

FORM OVER SUBSTANCE –

The EEOC's proposed revisions to its federal sector complaint processing fail to substantively address the continued failure of agencies to timely and adequately investigate complaints.

By Mahoney and Jeffrey, PLLC

On December 21, 2009, the EEOC proposed revisions to its federal sector complaint processing regulations which, in part, would permit agencies to forgo the current complaint processing provisions of 29 C.F.R. Part 1614, and develop and conduct their own pilot projects for processing complainants. *See Fed. Reg. Vol. 74, No. 243, 67839-67844, at 67843.* Disturbingly absent from these proposed revisions are any EEOC proscribed standards or guidelines to ensure that any pilot programs are fair to employees and/or maintain investigative quality.

Currently, Executive Branch agencies process federal employees' EEO complaints under the U.S. Equal Employment Opportunity Commission's (EEOC) regulations at 29 C.F.R. Part 1614. Employees unable to informally resolve their complaints during the counseling phase may file a formal complaint with their agency. The agency will then either dismiss or accept the complaint for investigation. Thereafter, if the complaint is accepted, the agency typically has 180 days from the date the complaint was filed in which to issue an investigative report. After the employee receives the report, or 180 days have passed since she filed the complaint, she may (1) request a hearing before an EEOC administrative judge; or (2) forgo a hearing and request a final agency decision.

In fiscal year 2008, agencies failed to timely complete their investigations more than 25% of the time. *See U.S. Equal Employment Opportunity Commission Annual Report on the Federal Work Force Fiscal Year 2008, Part 1, § E, ¶ (1)(g).* Further, when the U.S. Postal Service was excluded from the Federal work force, agencies failed to timely complete their investigations of complaints more than 40% of the time. *See id.* Would your failure to timely and adequately complete a criminal investigation 40% of the time be found acceptable by your agency? Moreover, in fiscal year 2008, the EEOC overruled 33% of all final agency decisions, in which an employee had forgone a hearing. *See id.* at ¶(2)(i). That's right, 1 out of every 3 final agency decision, in which the employee had not elected a hearing before an administrative judge, was overturned by the EEOC.

Also, as noted in two of the EEOC's recent federal sector appellate decisions, the timely completion of investigations and the adequacy of investigations remain an ongoing problem. First, in *Royal v. Department of Veterans Affairs*, the EEOC affirmed an administrative judge's decision entering a default judgment in favor of the complainant as a sanction against the U.S. Department of Veterans Affairs when the agency failed to start its investigation until after the 180-day deadline to complete the investigation. *See Royal v. Dep't of Veterans Aff'rs*, EEOC Appeal No. 0720070045 (2009). Second, in *Cox v. Social Security Administration*, the EEOC affirmed an administrative judge's decision entering a default judgment in favor of the complainant as a sanction against the Social Security Administration's failure to ensure an adequate investigation and its failure to properly respond to the Complainant's discovery requests. *See Cox v. Social Security Admin.*, EEOC Appeal No. 0720050055 (2009).

It is unrealistic to expect agencies that are currently unable to meet investigative timetables to be able to develop effective pilot programs that are fair to employees. Any agency developed pilot

more than likely will frustrate investigations by establishing more "byzantine" procedures that would lead to increased legal costs for employees, or sacrifice investigative quality for economy. In addition, it is impossible to expect that understaffed agencies will be willing, let alone be able, to develop and implement new requirements and procedures for an administrative program. Rather than the EEO abrogating its responsibility, it should instead develop its own proposal to improve the federal sector complaint process, and then allow agencies to test the "model" program.

Peter J. Jeffrey, Esq.

Member & Director of Litigation

Mahoney & Jeffrey, PLLC, *The Federal Employee's Law Firm*®

202-312-7100

www.MahoneyJeffrey.com

The information contained in this article is of a general nature and is subject to change; it is not meant to serve as legal advice in any particular situation. For specific legal advice, the author recommends you consult a licensed attorney who is knowledgeable about the area of law in question.