified individual with a disability and instead of honoring my telework agreement, she used this information to harass me. The Disability Coordinator became involved and let Ms. Moore know that her involvement of other OASCR employees was a total violation of my rights under the Americans with Disabilities Act. (please see attachment #)

Even after Ms. Moore had a copy of my telework agreement and my condition was active she refused to honor my reasonable accommodation/telework agreement and refused to make arrangements for me to participate in mandatory training telephonically. I was forced to use my leave, which I really do not have to spare. (please see attachment #) I have been so sick, for such a very long period of time, that I just did not and still do not have the energy to explain to Ms. Moore reasonable accommodations, what it means to be a qualified individual with a disability, and how telework is used as an accommodation for me. I am just very, very tired of explaining this to Ms. Moore who cannot say she is a new manager because she says that she has been with the federal government a very long time and should know this. I am also too sick and would like to use my energy to get better. No one feels like going through something traumatic like this when you are not feeling your best.

Assignment of Duties

Ms. Moore continues to discriminate against and harass me by not providing portable work to me when I am teleworking, and not ensuring that I am accommodated during required training. (please see attachments) In addition, Ms. Moore has been in the division now as the Acting Chief for over thirty days. As of this writing, Ms. Moore has yet to provide me with any assignment that is commensurate for work of an employee at the GS-14/7 level. She stated and we have always been aware that there needed to be a person in place to conduct intake and

acceptances/dismissals. When she came into her position she had one on one interviews with each of the members of her staff, and I informed her that I had conducted acceptance/dismissal for the Program Intake Division. I let her know that the employment side could not really be that much different from Programs and I was interested in training. She later came back and asked me if I wanted on the job training or formal training. I let her know that either way was fine and I really had no preference. Because she offered on the job training I assumed she would be teaching us everything she wanted us to know, since she had stated that she has trained others how to perform this function. I have let her know once again that I was interested, and still – no acceptance/dismissal training.

I have been asked by Ms. Moore to attend meetings with the contractors IMS/MSCG, Inc. and after she informed the contractors that it would no longer be necessary for them to input their information into iComplaints, nor update iComplaints ever again, she asked me to leave the room. I complied with her request but it has been my experience that it is highly unusual for government employees to meet with contractors alone and in private, and have conversations off the record or "off-line" as Ms. Moore states. The reason that this policy is in place is because it gives the appearance of impropriety. That is exactly what I thought when I was asked to leave, and Ms. Moore was left in the room alone with the two contractors from IMS/MSCG, Inc. – that something improper was being discussed, and that she did not want me to hear.

Retaliation/Reprisal

Ms. Moore is aware of my two active complaints. Ms. Moore is aware that management does not like individuals who exercise their EEO rights. While going through the list of active complaints, she saw her name and became upset and said her name should not have been on the list. She stated that when she had her problem with the USDA Food, Safety, Inspection Service and she did not like what happened to her there she merely made in inquiry. Ms. Moore later had her complaint information removed from iComplaints.

Bases

Reprisal/Retaliation (Prior EEO Involvement & Opposing a practice made unlawful by one of the employment discrimination statutes).[3]
Physical Handicap (COPD)

Issues

Hostile Work Environment and Harassment/Non Sexual
Reasonable Accommodation
Time and Attendance
Assignment of Duties

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[3] Per Title VII of the Civil Rights Act of 1964, which states, "...It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed, any practice made an unlawful employment practice by this title, or because he has made a charge, testified assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

Responding Management Official
Barbara "Bobbie" Moore

Witnesses
Nadine Chatman
Katrice Jackson
Paula Graham
Sequana Janifer

Remedy
1. I would like Ms. Moore to apologize publicly and in writing to me and the CSD staff for making the following false allegations that:

a) CSD staff hid the files;
b) CSD did not perform work on the files in their possession;
c) CSD staff is responsible for the late processing of work which has resulted in sanctions by the EEOC;
d) CSD staff failed to update iComplaints;
e) CSD staff does not work and they are lazy and incompetent; and,

2. For Ms. Moore to immediately cease and desist making further false and derogatory statements about CSD staff and OASCR employees.

3. For the harassment against myself and the CSD staff to stop.

4. To be given grade appropriate (GS-14/7) work;

5. Restoration of my annual and sick leave which I had to use because my telework agreement/reasonable accommodation was not honored; and,

6. For Barbara "Bobbie" Moore begin to honor my reasonable accommodation determination.

MEMORANDUM

TO: **Bobbie Moore, Acting Director, Corporate Services Division**

FROM: **Gayle M. Petersen, Branch Chief, Corporate Services Division**

SUBJ: **Staffing Issues and Office Structure**

DATE: **July 8, 2013**

As the Branch Chief of the Corporate Services Division (CSD), and the "Complaints Manager," I have had the opportunity to observe the workflow of CSD and the work products produced by the CSD staff. This memorandum is written to advise you that I have very serious concerns regarding the current office structure.

The employees in CSD currently do not have position descriptions, standard operating procedures, an organizational chart delegating the lines of authority, or a staffing plan, and the performance standards are now obsolete since the bulk of CSD work has been outsourced.

You continue to assign work to me as though I am the first level supervisor of the CSD staff. This is problematic since I cannot supervise staff without written documentation such as an organizational chart, or a delegation of authority or other instrument identifying me as the supervisor. Titles such as Branch Chief and Complaints Manager do not denote supervisory authority. There are currently no supervisory controls and this is especially problematic when you continue to direct me to supervise current CSD staff, and CSD detailees such as Anita Pitchford.

Ms. Pitchford was bought to CSD sometime in either late February or early March of 2013, to handle ADR for CSD. Ms. Pitchford's sole duty and responsibility was to coordinate ADR for the division. Coordinating ADR entailed, after ascertaining that a Complainant was interested in ADR, contacting the parties involved (the Complainant, the Resolving Official, and the mediator), and coordinating with all parties to schedule a time and place for the mediation. After settlements were reached, she also had the responsibility of drafting the settlement agreements.

Sometime in April you informed me and the staff verbally that you had delegated to me the additional title of Complaints Manager. There was no discussion of what this meant. However, I made an assessment of the work in the division and determined that ADR was not progressing. I bought this fact to Ms. Pitchford's attention and inquired of her as to what she perceived to be the problem. She advised me that everything was fine. After a few weeks, I again bought to her attention that ADR did not seem to be progressing, hoping that she would improve her performance. After I did not see any improvement in ADR, I bought this to your attention. Seeing no improvement, I began requesting Ms. Pitchford to provide to me status update reports on the more than 18 pending ADR requests. Ms. Pitchford refused to provide me with a matrix on the status of the pending ADR requests, or a report of any kind regarding ADR. She stated, "I

do not feel that I should, and I am not going to report to anyone with respect to the status of my work except for Bobbie Moore."

During this time, I also noticed that Ms. Pitchford became increasingly involved in the data management aspect of iComplaints. She also became involved with the management of the ROIs. She did not seem at all interested in ADR. When making inquiries of Ms. Pitchford as to what the problem was with her scheduling ADR, she said she could not get resolving officials. I asked her to work with you, Bobbie Moore to obtain the list of resolving officials willing to engage in ADR. After no progress was made, I once again asked Ms. Pitchford to explain what the current problems were that she was experiencing in ADR, and what the specific impediments to her accomplishing the task were. She informed me that Complainants had expressed to her that they did not wish to work with IMS. I asked Ms. Pitchford to write a brief memo outlining her difficulties, but she refused. In spite of Ms. Pitchford's obvious lack of interest to anything ADR related, I continued to ask Ms. Pitchford to provide me with information regarding ADR. She has never provided me with a status report, email communication, or memorandum regarding ADR and her difficulties performing this core and critical function. Despite my efforts to get Ms. Pitchford to take ADR seriously, in June 2013 a decision was made to contract out ADR to IMS. I contribute this to a lack of supervisory controls.

CSD currently has several Complainants who have not been outsourced to IMS that have requested ADR. These Complainants have been waiting for ADR for more than 90 days. I have sent to Ms. Pitchford an email inquiring about the status of these Complainants and I do not expect her to provide me with the requested information. For the record these Complainants are:

Debra Smith
Garry Lee
Homer Wilkes
Sue Dietrich
Laurie Lewis
Michelle Clark
Mark Benedict
Ronald Jones
Lydia Marquez
Timothy Beard

After ADR was taken from CSD, sometime in June 2013, you returned the stop light report to Ms. Pitchford. In late June or early July, Ms. Pitchford while working on the stop light report prepared a document with cases which she deemed to be of concern. On Friday, July 5, 2013, in the late afternoon you assigned the research of the potentially problematic cases to me, as Ms. Pitchford either could not, or would not, complete the task. On this same day, I requested Ms. Pitchford to review and research the ROIs on the list as monitoring the ROIs is her new area of responsibility. Instead of completing the task, Ms. Pitchford who was obviously determined not

to do the work sent me a series of emails with various excuses saying she had updated iComplaints which was not what was requested of her, or other reasons as to why she could not complete the assignment. This activity required me to stop work that I was doing in order to provide her with guidance, direction and instruction, with still no work product, and a large consumption of my time that I could have directed at completing my tasks such as uploading complaint files into EEOC/EFX. Ms. Pitchford has not, and does not follow directions from me, or from what I have observed, anyone else, and has no initiative to take the extra steps required to complete tasks.

For example, in order to complete the above described assignment she only had to send out emails to IMS and ECD and request that they provide the necessary information. Instead, because she would not complete the task I had to stop my work in order to complete the task for her, per your instruction. On another occasion I asked Ms. Pitchford to send the Hearing portion of the stop light report to IMS and request that they provide a status report on hearings requested by Complainants under their purview. I never received this report, or was ever copied on an email generated by Ms. Pitchford to IMS requesting this information, and when I asked her what happened to this report, I received a series of excuses and no product.

Under normal circumstances an employee who performs at this low level would be placed on a performance improvement plan. Because Ms. Pitchford is a detailee, my suggestion would be to have her returned to her position of record in the Early Resolution Conciliation Division. The CSD is a fledgling division which requires the enthusiasm of employees who have the initiative and drive to do outstanding work. Anita Pitchford has not impressed me as an employee who can handle, is interested in, or wants to learn the very vital work that we are tasked with accomplishing in this division with limited staff that need to function at maximum capacity. This division would be better served by a detailee with a "can do" attitude who will expend energy figuring out how to get work done with minimal effort and guidance, instead of spending energy on how to avoid work at all costs.

In addition CSD requires at the minimum standard operating procedures, position descriptions, staffing plans, an organizational chart and/or a work flow chart in order to function effectively. Although I provided you with draft standard operating procedures for CSD I have received no response.

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PREAMBLE

HISTORY OF THE FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT PROCESS

This section examines the history of the federal sector equal employment opportunity (EEO) complaint process. It provides an overview of the historical authority that transferred the responsibility for the federal sector EEO process from the Civil Service Commission (CSC) to the Equal Employment Opportunity Commission (EEOC or Commission).

I. HISTORICAL AUTHORITY

The Government first recognized a policy of nondiscrimination in federal employment during the 1940s. Specifically, in July 1948, President Harry S. Truman issued the first Executive Order to declare a policy of nondiscrimination in federal employment.[1] Executive Order 9980 prohibited discrimination in federal employment on the bases of race, color, religion, or national origin.[2] Exec. Order No. 9980, 13 Fed. Reg. 4,311 (July 28, 1948). The Order designated the head of each department to be personally responsible for insuring that employment decisions were based "solely on merit and fitness," and it required the head of each department to designate a Fair Employment Officer to appraise department personnel actions, receive discrimination complaints, and take necessary corrective or disciplinary action. Id. The Fair Employment Officer's decisions were appealable to the head of the department. Id. Executive Order 9980 also established a Fair Employment Board (FEB) in the Civil Service Commission (CSC) to advise department heads on issues related to fair employment, disseminate information relevant to fair employment programs, and coordinate department programs. Id. The FEB was authorized "to review decisions made by the head of any department which are appealed . . . or referred to the Board by the head of the department for advice, and to make recommendations to such head." Id.

President Dwight D. Eisenhower carried forward the government's nondiscrimination policy when he issued Executive Order 10590, which superseded Executive Order 9980. Exec. Order No. 10590, 20 Fed. Reg. 409 (Jan. 19, 1955). The Order required each department or agency head to establish procedures to provide a complainant with a fair hearing and the opportunity to appeal their case. Id. Executive Order 10590 re-designated the Fair Employment Officer as an

[1] In 1941, President Franklin D. Roosevelt signed Executive Order 8802, which prohibited government contractors from engaging in employment discrimination based on race, creed, color, or national origin. Exec. Order 8802, 6 Fed. Reg. 3,109 (June 27, 1941).

[2] President Truman concurrently issued Executive Order 9981, which ordered desegregation of the U.S. Armed Forces. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

Employment Policy Officer and abolished the FEB, replacing it with the President's Committee on Government Employment Policy. Id. The Committee's authority was limited, however, to reviewing cases and rendering advisory opinions to the agency or department heads before issuance of a final agency action. Id.

In March 1961, President John F. Kennedy issued Executive Order 10925, which amended Executive Order 10590. Executive Order 10925 replaced the President's Committee on Government Employment Policy with the President's Committee on Equal Employment Opportunity.[3] Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961). The Order charged this new committee with studying federal employment practices and recommending additional steps to fully achieve the policy of nondiscrimination. Id. The Committee was empowered with the authority to impose sanctions for violations of the Executive Order. Id.

In September 1965, President Lyndon B. Johnson issued Executive Order 11246, which superseded Executive Order 10590 but retained the prohibition on discrimination in federal employment on the bases of race, color, creed, or national origin. Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965). Notably, Executive Order 11246 returned appellate review of final agency actions to the CSC and authorized the CSC to issue regulations and orders necessary to carry out its responsibilities.[4] Id. The Order required each department and agency head to comply with the CSC's procedures, establish and maintain a positive program of equal employment opportunity. Id.

In August 1969, President Richard Nixon further amended Executive Order 11246 by issuing Executive Order 11478, which required department and agency heads to "establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment." Exec. Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 12, 1969). President Nixon tasked the CSC with reviewing and evaluating agency programs. Id. Executive Order 11478 also required agencies to "provide access to counseling for employees who feel aggrieved and . . . encourage the resolution of employee problems on an informal basis." Id.

By 1970, despite the issuance of numerous Executive Orders addressing nondiscrimination, employment discrimination remained a significant problem in the federal government. John Ross, A History of the Equal Employment Opportunity Commission 1965-1984 [hereinafter

[3] Executive Order 10925 also added "creed" as a prohibited basis of discrimination and prohibited federal government contractors from discriminating on account of race. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

[4] Executive Order 11246 also imposed nondiscrimination requirements on contractors and subcontractors as a condition of doing business with the federal government. Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

History of EEOC] at 82 (unpublished manuscript on file at EEOC Library in Washington, D.C.).[5] Congress did not find the administrative procedures established by the CSC to be effective. Id. at 82. The CSC rarely reversed agency decisions and was criticized for failing to address systemic discrimination. Id. at 82-83. In addition, testimony presented to Congress suggested that federal employees had little faith in the complaint process and often feared retaliation for challenging discriminatory employment practices. Id. at 83. Furthermore, Congress "found that inadequate remedies existed to make aggrieved persons whole," including the unavailability of back pay as an administrative remedy and procedural obstacles potentially limiting the ability of federal employees to bring claims against the federal government, such as sovereign immunity. Id. As a result, Congress passed the Equal Employment Opportunity Act of 1972, which amended Title VII to extend its coverage to include federal employees while retaining the CSC's role in the administrative process.[6] Id. Additionally, Congress passed the Rehabilitation Act of 1973, which prohibited the federal government from discriminating against qualified individuals with disabilities and required federal agencies to establish affirmative action programs to provide greater employment opportunities for individuals with disabilities. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

Despite the passage of the Equal Employment Opportunity Act and the Rehabilitation Act, there were still several problems with the federal complaint/appeals process. The CSC's procedural regulations were viewed as fundamentally biased against complainants, and the complaint process itself was difficult for individual complainants to navigate. History of EEOC at 169 (citing to U.S. CRC, To ELIMINATE EMPLOYMENT DISCRIMINATION (1975)). Furthermore, by the 1970s, seventeen federal agencies and departments were responsible for enforcing forty different nondiscrimination statutes and executive orders. EEOC History: 35th Anniversary: 1965 – 2000: The Law, http://www.eeoc.gov/eeoc/history/35th/thelaw/index.html. As a result, in 1978, President Jimmy Carter submitted two reorganization plans to Congress to eliminate duplication and conflict by placing the responsibility for coordinating all federal EEO programs exclusively with the EEOC. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 5, 1978); Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36,037 (Aug. 15, 1978).

President Carter issued Executive Order 12067 to implement Reorganization Plan No. 1 and transfer the functions of the Equal Employment Opportunity Coordinating Council (EEOCC) to the EEOC. Exec. Order No. 12067, 43 Fed. Reg. 28,967 (Jan. 3, 1979). Executive Order 12067 delineated the EEOC's responsibility for "develop[ing] uniform standards, guidelines, and policies" for promoting and furthering equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. Id. Executive Order 12067 required

[5] A former Regional Attorney with the Dallas District Office, John Ross, drafted this source as part of the Senior Executive Service Candidate Development Program.

[6] In 1974, Congress amended the EPA and ADEA to extend coverage to the federal sector. History of EEOC at 165, 167. Initially, the CSC was responsible for the enforcement of the EPA and the ADEA with respect to the federal sector. *Id.*

department and agency heads to comply with the Commission's final rules, regulations, policies, procedures, and orders. Id.

After President Carter submitted his Reorganization Plans to Congress in 1978, Congress passed the Civil Service Reform Act of 1978, which abolished the CSC and distributed its functions primarily among three agencies: the EEOC; a newly established Office of Personnel Management (OPM); and the Merit Systems Protection Board (MSPB), which replaced the CSC. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat 1111 (1978). The Reorganization Plan gave EEOC responsibility over the hearings and appeals functions for certain cases involving employment discrimination. Id. In December 1978, President Carter issued Executive Order 12106, which transferred additional CSC functions to the EEOC and amended Executive Order 11478 by adding disability and age as protected bases. Exec. Order No. 12106, 44 Fed. Reg. 1053 (Jan. 3, 1979). President Carter also issued Executive Orders 12107 implementing the Civil Service Reform Act of 1978 and Reorganization Plan No. 2. Exec. Order No. 12107, 44 Fed. Reg. 1055 (Jan. 3, 1979). In June, 1979, President Carter signed Executive Order 12144, which transferred certain equal pay and age discrimination enforcement functions to the EEOC. Exec. Order No. 12144, 44 Fed. Reg. 37,193 (June 26, 1979).

II. The Late 1970s-1980

Prior to the Commission obtaining authority over the federal sector EEO process, the CSC had authority to issue regulations and orders with respect to the processing of federal sector EEO complaints. As a result of Executive Order 11246, the CSC issued its initial regulations pertaining to complaint processing at 5 C.F.R. Part 1613, effective April 3, 1966. History of EEOC at 205 (citing to 5 C.F.R. Part 713 et seq.). These regulations provided time frames for filing complaints, required agency investigations, a hearing by an agency panel or an agency appointed hearing officer, a final decision by the agency head or a designee, and a process allowing complainants to file appeals with the CSC's Board of Appeals and Review. Id. After President Johnson issued Executive Order 11375, in October 1967, which prohibited discrimination in federal employment on the basis of sex, the CSC amended its regulations to require that sex discrimination complaints be processed the same as other EEO complaints. History of EEOC at 205. In 1969, the CSC revised its regulations. Significant changes to the regulations included: complainants were required to participate in informal counseling prior to filing a formal complaint, and complaints examiners were prohibited from being employees of the respondent agency. Id. The CSC subsequently amended its regulations several times between 1972 and 1979. Id.

When EEOC gained authority over CSC's functions regarding federal sector employment discrimination in 1979, it decided to keep the existing process in place until a detailed study could be completed. Id. Thus, the Commission adopted the CSC regulations with only minor technical changes. 43 Fed. Reg. 60,900 (Dec. 29, 1978). The regulations were moved from 5 C.F.R. Part 713 and re-designated at 29 C.F.R. Part 1613, effective January 1, 1979. Id.

In the early 1980s, the Commission amended its regulations with respect to the issue of remedies for complainants alleging discrimination in violation of the Rehabilitation Act. Specifically, in October 1981, the Commission amended its regulations to authorize back pay to applicants for federal employment who successfully proved disability discrimination in order to comply with the 1978 amendments to the Rehabilitation Act of 1973. 46 Fed. Reg. 51,384 (Oct. 20, 1981). The 1978 amendments provided that prevailing complainants of disability discrimination were entitled to the same remedies as those provided under Title VII. Id. The Commission's amendments deleted the provision in the regulations prohibiting back pay awards to applicants aggrieved by disability discrimination. *Id.*

During the mid-1980s, the Commission significantly revised its regulations governing the processing of federal sector complaints. Initially, the regulations were amended in 1985, to provide for a special panel to resolve conflicts between the MSPB and the EEOC. 50 Fed. Reg. 53,897 (Dec. 27, 1985). Subpart D, Processing Mixed Case Complaints, was amended to provide for a means to refer cases to a special panel, the organization of the special panel, and the procedures of the panel. Id. Subsequently, the Commission revised it regulations, effective November 30, 1987. 52 Fed. Reg. 41,920 (Oct. 30, 1987). The revised regulations encompassed numerous changes including providing additional grounds for dismissing complaints, as well as providing a right of appeal for complainants alleging breach of a settlement agreement. Id. In addition, the Commission in 1987, renamed complaints examiners to Administrative Judges (effective March 30, 1987), in order to "reflect more accurately the nature of the position." 52 Fed. Reg. 10085 (Mar. 30, 1987).

III. THE 1990s to the Present

The 1990s also represented a time of significant change to the Commission's regulations governing the processing of federal sector complaints. The Commission issued revised regulations effective October 1, 1992. 57 Fed. Reg. 12,634 (Apr. 10, 1992). These revisions moved the regulations from 29 C.F.R. Part 1613 to 29 C.F.R. Part 1614. Id. Part 1614 was organized differently than the prior version of the regulations. Id. Specifically, Part 1613 contained separate subparts for each type of complaint (Title VII complaints, age complaints, mixed case complaints *etc.*). Part 1614 consolidated the procedures as much as possible in an effort to avoid repetition. Id. One noteworthy change encompassed in the 1992 revisions was extending the time limit to contact an EEO Counselor from 30 days to 45 days. 57 Fed. Reg. 12,635 (Apr. 10, 1992).

Pursuant to the recommendations of a Federal Sector Workgroup, comprised of representatives from various offices throughout EEOC, the Commission revised its regulations again in 1999, effective November 9, 1999. 64 Fed. Reg. 37, 644 (July 12, 1999). Some of the significant changes to the regulations included: a requirement that agencies establish an alternative dispute resolution program, providing additional grounds for dismissal, providing Commission Administrative Judges with the authority to dismiss complaints, and making Administrative

Judge decision final decisions without potential agency modification. 64 Fed. Reg. 37, 644-37,645; 37,650 (July 12, 1999). In addition, the revised regulations implemented changes to the provisions governing class complaints to ensure that complaints "raising class claims are not unjustifiably denied class certification and are resolved under the appropriate legal standards consistent" with the federal courts. 64 Fed. Reg. 37,651 (July 12, 1999). Moreover, the Commission issued guidance regarding its new regulations in EEO Management Directive-110 (MD-110) (Nov. 9, 1999).

In 1992, Congress amended section 501 of the Rehabilitation Act to adopt the employment nondiscrimination standards of the Americans with Disabilities Act (ADA). 67 Fed. Reg. 35,732 (May 21, 2002). Effective June 20, 2002, the Commission deleted from its regulations the text of its old section 501 regulation, at 29 C.F.R. § 1614.203. Id. The new text of § 1614.203 provides, in pertinent part, that the standards used to determine whether section 501 of the Rehabilitation Act has been violated in a complaint alleging employment discrimination shall be the standards applied under the ADA. 67 Fed. Reg. 35,735 (May 21, 2002).

In an effort to clarify its procedures on mixed case complaints, the Commission issued EEO Management Bulletin 100-1 (EEO MB 100-1) on October 24, 2003. This bulletin advises agencies to delete from their copies of EEO MD-110, Section II.B.4.d in Chapter 4. EEO-MB 100-1 (Oct. 24, 2003). This section advised agency representatives to file a motion with an MSPB Administrative Judge to consolidate matters that were not within their jurisdiction with matters that were properly before the MSPB Administrative Judge. Id. The MSPB notified the Commission that this section was improper because it constituted a request for an MSPB Administrative Judge to hear matters that may not be within the jurisdiction of the MSPB. Id.

In 2004, the process that led to the current regulatory revisions began when the Commission created a workgroup to develop consensus recommendations from the Commissioners for improvements to the federal sector EEO complaint process. The workgroup considered a number of items including testimony and submissions from a November 12, 2002 Commission meeting on federal sector reform, staff proposals, and submissions from internal and external stakeholders including the National Employment Lawyers Association and the Commission's union. The workgroup determined that while there was no consensus among the Commissioners for large-scale revision of the federal sector EEO process, there was agreement on several discrete changes to the existing regulations that would clarify or build on the 1999 Part 1614 revisions.

Based on the workgroup's recommendations, a Notice of Proposed Rulemaking (NPRM) was drafted that amended certain sections of 29 C.F.R. 1614. The Commission approved the draft NPRM on June 2, 2008, circulated it to federal agencies on June 4, 2008, pursuant to EO 12067, and gave agencies two months to submit comments. Thirty-three (33) agencies or agency components submitted comments. After coordination with the Office of Management and Budget (OMB) and the commenting agencies, the Commission formally submitted the draft NPRM to OMB for review under EO 12866 on July 27, 2009.

The Commission approved the NPRM on December 9, 2009, and published it in the Federal Register on December 21, 2009. The Commission received 35 public comments: 14 from federal agencies; 6 from individuals; 5 from civil rights groups; 5 from members of the bar, and 5 from unions or other groups. The Commission issued the Final Rule, with public comments discussed in the preamble, on July 25, 2012.

The final rule contains a number of key revisions to 29 C.F.R. Part 1614:

- As part of the Commission's authority to review agency programs for compliance with Commission directives and guidelines that promote equal employment opportunity in the federal workplace, the Commission can issue notices to agencies when non-compliance is found and not corrected.

- Agencies can seek approval from the Commission to conduct pilot projects in which the complaint processing procedures vary from the requirements of Part 1614.

- A complaint that alleges that a proposal or preliminary step to taking a personnel action is discriminatory can be dismissed, unless the complainant alleges that the proposal is retaliatory.

- An agency that has not completed its investigation in a timely manner must inform the complainant in writing that the investigation is not complete, provide an estimated date of completion, and remind the complainant that s/he has a current right to request a hearing or file a lawsuit.

- An Administrative Judge's decision on the merits of a class complaint is a final decision, rather than a recommended decision, which an agency can implement or appeal.

- Agencies must submit appeals and complaint files to the Commission in a digital format, unless they can establish good cause for not doing so. Complainants are encouraged to submit digital filings.

- The rule also required that the Commission provide guidance regarding the changes made by the final rule and continue to assess the federal sector EEO complaint process with a view to further improvements.

CHAPTER 1
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AGENCY AUTHORITY AND RESPONSIBILITY

I. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (Commission) enforces five federal laws that prohibit employment discrimination against applicants for employment, current employees or former employees, including those in the federal workforce: Title VII of the Civil Rights Act of 1964, as amended (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); the Equal Pay Act of 1963 (prohibiting agencies from paying different wages to men and women performing equal work in the same work place); the Age Discrimination In Employment Act of 1967, as amended (prohibiting discrimination against persons age 40 or older); Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, (prohibiting discrimination on the basis of disability) and Title II of the Genetic Information Nondiscrimination Act of 2008 (prohibiting discrimination based on genetic information).

The Commission provides leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program. The Commission ensures federal agency and department compliance with Commission regulations, provides technical assistance to federal agencies concerning EEO complaint adjudication, monitors and evaluates federal agencies' affirmative employment programs, develops and distributes federal sector educational materials and conducts training for stakeholders, provides guidance and assistance to our Administrative Judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.

To carry out these duties, the Commission is authorized to issue rules, regulations, orders, and instructions governing the federal sector pursuant to section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b); section 15(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(b); section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1); the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff10; the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.; section 303 of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174; Executive Order 12067, 43 Fed. Reg. 28,967 (1978); and Executive Order 11478, 34 Fed. Reg. 12,985 (1969), as amended by Executive Order 12106 (1979). It is pursuant to these authorities that the Commission issues this Management Directive.

In furtherance of its mission, to stop and remedy unlawful employment discrimination, the Commission will from time to time review agency programs and provide guidance regarding whether they are in compliance with the Commission's rules, regulations, orders, management directives, management bulletins and any other instructions issued by the Commission. See 29 C.F.R. § 1614.102(e). It is the intent of the Commission to assist agencies in perfecting their EEO programs and to avoid or rectify any deficiencies in their programs that prevent them from reaching the statutory mandate of being model workplaces free from unlawful discrimination.

II. FEDERAL AGENCY[1]

Federal agencies are required by statute not to engage in discrimination on the bases of race, color, religion, sex, national origin, age, disability, genetic information or retaliation. A federal employee, former employee or job applicant who believes they were discriminated against has a right to file a complaint with the agency's office responsible for its EEO programs. Federal agencies must offer pre-complaint counseling or alternative dispute resolution (ADR) to individuals who allege that they were discriminated against by the agency. If pre-complaint counseling or ADR does not resolve the dispute(s), the individual can file a formal discrimination complaint with the agency's EEO office. The agency may dismiss the complaint for certain procedural reasons or conduct an investigation. At the conclusion of the investigation, the agency will issue a notice that provides the complainant with the option of either requesting a hearing before a Commission Administrative Judge or having the agency issue a final agency decision. The final agency action can be appealed to the Commission or challenged in a U.S. District court. The responsibility which the agency has to investigate and resolve complaints of discrimination stems from the statutory obligation which states that federal agencies have primary responsibility to ensure nondiscrimination in employment. 42 U.S.C. §2000e-16(e).

In light of the significant responsibility agencies have for ensuring the integrity of the EEO process, agency programs must comply with the rules, regulations, orders and

[1]The term "federal agency" or "agency," as used in this Management Directive, applies to military departments as defined in 5 U.S.C. § 102, executive agencies as defined in 5 U.S.C. § 105, the U.S. Postal Service, Postal Regulatory Commission, Tennessee Valley Authority, the National Oceanic and Atmospheric Administration Commissioned Corps, the Government Printing Office (except for complaints under the Rehabilitation Act), and the Smithsonian Institution. See 29 C.F.R. § 1614.103(b). The term also may include such other agencies, administrations, bureaus, (sub-components) as may be established within the above-listed that are given the authority to establish a separate unit tasked with implementing an agency program consistent with the requirements of 29 C.F.R. § 1614.102. Where such sub-components have been so authorized, the EEO Director shall be under the immediate supervision of the head of the sub-component. The sub-component EEO Director may, in the alternative, report to either the EEO Director of the parent organization or to the head of the parent organization.

instructions issued by the Commission to ensure that complaints of employment discrimination are resolved fairly and quickly. 29 C.F.R. § 1614.102(e) clearly sets forth both the authority of the Commission over the federal sector EEO programs and the duty of federal agencies to maintain EEO programs in a manner consistent with the mandatory directives of the Commission.

III. EEO DIRECTOR'S[2] INDEPENDENT AUTHORITY AND REPORTING RELATIONSHIPS

A. Federal Agencies Must Appoint an EEO Director Who Shall Be Responsible for:

1. implementing a continuing affirmative employment program to promote equal employment opportunity;

2. identifying and eliminating discriminatory practices and policies, including the counseling of individuals and the fair and impartial investigations of complaints; and

3. advising the agency head on matters related to equality of opportunity.

B. The EEO Director Must Report Directly to the Agency Head

To ensure that federal agencies achieve their goal of being a model workplace, all managers and employees must see equal employment opportunity as an integral part of the agency's strategic mission. Commission regulations require that the EEO Director "be under the immediate supervision of the agency head." 29 C.F.R. § 1614.102(b)(4). The purpose of this requirement is to ensure that the EEO Director has the access and authority to ensure that the agency truly considers the elimination of workplace discrimination to be a fundamental aspect of the agency's mission.

In order to maintain and exercise the independent authority required of the position, the EEO Director cannot be placed under the supervision of the agency's Chief Human Capital Officer or other officials responsible for executing and

[2]EEO Director in this Directive refers to Director of Civil Rights, EEO Officer, Complaints Manager or any other title used for the position that is responsible for carrying out the responsibilities set forth in 29 C.F.R. § 1614.102(c).

advising on personnel actions or providing the agency with a legal defense to claims of discrimination, such as the Office of General Counsel.

By placing the EEO Director in a direct reporting relationship to the head of the agency, the agency underscores the importance of equal employment opportunity to the mission of each federal agency and ensures that the EEO Director is able to act with the greatest degree of independence.

This unfiltered relationship allows the agency head to have a clear understanding of EEO factors when making organizational decisions. Placing the EEO Director under the authority of others within the agency may undermine the EEO Director's independence, especially where the person or entity to which the EEO Director reports is involved in, or would be affected by, the actions of the EEO Director in the performance of his/her implementation of the agency program set forth in 29 C.F.R. § 1614.102.

IV. AVOIDING CONFLICTS OF INTEREST

It is important to note that prior to the issuance of the final agency action, the agency is responsible for the fair, impartial processing and resolution of complaints of employment discrimination. Only when the employee opts to move the matter to the Commission or U.S. District court, does the process become adversarial for the agency. The primary role of an agency representative in the EEO process is to provide diligent representation to the agency in the adversarial portion of the process.

Federal agencies thus have a unique role to play in ensuring equal employment opportunity. First, every agency head has a statutory obligation to eradicate unlawful employment discrimination that may occur within the agency. This anti-discrimination responsibility is what requires federal agencies to administer a fair and impartial investigative process designed to determine the validity of complaints, as well as to employ affirmative efforts to root out discrimination and ensure equal employment opportunity. The Director of the Office responsible for the agency's EEO programs within the agency (or other comparable representative) is designated by the agency head to carry out this obligation.

At the same time, the agency head has a fiduciary obligation to defend the agency against legal challenges brought against it, including charges of discrimination. The General Counsel of the agency (or a comparable legal representative) is designated by the agency head to carry out this obligation.

Some may view the agency's investigative process as inherently biased because the agency accused of discrimination is the same agency that is charged with administering the EEO investigative process. But the statute requires that an agency conduct a fair and impartial investigation and issue a "final action" on a complaint of discrimination, and Commission

regulations establish a comprehensive system through which agencies must issue these final agency actions. Nevertheless, as the Commission's regulations make clear, and as this management directive reinforces, a federal agency head is obligated to protect both the integrity of the agency's EEO process and the legal interests of the agency.

29 C.F.R. §1614.102(e) sets forth the authority of the Commission over the federal sector EEO programs and the duty of federal agencies to maintain EEO programs in a manner consistent with the mandatory directives of the Commission.

A. Separation of EEO Complaint Program From the Agency's Personnel Function

The EEO complaint program is an integral part of the agency's "affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies." See 29 C.F.R. § 1614.102. To carry out this function in an impartial manner, the agency's personnel function must be kept separate from the EEO complaint process. The same agency official(s) responsible for executing and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes. The EEO processes often scrutinize and challenge the motivations and impacts of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision-making processes, those EEO functions must be kept separate from the personnel function.

B. Complaints That Present Potential Conflicts of Interest

1. When the Alleged Responsible Management Official is the Head of the Agency

A conflict of interest may exist when the responsible management official alleged to have engaged in discriminatory conduct is the agency head or a member of the immediate staff of the agency head, or occupies a high-level position of influence in the agency. Real or perceived conflict may occur as a result of the undue influence that the high level official may have over the EEO Director and other involved agency personnel. Whether this conflict is real or presents the appearance of a conflict, the matter must be addressed through procedures designed to safeguard the integrity of the EEO complaint process. For example, when an EEO complaint alleges that the agency head or a member of his/her immediate staff has engaged in discrimination, the agency head shall recuse

him/herself from the decision making process, and engage an official outside his/her chain of command to issue a final action on the case.

2. **When the Alleged Responsible Management Official is the EEO Director or Supervisor in the EEO Office**

If an employee wishes to file a complaint alleging discrimination by the EEO Director or another supervisor in the EEO office, a real or perceived conflict may exist because the interests of the responding official would challenge the objectivity or perceived objectivity of the EEO office. This matter must be addressed through procedures designed to safeguard the integrity of the EEO complaint process. For example, when an EEO complaint alleges that the EEO Director or a member of his/her immediate staff discriminated, the EEO Director shall recuse him/herself and retain a 3rd party to conduct the counseling, investigation, and draft the final agency decision for the agency head to issue.

C. Agencies Must Avoid Conflicts of Interest in Processing Complaints

Agencies are required to develop an impartial factual record in accordance with the instructions contained in this Management Directive. See 29 C.F.R. § 1614.108(b). Therefore, agencies must develop procedures for investigating complaints in which it is perceived that the EEO office would have an actual or perceived conflict of interest. In developing an impartial record where a conflict of interest or the appearance of a conflict exists, agencies should consider the following:

1. Formal or Informal Arrangements

Agencies should consider whether the EEO program would be best served by entering into a formal contract with a third party or whether an informal arrangement with a third party would suffice. When establishing a formal contract, many agencies enter into interagency agreements with other agencies to handle one or more of the stages in the EEO process. See Appendix A for a sample Interagency Agreement. Other agencies have developed informal arrangements with a third party, whereby the third party provides EEO services on an as-needed basis.

Agencies should consider the best source from which to obtain a third party. Agencies have reported using private contractors, parallel sub-components within a department or agency, and other federal agencies. The Commission does not endorse any particular type of third party over

any other. However, agencies should ensure that the third party adheres to the applicable requirements established in this Management Directive.

2. Stages of the EEO Process

Agencies should assess the stages of the EEO complaint process at which the assistance of a third party would be most effective. Many agencies assign a third party the responsibility of providing counseling, administering ADR, conducting the investigation, and/or writing the accept/dismiss letter and/or the final agency action. Pursuant to 29 C.F.R. § 1614.110(a), the agency is responsible to issue a final order either fully implementing an Administrative Judge's decision or not fully implementing and appealing the Administrative Judge's decision; pursuant to 29 C.F.R. §1614.110(b), the agency is responsible for taking final action by issuing a final agency decision (FAD). Although the agency must issue the final action, it may assign a third party to write the final action and review the final action before issuance.

D. Separation of EEO Complaint Program from Agency's Defensive Function

Heads of agencies must manage the dual obligations of carrying out fair and impartial investigations of complaints that result in final agency determinations on whether discrimination has occurred and defending the agency against claims of employment discrimination. Only through the vigilant separation of the investigative and defensive functions can this inherent tension be managed.

Ensuring a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, and enhances the credibility of the EEO office and the integrity of the EEO complaints process.

There must be a firewall between the EEO function and the agency's defensive function. The firewall will ensure that actions taken by the agency to protect itself from legal liability will not contaminate the agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

The various means of ensuring this firewall are set forth in Section E below. In addition, is it important for the EEO Director to be provided with sufficient legal resources (either directly or through contracts) so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office.

At a minimum, however, the legal office that represents the agency in EEO complaints may not conduct legal sufficiency reviews of EEO matters. Similarly, impartiality or the appearance of impartiality is not ensured by simply rotating representatives within the same office and is undermined where the office colleagues of an agency representative are assigned the legal sufficiency function in EEO cases from the representative's caseload.

The following sections provide answers to commonly asked questions regarding the appropriate role of those defending the agency during the EEO counseling and investigative processes.

E. Questions and Answers Clarifying Proper Roles of an Agency Representative[3] in the EEO Administrative Complaint Process

(Q1) May an agency representative participate in settlement attempts during the informal stage of the EEO process?

(A1) Yes. Either party may have a representative present during settlement attempts.

(Q2) May an agency representative accompany a management official to a meeting with an EEO Counselor concerning an informal complaint?

(A2) Yes. An agency representative may accompany a management official to a meeting with an EEO Counselor at the request of the management official. The agency representative may advise the management official of his or her rights and responsibilities and represent the agency's interest in facilitating resolution of the complaint. The EEO Counselor should not defer to the counsel/representative or allow the counsel/representative to interfere in the performance of the Counselor's duties.

(Q3) May an Agency representative participate in activities conducted by the EEO Counselor during the informal process?

(A3) No. Other than the situations described in Q1 and Q2, the Agency representative may not question witnesses or in any way attempt to consult/direct the EEO counseling process.

[3]The term "agency representative" refers to any or all agency employees whose job duties include defending the agency's personnel policies and/or actions. The term is not limited to attorneys employed in an agency's Office of General Counsel or Office of Legal Counsel. The term also includes non-attorney employees whose job duties include defending the agency's personnel policies and/or actions, for example, labor relations specialists.

(Q4) Is an agency representative the personal representative of the management official?

(A4) No. The agency representative represents the agency. However, to the extent that management officials are acting within their official capacity and their interests are consistent with the agency's interests, the agency may permit the agency representative to provide representation to the management official during the EEO process. At no time during the EEO administrative process is an individual management official considered a party to the complaint. Rather, during the EEO administrative process, management officials are considered witnesses.

(Q5) May an agency representative be involved in deciding whether or not to accept a complaint for investigation?

(A5) No. In order to preserve the integrity and impartiality of the EEO process, an agency representative may not be involved in deciding whether or not to accept a complaint for investigation, or to determine which bases and issues are to be accepted.

(Q6) May an agency require the EEO office to accept legal advice from the agency representative on how to conduct an EEO investigation?

(A6) No. In order to preserve the integrity and neutrality of the EEO process, the agency representative may not advise the EEO office concerning any aspect of an EEO investigation unless requested to do so by the EEO office. The EEO office must be free to follow, or reject, the advice given. Advice can be provided by an attorney within the EEO office or an attorney in a unit separate and apart from the unit that provides representation to the agency. However, it would be a conflict, for example, for the individual who represented the agency in an EEO hearing to subsequently play a role in decisions with respect to EEO investigations involving the same complainant.

(Q7) May an agency representative review documents during the investigation?

(A7) Generally, no. The investigative process is a non-adversarial fact finding process. The role of the investigator in gathering information concerning the claim(s) in the complaint is to obtain unbiased, objective, and impartial information and facts regarding the allegations. The investigator has discretion to determine what documents and information would facilitate the investigation. The investigator also has the discretion to determine whether to disclose information and documents obtained during the investigation. For example, neither management officials nor agency representatives are entitled to review complainant's affidavit or the statements of other non-management witnesses unless the investigator decides that it would facilitate the investigation to disclose that information. However, if a witness is a

management official, such official may consult with agency counsel for information to assist the official in responding to the inquiry.[4] This is not, however, a requirement, and agencies must not require that management officials' investigative responses be reviewed/approved by agency counsel.

(Q8) May an agency representative accompany a management official, who is alleged to have engaged in an unlawful employment action, to a meeting with an EEO Investigator?

(A8) Yes. An agency representative may accompany a management official who is alleged to have engaged in an unlawful employment action to an interview with an EEO Investigator at the request of the agency or the management official. The agency representative may advise the management official of his or her rights and responsibilities and participate in efforts to resolve the complaint. The EEO Investigator should be careful not to defer to the counsel/representative during the interview. The counsel/representative should be careful not to interfere with the performance of the Investigator's duties during the interview.

(Q9) May an agency representative accompany managerial agency personnel who are not the subject of the complaint to interviews with an EEO investigator?

(A9) Yes. Managers can request the advice of an agency representative during EEO interviews as they can for any matters related to their performance of their official duties because managers are agency agents whose actions are legally binding on the agency. However, the agency representative does not represent the manager in his/her personal capacity; the agency representative represents the manager in the manager's official capacity only. Therefore, if a manager requests an agency representative, the agency should consider whether the agency's and manager's interests coincide. Furthermore, because the investigation of an EEO complaint is not an adversarial process, the agency representative's role during the interview is limited to advising the manager witness. The agency representative may not ask questions, make objections, or otherwise play a defensive role for the agency.

(Q10) May an agency representative accompany non-managerial agency personnel who are not the subject of the complaint to interviews with an EEO investigator?

[4] See, Rucker v. Department of the Treasury, EEOC Appeal No. 0120082225 (February 4, 2011) (Participants in EEO investigations should be assured that they can give candid, truthful responses to EEO investigators. The agency must avoid actions that might create the appearance that it is influencing employees' responses to EEO investigators.)

(A10) No. The investigation of a complaint is not an adversarial process and there is no defensive role for the agency during the investigation. However, the witness may consult with personal counsel and bring them to the interview at their own expense.

(Q11) May an agency representative make suggestions to the investigator regarding which documents to obtain or witnesses to interview?

(A11) Yes. An agency representative and anyone else with knowledge of the matter may suggest or submit to the investigator relevant documents and witnesses. However, an agency representative cannot require the investigator to obtain certain documents or interview certain witnesses. Furthermore, an agency representative may not control the means and methods of the investigation. The means and methods of the investigation are solely within the discretion of the investigator. The investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence. Investigative inquiries may include any fact-finding methods that the investigator decides will efficiently and thoroughly address the matters at issue, including but not limited to: personal interviews, depositions, fact-finding conferences, requests for information, position statements, exchange of letters or memoranda, interrogatories and affidavits.

(Q12) May an agency representative review the affidavit of a management official who is the subject of a complaint of employment discrimination?

(A12) Yes. Because the agency will be accountable for the actions of a management official who is the subject of a complaint of employment discrimination, an agency representative may review such management official's affidavit. However, agency representative should not direct the witness in how to respond to the questions contained in the affidavit.

(Q13) May an agency representative review and comment on a draft report of investigation (ROI)?

(A13) Generally no. However if the EEO office affords the complainant the opportunity to review the draft ROI before it is finalized and comment on any perceived deficiencies, the agency representative may also be afforded the opportunity to review and comment.

(Q14) May an agency representative review a draft of an agency's final decision on the merits of an EEO complaint before it is issued?

(A14) No. Legal sufficiency reviews must be handled by an individual or functional unit that is separate and apart from the agency representative and his/her functional unit. Because the EEO Director is acting as an adjudicator of the complaint when

s/he issues a final decision, it would be inappropriate for the agency representative to review or suggest any modifications to a draft final agency decision. An EEO Director may seek legal advice from any individual or unit that is separate and apart from the unit that handles agency representation in EEO complaints. Each agency must provide sufficient resources for its EEO office in order to ensure the legal sufficiency of its final actions. As noted above, the optimal situation is for the EEO office to have sufficient internal legal resources to draft final agency actions.

(Q15) May an agency representative be involved in deciding whether or not to appeal a decision issued by a Commission Administrative Judge?

(A15) Yes. When an Administrative Judge issues a decision, the administrative EEO complaint process allows both parties to the complaint the right to appeal to the Commission. The complainant may appeal the agency's final action on the complaint, and the agency must appeal from an Administrative Judge's decision if its final order does not fully implement the decision of the Administrative Judge. Unlike the issuance of a final decision without a hearing, where a decision is issued by a Commission Administrative Judge, the agency is no longer responsible for adjudicating the complaint, but rather is determining whether, as a party to the matter, to appeal from the Administrative Judge's decision. Therefore, an agency representative cannot make the decision but may, if requested, counsel the person designated with the responsibility with deciding whether to appeal a decision by an Administrative Judge.

(Q16) May an agency representative be involved in deciding whether or not to request reconsideration of a decision issued by the Commission on appeal?

(A16) Yes. For the same reasons stated in Question No. 15, an agency representative may also counsel the person who decides whether to request reconsideration of a decision issued by the Commission on appeal.

V. DELEGATION OF AUTHORITY TO RESOLVE DISPUTES

The agency must designate an individual to attend settlement discussions convened by a Commission Administrative Judge or to participate in alternative dispute resolution (ADR) attempts. Agencies should include an official with settlement authority during all settlement discussions and at all ADR meetings, (note: the agency's official with settlement authority should not be the responsible management official or agency official directly involved in the case). The probability of achieving resolution of a dispute improves significantly if the designated agency official has the authority to agree immediately to a resolution reached between the parties. If an official with settlement authority is not present at the settlement or ADR negotiations, such official must be

immediately accessible to the agency representative during settlement discussions or ADR.

VI. SPECIAL EMPHASIS PROGRAM

The head of the agency shall designate an Equal Employment Opportunity Officer(s) and such Special Emphasis Program Managers, clerical, and administrative support as may be necessary to carry out the functions described in Part 1614 in all organizational units of the agency and at all agency installations. 29 C.F.R. § 1614.102(b)(4).

Special Emphasis Program Managers should include managers of the Program for Employees with Disabilities, the Federal Women's Program, Hispanic Employment Program and such other programs as may be required by the Office of Personnel Management or the particular agency.

An agency head may delegate authority under this part to one or more designees. 29 C.F.R. § 1614.607.

VII. EEO OFFICIALS CANNOT SERVE AS REPRESENTATIVES

EEO officials must have the confidence of the agency and its employees. It is inconsistent with their neutral roles for EEO counselors, EEO investigators, EEO program managers, or EEO Directors to represent agencies or complainants in the EEO complaint process. Therefore, persons in these positions cannot serve as representatives for complainants or for agencies in connection with the processing of discrimination complaints. See 29 C.F.R. § 1614.605(c) (disqualification of representatives for conflict of duties).

VIII. AGENCY STATISTICAL REPORTING REQUIREMENTS FOR THE COMPLAINT PROCESS

A. Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints

The Commission requires each covered agency to use the EEOC Form 462 Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints to provide an annual report of the status of all pre-complaints and formal complaints processed under its EEO complaints program. See 29 C.F.R. § 1614.602(a). The Commission annually provides detailed instructions for reporting the data in an EEOC Form 462 User's Instruction Manual located on the Guidance page of the Commission's electronic document submission portal.

B. Quarterly and Fiscal Year EEO Complaint Statistics Required by Title III of the No FEAR Act

Pursuant to 29 C.F.R. § 1614.703, agencies are required to post cumulative quarterly and fiscal year EEO complaint statistics, titled "Equal Employment Opportunity Data Posted Pursuant to Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174" on the home page of the agency's public web site. Agencies should provide a hyperlink to the statistical data entitled "No FEAR Act Data," Section 1614.704 of 29 C.F.R. sets forth the list of statistical data the agency must post. Additional information regarding No FEAR Act posting can be found at http://www.eeoc.gov/federal/directives/index.cfm.

C. Annual Report to Congress, EEOC and the U.S. Attorney General Required by Title II of the No FEAR Act

Title II of the No FEAR Act of 2002 requires each federal agency to submit to Congress, the Commission and the Attorney General an annual report that includes the agency's fiscal year Equal Employment Opportunity complaint statistics among other requirements. More information on the No FEAR Act annual report requirements can be found in 5 C.F.R. §§ 724.301-302. All No FEAR Act reports should be sent to the

Chair of the Equal Employment Opportunity Commission
c/o Office of Federal Operations

Attention: No FEAR Act Report Coordinator
P.O. Box 77960
Washington, D.C. 20013

or submitted electronically through the Commission's electronic document submission portal.

Other Commission reporting requirements are set forth in Management Directive 715 issued in October 2003 that is located on the Commission's web site at http://www.eeoc.gov/federal/directives/md715.cfm.

IX. PROGRAM REVIEW PROCEDURES FOR COMPLIANCE

Agency programs will be reviewed for compliance with Commission rules, regulations, orders, Management Directives, Management Bulletins or any other instructions issued by the Commission. Due to the variation in the requirements set forth in the above issuances the method of review may vary, depending on the requirement(s) at issue. A review may result from multiple sources: 1) monitoring agency submissions including complaint files, plans and reports; 2) monitoring correspondence and news media for reports of agency action or non-action indicative of compliant or noncompliant activity; 3) requesting information directly from the agency; and 4) onsite visits or virtual conferences.

Pursuant to 29 C.F.R. § 1614.102(e), in cases where any of an agency's EEO programs or activities are found not to be in compliance with a Commission issuance, the agency will be notified of such non-compliance, and the agency will be given the opportunity to respond to the Commission. The agency's response should contain a statement of the agency's compliance, a plan to bring the program or activity into compliance or a justification as to why the agency will not comply. Failure to respond or an inadequate agency response will result in escalation to the next step in this process.

A. Notice to Agency of Non-Compliance

In cases where non-compliance is discovered, the agency EEO Director or responsible Program Manager will be notified in writing of the noncompliance. The notice will include:

1) the requirement with which the Commission believes that the agency is not in compliance and the source of that requirement;

2) a statement explaining how the Commission became aware of the noncompliance;

3) a statement as to how the agency is not in compliance and the basis for that conclusion;

4) a stated period of time to cure the noncompliance with recommended actions; and

5) a stated period of time in which the agency may establish that it is, in fact, in compliance or a stated period of time to establish a justification for the non-compliance.

B. Written Notice to Head of Federal Agency

The Chair of the Commission may issue a notice to the head of the agency whose program is non-compliant when an agency head fails to be responsive and/or where efforts to assist the agency in reaching compliance through the steps set forth in Section IX.A fail. The notice to the agency head will include:

1) the compliance requirement with which the Commission believes the agency is not complying and the source of that compliance requirement;

2) a statement explaining how the Commission became aware of the noncompliance;

3) the efforts undertaken by the Commission's Office of Federal Operations to obtain compliance;

4) the agency response to the Commission's efforts; and

5) a stated period of time within which the agency head must respond with a plan to bring the program into compliance.

C. Public Notification of Non-Compliance

Where the head of the agency fails to respond timely and in good faith with a plan that the Director of Federal Operations believes is sufficient to bring the agency program into compliance, the Chair of the Commission will publically identify the non-compliant agency and the factual bases surrounding the non-compliance.

1. The Chair will evaluate the repercussions and reach of the effect of the non-compliance on equal employment opportunity and publish or publically identify the fact of non-compliance in a manner reflective of the reach and severity of the harm.

2. Public identification may occur by using, among other means, publication in the Annual Report to Congress, a press release, posting some form of notice of non-compliance on the Commissions's public website, or any other means the Chair deems appropriate.

X. Pilot Projects

Unless prohibited by law or executive order, the Commission, in its discretion and for good cause shown, may grant agencies prospective variances from the complaint processing procedures prescribed in 29 C.F.R Part 1614. Variances will permit agencies to conduct pilot projects of proposed changes to the complaint processing requirements of 29 C.F.R Part 1614 that may later be made permanent through regulatory change. See 29 C.F.R. § 1614.102(f).

A. Request for Pilot Authority

Agencies requesting variances must submit in writing a request for pilot authority. In its written request, the agency requesting a variance must:

1. identify the specific section(s) of 29 C.F.R Part 1614 from which it wishes to deviate and provide a summary description of what it proposes to do instead;

2. provide information clearly defining the stages in the pilot project and how matters will progress to completion within the pilot project;

3. explain the expected benefits and expected effect on the EEO complaints process of the proposed pilot project;

4. certify that the pilot project will ensure fairness and neutrality with the ultimate goal of achieving equality of employment opportunity;

5. state how the agency intends to maintain an adequate record for a potential hearing or appeal;

6. submit information demonstrating the agency's current status of operating within regulatory guidelines for complaint processing (information should include EEO Form 462 timeliness indicators, Management Directive 715 self-assessment, and any third-party evaluations, such Commission program evaluations, OIG evaluation reports, or GAO reports);

7. provide a written description of the knowing and voluntary opt-in provision for participants;

8. indicate the proposed duration of the pilot project;

9. describe the method to be used to inform agency employees and applicants of the pilot project; and

10. explain the method by which it intends to evaluate the success of the pilot project on an interim basis and at the completion of the pilot project, including identification of well-defined, clear and measurable objectives and their connection to program objectives, the criteria for determining pilot project performance, a way to isolate the effects of the pilot project and how data will be collected for evaluation purposes.

B. Process for Submitting, Reviewing, and Approving Pilot Projects

The Commission will annually review and evaluate requests for pilot authority. Agencies should submit their request electronically at the end of the second quarter of the fiscal year and the Commission will make its determination by the end of the third quarter. All approved pilot projects will begin at the beginning of the next fiscal year and terminate not more than 24 months later, unless extended (see below). The process for approval of pilot authority follows:

1. The Commission announces the opening period of the request for pilot authority at the end of the second quarter of the fiscal year (March 31st).

2. Agencies submit requests to the Office of Federal Operations by April 15th.

3. The Office of Federal Operations reviews requests and makes recommendations (completed by May 15th).

4. The Office of Federal Operations submits requests and recommendations to the Commission by May 15th.

5. The Commission review, including a briefing period regarding the requests for variances and recommendations from the Office of Federal Operations, will be completed within 30 days (or by June 15th).
6. The Commission votes on approval of requests for pilot authorities.
7. The Office of Federal Operations sends Commission determinations to proposing agencies.
8. Pilot projects must begin the first day of the next fiscal year (October 1st).
9. The 24 month maximum timeframe for pilot projects will permit agencies to accept complaints into the pilot projects for up to 24 months, and allow agencies a reasonable amount of time to conclude the processing of those complaints.
10. Agencies administering pilot projects must submit quarterly reports to the Office of Federal Operations with information on the total complainants opting into the pilot project, the average age of complaints with the pilot project, and updated pilot project evaluation data. See Section X.A.10 of this Chapter.
11. Agencies administering pilot projects must submit a final evaluation report at the conclusion of the pilot project. The report must provide a detailed evaluation of the results of the pilot project and be submitted to the Commission within 90 days of the conclusion of the pilot project.

Variances will not be granted for individual cases and will usually not be granted for more than 24 months. The Director of the Office of Federal Operations for good cause shown may grant requests for extensions of variances for up to an additional 12 months. Additionally, the Director of the Office of Federal Operations may terminate an agency's pilot authority if the agency fails to comply with the requirements of the variance. Prior to termination of the pilot authority, the Director of the Office of Federal Operations will send a notice to the agency requesting information on compliance with the variance provisions.

Electronic submission of pilot authority requests must be made using email transmission of all documents to federalsectoreeo@eeoc.gov or through the Commission's electronic document submission portal.

CHAPTER 2
EQUAL EMPLOYMENT OPPORTUNITY PRE-COMPLAINT PROCESSING

I. INTRODUCTION

A. Counseling Generally

The EEO process begins when a person who believes s/he has been aggrieved meets with an EEO Counselor.[1] The EEO Counselor provides vital information regarding the EEO process and other processes that may be available to the aggrieved individual, gathers basic information regarding the matter(s) from the aggrieved individual and attempts to informally resolve the matter(s) if the matter does not go to the alternative dispute resolution program. The EEO Counselor plays a vital role in ensuring prompt and efficient processing of the formal complaint. This section of the Management Directive provides Commission guidance and procedures that EEO Counselors should follow when presented with individual and class claims of discrimination.[2]

B. Full-Time Counselors

Agencies should use full-time EEO Counselors whenever possible. If an agency must rely on EEO counselors for whom EEO counseling is a collateral-duty, agencies should consider the following best practices: (1) include a timeliness component in the performance plan of the collateral-duty EEO Counselors; (2) implement a policy to remove EEO Counselors for tardiness or inferior work product; and (3) provide incentives for good performance by using on-the-spot awards, letters to supervisors, and awards presentations.[3] The Commission also

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[1]The Commission consistently has held that a complainant may satisfy the criterion of EEO Counselor contact by initiating contact with any agency official logically connected with the EEO process, even if that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO process. See Hyman v. Department of the Navy, EEOC Appeal No. 0120100060 (May 26, 2011); Walters v. Department of Veterans Affairs, EEOC Appeal No. 0120110980 (May 18, 2011); Lodge v. Social Security Administration, EEOC Appeal No. 0120110847 (May 12, 2011).

[2]All time frames set out in this Management Directive are stated in calendar days unless otherwise indicated.

[3]For more information, please review the Commission's report, "Attaining a Model Agency Program: Efficiency" (2004).

encourages agencies to use the step-by-step guide at Appendix B to develop or refine its own counseling procedures.

C. EEO Counselor Training Requirements

Continuing education and training for employees working in federal sector EEO is vitally important to promoting the goals and objectives of equal employment opportunity. This Chapter establishes mandatory training requirements for EEO Counselors.

D. EEO Counseling and Investigations

An EEO Counselor may not serve as an Investigator in a dispute in which s/he provided counseling to the aggrieved person. The EEO Counselor's role is to provide an environment for open dialogue leading to an informal resolution prior to the filing of a complaint. The role is compromised if the EEO Counselor also serves as an Investigator of the complaint.

The Commission also discourages agencies from allowing an EEO Counselor to act as an Investigator in a different dispute. Combining the roles of Counselor and Investigator (even with regard to different disputes) can create a perception of bias and potentially confuse individuals with regard to the purpose of the counseling process. Therefore, the Commission recommends against using EEO Counselors as Investigators, except as a last resort.

E. EEO Counseling and ADR

Both alternative dispute resolution (ADR) and EEO counseling are essential to the prompt resolution of claims of discrimination. The opportunity for informal resolution is important. ADR is a term used to describe a variety of approaches to resolving conflict that are different from traditional adjudicatory methods or adversarial methods. ADR provides a means of improving the efficiency of the federal EEO complaint process by attempting early and informal resolution of EEO disputes without the filing of a complaint.

When an aggrieved person seeks pre-complaint counseling, the individual must be fully informed of:

1. how the agency ADR program works;

2. the opportunity to participate in the program where the agency agrees to offer ADR in a particular case; and

3. the right to file a formal complaint if ADR does not achieve a resolution.

II. MANDATORY EEO COUNSELOR TRAINING REQUIREMENTS

A. Minimum Requirements

To ensure quality counseling throughout the federal sector, the Commission requires that new EEO Counselors, including contract and collateral duty Counselors, receive a minimum of thirty-two (32) hours of EEO Counselor training prior to assuming counseling duties. In addition to the training for new Counselors, all Counselors are required to receive at least 8 hours of continuing counselor training each fiscal year.

The Commission has developed training courses to satisfy this requirement, and offers them to agencies through the EEOC Revolving Fund Program on a fee-for-service basis.[4] Agencies may also develop their own courses to satisfy this requirement as long as the training meets the standards set forth by the Commission.

B. Standards for Thirty-Two Hour Training Course

New EEO Counselors must receive training in the following areas before an agency assigns them to provide EEO counseling to aggrieved persons:

1. an overview of the entire EEO process set forth under 29 C.F.R. Part 1614, emphasizing important time frames in the EEO process, providing an overview of counseling class complaints, and analyzing fragmentation issues (see Chapter 5, Section III of this Management Directive for a discussion of fragmentation);

2. a review of the roles and responsibilities of an EEO Counselor, as described in this Chapter and in the Appendices to this Management Directive;

[4]For more information about EEOC training courses, visit the Commission's website at http://www.eeoc.gov/federal/training/index.cfm.

3. an overview of the statutes that the Commission enforces, including Title VII of the Civil Rights Act of 1964, as amended (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); the Equal Pay Act of 1963 (prohibiting agencies from paying different wages to men and women performing equal work in the same work place); the Age Discrimination In Employment Act of 1967, as amended (prohibiting discrimination against persons age 40 or older); Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, (prohibiting discrimination against people with disabilities) and Title II of the Genetic Information Nondiscrimination Act of 2008 (prohibiting discrimination based on genetic information);

4. an explanation of the theories of discrimination, including the disparate treatment, adverse impact, and reasonable accommodation theories, and providing more detailed instructions concerning class actions and issues attendant to fragmentation;

5. a review of the practical development of issues through role-playing or other practices designed to have attendees practice providing EEO counseling, including the initial intake session with an aggrieved person, identifying claims, writing reports, and attempting resolution;

6. a review of other procedures available to aggrieved persons: the right to go directly to court under the ADEA after notice to the Commission; mixed case processing issues, including the right of election; class complaints processing issues; and the negotiated grievance procedure, including the right of election; and

7. an overview of the remedies available for each law, such as compensatory damages, attorney's fees, and costs available to prevailing parties.

C. Standards for Continuing Training Requirements

Once EEO Counselors complete the minimum requirements, they must receive at least eight hours of continuing EEO counseling training during every fiscal year thereafter. The purpose of this continuing training requirement is to keep EEO Counselors informed of developments in EEO practice, law, and guidance, as well as to enhance and develop their counseling skills. Accordingly, agencies should conduct a needs assessment to determine specific areas for training. The Commission anticipates that this training will include segments on legal and policy updates, regulatory and statutory changes, and counseling skills development.

III. THE ROLES AND RESPONSIBILITIES OF AN EEO COUNSELOR

When an aggrieved person seeks EEO counseling, the Counselor must ensure that the complainant understands his/her rights and responsibilities in the EEO process, including the option to participate in ADR. The EEO Counselor must perform several tasks in all cases, regardless of whether the individual ultimately participates in ADR, including:

1. Advise the aggrieved person about the EEO complaint process under 29 C.F.R. Part 1614. The EEO counselor should explain the agency ADR program, stating that the program is available to the aggrieved person or advising the individual whether the program will be made available. The EEO Counselor should further explain that if the ADR program is available, the aggrieved person will have to decide whether to seek pre-complaint resolution through the ADR process or through the traditional EEO counseling process. In this regard, the EEO Counselor should inform the aggrieved person about the differences between the two processes.

2. Determine the claim(s) and basis(es) raised by the potential complaint.

3. Conduct an inquiry during the initial interview with the aggrieved person for the purpose of determining jurisdictional questions. This includes determining whether there may be issues relating to the timeliness of the individual's EEO Counselor contact and obtaining information relating to this issue. It also includes obtaining enough information concerning the claim(s) and basis(es) so as to enable the agency to properly identify the legal claim raised if the individual files a complaint at the conclusion of the EEO counseling process.

   Use of the term "initial interview" in this context is not intended to suggest that during the first meeting with the aggrieved person an EEO Counselor must obtain all of the information s/he needs to determine the claim(s) or basis(es). Nor does it mean that if the person decides to participate in ADR, the EEO Counselor is foreclosed from contacting the person to obtain such additional information as s/he needs for this specific purpose.

4. Seek a resolution of the dispute at the lowest possible level, unless the agency offers ADR and the aggrieved person agrees to participate in the ADR program. If the dispute is resolved in counseling, the EEO Counselor must document the resolution.

5. Advise the aggrieved person of his/her right to file a formal discrimination complaint if attempts to resolve the dispute through EEO counseling or ADR are unsuccessful.

6. Prepare a report sufficient to document that the EEO Counselor undertook the required counseling actions and to resolve any jurisdictional questions that arise.

The Commission has developed a guide for EEO counseling that agencies may use in developing or refining their own procedures. (See Appendix B.)

IV. INITIAL INTERVIEW SESSION

A. Provide Required Written Notice

At the initial session or as soon as possible thereafter, the EEO Counselor must provide all aggrieved persons written notice of their rights and responsibilities. 29 C.F.R. § 1614.105(b). The Commission has set forth this information in the "EEO Counselor Checklist," in Appendix C

B. Provide Information on Other Procedures as Required

Depending upon the facts and circumstances of the case, an aggrieved person may have options other than the Part 1614 procedure available in pursuit of a discrimination claim. The individual, in some cases, may have to elect the process s/he wishes to pursue. Election options apply in age discrimination complaints, mixed case complaints, Equal Pay Act complaints, and claims where certain negotiated grievance procedures apply.

In addition, for cases alleging discrimination based on sex stereotypes (for example, sexual orientation) under Title VII, the aggrieved person may file a formal complaint under Part 1614 and/or file under the agency's grievance procedures, under the agency's procedures pursuant to Executive Order 13087, or with the Office of Special Counsel. As such, EEO Counselors must be familiar with these procedures and be able to identify such cases when the aggrieved person first seeks counseling. See Appendices D and E.[5]

[5]See Chapter 4, Section II, of this Management Directive, for additional guidance on the election process applicable to mixed case complaints.

C. Explain Statutes and Regulations

EEO Counselors must have a good working knowledge of the complaint processing regulations in Part 1614 and a sufficient familiarity with federal anti-discrimination statutes, regulations and Commission guidance that will enable them to identify bases and claims correctly. These statutes are:

1. Title VII of the Civil Rights Act of 1964, as amended

Title VII prohibits discrimination based on race, color, religion, sex, and national origin. It also prohibits reprisal or retaliation for participating in the discrimination complaint process or for opposing any employment practice that the individual reasonably and in good faith believes violates Title VII.

Title VII's prohibition against sex discrimination includes denial of equal pay, pregnancy status, transgender status,[6] and non-conformity of sex stereotypes (for example, sexual orientation).[7]

2. Age Discrimination in Employment Act of 1967, as amended (ADEA)

The ADEA prohibits discrimination in employment on the basis of age (40 years or older). It also prohibits retaliation against individuals exercising their rights under the statute. Unlike Title VII and the Rehabilitation Act, the ADEA allows persons claiming age discrimination to go directly to court, after giving the Commission 30 days' notice of the intent to file such an action, without utilizing an agency's administrative complaint

[6]Discrimination against an individual because that person is transgender (also known as gender identity) is discrimination because of sex under Title VII, and those claims should be processed through the 29 C.F.R. Part 1614 process. Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012).

[7]Claims of discrimination based on sex stereotype non-conformity (e.g., sexual orientation) may constitute sex discrimination under Title VII. See Baker v. Social Security Administration, EEOC Appeal No. 0120110008 (January 11, 2013); Veretto v. U. S. Postal Service, EEOC Appeal No. 0120110873 (July 1, 2011) (discrimination based on the sex-stereotype that men should only marry women can constitute discrimination based on sex); Castello v. U.S. Postal Service, EEOC Request No. 0520110649 (December 20, 2011) (discrimination based on the sex-stereotype that women should only have sexual relationships with men can constitute discrimination based on sex). EEO Counselors should advise employees that they may file a complaint under the Part 1614 EEO process and/or they may utilize any additional complaint procedures provided by the agency or utilize the process set forth in the Civil Service Reform Act of 1978 by taking their complaint to the Office of Special Counsel or the Merit Systems Protection Board.

procedures. If, however, a complainant chooses to file an administrative complaint, s/he must exhaust administrative remedies before proceeding to court. As with Title VII complaints, a complainant exhausts administrative remedies 180 days after filing a formal complaint, if the agency has not taken a final action, or 180 days after filing an appeal with the Commission if the Commission has not issued a decision.

3. Rehabilitation Act of 1973, as amended

The Rehabilitation Act prohibits discrimination on the basis of mental and physical disabilities, as well as retaliation for exercising rights under the Act. The Rehabilitation Act requires that agencies make reasonable accommodations to the known physical or mental limitations of a qualified applicant or employee with a disability unless the agency can demonstrate that the accommodations would impose an undue hardship on the operation of its program. (Congress amended the Rehabilitation Act of 1973 in October 1992, to provide that the standards used to determine whether non-affirmative action employment discrimination has occurred shall be the standards applied under Title I of the Americans with Disabilities Act. See § 503(b) of the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat 4344 (October 29, 1992); 29 U.S.C.§ 791(g).) (Congress amended the Rehabilitation Act again when it issued the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). This statute broadly interprets the definition of disability by adding "major bodily functions" as a major life activity; by directing that the determination of whether an impairment substantially limits a major life activity should be determined based on the impairment's effect in its active state (for impairments that are episodic or in remission) and should be determined without taking into account the ameliorative effects of mitigating measures, such as medication.

4. Equal Pay Act of 1963 (EPA)

The EPA prohibits sex-based wage discrimination. It prohibits federal agencies from paying employees of one sex lower wages than those of the opposite sex for performing substantially equal work. Substantially equal work means that the jobs require equal skills, effort, and responsibility, and that the jobs are performed under similar working conditions.[8] The EPA also prohibits retaliation for exercising rights under the Act.

[8]Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. EPA complaints are processed under Part 1614. In the alternative, an EPA complainant may go directly to a court of competent

[MACHINE SCANED DOCUMENT]

U.S. Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
P.O. Box 19848
Washington, DC 20036

U.S. Equal Employment Opportunity Commission
Onsite Report

U.S. Department of Agriculture
Washington, DC

[MACHINE SCANED DOCUMENT]

US. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

FEB 26, 2003

David Winningham, Director
Office of Civil Rights
United States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D. C. 20250

Dear Mr. Winningham

Enclosed is the report of our June 3-7, 2002 onsite review of the United States Department of Agriculture's Office of Civil Rights. The purpose of the review was to determine the Department's compliance with Equal Employment Opportunity (EEO) statutes, rules, regulations and the Commission's Management Directives that govern the processing of EEO complaints.

Within 60 days of the receipt of this correspondence, please provide the undersigned with a report identifying the actions taken in response to the findings and recommendations in the enclosed report. Thank you for the courtesies and cooperation that were extended to the onsite team and your continued commitment to equal opportunity in the workplace. Please do not hesitate to contact me if 1 can be of assistance in implementing the recommendations contained in the report.

Sincerely,

Carlton M. Hadden, Director
Office of Federal Operations

Enclosure

CC: The Honorable Ann M. Veneman, Secretary
The Honorable Lou Gallegos, Assistant Secretary
The Honorable Clyde Thompson, Associate Assistant Secretary

INTRODUCTION

It is the policy of the federal government to prohibit discrimination in employment because of race, color, sex, national origin, religion, age or disability, and to promote the full realization of equal employment opportunity for all persons. *29 C.F.R. 1614.101.* To implement this policy, each federal agency must maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate barriers to participation by all persons in the full-range of employment opportunities. The Equal Employment Opportunity Commission (EEOC) is responsible for the review and evaluation of all federal sector equal employment opportunity efforts. Pursuant to this responsibility, EEOC representatives conduct reviews of program areas involving program management personnel practices, training, and recruitment. Furthermore, EEOC periodically reviews agency equal employment opportunity (EEO) complaints processing programs. 29 C.F.R Part 1614.104(b).

EEOC provides annual reports to the President and Congress on the federal workforce and agencies' efforts to eradicate discriminatory employment practices in the workplace.

BACKGROUND

As part of the EEOC's oversight responsibility and to ensure that the federal government becomes a model employer, the EEOC conducted a review of the equal employment opportunity program in the Office of Civil Rights, at the United States Department of Agriculture (USDA). This review was primarily conducted at the Departmental Level in Washington, D.C. However, in addition to reviewing the USDA's Office of Civil Rights at the Departmental level, EEOC also reviewed how the USDA subcomponents (e.g., Farm Service Agency, Animal Plant Health Inspection Service, etc.) provided EEO complaint data to the USDA Office of Civil Rights at the Departmental Level, as well as what guidance and oversight this office provides the subcomponent's EEO offices and their programs

The EEOC initiated this review because of numerous employee complaints about the efficiency, integrity, and accuracy of the USDA's EEO complaints process, as well as the fact that the USDA is consistently late in providing EEOC with the required EEO complaint data in the Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (the 462 report).

OBJECTIVES SCOPE. AND METHODOLOGY

The EEOC's Office of Federal Operations (OFO) conducted an onsite review to determine the extent of the USDA's Office of General Counsel's involvement in the EEO complaints process the effectiveness of the USDA's Alternative Dispute Resolution programs and their EEO complaints tracking system.

As part of the review, the EEOC requested and analyzed relevant documents. EEOC requested copies of all USDA policies and procedures for their ADR programs and the agency's submission of ADR data for the annual report on the federal workforce. However, neither the Office of Civil Rights nor the Conflict Prevention and Resolution Center (CPRC) possessed all the subcomponent's policies and procedures for ADR as of July 25, 2002. In addition, each subcomponent's data on *ADR* which was submitted to the Office of Civil Rights for the annual report an the federal workforce, was not provided.[1] In addition, EEOC interviewed agency officials and staff within the Office of Civil Rights, CPRC, and other subcomponents EEO offices regarding their responsibilities for administering the EEO process.

Prior to the issuance of this report, on September 5, 2002, EEOC staff met with staff from the USDA to discuss the results of our review and provide them a draft of our findings. By letter dated September 12,2002, the USDA, Office of Civil Rights responded to the meeting and our findings. In this letter, the Director of Civil Rights, takes issue with several aspects of the review. For instance, he states:

> "USDA is concerned that the BEOC has relied heavily upon anecdotal information and isolated incidents rather than statistical or empirical data to draw overarching conclusions about USDA's operations."

Throughout this report EEOC indicates its repeated attempts to obtain documentation from the USDA, and that the USDA's responses were delayed, inaccurate and incomplete, The Office of Civil Rights also takes positions contrary to many of the findings and information contained therein. Furthermore, the Director of the Office of Civil Rights, in the aforementioned letter, takes issue with EEOC for not providing the names of all individuals who provided statements to EEOC during the onsite review.

As indicated herein, *EEOC* does however, provide titles of officials who are interviewed, For example; EEOC has identified correspondence submitted by the Deputy Director for Employment Office of Civil Rights, and statements he made to EEOC interviewers. It has long been the practice of the EEOC not to reveal the names of general staff members and employees who provide statements during interviews, because doing so could have a chilling effect on the onsite review process. More specifically, employees may be reluctant to meet With EEOC interviewers out of fear of retaliation from the agency if their names are attributed to their statements. The practice of not providing names encourages greater participation and willingness on the part *of* interviewees to speak freely and honestly-with EEOC about practices and policies occurring at their agency. In turn,

[1]By an electronic mail transmission dated July *5,* 2002, the USDA. Office of Civil Rights, notified the EEOC that neither the Office of Civil Rights nor the Conflict Prevention and Resolution Center possessed all the subagency's ADR policies and procedures. Thc email suggested that a formal letter be issued by the Conflict Prevention mud Resolution Center to request this information The Office of Civil Rights by letters dated August 23, 2002 and September 6, 2002, submitted to the EEOC some of the requested data, however, it was inaccurate and incomplete

this allows EEOC to gain an adept understanding of the agency being reviewed, and assists us in providing the agency with useful practical advice an how to improve their programs.

FINDINGSAND RECOMMENDATIONS

Finding 1

The defensive functions of the USDA's Office of General Counsel intrude on The investigation and deliberation of EEO complaints.

Equal Employment Opportunity Commission Management Directive for 29 C.F.R Part 1614 *(MD-110),* chapter 1,I-2pg. (November 9, 1999), requires that agencies have a complaint process where the neutral adjudication function of the agency's EEO office is kept separate from the legal defense arm of the agency. Heads of agencies must not permit intrusion on the investigations and deliberations of EEO complaints by agency representatives and the offices responsible for defending the agency against EEO complaints. Furthermore legal sufficiency reviews of EEO matters must be handled by a functional unit that is separate and apart from the unit which handles agency representation in EEO complaints. *Id.*

The Office of General Counsel, CMI Rights Division, which is responsible for defending the agency against complaints of discrimination, intrudes in the EEO process prior to a request for a hearing. Documents and interviews with officials and staff from the Office of Civil Rights and the Office of General Counsel, indicate that representatives from the Office of General Counsel, Civil Rights Division, intrude in the following areas of the EEO complaint process: (a) the investigation of formal EEO complaints; and (b) the deliberations on EEO complaints. The intrusion of the Civil Rights Division during the investigation of and deliberation on EEO complaints is contrary to the spirit and language of MD-1 10.

a. Investigations.

Interviews with staff from the Office of Civil Rights reveal that this office seeks guidance from the Office of General Counsel, Civil Rights Division (which is responsible for defending the agency against EEO complaints) in difficult EEO cases. Moreover, staff from both the Complaints Division and the Office of General Counsel acknowledged that in one case the Office of General Counsel wrote a letter critical of an investigation, which according to staff from the Office of General Counsel, resulted in the USDA having to settle the case. An official in the Office of Civil Rights stated that the Office of General Counsel has the right by regulation or otherwise to do legal sufficiency reviews of the reports of investigation prior to their issuance, but does not exercise this right. The only regulation which may provide for such a review is 7 C.F.R. § 2.31(2002).

Legal sufficiency reviews of EEO reports of investigations by the Office of General Counsel, civil Rights Division is inconsistent with MD-1 10, because this unit will provide representation to the agency regarding the same complaint. Furthermore any binding advice the Office of Civil Rights receives from the Office of General Counsel, Civil Rights Division concerning EEO complaints is also inconsistent with MD-1 10, because this unit will provide representation to the agency regarding the same complaint. An arrangement of this nature can compromise the neutrality of the administrative process both in appearance and in reality. A system with a real or perceived absence of neutrality has a chilling effect on individuals seeking to exercise their rights through the EEO process.

b. Deliberations.

The Office of General Counsel, Civil Rights Division, and the Office of Civil Rights, Adjudication Division, acknowledged that the Office of General Counsel, Civil Rights Division, which defends the agency against EEO complaints, provides binding advice on whether to appeal an EEOC Administrative Judge's decision on class certifications. This very same unit within the Office of General Counsel also reviews every decision, prior to its issuance, where there is a finding of discrimination

In cases where there is a decision or final action finding discrimination, the Office of General Counsel, Civil Rights Division will review each decision prior to issuance, In such cases, an Office of General Counsel, Civil Rights Division attorney writes a memo advising on the decision. In one particular ease discussed with EEOC staff, the Office of Civil Rights indicated that the Office of General Counsel, Civil Rights Division, actually rewrote the Final Agency Decision.

Heads of agencies must not permit intrusion on the investigations and deliberations of EEO complaints by agency representatives and the offices responsible for defending the agency against EEO complaints. Furthermore, legal sufficiency reviews of EEO matters must be handled by a functional unit that is separate and apart from the unit which handles agency representation in EEO complaints. *Id.* Therefore, the Office of General Counsel, Civil Rights Division's binding advice concerning class certifications and their legal sufficiency reviews of all decisions involving a finding of discrimination is contrary to MD-1 10, because this unit will have provided representation to the agency regarding the same complaint

Recommendation 1

The USDA must take the necessary steps to ensure that there is the proper separation between the Office of General Counsel Civil Rights Division, and the Office of Civil Rights. The USDA must ensure that the Office of General Counsel, Civil Rights Division, does not provide legal sufficiency reviews of reports of investigation and final agency decisions/actions. Furthermore, the Office of

General Counsel, Civil Rights Division, should not provide binding advice to the Office of Civil Rights concerning EEO complaints. The USDA may consider utilizing a unit separate and apart from the Civil Rights Division in the Office of General Counsel to provide legal sufficiency reviews of EEO complaints.

Finding 2.

The Office of General Counsel, Civil Rights Division's involvement in the informal stage of the EEO process impedes opportunities for settlement

According to an internal memorandum from the Associate General Counsel, dated May 10, 2001, the Office of General Counsel, Civil Rights Division, mandates that the office provide representation in the following EEO cases:

1. The complaint is filed in Federal district court against a USDA agency headquarters in the District of Columbia metropolitan area;

2. Allegations in the complaint identify a member of the Senior Executive Service (SES) as the Responsible Management Official (RMO);

3. Allegations in the complaint involve a non-selection to the SES or SES Candidate Program;

4. The complaint is filed as a class action raising the allegations of disparate impact or disparate treatment or

5. The complaint involves novel, complex, or sensitive legal issues such as sexual harassment, hostile work environment, or mixed case appeals before the Merit Systems Protection Board (MSPB). With respect to cases before the MSPB, the Civil Rights Division will coordinate with the Office of General Counsel's General Law Division to determine if the Office of General Counsel representation is appropriate.

Interviews with officials and staff from a USDA subcomponent EEO office also revealed that pursuant to the above memorandum, responsible management officials, who are members of the Senior Executive Service or are political appointees (which are not mentioned above), when approached by an EEO Counselor, will defer the matter to the Office of General Counsel and will not speak with the EEO Counselor.

EEOC Regulation 29 C.F.R § 1614.1 02(b)(6) requires that all agencies ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters. Furthermore EEOC regulations encourage voluntary settlement of employment discrimination disputes. *See*, 29 C.F.R. § 1614.603. Specifically, all agencies should make reasonable efforts to settle EEO complaints as early as possible in the administrative process, including the pie-complaint counseling stage. *Id.* EEO counseling can, and often does, provide an excellent way to resolve employment discrimination disputes early in the process.

The Office of General Counsel's involvement during the informal stage of the EEO process may thwart attempts at counseling to resolve matters prior to the filing of a formal complaint where the parties may be willing to settle. In addition, when responsible management officials defer an EEO matter to the Office of General Counsel and/or will not speak with the EEO Counselor, they are not cooperating with agency EEO personnel. Therefore, any involvement by the Office of General Counsel during the informal stage of the EEO process should not interfere with EEO Counselors performing their duties, prevent agency employees from cooperating with the Counselors, and should be conducted in a fashion as not to hinder attempts for settlement.

In response to EEOC's draft report the USDA's General Counsel, issued a memorandum dated September 11, 2002, to the Assistant Secretary for Administration, the General Counsel states:

> "OGC agrees that USDA and its agencies should make reasonable efforts to resolve EEO complaints as early as possible in flat administrative process."
>
> "OGC is extremely successful in early resolution of cases where there is evidence of discrimination. OGC makes every effort to resolve such cases as the earliest stage possible, as this is in the best interests of both USDA and the complainant."
>
> "Therefore, OGC is committed to early resolution of employment discrimination complaints where there is evidence of discrimination or other improprieties, but not in cases where even a cursory review indicates the complaints have little or no merit."

As previously discussed, EEOC encourages Settlement of EEO disputes at the earliest possible stages of the administrative process. EEOC is pleased to see that the General Counsel for the USDA also agrees. EEOC, however, is concerned that the USDA is only settling cases where there is evidence of discrimination or other improprieties. Taking this approach may cause the USDA to experience

low resolution rates during the informal and formal complaint stages of the EEO process.[2] Moreover, such a policy may needlessly stigmatize the utilization of ADR by managers who may view any settlement as evidence of discrimination or impropriety.

Inmost EEO complaints, evidence of discrimination is not apparent until after a formal investigation has occurred or until after a hearing before an EEOC Administrative Judge is conducted. Utilizing this method for settling eases is contrary to EEOC's regulation that all agencies should make reasonable efforts to settle EEO complaints as early as possible in the administrative process, including the pre-complaint counseling stage. 29 C.F.R. § 1614.603.

Only settling cases where there is evidence of discrimination will preclude the USDA from resolving disputes which nonetheless can negatively impact the moral, productivity and efficiency of the agency if left unresolved. Furthermore, this approach may fall short of the policy goals of the Administrative Dispute Resolution Act of 1996, which authorizes federal agencies to utilize dispute resolution techniques to resolve disputes mid avoid costly and protracted litigation. *See*, Pub. Law 104-320 (1996).

Recommendation 2

The USDA should ensure that all USDA employees cooperate at all stages of the EEO process, and that all opportunities to settle complaints are considered, and that opportunities for settlement are not obstructed by the Office of General Counsel, Civil Rights Division. The USDA should clarify their May 10; 2001, memorandum to indicate that although the Office of General Counsel, Civil Rights Division may provide representation in certain cases upon request of a witness, this does not relieve responsible management officials from their duty to speak or cooperate with an EEO Counselor.

Finding 3

There is a lack of coordination between the Office of Civil Rights and the Conflict Prevention Resolution Center for ADR program operations.

The USDA is a cabinet-level agency comprised of 26 subcomponents and the Departmental Administrative offices. Each subcomponent has been delegated the authority to develop and manage its own EEO program in accordance with the policies, guidelines, and directives promulgated by the Office of Civil Rights. See USDA Departmental Regulation 4330-003, §7(d)(4) (March 3,1999). With regard to ADR, which is conducted pursuant to the EEO process, each- subcomponent may establish its own ADR program and is responsible for reporting to the Department at least annually

[2]EEOC cannot with any certainty discern USDA's settlement rate because of errors contained in their statistical information provided to EEOC for the 462 report as well as for this review. The inaccuracies in the data collection and submission for ADR matters is discussed in Finding 3 of this report.

on agency ADR programs and usage. See USDA Departmental Regulation 4710-001, § 6(a)(2) (July 20, 2001).

The Assistant Secretary for Administration is responsible for evaluating the ADR programs. *See* USDA Departmental Regulation 4710-001, §6(b). The departmental regulations provide two different offices with roles for overseeing the ADR programs. In Section 7(b)(2) of USDA Departmental Regulation 4330-003, the Assistant Secretary for Administration delegates to the Director, Office of Civil Rights, full and comprehensive responsibility for the day-to-day management and administration of the Department's civil rights compliance and enforcement activities. Section 6(c) of USDA Departmental Regulation 4710-001 also requires the Director, Conflict Prevention and Resolution Center monitor agency ADR programs, track usage, determine compliance with Departmental standards, and report at least annually to the Secretary on ADR activities.

According to interviews with numerous Office of Civil Rights arid Conflict Prevention and Resolution Center staff members, it is clear that employees think that there is inadequate communication between the Office of Civil Rights and the Conflict Prevention and Resolution Center regarding ADR that is conducted during the EEO process. The Office of Civil Rights' Deputy Director for Employment, disagreed, stating that there are "pretty good" lines of communication between the Conflict Prevention and Resolution Center and the Office of Civil Rights, and that those offices have never had any issues or disputes in terms of who has what data or sharing information.

Many other USDA employees, however, have recognized a breakdown in communication between the two offices. For example, one Conflict Prevention and Resolution Center employee stated that the Conflict Prevention and Resolution Center and the Office of Civil Rights have not shared data due to turf battles. An Office of Civil Rights employee also stated that turf battles exist and officials and staff from the Farm Service Agency (FSA) and Animal and Plant Health Inspection Service (APHIS) identified the problem as a power struggle.

Based an interviews and documents provided to the EEOC, it is clear that the Conflict Prevention and Resolution Center and the Office of Civil Rights have difficulties coordinating two critical *ADR* functions: (a) oversight of the subcomponents' ADR programs; and (b) ADR data collection

a. <u>Oversight of Subcomponents' ADR Programs</u>

As to the oversight of the subcomponents' ADR programs, it is unclear whether the Conflict Prevention and Resolution Center and the Office of Civil Rights have determined which office has the responsibility to ensure that the agency's ADR programs are in compliance with 29 C.F.R Part 1614. Section 7(b)(4) of the USDA Departmental Regulation 4330-003 provides that the Assistant Secretary for Administration is responsible for systematically reviewing and evaluating the civil rights performance of agency heads and administrators. Section 7(b)(2) of that regulation delegates

some of the enforcement authority to the Director of the Office of Civil Rights; however, section 6(e) of USDA Departmental Regulation 4710-001 also requires the Director of the Conflict Prevention and Resolution Center to monitor agency ADR programs and determine compliance with Departmental standards

An employee from the Conflict Prevention and Resolution Center stated that it is unclear which office has enforcement authority over the subcomponents' ADR programs. This employee explained that the Conflict Prevention and Resolution Center is responsible for case tracking, but not supervising the ADR programs. An Office of Civil Rights official indicated tat the Office of Civil Rights has authority over ADR programs as they relate to civil rights issues. However, when the EBOC requested copies of the ADR procedures for every subcomponent an June 4,2002, the Office of Civil Rights did not have those procedures and initially attempted to obtain the documents from the Conflict Prevention and Resolution Center? When the Conflict Prevention and Resolution Center produced only two ADR procedures, one from the Conflict Prevention and Resolution Center and one from the Food, Nutrition, and Consumer Services (FNCS), the Office of Civil Rights had to request the procedures directly from the subcomponents.

In October 2000, the USDA issued its Long Term Improvement Plan for the Office of Civil Rights' Employment and Program functions. This plan did not specifically address the ADR process; however, section 3(8.1) of the plan found that the Office of Civil Rights is required to conduct numerous planned and ad-hoc compliance reviews annually without sufficient staff appropriately trained staff or permanent procedures in place. In order to resolve these problems, the plan recommends centralizing management of the-compliance function for Programs and Employment, establishing standard procedures for compliance function, and establishing criteria for which compliance reviews will be performed.

Numerous USDA employees stated that as of July 2002, neither the Office of Civil Rights nor the Conflict Prevention and Resolution Center has reviewed any of the subcomponents' ADR programs for compliance with 29 C.F.R. Part 1614 and MD-110, *An* Office of Civil Rights official commented that the subcomponents are protective of their programs and that the Office of Civil Rights will require additional resources to conduct operations with the subcomponents. However, officials and staff from FSA and APHIS stated that they provided their ADR procedures to the Office of Civil Rights for review, but they have yet to receive any feedback.[4] One APHIS employee stated that it has been approximately thirteen years since the Office of Civil Rights has conducted

[3]The USDA did not produce the ADR procedures for all of its subcomponents, the 462 reports that each subcomponent submitted for fiscal year 2001, and the 2001 case tracking data for the subcomponent ADR programs, including ***the*** names of all aggrieved individuals who attempted ADR, the dates that the ADR process began and concluded, and whether the matter was resolved.

[4]Even though APHIS and FSA stated they submitted their ADR procedures to the Office of Civil Rights in FY2000, the Office of Civil Rights failed to provide those procedures to EEOC during and subsequent to this onsite review.

a compliance review. 'While it is possible that some subcomponents maybe protective of their ADR programs, it appears that neither the Office of Civil Rights nor the Conflict Prevention and Resolution Center has made any effort to review the sub components' *ADR* procedures.

As a direct result of USDA's failure to monitor the ADR programs, the subcomponents have a negative view toward the Office of Civil Rights and the Conflict Prevention and Resolution Center. With respect to the Office of Civil Rights, the primary complaint involves the Office of Civil Rights repeated requests, with a short turnaround time, for ADR and other information which the subcomponents have previously provided the Office of Civil Rights. A frustrated APHIS employee wondered what the Office of Civil Rights does with ADR data. In this regard, the Director, Office of Civil Rights, confirmed in a memorandum dated July 8, 2002 that "there is presently no central repository" for ADR information

The Office of Civil Rights' inability to locate previous submissions and contentious that those submissions were never received have resulted in the APHIS engaging the costly practice of submitting every report to the Office of Civil Rights via Federal Express so they can document which Office of Civil Rights employee received the package, as well as the specific date and time of its receipt. Another complaint involves the Office of Civil Rights' failure to provide guidance or feedback to the subcomponents

In particular, FSA and APHIS officials noted that the Office of Civil Rights lacks knowledge about ADR and has poor customer service skills. An APHIS employee complained that since the Office of Civil Rights staff rarely responds to their requests for assistance, they seek guidance from USDA's Office of General Counsel or the EEOC. To illustrate the lack of confidence in the Office of Civil Rights, in July 2002, an APHIS employee contacted the EEOC to determine whether it should comply with the Office of Civil Rights' request to submit ADR data.[5] An FSA employee explained that most of the subcomponents "do what they want to do" because they have no accountability to the Office of Civil Rights.

As to the Conflict Prevention and Resolution Center, some of the subcomponents expressed confusion about the role that the Conflict Prevention and Resolution Center plays in the oversight of their ADR programs. Based on the belief that the Conflict Prevention and Resolution Center was created to resolve non-EEO issues, an APHIS official questioned why the Conflict Prevention and Resolution Center participates in EEO-related functions. An FSA employee also commented that the Conflict Prevention and Resolution Center has not obtained buy-in among the subcomponents, as evidenced by very few EEO people attending the Conflict Prevention and Resolution Center's meetings. Moreover, APHIS and FSA have become frustrated by the inability of the Conflict Prevention and Resolution Center and the Office of Civil Rights to share ADR data.

[5]The Office of Civil Right requested all subcomponents to provide their *ADR* procedures and the names of the individuals who chose ADR pursuant to the EEOC's request in June 2002.

Furthermore, based upon the procedures set forth in USDA Departmental Regulation 4710-001, the Conflict Prevention and Resolution Center is required to evaluate the USDA's ADR programs or an annual basis. Currently, the Conflict Prevention and Resolution Center currently evaluates three areas of the ADR programs in the EEO process, including the number of' complainants that were offered ADR, the number of complaints that went through ADR, and the number of complaints which were settled in ADR. This data is compiled in an Annual Report to the Secretary of Agriculture.

According to interviews with the Conflict Prevention and Resolution Center staff, customer satisfaction surveys are utilized by some subcomponents, but this data has not been collected by the Conflict Prevention and Resolution Center. A Conflict Prevention and Resolution Center employee stated that as of October2002, it expects to contract with the University of Indiana to collect ADR data and conduct evaluations.

Chapter 3, Section VII(C) of the MD-1 10 sets forth that an evaluation component is essential to any successful ADR program. Currently, the USDA does not have a sufficient method in place to evaluate the ADR programs in the EEO process.

b. <u>ADR Data Collection</u>

Under 29 C.F.R § 1614.602(a), the USDA has an obligation to report to the Commission information concerning pre-complaint counseling and the status, processing, and disposition of complaints under this part at such times and in such manner as the Commission prescribes. The Commission has mandated that agencies report all ADR data relating to the EEO process in their annual 462 report to the EEOC. As such, agencies should have a case tracking system to gather data for the 462 report. In response to question 13 of the EEOC's Request for Information (April 23, 2002), the Office of Civil Rights stated:

> "It is expected that the new Employment Complaints Tracking System (ECTS) will capture all ADR related data for all employment complaints received on or after April 24, 2002."

Pursuant to subsequent interviews with Office of Civil Rights employees, it appears that ECTS only captures ADR data for the formal stage of the EEO process, and is not expected to include ADR data for the informal stage for at least twelve months. Thereafter, it is unclear as to how the information will be transmitted to the Office of Civil Rights. Consequently, the Office of Civil Rights relies on the subcomponents to maintain independent case tracking systems. Since the Office of Civil Rights has not required a standard data collection system, the subcomponents have a wide variety of systems, including electronic and manual data collection systems. One FSA employee stated that almost all subcomponents have a system; however, employees from FSA and APHIS commented that there is no accountability it' subcomponents fail to establish a data collection system.

According to USDA staff, the Office of Civil Rights and the Conflict Prevention and Resolution Center have failed to properly communicate their respective duties with regard to the process of collecting ADR data for the annual 462 report. This has caused tremendous confusion among the subcomponents. In fiscal year 2000, the USDA failed to provide EEOC with all of the ADR data it requested. When the EEOC onsite review team spoke with staff from the Office of Civil Rights and the Conflict Prevention and Resolution Center about the missing data, an Office of Civil Rights employee stated that the agency did not collect the data. A Conflict Prevention and Resolution Center employee explained that they had not seen the 462 report and the Office of Civil Rights had never requested the data from the Conflict Prevention and Resolution Center. To date, the missing data has not been provided to the EEOC.

Similarly, in fiscal year 2001, there were numerous problems with the USDA's data collection process. In collecting the ADR data for this reporting period, an Office of Civil Rights employee stated that the Office of Civil Rights requested the information from the Conflict Prevention and Resolution Center, but never received it. As a result the Office of Civil Rights submitted a form to each of the subcomponents, requesting the 462 data for their ADR programs. The form that APHIS received did not contain the new ADR questions for the fiscal year 2001 reporting period, and an APHIS employee stated that the Office of Civil Rights did not subsequently request the missing information.[6] Therefore, the USDA's consolidated 462 report did not contain APHIS' data, or the other subcomponents' data for those missing questions. Furthermore, the Office of Civil Rights did not provide FSA ***or*** APHIS with any guidance for completing the 462 report according to interviews with officials from these subcomponents. Due to this lack of direction, the *ADR* data that was submitted by FSA and APHIS for fiscal year 2001 contained numerous errors. USDA employees confirmed that the Office of Civil Rights did not verify the ADR data for APHIS; FSA and Food Nutrition Service (FNS).

In particular, APHIS' data for Part X of the 462 report contained many obvious inconsistencies between the number of ADR Resources Used, the Types of ADR Techniques, and the Type of Closures, In Part X, Section 5(A) of the 462 report, APHIS and FSA included a total of five cases that received "other non-monetary relief," but USDA's consolidated 462 report did not refer to any of those cases. An APHIS employee stated that the Office of Civil Rights must have modified the ADR data without consulting the subcomponents. In addition, an Office of Civil Rights employee stated that the Office of Civil Rights modified some of the 462 data to be consistent with an earlier report submitted to Congress.

According to an employee in the Office of Civil Rights, some fiscal year 2001 data had not been entered into the case tracking system at the time of a report to Congress, and the Office of Civil Rights made the decision to exclude that new data from the 462 report for the sake of consistency.

[6]The form that APHIS received from the Office of Civil Rights for fiscal year 2001 did not include the following new questions in the 462 report (a) Multiple Resources Used,' (b) Multiple Techniques Used; and (c) Open Inventory - ADR Pending.

Once the Office of Civil Rights completed the 462 report, an Office of Civil Rights employee stated that a copy of the report was sent to the Conflict Prevention and Resolution Center, however the Conflict Prevention and Resolution Center denied ever receiving the report. Based upon all of the factors cited above, the evidence suggests that due to the lack of coordination between the Office of Civil Rights and the Conflict Prevention and Resolution Center the USDA submitted an untimely 462 report which appears to contain inaccurate ADR data.

As previously indicated, in June 2002, EEOC requested copies of all the subcomponents' FY2001
forum 462 reports containing ADR data submitted to the Office of Civil Rights. By letter dated August 23, 2002, over two months later, the EEOC received from the Deputy Director for Employment Office of Civil Rights, individual subcomponent ADR 462 reports. His letter states:

> "In accordance with the follow-up request made by your review team while they were on-site, please find enclosed the documentation our office received from sub agencies which we used to develop the FY 2001 EEOC 462 report?'

Upon review of the reports which were enclosed, we discovered that there were only twelve (12) reports when EEOC was informed that there were a total of twenty-six *(26)* subcomponents/sub agencies. Moreover, we found that three (3) of the reports were duplicates and three (3) could not be attributed to a particular subcomponent According to the consolidated 462 report submitted to EEOC, one hundred sixty-five (165) individuals elected ADR in the informal stage of the EEO process. The individual 462 reports submitted on August23, 2002, however, indicated that only one hundred thirty-seven (137) individuals elected *ADR* in the informal stage of the EEO process. This number excludes the three (3) duplicate reports. However, when including the three (3) duplicate reports, the number of individuals electing ADR in the informal stage is only one hundred fifty-two (152).

This submission indicates that either the USDA's$_5$ Office of Civil Rights' consolidated 462 report submitted to EEOC was inaccurate, or the August 23, 2002, submission did not include all the documentation received from subagencies, which was used to develop the FY 2001 EEOC 462 report, or both.

Furthermore, by letter dated September 6,2002, the USDA, Office of Civil Rights, Deputy Director for Employment enclosed additional documentation requested by EEOC in June 2002. This letter states in pertinent part

> "One focal point of the EEOC audit (as follow-up to question 16(e)), was the extent to which USDA used Alternative Dispute Resolution (ADR) at the informal stage of the EEO process. As CR is presently without a central repository for this information, we requested that USDA sub-agencies provide this office with the following information

- Name of each informal EEO complainant who went through the ADR program;
- Date the ADR began i.e., the date both parties agreed to participate in ADR);
- Date of the ADR completion; and
- Resolution, if any, during the ADR process.

Enclosed is a compilation of data from each USDA agency at the informal stage of the EEO counseling and ADR process. Also enclosed are the forms, operating procedures, brochures, and other materials utilized by each agency."

Contained within the August23, 2002 submission to EEOC was the FY2001 462 report for ADR submitted by APHIS to the USDA, Office of Civil Rights, which indicated that *54* APHIS employees selected ADR in the informal stage of the EEO process, and that 22 ADR sessions were conducted in FY2001. The September 6, 2002 submission, however, does not indicate that any APHIS 'employees underwent ADR in FY 2001. It is clear from the above two submissions that the USDA, Office of Civil Rights, has not submitted reliable data to EEOC for the annual *462* report for FY2001 and for this onsite review?

With respect to fiscal year 2002, two Office of Civil Rights employees stated that their office has an unofficial agreement with the Conflict Prevention and Resolution Center that the Conflict Prevention and Resolution Center will collect the ADR data for the 462 report. In this regard, we have no evidence that the Office of Civil Rights has made a formal, written request of the Conflict Prevention and Resolution Center to collect the data. When asked what would happen if they did not provide the ADR data to the Office of Civil Rights, an Office of Civil Rights employee explained that similar to fiscal year 2001, the Office of Civil Rights would request the data directly from the subcomponents. The Conflict Prevention and Resolution Center staff denies ever receiving a request from the Office of Civil Rights to provide ADR data for the 462 report, and claim that they have never received a copy of the 462 report from the Office of Civil Rights.

[7]We also note that according to the September 6, 2002 submission, employees from only nine (9) USDA subcomponents underwent ADR in FY 2001, when according to the USDA there are twenty-six (26) subcomponents. Furthermore, the USDA, Office of Civil Rights, as indicated above, claims to have submitted the ADR forms, operating procedures, brochures and other materials utilized by "each agency". However, upon review of the material submitted, EEOC realized that material from only six (6) subcomponents was submitted as opposed to twenty-six (26). Furthermore, in either submission, there was no communication from the USDA as to the apparent lack of documentation.

Currently, the Conflict Prevention and Resolution Center reports that it collects ADR data an the following categories; (1) the number of cases that were offered ADR; (2) the number of cases that completed ADR; *(3)* the number of cases that were resolved; and (4) the number of employees who received conflict management training As such, the Conflict Prevention and Resolution Center has not modified its data collection process to include any new ADR data for the purpose of completing the 462 report. The Office of Civil Rights, in its response to the draft report indicates that the Conflict Prevention and Resolution Center has modified its report to capture the new ADR data. The Office of Civil Rights, however, provided no documentation of this change.

Until the USDA provides guidance and oversight with respect to the subcomponent's *ADR* programs, the USDA will continue to experience inaccuracies in their data collection, turf battles or power struggles, and poor employee and staff perceptions of the Office of Civil Rights and the Conflict Prevention and Resolution Center.

Recommendation 3

To ensure compliance with *29* C.F.R. § 1614.102(a)(II) and § 1614.602(a), and to correct and improve data collection, the USDA (Office of Civil Rights and the Conflict Prevention and Resolution Center) should establish a sufficient process to monitor its ADR programs. We recommend the USDA implement the following:

- Issue written regulations which clarify the respective roles of the Office of Civil Rights and the Conflict Prevention and Resolution Center concerning the oversight of the agency's ADR programs, the data collection process, and all other areas where there may be overlap of their respective functions;
- Improve the communication between the Office of Civil Rights, the Conflict Prevention and Resolution Center, and the subcomponents to allow for greater sharing of ADR and EEO related information;
- Issue written procedures on the form 462 data collection process to assist the USDA in submitting timely, complete. and accurate form 462 reports to the EEOC;
- Provide training and instructions to all USDA employees who are expected to complete *462* reports on behalf of the subcomponents, the Conflict Prevention and Resolution Center, and the Office of Civil Rights;
- Establish a central repository which can reliably store and retrieve all ADR (as well as all other EEO complaint) data from the Office of Civil Rights. the Conflict Prevention and Resolution Center, and all USDA subcomponents;

- Expand ECTS to include both the informal and formal stages of the EEO process and ensure the collection of all the data required to complete the 462 annual report;

  Conduct regular compliance reviews of all ADR programs, including the review of ADR procedures and onsite reviews to monitor the implementation of the programs;
- Improve customer service skills in the Office of Civil Rights to increase the subcomponents' trust in the Office of Civil Rights' ability to monitor the ADR/EEO programs;
- "Issue ADR guidance, as necessary, to clarify questions and concerns that have been raised by the Office of Civil Rights, the Conflict Prevention and Resolution Center, and the subcomponents;
- Collect compile and evaluate all USDA ADR programs based on participant, surveys and provide higher management with a copy of the results for action to improve program operations;

Finding 4

All EEO settlement agreements are reviewed by the Office of Human Resource Management for possible disciplinary action against responsible management officials.

Our review revealed that the USDA has taken positive steps to hold managers and supervisors accountable for engaging in policies and/or practices which violate the laws the EEOC is charged with enforcing. For example, on June 29, 2000, Dan Glickman, the former U.S. Secretary of Agriculture, delivered remarks on "Civil Rights 2000: A Continuing Journey." USDA Release No. 0213.00. In an effort to further enhance the agency's "ability to enforce civil rights and improve human relations," Secretary Glickman stated that "all civil rights settlements will automatically be referred to agency human resources people who will decide what, if any, further action to take" concerning future discipline of managers. The settlement agreements will be forwarded along with the entire complaint file for review, and based on all available information, action may be taken.

While recognizing that this procedure is not intended "to deter people from using the settlement process to resolve claims," Secretary Glickman asserted this procedure is necessary to "achieve greater accountability" by preventing "bad actors" from entering into settlement agreements to avoid possible disciplinary action. However, this process along with the position of the General Counsel, as described in finding 2, can deter managers from engaging ADR because only cases with merit are settled, thus increasing the likelihood that the manager(s) will be disciplined.

One Conflict Prevention and Resolution Center employee confirmed that the procedure described in Release No. 0213.00 requires OHRM to be notified of any settlement agreements in order to evaluate whether disciplinary actions should be pursued concerning the responsible management official (RMO). In addition to reviewing settlement agreements, the USDA should review all EEQ complaint files regardless of the type of resolution reached (e.g., a finding of discrimination, a withdrawal, or a settlement), which will further the spirit of the "NO FEAR" bill and will broaden the USDA's ability to ensure that those who engage in inappropriate behavior do not escape detection.

The EEOC recognizes that the EEO program has a duty to provide the agency head with recommendations as to any improvements or corrections needed, including remedial or disciplinary action with respect to managerial supervisory or other employees who have failed in their responsibilities. See 29 C.F.R. § 1614.1 02(e)(2). While it is necessary to monitor the EEO process in order to determine whether supervisors have failed in their responsibilities, it is also important to ensure that such oversight does not adversely impact the ADR process, which ideally, should be a no-fault process. In this regard, 29 C.F.R. § 1614.603 requires agencies to make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in and throughout, the administrative processing of complaints, including the pre-complaint counseling stage.

Recommendation 4

We applaud USDA's holding managers accountable for their actions and disciplining them where appropriate, and we believe this can be accomplished without discouraging participation in the settlement of EEO matters. As discussed above, we recommend that the USDA review all EEO complaint files regardless of the type of resolution reached (e.g., a finding of discrimination, a withdrawal, or a settlement) and take disciplinary action when appropriate.

Finding 5

The USDA does not provide clear guidance to EEO counselors as to when they should offer ADR to aggrieved employees seeking EEO counseling.

According to interviews with staff from the Office of Civil Rights and the Conflict Prevention and Resolution Center, it was unclear as to who makes the decision to offer ADR during the informal stage of the EEO process. One Office of Civil Rights employee commented that the decision to offer ADR could be made by the Office of Civil Rights, Office of Human Resources, or a line manager. The Deputy Director for Employment, Office of Civil Rights stated that the EEO counselors should offer ADR in 100 percent of all informal matters, except those involving class actions. He also stated that the subcomponents have the discretion to decide how the offer of ADR is made.

In Chapter IV, Section 8(a) of the USDA Departmental Manual (DM) 4300-001 (July 20, 2001), it states that the USDA's subcomponents shall offer *ADR* with limited exceptions, as an alternative to traditional counseling in the informal EEO process. The decision not to offer ADR must be fair, equitable, and consistent with Departmental ADR policy. Chapter III, Section 4 of DM 4300-001 clarifies that management may not decline to offer ADR because of the complaint basis (race; color, etc.).

During this review, the EEOC contacted some of the USDA's EEO counselors who have been contracted from Delany, Siegler and Zorn Two counselors stated that they have not received any training on ADR and know very little about the USDA's ADR program. One of those counselors commented that she does not offer ADR at the informal stage; rather, the subcomponents make the offer Another EEO counselor said tat she had extensive ADR training, but did not state whether she offered ADR.

The Conflict Prevention and Resolution Center also indicated that it does not know how ADR was being offered to aggrieved employees. In the 'FY 2001 Annual Report for the Secretary of Agriculture: Alternative Dispute Resolution" (Apr11 2002), the Conflict Prevention Resolution Center found that ADR was offered in 706 complaints at the informal stage. The USDA's form 462 report submitted to EEOC indicates that 1,509 individuals were counseled during fiscal year 2001. These reports reviewed together reveal that USDA offered ADR to only 47 percent of the individuals who sought counseling. When the Deputy Director for Employment, Office of Civil Rights, was asked to comment on the significant difference between the Office of Civil Right's goal of a one hundred (100) percent offer rate and the actual forty-seven (47) percent offer rate, he stated that the Office of Civil Rights has not yet compared the Conflict Prevention and Resolution Center's report to the 462 report, and could not otherwise explain the discrepancy.

Furthermore, an enclosure to a letter dated September 12,2002, to the EEOC, from the USDA's Director, Office of Civil Rights, states in pertinent part, that:

> "no subcomponent has excluded any issues. This offer [of ADR] is to be in writing. This guidance is well beyond what MD-110 requires."

This assertion, however, is in direct contradiction to statements made by officials at the APHIS who claim that ADR is not offered in complaints which raise the issue of sexual harassment. Furthermore, USDA regulations for its ADR programs are silent as to whether they must provide reasonable accommodations to those who participate in the ADR process.

Chapter *3,* Section II(A)(5) of MD-110 provides that agencies have the discretion to determine whether a given dispute is appropriate for ADR; however, pursuant to Chapter 3, Section VI(A) of MD-110, agencies must establish written procedures detailing the operation of its ADR program. Until procedures and guidance are provided to subcomponents, regarding what cases are appropriate for ADR and that reasonable accommodations must be provided to those who participate in the ADR

process, the USDA may not realize the full benefits of an ADR program for resolving disputes. The USDA may also continue to experience low rates of ADR offerings to aggrieved employees and possible complaints for failure to accommodate.

Recommendation 5

The USDA should issue written guidance on the method in which ADR is offered to aggrieved employees and complainants, specifying categories of matters for which ADR will be offered and those for which ADR will not be offered and that reasonable accommodations will be provide for qualified individuals. This information should be contained in informational brochures about the agency's ADR program. In addition, USDA should ensure that all EEO counselors, including contract Counselors are trained in the agency's ADR process. *See* MD-110, Chapter 2, Sections I and II.

Finding 6

USDA procedures do not require that all ADR neutrals receive training in EEO law.

According to Chapter III, Section 4 of DM 4300-001, ADR in the EEO complaint process will adhere to the USDA ADR policy set forth in Departmental Regulation 4710—001 (July 20,200]). In Section *5(D)* of DM 4710-001; the regulation establishes the standards necessary to qualify as a neutral in the USDA. These standards do not state whether neutrals are required to have training in EEO law. Employees from the Office of Civil Rights and the Conflict Prevention and Resolution Center confirmed that the departmental regulations do not require neutrals receive training in EEO law. However, staff from the Conflict Prevention and Resolution Center stated that it is the Conflict Prevention and Resolution Center's practice to contract with neutrals who have a background in EEO law and that the Conflict Prevention and Resolution Center wants to bold internal neutrals to the same standards as contract neutrals.

Interviews with EEO staff from FSA and APHIS$_1$ revealed that these subcomponents utilize EEO counselors as mediators. Similar to the Conflict Prevention Resolution Center, it would appear that these mediators are familiar with EEO law. Whether all the remaining subcomponents require neutrals to receive training in EEO law, EEOC could not determine without reviewing their ADR procedures (which were never provided to EEOC during the review) and interviewing their program managers, With respect to Counselor's acting as neutrals, EEOC discourages this practice. Utilizing Counselors as neutrals may create a perception of bias in favor of the agency. Furthermore, neutrals are often privy to confidential information which may compromise their ability to serve as a Counselor. Therefore, Counselors should only serve as neutrals in a last resort situation. See MD110, Chapter 3, Sections IX.

Chapter 35 Section IV(B)(2) of the MD-110 provides that any person who serves as a neutral in the agency's ADR program must be familiar with: (a) the entire EEO process pursuant to 29 C.F.R. Part 1614, including time frames; (b) the Civil Service Reform Act, Title VII of the Civil Rights Act of 1964, *as amended* (Title VII), the Rehabilitation Act of 1973, as *amended,* the Americans with Disabilities Act (ADA), the Age Discrimination Act of 1967, *as amended* (ADHA), and the Equal Pay Act of 1963 (EPA); (c) the theories of discrimination; and (d) the remedies available, including compensatory damages, costs and attorney's fees.

Recommendation 6

The USDA should modify its regulations and practices to ensure tat its training requirements for neutrals is consistent with MD-1 10, thus satisfying the requirement that ADR neutrals be familiar with: (a) the entire EEO process pursuant to 29 C.F.R. Part 1614, including time frames; (b) the Civil Service Reform Act and the statues that EEOC enforces; (e) the theories of discrimination and (d) the remedies available, including compensatory damages, costs and attorney's fees. Furthermore, the agency should consider not utilizing Counselors as neutrals except as a last resort and only if the Counselors meet the qualifications set forth in MD-1 10.

Finding 7

The USDA's Office of Civil Rights does not complete EEO Investigations within the regulatory time period.

Our review revealed that the USDA, Office of Civil Rights is not completing EEO investigation within the regulatory time period. EEOC Regulation 29 C.F.R § 1614.108(e)(2), requires that agencies conduct an investigation and issue a report of investigation within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. In the event that the parties agree to an extension, the investigative period will be extended not more than an additional ninety (90) days, thus totaling a maximum of 270 days in which to complete the investigation. The agency may also unilaterally extend the time period or any period of extension for not more than thirty (30) days where it must sanitize a complaint file that may contain information classified pursuant to Executive Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy. Furthermore, the investigative time period may be extended in the case of an amendment or consolidation of a complaint to the earlier of 180 days after the last complaint or 360 days after the filing of the original complaint *See* 29 C.F.R. § 1614.1 08(f) and § 1614.606. Our review disclosed that the EEO investigative period is being delayed at two points: (a) dismissing or accepting a complaint for investigation and (b) reviewing the reports of investigation prior to their release.

a. Dismissing or accepting a complaint for investigation

According to several interviews with officials and staff from the Office of Civil Rights, it may take up to or more than six months before a formal EEO complaint filed with this office is either accepted for investigation or is dismissed. The staff within the Office of Civil Rights have articulated that they believe the delay is because of a lack of staff to review the complaints and decide whether to accept or dismiss them. Each agency, however, is required to provide for the prompt, fair and impartial processing of complaints in accordance with 29 C.F.R. Part 1614 and the instructions contained in the Commission's Management Directives. See 29 C.F.R. 1614.102(a)(2). Furthermore the agency should either accept or dismiss a complaint within a reasonable amount of time after receiving the EEO Counselor's report *See* Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), ch.5-pgl. (November 9, 1999). The EEO Counselor should submit the report to both the agency and the complainant within fifteen *(15)* days after being advised that a formal complaint has been flied. See 29 C.F.R § 1614.105(c). Officials and staff from the Office of Civil Rights state that EEO Counselor reports are generally received within the regulatory time frame.

Table: Analysis of average processing times for dismissals of complaints.[8]

FY	Decisions Issued	Total Days	Average Days	Government-wide Average
1997	75	55,402	739	226
1995	158	84,124	532	203
1999	158	79,182	501	192
2000	6	3,812	635	227
2001*	297	166,126	559	451

*The statistics supplied for FY2001 includes decisions on both procedural and merit grounds.

According to Table 1, the delay of dismissing/Accepting formal complaints is clearly more than the six (6) months as articulated by the Office of Civil Rights staff. The delay, more accurately, is closer to an average of one and a half years. This average time frame does not provide for the prompt processing of EEO complaints nor is it within a reasonable time of the receipt of the Counselor's report. The delay, in and of itself, equates to more than the one hundred and eighty (180) day time period for completing investigations and issuing the ROI. This delay is not only contrary to the language and spirit of EEOC regulations, but also contributes to the overall lengthy processing time for EEO complaints.

[8]This table represents the average amount of time it took the USDA to issue decisions dismissing complaints on procedural grounds. In order to issue a decision dismissing a complaint the agency must conduct an analysis of the entire tile. Therefore, we presume that a similar amount of time is spent on issuing a decision accepting complaints for investigation.

b. Reviewing reports of investigation prior to their release.

Interviews with officials and staff from subcomponent EEO Offices and the Office of Civil Rights reveal that the Office of Civil Rights will not issue a report of investigation until a sufficiency review has been conducted. According to these interviews, this is why EEO investigations conducted by the USDA are typically not completed within one hundred and eighty (180) days from the filing of the formal complaint! However, the fact that a complaint may not be accepted for investigation for up to a year and a half; as discussed above, also contributes to the delay. Data supplied by the USDA in its FY2001, 462 report indicates that it took the USDA on average, five hundred and ninety-four (594) days to complete an EEO investigation.

EEO staff at the APHIS[3] stated that when they have inquired why there was a delay, staff from the Office of Civil Rights indicated to them that they did not have adequate personnel to. review the reports. The requirement that all reports of investigation must be reviewed for sufficiency before issuance, without adequate staff has clearly contributed to the EEO investigations not being conducted in a timely manner. This protracted procedure is prolonging the EEO process and detracting from its integrity and efficiency.

Recommendation 7

The USDA should ensure that formal EEO complaints filed with the Office of Civil Rights are investigated within the regulatory time periods discussed above. The USDA should ensure that complaints are either accepted or dismissed within a reasonable time and that investigations are conducted in a timely manner and any review of the reports of investigation so not delay the process. This may require the USDA to increase its staff in the Office of Civil Rights to provide for the timely processing of EEO complaints.

Finding 8

The USDA's Office of Civil Rights, does not possess an effective EEO complaint tracking system and process.

The USDA' a Office of Civil Rights complaint tracking system and the process for ensuring that the data entered and produced is accurate and complete is deficient According to our review, there are several factors contributing to the deficiency: (a) the EEO tracking system cannot produce all necessary data; (b) there is & lack of verification of the data entered; and (c) status reports are not regularly provided to USDA subcomponents.

[3]this 180 day period assumes that no amendments, consolidations, or extension of any kind have occurred during the investigative stage.

Clearly, the current tracking system being utilized by the USDA's, Office of Civil Rights, is ineffective. Through the above submissions, the USDA has proven that their tracking system cannot produce, in a timely fashion, the data EEOC requested, which is necessary to ensure that EEO complaints are progressing through the process as required by regulation.

b. <u>There is a lack of verification of EEO data entered in the complaint tracking system</u>.

According to interviews conducted with staff from the Office of Civil Rights, there currently is no system in place to systematically verify if the complaint data which is entered into their tracking system is accurate. Interviews with the staff of the Office of Civil Rights indicated that members were uncertain as to who, if anyone, should be verifying the data which is entered. More specifically, the Program Analyst in the Office of Civil Rights indicated that the Team Leaders in the Intake Division are supposed to verify the data which is entered into the system. To the contrary, the Team Leaders indicated that the Program Analyst should be conducting the verification of the data entered into the tracking system. Consequently, we can assume that no one is currently conducting verification of the EEO complaint data which is entered into the system. This lack of verification can and may have contributed to inaccurate data being submitted to EEOC in the agency's 462 annual report, as indicated in Finding 2 of this report.

Furthermore, according to interviews with staff from the Office of Civil Rights, upon receipt of a formal complaint by either an employee or applicant for employment, the Office of Civil Rights will ordinarily issue, within a week, an acknowledgment letter to the complainant. The Office of Civil Rights, however, will not consider this complaint to be a complaint for identification purposes, until it is either accepted for investigation or dismissed. As noted above in Finding 6, the Office of Civil Rights may not accept or dismiss a complaint on average for one and a half years. Therefore at any one time, the USDA can have one and a half years worth of complaints which are not categorized as such. The EEOC considers that a formal EEO complaint filed with the agency is such upon its receipt by the agency with which it is filed. The USDA's interpretation of when a complaint filed with the Office of Civil Rights is considered a formal EEO complaint, surely must cause an inaccurate reading of the number of complaints at any one time.

As discussed herein, the EEOC requires that the USDA, as well as other federal agencies provide EEOC with EEO complaint data. One field of complaint data which is requested is the aggregate number of formal EEO complaints filed with an agency on an annual basis. Consequently, we can assume that because of the USDA's interpretation of when a complaint is a complaint, the statistical information provided EEOC regarding the number of complaints filed with the agency was inaccurate. Specifically, we can assume that the number of complaints actually filed is greater than what was reported. This practice not only provides EEOC with an inaccurate number of complaints being filed in a given year, but can also paint a distorted picture of complaint activity when, and if, a trend analysis is conducted.

Without establishing a clearly communicated process in which EEO complaint data is verified, the Office of Civil Rights may continue to experience inaccuracies in their data collection and submissions. This can negatively impact integrity, efficiency, and professionalism of their office.

c. Status reports are not regularly provided to USDA subcomponents.

According to several interviews with staff from the USDA subcomponent's EEO offices, the USDA's Office of Civil Rights does not provide status updates to their offices on a regular basis regarding formal EEO complaints filed with the Office of Civil Rights. Staff with the USDA subcomponent's EEO Offices stated that once a formal complaint has been filed, they are unaware of what transpires at the Departmental level Moreover, staff at APHIS, stated that several times they had called to gather information about a particular complaint and the Office of Civil Rights did not respond to them. APHIS EEO staff further indicated that they were incapable of accessing the Office of' Civil Rights EEO data base to gather the information themselves. The subcomponents inability at times to gather information about a particular complaint when necessary can negatively affect customer, service provided to USDA employees and applicants for employment

Recommendation 8

To ensure that the USDA is accurately capturing, entering, and verifying EEO complaint data, we recommend the following action be taken:

- Take the necessary steps to ensure that the Office of Civil Rights' tracking system can collect and compile all the EEO complaint data in subpart a. of this finding;
- Take the necessary steps to implement an effective verification process of all the EEO complaint data entered. This would include clear written direction as to whom is responsible for the verification of the data;
- Take the necessary steps to ensure that formal complaints filed with the Office of Civil Rights are considered formal complaints for tracking purposes once they are received;
- Provide the USDA subcomponent EEO offices with status reports of EEO complaint activity involving their subcomponent on a regular basis. The agency should also consider making their tracking system accessible to the subcomponents' EEO offices directly.

CONCLUSIONS

Delays of processing EEO complaints, the absence of effective oversight of EEO programs, and the lack of proper separation between the Office of General Counsel and the Office of Civil Rights, has severely impacted the integrity, efficiency, and professionalism of the Office of Civil Rights, the programs it administers, and its staff

In order to establish integrity, efficiency and professionalism in the Office of Civil Rights and the programs for which it is responsible, the USDA must take action on several fronts. First, the USDA must ensure that there is the proper separation between the Office of Civil Rights and the Office of General Counsel. Second, the USDA must establish an effective tracking system that accurately and timely captures EEO complaint data at both the Departmental and subcomponent level. The USDA must also implement measures to ensure that data, which is not sent electronically to the Office of Civil Rights, is maintained in a central location (repository) so this information is not misplaced requiring additional submissions by the subcomponents. Furthermore additional measures must be implemented to ensure that the EEO complaint data is made available to the subcomponents so they can, when necessary, disseminate information about a complaint to the proper parties in a expeditious fashion. Fourth, the USDA must also establish a system where the Office of Civil Rights provides guidance and feedback on a regular basis to the subcomponents regarding their EEO programs including the Alternative Dispute Resolution programs.

By implementing these measures, the USDA can begin restoring employee confidence in the Office of Civil Rights and its programs, as well as increasing the integrity, efficiency and professionalism of the Office of Civil Rights and its staff.

From: Petersen, Gayle -ASCR <Gayle.Petersen@ascr.usda.gov>
To: 'gayle1214@aol.com' <gayle1214@aol.com>
Subject: FW: Von Streunsee FAD
Date: Tue, Feb 10, 2015 3:16 pm

From: Scott, Winona -ASCR
Sent: Friday, December 06, 2013 10:13 AM
To: Petersen, Gayle -ASCR; Chatman, Nadine -ASCR
Subject: RE: Von Streunsee FAD

Sure.

From: Petersen, Gayle -ASCR
Sent: Friday, December 06, 2013 10:10 AM
To: Scott, Winona -ASCR
Subject: Re: Von Streunsee FAD

Ok not a problem, would u give Nadine and I a chance to finalize the draft?

From: Scott, Winona -ASCR
Sent: Friday, December 06, 2013 03:08 PM Coordinated Universal Time
To: Petersen, Gayle -ASCR
Subject: RE: Von Streunsee FAD

The SOPs?

From: Petersen, Gayle -ASCR
Sent: Friday, December 06, 2013 10:05 AM
To: Scott, Winona -ASCR
Cc: Moore, Bobbie -ASCR; Patterson, Anika -ASCR; Sutler, Eliot -ASCR; Chatman, Nadine -ASCR
Subject: Re: Von Streunsee FAD

Eliot and/or Bobbie can provide.

From: Scott, Winona -ASCR
Sent: Friday, December 06, 2013 03:00 PM Coordinated Universal Time
To: Petersen, Gayle -ASCR
Cc: Moore, Bobbie -ASCR; Patterson, Anika -ASCR; Sutler, Eliot -ASCR; Chatman, Nadine -ASCR
Subject: Re: Von Streunsee FAD

Can you provide a copy to Anika and me? Thanks

Winona

On Dec 6, 2013, at 8:34 AM, "Petersen, Gayle -ASCR" <Gayle.Petersen@ascr.usda.gov> wrote:

I have draft SOPs for the informal and formal process.

From: Scott, Winona -ASCR
Sent: Friday, December 06, 2013 01:03 PM Coordinated Universal Time
To: Petersen, Gayle -ASCR
Cc: Moore, Bobbie -ASCR; Patterson, Anika -ASCR; Sutler, Eliot -ASCR
Subject: Re: Von Streunsee FAD

SOP's are something we can begin to develop once our workflow process is complete.

Thanks

Winona

On Dec 6, 2013, at 6:20 AM, "Petersen, Gayle -ASCR" <Gayle.Petersen@ascr.usda.gov> wrote:

Bobbie,

This task was completed by me over two weeks ago. Because we do not have Standard Operating Procedures, if there is something further required of me please send me an email setting forth what further information I can provide, and I will be glad to assist.

Gayle

From: Moore, Bobbie -ASCR
Sent: Thursday, December 05, 2013 3:22 PM
To: Petersen, Gayle -ASCR
Cc: Patterson, Anika -ASCR; Scott, Winona -ASCR
Subject: Von Streunsee FAD

Hello Gayle,

Eliot sent you a FAD for review regarding the CP listed in the subject line. Please complete the product and prepare accordingly by COB, December 9, 2013.

Regards,
Bobbie

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From: Petersen, Gayle -ASCR <Gayle.Petersen@ascr.usda.gov>
To: 'gayle1214@aol.com' <gayle1214@aol.com>
Subject: FW: Personal inventory and timelines
Date: Tue, Feb 10, 2015 3:09 pm

From: Petersen, Gayle -ASCR
Sent: Thursday, December 12, 2013 6:32 AM
To: Scott, Winona -ASCR; Pitchford, Anita -ASCR; Lopez, Debbie -ASCR; Graham, Paula -ASCR; Chatman, Nadine -ASCR; Sutler, Eliot -ASCR; Jackson, Katrice
Cc: Velasquez, Pilar; Patterson, Anika -ASCR; Moore, Bobbie -ASCR
Subject: RE: Personal inventory and timelines

Hi Winona,

I. My current complaint inventory is "0" and I am currently working on drafting and finalizing the Standard Operating Procedures for CSD.

II. My roles and responsibilities include primarily work with processing work on the formal side. I perform and/or have performed the following:

Preparing Formal Letters
Acknowledgment
Acceptance
Dismissal
Accept/Dismiss Letters

Compliance Monitoring
Reviewing Settlement Agreements
Preparing Requests for Compliance Reports
Reviewing Compliance Reports
Preparing Second, Third and/or Fourth Requests for Compliance Reports
Preparing Compliance Monitoring Ceased Letters

Congressional/Controlled Correspondence
Preparing Responses to:
Congressional Correspondence
Controlled Correspondence

Hearings/Appeals
Uploading information into EFX, i.e., Hearing Requests, EEOC Acknowledgment and Orders, ROIs, Cover Letters, and any other information required. Printing out the EFX receipt and emailing the documents to the agency representative, and other parties as required.

Legal and Technical Sufficiency Review
ROIs
FADs

Document Requests
Upon request, providing agencies and or investigators with information about complaints/complainants. Also trouble shooting when documents are not readily found.

Acting Director
When required I have acted and performed the full array of duties with respect to answering emails and phone calls regarding complaints/complainants, and providing reports on status of work, troubleshooting, etc.

Draft of Functional/Process Documents (CSD)
Standard Operating Procedures and Workflow Charts
Drafting/Disseminating and requesting input from staff

III. On another note, CSD was established in October 2012, but I have not been able to review certain documents.

Can you please provide me with the CSD:

Organizational chart
Functional statement(s)
Position descriptions
CSD plan or white paper to substantiate the unit (if one was prepared)

Gayle

From: Scott, Winona -ASCR
Sent: Wednesday, December 11, 2013 11:30 AM
To: Pitchford, Anita -ASCR; Lopez, Debbie -ASCR; Graham, Paula -ASCR; Petersen, Gayle -ASCR; Chatman, Nadine -ASCR; Sutler, Eliot -ASCR; Jackson, Katrice
Cc: Velasquez, Pilar; Patterson, Anika -ASCR; Moore, Bobbie -ASCR
Subject: Personal inventory and timelines
Importance: High

Hello CSD Staff –

Please provide to me by COB 12/13/13 a complete list of your current complaint inventory, indicating status and date you received the complaint. Also indicate your current roles/responsibilities within CSD.

A few of you will be getting emails from either Anika or Pilar regarding the stoplight sheet which needs to be updated per the Office of General Counsel.

Thanks you for your cooperation.

Winona Lake Scott
Chief of Staff
Office of the Assistant Secretary for Civil Rights
Room 212-A, Whitten Building

From: Gayle1214 <gayle1214@aol.com>
To: gayle1214 <gayle1214@aol.com>
Subject: Fwd: We cannot find 2 new informal complaints.
Date: Fri, Mar 6, 2015 1:14 pm

From: Chatman, Nadine -ASCR
Sent: Wednesday, January 15, 2014 7:51 AM
To: Petersen, Gayle -ASCR
Subject: FW: We cannot find 2 new informal complaints.

FYI

From: Lopez, Debbie -ASCR
Sent: Wednesday, January 15, 2014 7:30 AM
To: CRES HelpDesk
Cc: Chatman, Nadine -ASCR
Subject: RE: We cannot find 2 new informal complaints.

Good morning. But don't we want to know why the disappeared? I also can't run the standard reports.

From: Patten, Corliss -ASCR **On Behalf Of** CRES HelpDesk
Sent: Wednesday, January 15, 2014 5:44 AM
To: Lopez, Debbie -ASCR
Subject: RE: We cannot find 2 new informal complaints.

You can re-create them

Thanks
CRES Helpdesk

Corliss A. Patten
Data & Records Management Division
Civil Rights Enterprise Systems
202-720-9864

From: Lopez, Debbie -ASCR
Sent: Tuesday, January 14, 2014 12:48 PM
To: CRES HelpDesk
Cc: Chatman, Nadine -ASCR
Subject: We cannot find 2 new informal complaints.

Help, we cannot find these informal complaints; CRSD-CF-2014- 01068 and CRSD-2014-00171. What do you recommend we do?

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From: Petersen, Gayle -ASCR <Gayle.Petersen@ascr.usda.gov>
To: gayle1214 <gayle1214@aol.com>
Subject: FW: CRSD-CF Site Records/Alterations
Date: Wed, Feb 11, 2015 7:43 am

From: Petersen, Gayle -ASCR
Sent: Friday, February 01, 2013 10:39 AM
To: Banks, Denise -ASCR
Cc: Chatman, Nadine -ASCR; Graham, Paula -ASCR
Subject: CRSD-CF Site Records/Alterations

Hi Denise,

I would like to bring something to your immediate attention. After this email went out yesterday, today when looking in the CRSD-CF (conflict site) some of the cases that were not in the system since we have had access to the conflict site, have now mysteriously appeared in the system. However, the name of the responding management officials (Dr. Leonard, Geraldine Herring, David King, etc.) are not included in the section designated for name of the responding management official. And, although the cases appear now, the document section states, "There are no documents for this case." Kim Camillo appears to be the person entering the information, and it seems very odd that these cases are now appearing, but in an altered form.

I have a question regarding whether you would like for me to print these cases out as they appear now to preserve the record and then go back and enter the data as it should appear, including the documents, the names of the responding management officials and other pertinent information that has been left out? If I do this, how can we be certain that we can secure/lock this information to prevent it from being tampered with further? This is creating a lot of work for us, in addition to the work we already have! But we need to be able to run accurate reports and provide accurate data and numbers when called upon to do so.

Someone should inform MSCG/Micropact/DRDM/OASCR or whomever it is that is doing this, that it is a violation of federal law to falsify and otherwise tamper with federal records. The link below is the USDA Office of the Chief Information Officer's regulation on Records Management. Please see 13. Safeguarding Records and 13 d. Penalties for Improper Handling.

http://www.ocio.usda.gov/records/doc/DR3080-001.htm

Gayle

From: Petersen, Gayle -ASCR
Sent: Thursday, January 31, 2013 2:05 PM
To: Washington, Michele - OCIO
Subject: RE: M - docs

No. thanx

From: Washington, Michele - OCIO
Sent: Thursday, January 31, 2013 2:04 PM
To: Petersen, Gayle -ASCR
Subject: Re: M - docs

Hi Gayle:

Should I have received this email?

Thanks

Michele

From: Petersen, Gayle -ASCR
Sent: Thursday, January 31, 2013 06:52 PM
To: Washington, Michele - OCIO
Cc: Banks, Denise -ASCR; Graham, Paula -ASCR
Subject: FW: M - docs

Hi Mackenzie,

I just received these documents I think that they had been e-mailed to us (not in iComplaints). You can use these docs to verify the dates in the ROI/FAD.

Gayle

From: Graham, Paula -ASCR
Sent: Thursday, January 31, 2013 1:47 PM
To: Petersen, Gayle -ASCR; Banks, Denise -ASCR; Chatman, Nadine -ASCR
Subject: M - docs

FYI - I have documents for Matthews – but am unable to access her case.

Please see the attached documents for the Matthews case.

From: Petersen, Gayle -ASCR
Sent: Thursday, January 31, 2013 1:37 PM
To: Banks, Denise -ASCR; Chatman, Nadine -ASCR
Cc: Graham, Paula -ASCR
Subject: Keeping you Informed

Hi Denise,

I just got back into the system and checked the conflict site and there is still nothing for Marion Matthews or Sheila Bryant in iComplaints. Just wanted to update you.

Gayle

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WITHDRAWAL OF DISPUTE/COMPLAINT

From: Petersen, Gayle, Complainant	To: Darvin Bennett, EEO Specialist
Subject: WITHDRAWAL OF FORMAL COMPLAINT (INITIATED)FILED: 2/11/14	Agency Case No. (if assigned): CRSD-CF2-2014-00201 Old # CRSD-CF-2014-00201 & Informal # CRSD-CF-2014-00168

I DO HEREBY WITHDRAW THE SUBJECT FORMAL COMPLAINT FROM PROCESSING BY THE AGENCY:

Issue(s):

1. On unspecified dates, the Assistant Secretary for Civil Rights asked other Civil Rights Directors to recruit Complainant for detail assignments outside the Corporate Services Division;
2. On December 19, 2013, Complainant was informed she was being moved from her position as Branch Chief of the Corporate Services Division, to the Employment Adjudication Division at Patriot Plaza III;
3. On an unspecified date, Complainant became aware her current EEO complaint had been deleted from the iComplaints system;
4. On an unspecified date, Complainant was denied the opportunity to act in the position of Director, Corporate Services Division (GS-15); and
5. On an unspecified date, Complainant was denied a Quality Step Increase.

Basis(es): Race (A/A), Age (DOB 12/14/55), National Origin (American), Sex (F), Reprisal, Disability (P)

THIS WITHDRAWAL IS MADE VOLUNTARILY AND WITH FULL KNOWLEDGE OF MY RIGHTS TO PURSUE A DISCRIMINATION CLAIM UNDER FEDERAL REGULATIONS.

I am withdrawing my complaint and want the record to reflect that USDA is not following the rules found at MD-110 Section IV, Parts A-C. "A conflict complaint must be addressed through procedures designed to safeguard the integrity of the EEO complaint process. When an EEO complaint alleges that the agency head or a member of his/her immediate staff has engaged in discrimination, the agency head shall recuse him/herself from the investigative and decision making process, and engage an official outside his/her chain of command to issue a final action on the case."

One of the RMOs in my complaint is the COTR for USPS who NFC planned to use for the investigation. The second RMO oversees the Agency Head Assessment for NFC. For these reasons this conflict complaint process is flawed, and I will have my concerns addressed via another route outside of USDA.

SIGNATURE (Complainant)

DATE:
2/11/14

Original: Case File
cc: Complainant

From: Petersen, Gayle -ASCR <Gayle.Petersen@ascr.usda.gov>
To: 'gayle1214@aol.com' <gayle1214@aol.com>
Subject: FW: NEW COMPLAINT
Date: Fri, Mar 6, 2015 1:50 pm

-----Original Message-----
From: Hall, Violet -ASCR
Sent: Friday,
February 21, 2014 8:13 AM
To: Petersen, Gayle -ASCR; Lopez, Debbie -ASCR
Cc:
Norwood, Vincent -ASCR; Gist, Crystal -ASCR; Velasquez, Pilar; Patterson, Anika
-ASCR
Subject: RE: NEW COMPLAINT

Good Morning Gayle,

According to the new
direction recently issued by Winona and Pilar, CSD will process the informal
complaints filed by DM employees and ECD, EID, and EAD will process the formal
complaints. Hope this helps.

-----Original Message-----
From: Petersen,
Gayle -ASCR
Sent: Friday, February 21, 2014 7:53 AM
To: Lopez, Debbie
-ASCR
Cc: Norwood, Vincent -ASCR; Gist, Crystal -ASCR; Hall, Violet -ASCR;
Velasquez, Pilar; Patterson, Anika -ASCR
Subject: Re: NEW
COMPLAINT

Debbie.

This is a complaint against DM so tell me why we should
not be processing this complaint.

Gayle

Sent from my iPhone

> On Feb
21, 2014, at 7:39 AM, "Lopez, Debbie -ASCR" <Debbie.Lopez@ascr.usda.gov>
wrote:
>
> Gayle, ECD is processing her complaints, so I will forward this
new complaint to them.
>
> From: Petersen, Gayle -ASCR
> Sent: Friday,
February 21, 2014 7:12 AM
> To: Lopez, Debbie -ASCR
> Subject: FW: NEW
COMPLAINT
> Importance: High
>
>
>
> From: Mauney, Angela - OCIO
>
Sent: Tuesday, December 31, 2013 7:27 AM
> To: Chatman, Nadine -ASCR
> Cc:

From: Petersen, Gayle -ASCR <Gayle.Petersen@ascr.usda.gov>
To: 'gayle1214@aol.com' <gayle1214@aol.com>
Subject: FW: Conflicts Definition UPDATE
Date: Thu, Mar 19, 2015 8:32 am
Attachments: Conflict Case Definition Revised 12 16.doc (41K)

From: Velasquez, Pilar
Sent: Tuesday, January 14, 2014 9:21 AM
To: Velasquez, Pilar; Moore, Bobbie -ASCR; Petersen, Gayle -ASCR; Graham, Paula -ASCR; Chatman, Nadine -ASCR; Pitchford, Anita -ASCR; Sutler, Eliot -ASCR; Jackson, Katrice; Lopez, Debbie -ASCR; Hall, Violet -ASCR
Cc: Scott, Winona -ASCR; Patterson, Anika -ASCR
Subject: RE: Conflicts Definition UPDATE

All,

Just a reminder that CSD staff should process conflict cases according to the new definition. Please reference the attached memo that was handed out at the December 18, 2013, staff meeting. Please let me know if you have any questions.

Thank you,

From: Velasquez, Pilar
Sent: Wednesday, December 18, 2013 4:57 PM
To: Moore, Bobbie -ASCR; Petersen, Gayle -ASCR; Graham, Paula -ASCR; Chatman, Nadine -ASCR; Pitchford, Anita -ASCR; Sutler, Eliot -ASCR; Jackson, Katrice; Lopez, Debbie -ASCR; Hall, Violet -ASCR
Cc: Scott, Winona -ASCR; Patterson, Anika -ASCR
Subject: Conflicts Definition UPDATE
Importance: High

All:

I wanted to clarify an important point from this morning's meeting. **Cases that are currently pending on CSD's docket should stay on CSD's docket**. For now, please keep processing your cases according to the old conflicts case definition.

Starting on **January 6, 2014**, CSD should begin processing cases according to the new definition we discussed at today's meeting.

Please let me know if you have any questions.

Pilar F. Velasquez, Special Assistant
Office of the Assistant Secretary for Civil Rights
U.S. Department of Agriculture
Office: 202-720-0133
Email: pilar.velasquez@ascr.usda.gov

Revised Conflict Case Definition

The Corporate Services Division (CSD) will process complaints when it is determined a named individual has sufficient involvement in the facts of the complaint such that it creates a conflict of interest for their civil rights office to process the complaint. CSD will be responsible for determining if complaints meet the criteria for a conflict of interest and reserves the right to return complaints to the agencies when no actual conflict exists.

Agency Civil Rights offices will be responsible for processing all non-conflict complaints filed by their employees.

CSD will process the informal and formal complaints filed *against*:

1. Agency Heads/Administrators/Chiefs
    a. Including: Department Management (DM) Assistant Secretary (Dr. Gregory Parham); Deputy Assistant Secretary (Malcolm Shorter); and, Deputy Assistant Secretary (Robin Heard)
    b. Civil Rights directors who report directly to Agency Heads/Administrators – legal conflict of interest

2. Civil Rights directors and their direct reports
    a. Deputy Civil Rights Directors

3. Employees of the Office of the Assistant Secretary for Civil Rights (OASCR)
    a. Complaints filed against OASCR employees are conflict cases regardless of the RMO's grade level or position

4. Office of the Secretary (OSEC)
    a. Complaints filed against OSEC employees are conflict regardless of the RMO's grade level or position
    b. Including Under Secretaries

5. Individuals on a case-by-case basis
    a. If the Complainant raises the issue; OR,
    b. There is a factual conflict of interest

CSD will handle the informal process only for non-conflict complaints filed against:

1. Departmental Management employees (with the exception of Parham, Shorter and Heard)

2. Departmental Staff Offices without a Civil Rights director
    a. Including: Office of the Chief Economist; Office of Communications; Office of Congressional Relations; Office of the Inspector General; and, Office of the General Counsel

From: Queen Kavanaugh <queenvictoriakav@aol.com>
To: Gayle <gayle1214@AOL.COM>
Subject: Fwd: Requesting an EEO Counselor
Date: Wed, Feb 18, 2015 9:38 am

Queen Victoria Kavanaugh

Begin forwarded message:

From: "Kavanaugh, Queen -ASCR" < Queen.Kavanaugh@ascr.usda.gov>
Date: February 17, 2015 at 10:31:05 AM EST
To: " [redacted] " < [redacted] >
Subject: FW: Requesting an EEO Counselor

From: Glover, Candace -ASCR
Sent: Friday, February 13, 2015 9:25 PM
To: Kavanaugh, Queen -ASCR
Cc: Smith, Kevin - GIPSA
Subject: Re: Requesting an EEO Counselor

Good Evening Ms. Kavanaugh,

My apologies for not responding sooner. Thank you for your email. I have reviewed your numerous requests for an outside entity to process your informal complaint. While I am sympathetic to your concerns, after careful consideration, I discern no reason to disturb my previous decision regarding the informal processing of your complaint.

The EEOC Regulations require agencies to avoid conflicts of interest or the appearance of such conflicts in the processing of EEO complaints. In order to avoid a potential conflict of interest in the processing of your complaint, CSD arranged to have the informal processing facilitated by Mr. Kevin Smith of GIPSA.

Although you asserted that a potential conflict of interest existed between Mr. Smith and the ASCR, you failed to provide concrete examples of the conflict. Instead, you made general assertions that Mr. Smith may be subjected to undue influence because of his role as Civil Rights Director. You described scenarios where the ASCR may make certain requests of Mr. Smith and in order to curry favor, Mr. Smith may comply with such requests. You also stated, "I'm not accusing Mr. Smith of anything inappropriate, I'm just using him for this example." Again, while I sympathize with your concerns, you have not sufficiently demonstrated that a conflict of interest exists between Mr. Smith and the ASCR.

Moreover, the EEOC has held that a conflict of interest exists when an official reporting relationship exists between the alleged responsible management official, and the official processing the EEO complaint. Here, however, no such relationship

exists. As previously stated, Mr. Smith does not report to the ASCR and no reporting relationship exists between the two. Additionally, none of the individuals identified by you as the alleged responsible officials are in Mr. Smith's chain of command or direct reports. As such, I do not find it a conflict of interest for GIPSA to process your informal EEO complaint.

Accordingly, please contact Mr. Kevin Smith from GIPSA to facilitate the informal processing of your complaint. Your continued refusal to do so may result in the dismissal of your formal complaint.

This is my final decision on this matter.

Regards,

-Candace

Candace B. Glover
Director, Corporate Services Division
South Building, Suite 4004
candace.glover@ascr.usda.gov
v: (202) 720-3680

"Be yourself; everyone else is already taken" -Oscar Wilde

"The privilege of a lifetime is being who you are" -Joseph Campbell

Sent from iPhone

On Feb 11, 2015, at 11:40 AM, "Kavanaugh, Queen -ASCR" <Queen.Kavanaugh@ascr.usda.gov> wrote:

Ms. Glover, I am resending the email previously sent to you on January 29, 2015. I did not receive a response from you to my request that you consider the opportunity for undue influences that are present if my informal complaint is handled by a Civil Rights Director or his/her staff. You informed me that a conflict of interest does not exist, and although I requested it, did not explain how you came to that conclusion and you ignored my requests that you share with me the standard, process, or whatever method or means you and your staff use to determine whether or not a conflict exist.

DR4300-007 requires that EEO complaints be resolved without exposure to conflicts of position, conflicts of interest, or the *appearance of such conflicts*. I am asking that my complaint be assigned to an entity outside of USDA where the opportunity for undue influence does not exist. Once again, if you continue to conclude that you will not reassign my case, please tell me who I can talk to about having my complaint process in accordance with the USDA regulations. Please respond right away because, as you know, the time for having my informal complaint considered is running out. Thanks.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Kavanaugh, Queen -ASCR
Sent: Thursday, January 29, 2015 12:26 PM
To: Glover, Candace -ASCR
Cc: Smith, Kevin - GIPSA
Subject: RE: Requesting an EEO Counselor

Ms. Glover, I want to pursue my complaint, but I am very concerned about the opportunity for undue influences that are present if my informal complaint is handled by a Civil Rights Director or his/her staff. The concerns that I have brought to your attention go beyond the apparent conflict of interest cases that are the subject of the memo sent to me by Mr. Smith (you were copied on his email). I have brought to your attention the opportunity for undue influence to be exerted during the processing of my complaint. I have a right to have my informal complaint processed in an arena that is free from undue influence as well as free of conflicts of interest. I believe, based on what you wrote in your email, that you have limited your consideration to whether this is a conflict of interest case and have not considered my concerns regarding the opportunities for undue influence to be exerted if my complaint is processed by a Civil Rights Director or their staff. These are two different issues (conflict of interest and undue influence) although closely related. In my email below, I described the opportunities for undue influence. I am asking to you expand your consideration beyond whether or not this is a conflict of interest case and consider the opportunity for undue influence that exists with my informal complaint being assigned to a USDA Civil Rights Director and to assign my complaint to another Federal agency other than USDA.
You wrote in your email "Should you decide to file a formal complaint, if applicable, the formal processing of your complaint will be conducted by an independent Federal agency due to the conflict of interest concerns articulated above." I am requesting you explain how it is not a conflict of interest for my informal complaint to be handled by Mr. Smith, yet you admit that it is a conflict of interest for my formal complaint to be handled by Mr. Smith. I don't understand that and would like an explanation, please.
Further, what you wrote in your email about a "conflict within in a conflict" is something that I have never heard of and don't understand. I have been conducting research on this concept, conflict within a conflict, since I received the email from you with that phrase in it, trying to find where some authority has defined that or even used that term and I have not been able to find an explanation. I appreciate an explanation or a reference to the authority you used.
Finally, I want to file my complaint. I know that I have a right to have my complaint handled in a process free from both conflict of interest and undue influence. These are basic tenets of the EEO process. If you should continue to deny my request to reassign my complaint, then please tell me who I can go to for a reconsideration of your decision. Surely, your word can't be the final word on such an important

matter. Thanks.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Glover, Candace -ASCR
Sent: Tuesday, January 20, 2015 8:06 PM
To: Kavanaugh, Queen -ASCR
Cc: Smith, Kevin - GIPSA
Subject: RE: Requesting an EEO Counselor

Ms. Kavanaugh,

Your concerns have been noted.

My office is required to oversee the processing your complaint. Please contact Mr. Smith if you wish to continue to pursue the informal processing of your complaint.

Thanks!

-Candace

From: Kavanaugh, Queen -ASCR
Sent: Tuesday, January 20, 2015 6:00 PM
To: Glover, Candace -ASCR
Cc: Smith, Kevin - GIPSA
Subject: RE: Requesting an EEO Counselor

Ms. Glover,
I am not trying to be antagonistic by continuing to pursue this matter regarding the conflict. I hope you will see my persistence as evidence of how important it is to me that my complaint be handled in a manner that is free of conflicts of interest, undue influence, or partiality.
Thank you for your explanation of what a "conflict of interest case" is. However, in my last email to you, I did not ask for an explanation of a "conflict of interest case," I asked that you share with me the standard, process or method you and your staff use to determine if a conflict exists. As the CSD director, I am sure you must be aware that there are many other situations that create a conflict of interest, not just the clear apparent conflict you describe as a "conflict of interest case." I was expecting that CSD would have some written guidance that the staff uses when examining the interests that are in conflict when someone brings to their attention the possible existence of a conflict of interest beyond what you call a "conflict of interest case." Since you did not provide the information that I requested, the following is an explanation of why I believe a conflict of interest exists in Mr. Smith or his staff handling my complaint, at any stage. I am asking you to reconsider your conclusion that it is not a conflict of interest for Mr. Smith or his staff to handle my complaint and to assign my informal complaint to an independent Federal agency now, rather than at the formal stage.

The EEO counselor has an obligation to execute her/his responsibilities impartially and without undue influence. With regard to my informal complaint, there is the opportunity or chance that Mr. Smith's obligation to be impartial could be compromised and his decisions to be affected by undue influence. For example, (I am not accusing Mr. Smith of anything inappropriate, I'm just using him for this example) the ASCR holds monthly Civil Rights Directors meetings where direction is given to the Civil Rights Directors, and the ASCR conducts the agency head assessments wherein the performance of the Civil Rights Directors is assessed. If the ASCR, or the AASCR, asked Mr. Smith for information relating to my complaint, prior to complying with that request Mr. Smith might reflect on the admonition that was given by OGC via Tammy Trost at the 2014 Conflict Resolution Day wherein Ms. Trost informed us that the Secretary delegated authority for handling EEO complaints to the ASCR and the ASCR delegated part of that authority to the agencies and that he can take back that authority or change how complaints are handled if he wants to. Upon reflection on the authority of the ASCR as articulated by OGC, Mr. Smith or his staff might comply with the request for information because the request came from the ASCR and also comply in deference to the ASCR's authority as explained to us at the Conflict Resolution Day presentation.

Mr. Smith could also comply so as to curry favor with the ASCR and to stay in his good graces so as to get a favorable assessment during the agency head assessment review. I have heard that sometimes the Civil Rights Directors feel personally attacked at those monthly meetings and sometimes the ASCR can be "brutal." Mr. Smith might not want to be on the wrong side of the ASCR so he might provide information about my case if the situation presents itself or if requested. Based on these examples alone, I conclude that the interest Mr. Smith has in getting a favorable assessment on the agency head assessment and in staying on the good side of the ASCR conflicts with his obligation, as an EEO counselor, to execute his duties impartially and without undue influence, and certainly has the appearance of a conflict.

Based on the explanation of why I believe that my complaint should not be handled by Mr. Smith or his staff, or any USDA Civil Rights director, I am asking you to reconsider your conclusion that it is not a conflict of interest for Mr. Smith or his staff to handle my complaint and to assign my informal complaint to an independent Federal agency now, rather than at the formal stage.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Glover, Candace -ASCR
Sent: Friday, January 16, 2015 6:25 PM
To: Kavanaugh, Queen -ASCR
Subject: Re: Requesting an EEO Counselor

Ms. Kavanaugh,

My apologies for not getting back to you sooner. It appears from your last email that my explanation was not clear and did not fully address your questions and concerns.

In re-reading the trailing emails, there seems to be two separate issues at hand: 1) whether your complaint qualifies as a conflict of interest case; and 2) whether

being informally counseled by Kevin Smith of GIPSA creates a conflict or an appearance of a conflict of interest. I will address both issues in turn below.

With respect to the first issue, the Corporate Services Division (CSD) is responsible for, among other things, the informal processing of a subset of complaints that would present a conflict of interest if processed through USDA's normal processing means, including complaints filed against or by members of the Office of the Assistant Secretary for Civil Rights (OASCR).

You indicated previously that you sought informal counseling on a complaint against the ASCR and other OASCR employees (the RMOs). Because the RMOs are employed by OASCR, the complaint falls within the jurisdiction of CSD for informal processing.

The complaint also falls within CSD's jurisdiction because OASCR, unlike the sub-agencies, does not have a civil rights department. Informal complaints are generally processed at the agency level and only transferred to the Department (e.g., the Office of Adjudication) for formal processing. Here, however, because the instant complaint is by an employee of OASCR, there is no "agency level" to informally process the complaint. In such instances, CSD acts as the "agency" for informal processing purposes.

However, because the instant complaint is by and against an OASCR employee, it creates a conflict of interest for CSD to internally process the complaint (e.g., a conflict within a conflict). In such instances, CSD partners with one of the sub-agencies to informally process the complaint so as to avoid a conflict of interest or the appearance of such. Here, we requested that Kevin Smith of GIPSA informally process the subject complaint.

As to the second issue, it is my belief, though as promised, I will look into the issue, that it is not a conflict of interest or the appearance of such for Kevin Smith, Civil Rights Director for GIPSA, to informally process your complaint. As stated previously, Mr. Smith is not employed by OASCR, nor are the RMOs in his chain of command. Indeed, Mr. Smith reports to the Administrator, who is the head of GIPSA. Importantly, none of the civil rights directors report to the ASCR or OASCR.

In light of the above, I recommend that you communicate with Mr. Smith to protect your EEO rights. It is also important to note that if your complaint is not resolved during the informal stage, you will be issued a Notice of Right to File formally. Should you decide to file a formal complaint, if applicable, the formal processing of your complaint will be conducted by an independent Federal agency due to the conflict of interest concerns articulated above.

My apologies for the length of this email. I did not intend on being so verbose, however, verbosity was necessary to fully respond to your inquiries. I trust that I have adequately answered your questions and addressed your concerns. Please direct future correspondences to Kevin Smith so that he can facilitate the informal counseling of your complaint.

Many Thanks,

-Candace

Candace B. Glover
Director, Corporate Services Division
South Building, Suite 4004
candace.glover@ascr.usda.gov
v: (202) 720-3680

"Be yourself; everyone else is already taken" -Oscar Wilde

"The privilege of a lifetime is being who you are" -Joseph Campbell

Sent from iPhone

On Jan 15, 2015, at 7:23 AM, "Kavanaugh, Queen -ASCR" <Queen.Kavanaugh@ascr.usda.gov> wrote:

Good morning Ms. Glover,
Thank you for your response. I am not asking for a change of your process. I am asking the you share with me the standard, process, or whatever method or means you and your staff use to determine whether or not a conflict exist. Surely you have some written guidance that you and your staff use to determine whether or not a conflict of interest exists. I know you are not just acting in some arbitrary manner. I am asking that you share that guidance or standard with me so that I can better understand how you conclude that a conflict does not exist in this instance. This is something you can do right away since such guidance surely must be readily available for you and your staff to consult when making such determinations and it should not take up the remaining time allowed for the informal stage of complaint processing. Please share that guidance with me, at least in the interest of transparency. I do believe that there is a conflict or an appearance of a conflict.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Glover, Candace -ASCR
Sent: Thursday, January 15, 2015 12:43 AM
To: Kavanaugh, Queen -ASCR
Cc: Smith, Kevin - GIPSA; Patterson, Anika - DM; Cowan, Dawn - GIPSA
Subject: Re: Requesting an EEO Counselor

Ms. Kavanaugh:

Thank you for bringing this matter to my attention. I understand your concerns and

they have been noted for the record.

I will look into whether it is a conflict of interest for the agency civil rights directors to informally counsel internal conflict of interest complaints. I will give this matter my due attention; however, it is unlikely that this issue will be resolved prior to the expiration of your informal processing time. As you know, the EEOC mandates that the informal process must conclude within a maximum of 90 days of your initial EEO contact. Thus, in the interest of time and to protect your EEO rights, please communicate with Mr. Kevin Smith of GIPSA to facilitate the informal counseling of your EEO complaint. Please note that Mr. Smith works for GIPSA; is not an employee of OASCR; does not report to the ASCR; and does not report to any of the RMOs referenced in your prior emails.

Communicating with Mr. Kevin Smith concerning the informal counseling of your complaint ensures that your issues have been properly raised and counseled, a resolution attempted, and should you decide to file formally, that your rights are protected.

In the meantime, I will look into whether your concerns warrant a change of process. That is, whether the system we currently have set up to process internal conflict of interest complaints should be modified due to a conflict of interest or the appearance of a conflict of interest.

-Candace

Candace B. Glover
Director, Corporate Services Division
South Building, Suite 4004
candace.glover@ascr.usda.gov
v: (202) 720-3680

"Be yourself; everyone else is already taken" -Oscar Wilde

"The privilege of a lifetime is being who you are" -Joseph Campbell

Sent from iPhone

On Jan 14, 2015, at 4:53 PM, "Kavanaugh, Queen -ASCR" <Queen.Kavanaugh@ascr.usda.gov> wrote:

Ms. Glover, I am writing to you seeking an explanation of how Ms. Patterson, per her email to me below, concluded that it was not a conflict of interest for Mr. Smith, Civil Rights Director for GIPSA to handle my informal complaint and I am also asking that my informal complaint be assigned another EEO counselor other than Mr. Smith or his staff.

On December 29, 2014 I responded to Ms. Patterson's email of December 22, 2014 (below) asking her to please either tell me where I can find the definition of a conflict of interest as it relates to an

EEO complaint, OR tell me what the definition is that she uses to determine if there is a conflict of interest. As of this date I have not received a response from Ms. Patterson. I would like an explanation, please. As I stated in my email to Ms. Patterson, I want to continue pursuing my complaint, but I want to rest assured that my complaint will be handled properly and not under a situation where there is a conflict of interest or even an appearance of a conflict.

I am awaiting a response from you so I can make a determination as to how I will go forward. Thanks in advance.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Kavanaugh, Queen -ASCR
Sent: Monday, December 29, 2014 10:42 AM
To: Smith, Kevin - GIPSA; Patterson, Anika -ASCR
Cc: Cowan, Dawn - GIPSA; Glover, Candace -ASCR
Subject: RE: Requesting an EEO Counselor

Yes, I will grant an extension.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Smith, Kevin - GIPSA
Sent: Monday, December 29, 2014 9:54 AM
To: Kavanaugh, Queen -ASCR; Patterson, Anika -ASCR
Cc: Cowan, Dawn - GIPSA; Glover, Candace -ASCR
Subject: RE: Requesting an EEO Counselor

Good morning ALL. Ms. Kavanaugh, until a more definitive response is received, I am prepared to issue you your notice of right to file (NRF) prior to January 1, 2015. However, if you will grant an extension, it will allow more time for counseling, and ensure the proper counseling venue.

Will you grant an extension?

Thanks in advance

From: Kavanaugh, Queen -ASCR
Sent: Monday, December 29, 2014 9:16 AM
To: Patterson, Anika -ASCR
Cc: Cowan, Dawn - GIPSA; Smith, Kevin - GIPSA; Glover, Candace -ASCR

Subject: RE: Requesting an EEO Counselor

Ms. Patterson, first, let me be clear: YES, is want to file a complaint.

In a presentation made to ADR and EEO staff on Conflict Resolution Day 2014, Tammy Troust made clear to us the authority that the ASCR has over the civil rights directors, including dictating how they will handle complaints, etc. As a result, it is clear to me, as I would define conflict of interest, that it is a conflict of interest for a civil rights director or her/his staff to handle a complaint against the ASCR. The EEOC says that agencies should avoid a conflict of interest or even an appearance of a conflict of interest in handling complaints. I see a conflict and since you do not, I am asking you to **please either tell me where I can find the definition of a conflict of interest as it relates to an EEO complaint, OR tell me what the definition is that YOU are using to determine if there is a conflict of interest**. I deserve an explanation of why this is not a conflict rather than such a dismissive response. I have a right to be assured that my complaint will be handled properly and an explanation will help with that assurance.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Patterson, Anika -ASCR
Sent: Monday, December 22, 2014 7:03 PM
To: Kavanaugh, Queen -ASCR
Cc: Cowan, Dawn - GIPSA; Smith, Kevin - GIPSA; Glover, Candace -ASCR
Subject: RE: Requesting an EEO Counselor

Ms. Kavanaugh,

Again, if you do want to proceed with a complaint of employment discrimination, please communicate directly with Mr. Smith/Civil Rights Office of GIPSA. It is not a conflict for Mr. Smith/Civil Rights Office of GIPSA to process an informal complaint of employment discrimination. Therefore it would not be appropriate or feasible for a different EEO Counselor from another federal agency to be assigned.

Thank you,

Anika H. Patterson, Esq., MPA
Office of the Assistant Secretary for Civil Rights
United States Department of Agriculture
Phone: (202) 306-1062
Email: anika.patterson@ascr.usda.gov
Website: www.ascr.usda.gov

From: Smith, Kevin - GIPSA
Sent: Wednesday, December 17, 2014 3:07 PM
To: Patterson, Anika -ASCR
Cc: Cowan, Dawn - GIPSA; Kavanaugh, Queen -ASCR

Subject: RE: Requesting an EEO Counselor

Good afternoon Ms. Patterson. Please refer to the email dated 12/10/2014, 7:52a.m., to Winona Scott (cc you) indicating that "Ms. Kavanaugh has informed me that she does not want this office to counsel her complaint."

Thanks

From: Kavanaugh, Queen -ASCR
Sent: Wednesday, December 17, 2014 2:38 PM
To: Patterson, Anika -ASCR
Cc: Cowan, Dawn - GIPSA; Smith, Kevin - GIPSA
Subject: Re: Requesting an EEO Counselor

I have had a telephone discussion with Mr. Smith. Please see the emails below wherein Mr. Smith writes that he is forwarding my concerns to the forwarding office. That was a week ago and since I have not heard anything from "the forwarding office," and nothing further from Mr. Smith, I made the inquiry below.

I am requesting you assign another EEO counselor because of the conflict described in my email, below, to Mr. Smith.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

On Dec 17, 2014, at 1:17 PM, "Patterson, Anika -ASCR" <Anika.Patterson@ascr.usda.gov> wrote:

> Good afternoon Ms. Kavanaugh,
>
> EEO Counselor Dawn Cowan and EEO Director Kevin Smith (Grain Inspection Packers and Stockyards Administration) have been available to provide EEO Counseling to you since December 4, 2014. Please communicate with your EEO Counselor regarding any complaint of employment discrimination.
>
> Best,
> Anika
>
> ---
>
> **From:** Kavanaugh, Queen -ASCR
> **Sent:** Wednesday, December 17, 2014 12:03 PM
> **To:** Smith, Kevin - GIPSA
> **Cc:** Cowan, Dawn - GIPSA; Patterson, Anika -ASCR
> **Subject:** RE: Requesting an EEO Counselor
>
> Good Afternoon Mr. Smith,
>
> I have not heard anything further since your email below. Who should I contact?

Who is the "forwarding office?"

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Smith, Kevin - GIPSA
Sent: Wednesday, December 10, 2014 7:47 AM
To: Kavanaugh, Queen -ASCR
Cc: Cowan, Dawn - GIPSA
Subject: RE: Requesting an EEO Counselor

Good morning Ms. Kavanaugh. I appreciate your response. I will forward your concerns to the forwarding office. I am hopeful that they can find an appropriate venue to counsel your complaint.

Thanks

From: Kavanaugh, Queen -ASCR
Sent: Tuesday, December 9, 2014 8:10 AM
To: Smith, Kevin - GIPSA
Cc: Cowan, Dawn - GIPSA
Subject: RE: Requesting an EEO Counselor

Thank you for your email. The management officials involved in the actions giving rise to my complaint are Joe Leonard, Assistant Secretary for Civil Rights, Frederick Pfaeffle Arana, Deputy Assistant Secretary for Civil Rights, Winona Scott, Associate Assistant Secretary for Civil Rights, Mary Thomas, Director, DRMD – OASCR, and Cyrus Salazar, Director of ERCD - OASCR. I see a conflict of interest in my complaint being handled by you, a civil rights director for a USDA agency, or any staff members in your office. I am requesting that my complaint be handled by another Federal agency.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

From: Smith, Kevin - GIPSA
Sent: Monday, December 08, 2014 9:54 AM
To: Kavanaugh, Queen -ASCR
Cc: Cowan, Dawn - GIPSA

Subject: RE: Requesting an EEO Counselor

Good morning Ms. Kavanaugh. I will call you today. In the interim, attached are the intake form and notice of rights and responsibilities and certification of those rights to be completed an returned to this office. You can email the forms to me, Ms. Cowan, EEO Counselor, or fax to 202-690-0609.

Thanks in advance.

From: Kavanaugh, Queen -ASCR
Sent: Friday, December 05, 2014 1:18 PM
To: Smith, Kevin - GIPSA
Subject: Fwd: Requesting an EEO Counselot

Mr. Smith, as can be seen from the email below from Ms. Scott, I am told that you will you provide counseling to me. I want to file an EEO complaint. Please contact me at 202-690-0425. Thank You.

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

Begin forwarded message:

From: "Scott, Winona -ASCR"
<Winona.Scott@ascr.usda.gov>
Date: December 4, 2014 at 10:56:53 AM EST
To: "Kavanaugh, Queen -ASCR"
<Queen.Kavanaugh@ascr.usda.gov>
Subject: RE: Requesting an EEO Counselot

Please contact Kevin Smith in GIPSA via email to get counseling. Thanks

Kevin N. Smith
Grain Inspection, Packers and Stockyards Administration (GIPSA)
Director, Civil Rights Staff
1400 Independence Avenue, SW
Room 2508-S
Washington, DC 20250
kevin.n.smith2@usda.gov

-----Original Message-----
From: Kavanaugh, Queen -ASCR
Sent: Tuesday, December 02, 2014 10:55 AM
To: Scott, Winona -ASCR
Subject: Requesting an EEO Counselot

I need to contact an EEO counselor to begin the informal complaint process. Please give me the contact information for an EEO counselor. Thanks

Queen Victoria Kavanaugh
Program and Management Analyst
Telephone: (202) 690-0425

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