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AN OVERVIEW OF THE FEDERAL EEO  
ADMINISTRATIVE HEARING PROCESS

Hon. Audrey M. Scott <sup>1/</sup>

I. INTRODUCTION

The Equal Employment Opportunity Commission (Commission) enforces four statutes: Title VII of the Civil Rights Act, which prohibits discrimination on the bases of race, color, sex, religion, and national origin; the Age Discrimination In Employment Act, which prohibits discrimination against persons over the age of forty; the Equal Pay Act; and the Rehabilitation Act, which prohibits discrimination against qualified mentally and physically handicapped persons. Federal employees and applicants for federal employment are protected under all four Acts.

Pursuant to President Carter's Reorganization Plan # 1 of 1978, the responsibility for promulgation of regulations governing the processing of discrimination complaints in the federal government was transferred to the Commission. These regulations are codified at 29 C.F.R. Section 1613.201 et seq.

The federal government has a rather complex administrative scheme for processing complaints of discrimination filed by employees or applicants. Although there is an adjudicatory component, the major emphasis is on informal resolution. Most of the processing activity takes place within the individual federal agencies. Each agency is required to employ EEO counselors, investigators, officers and other officials to administer its EEO programs. The federal sector's administrative process is substantially different from that in the private sector. The time frames are shorter, and there is an opportunity for a hearing and a decision on the merits by one of the Commission's

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<sup>1/</sup> The author is the senior administrative judge with the Memphis District Office, Equal Employment Opportunity Commission. This article was written by Judge Scott in her private capacity. No official support or endorsement by the United States Equal Employment Opportunity Commission or any other agency of the United States Government is intended or should be inferred.

administrative judges. These judges are located in the Commission's twenty-three district offices.

This article will primarily focus on the Commission's adjudicatory responsibilities in the federal sector. This is not intended as an exhaustive discussion of the federal sector administrative process. For more detailed information on this subject, the reader can refer to the Commission's regulations, 29 C.F.R. Section 1613.210 et seq.

## II. THE EEO COMPLAINTS PROCESS IN A NUTSHELL

1. An aggrieved federal employee or applicant has 30 days from the date that he/she becomes aware of the alleged discriminatory act to contact an EEO counselor within the employing agency.

2. The counselor has 21 days to attempt to informally resolve the matter. At the end of that time, if no resolution is reached, the counselor will issue a Notice of Final Interview to the aggrieved individual.

3. The aggrieved individual has 15 days from the date of receipt of the Notice of Final Interview to file a formal complaint of discrimination. The formal complaint is filed with the employing agency's EEO officer or other appropriate official. The agency may reject the complaint for any of the reasons set forth in the Commission's regulations, including failure to state a claim and untimeliness, both as to filing and consultation with the EEO counselor. <sup>2/</sup>

4. If the complaint is accepted, the employing agency will assign an EEO investigator to conduct an investigation of the complaint. Once a complaint has been accepted, the agency may cancel it for any of the reasons set forth in the Commission's regulations. This is a final action which can be appealed to the Commission's Office of Review and Appeals (ORA).

5. Once the investigation is completed, the agency will again attempt informal resolution. If that fails, the agency's EEO officer will issue a Notice of Proposed Disposition, which informs the complainant of his/her right to a hearing or a final decision by the agency head without a hearing.

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<sup>2/</sup> See, 29 C.F.R. Section 1613.215.

6. If the complainant elects to proceed to hearing, the case file is then submitted to the appropriate EEOC district office for assignment of an administrative judge to conduct the hearing. The assigned judge may hear the case and issue a recommended decision on the merits or, where appropriate, issue a recommended decision without a hearing.

7. The recommended decision is transmitted to the head of the agency against whom the complaint was filed for issuance of the final decision. The recommended decision becomes the final decision binding on the agency if it fails to act within 60 days after receipt of such.

8. If the final decision is not favorable to the complainant, he/she has two options: 1) file a civil action in Federal District Court within the appropriate time frame; or 2) appeal to the Commission's Office of Appeals and Review (ORA).

9. If an appeal is made, the Commission will issue a decision on the merits of the case. If the complainant is dissatisfied with that decision, he/she may file a civil action in Federal District Court within the appropriate time frame.

10. The complainant may also file in Federal District Court if the agency has not issued a final decision within 180 days of filing the complaint or if the Commission has not issued a decision on an appeal to ORA within 180 days of filing of appeal.

### III. THE HEARINGS PROCESS

The Commission's judges adhere to established procedures in processing requests for hearings. However, there may be slight variations from office to office. The procedures described herein are applicable to the office to which this writer is assigned, and may or may not be identical to those followed in other district offices.

As noted above, the employing agency, upon receipt of a timely request for a hearing, transmits the entire case file to the appropriate Commission district office. When the case is assigned to a judge, it is reviewed to determine the adequacy of the investigation. If the investigation is wholly inadequate; i.e., crucial evidence is omitted, the case file may be remanded to the agency for further investigation. However, if the deficiency is minor, the case file is retained and a hearing may be conducted.

The assigned judge schedules a prehearing conference in every case, and the attendance of the parties is required. The purposes of the prehearing conference are to define the issues in the case, obtain agreements of facts and stipulations, work out settlements, and to make the necessary preparations for the hearing.

A. The Authority of the Administrative Judge

The Administrative Judge has the normal powers of a judge in an administrative setting, including the power to regulate the course of the hearing, order the production of documents and witnesses, and rule on offers of proof. The judge also has summary judgment authority. If there are no material issues of fact remaining in the case, the judge can dispense with the hearing and decide the merits of the case based on the record.

The assigned judge can also impose sanctions for failure to comply with orders for production of documents and witnesses. This includes, but is not limited to, drawing adverse inferences, declaring a default on the issues to which the requested documents pertained and exclusion of other evidence submitted by the offending party.

B. Rights and Responsibilities of the Agency  
and the Complainant

In connection with the hearing, both sides to the dispute have the right to call witnesses, present relevant documents, and cross-examine opposing witnesses.

The complainant has the right to be represented by a representative of his or her own choosing at any stage in the process. The representative can be an attorney or a lay person. Also, the complainant must be afforded a reasonable amount of official duty time to prepare his/her case. If the complainant prevails on the merits of the case, he/she is entitled to relief which may include reasonable attorney fees and back pay.

The costs incurred in connection with the hearing are, for the most part, borne by the agency against whom the complaint has been filed. For instance, the cost of hiring a court reporter to transcribe the hearing is borne by the agency.

## C. Other Matters

### 1. Discovery

The Commission's regulations do not specifically provide for discovery. However, the parties can routinely discover a great deal of information such as: the names of all witnesses who will testify, a list of all documents that will be introduced at the hearing, as well as copies of all documents. In addition, the parties have access to the investigative file and all witness statements. Interrogatories and depositions of unavailable witnesses are also permitted. Because of the requirement of a full scale investigation of every complaint, there is rarely a need for additional discovery.

### 2. Continuances

When a case is assigned, the judge is usually prepared to proceed to hearing within the next thirty to ninety days. The parties are allowed considerable input into the scheduling of hearing dates; therefore, requests for continuances after a firm hearing date has been set are granted only upon a showing of good cause. The party who has made the request must also be prepared to proceed to hearing within a reasonable amount of time after the first schedule hearing date. Otherwise, the judge may remand the case to the agency.

### 3. Witnesses

Persons who have relevant and material evidence bearing on the case may be approved as witnesses to testify at the hearing. The Commission's judges do not have subpoena power and, therefore, cannot compel the attendance of a non-federal employee at a hearing. The party who has requested that witness must arrange for his/her attendance.

However, the judge can order the employing federal agency to produce witnesses who are employed by the federal government, and the agency must comply unless it is administratively impracticable to do so. In that case, the judge will arrange to secure the testimony of the witness through other means. If the witness's testimony is crucial, the judge may continue the hearing until such time as that witness can appear. The witness is in a duty status during the time he/she is made available as a witness.

### 4. Rules of Evidence

The technical rules of evidence as applied in a court of law are not applicable in an administrative hearing.

Evidence that is relevant, material, and not unduly repetitious will be admitted. This does not mean that a party cannot object to evidence that would be otherwise inadmissible in a court of law. Those objections will be considered as going to the weight rather than the admissibility of the evidence. When deciding the case, the judge will determine the weight to be given to the evidence, taking into consideration the objections that have been made.

#### 5. Class Actions

The Commission's judges adjudicate both individual and class complaints of discrimination in the federal sector. The regulations governing the processing of administrative class complaints, 20 C.F.R. Section 1613.601 et seq., are based on Rule 23 of the Federal Rules of Civil Procedure.

Unlike an individual complaint, the agency does not investigate class complaints of discrimination. Once a class complaint is filed, the agency transmits the file to a Commission district office for a determination as to whether it can properly be certified as a class action. The judge may issue a recommended decision and transmit the file to the agency for a final decision on the certification issue. If the class is certified, the agency bears the responsibility of notifying the class members and affording them an opportunity to opt out of the class. The case is then resubmitted to a Commission district office for processing which may include a hearing on the merits of the class allegations. For more detailed information on the class complaints processing procedures, the reader is referred to 29 C.F.R. Section 1613.601 et seq.

#### IV. CONCLUSION

The administrative hearings process is seen by many complainants to be an attractive alternative to court. First, it is less expensive. As noted above, most of the costs associated with this process are borne by the agency. Second, it is quicker because the Commissioner's judges have strict deadlines for completion of cases. Third, if the complainant prevails on the merits, he/she may be entitled to the same remedies that could be ordered in a court of law. Finally, once a complainant has exhausted all of the available administrative remedies, he/she can still file a civil action in Federal District Court and receive a trial de novo on the merits of the complaint.