



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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**GUIDANCE ON IMPROVING THE ACCURACY OF FORM 462 DATA
FOR “COMPLAINTS PENDING IN HEARINGS”**

This report provides guidance to federal EEO directors and Form 462 preparers on reporting accurate agency EEO complaints data. Focusing on Form 462 Part VIII(A)(3), it gives recommendations for tracking and timely closing cases in which complainants have requested a hearing.

U.S. Equal Employment Opportunity Commission (EEOC) regulations require federal agencies covered by 29 C.F.R. §1614.103 to report to EEOC data on EEO complaint processing, beginning with pre-complaint counseling and ending with final disposition. Agencies report this information on the Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (Form 462).

Form 462 has twelve parts. This guidance focuses on Part VIII, which collects data on the status of pending complaints (complaints that have not been closed by the end of the reporting period). For this section, the 462 preparer lists the number pending, the number of days pending, the average days pending and the number of days pending for the oldest such case. Section (A)(3) of Part VIII records such data for “complaints pending in hearings,” which are those cases in which the complainant has requested a hearing before an EEOC Administrative Judge (AJ) rather than a final agency decision. The reporting agency head and EEO director certify the accuracy of all EEO data before submitting it to EEOC’s Office of Federal Operations (OFO), which then uses it to create an aggregate report of federal complaint processing statistics. Those statistics are published in EEOC’s Annual Report on the Federal Work Force and submitted annually to the President and Congress. OFO also places the [Annual Reports](#) on EEOC’s external website, where it is available to the public.

As part of its oversight responsibility for federal programs required by Section 717 of Title VII and Section 501 of the Rehabilitation Act, OFO audited agencies’ Form 462 submissions for fiscal years (FYs) 2008-10. This audit uncovered inaccuracies in Part VIII(A)(3) data. For example, in FY 2008 reports, 42.85% (51 of 119) of the hearings agencies identified as pending in hearings had been closed prior to the end of the reporting period; in FY 2009 reports, 39.49% (62 of 157) of such

complaints had been closed prior to the end of the reporting period; and in FY 2010 reports, 35.9% (68 of 189) of complaints had been closed prior to the end of the reporting period.

Inaccurate Form 462 reporting has empirical and permanent effects that affect the integrity of the federal EEO program. First of all, inaccurate reporting is in and of itself problematic. EEOC cannot check the underlying integrity of each agency's raw data and thus must rely upon each agency to ensure an accurate Form 462 submission. The reporting process recognizes that the responsibility for accurate data rests with each agency: it requires authorized agency administrators to submit their complaints data to EEOC via EEOC's Form 462 website, and the program contains an edit check that alerts the reporter to data errors and helps ensure that the data is internally consistent and accurate.

As a further assurance, EEO directors are required to certify the accuracy of Form 462 data before submitting it to EEOC; failure to ascertain the status of complaints pending in hearing could result in non-compliance with 29 C.F.R. §1614.102(c)(5), which invests in EEO directors the responsibility to ensure timely final action on each EEO complaint. Moreover, EEOC's Management Directive 715 (MD-715) requires each agency annually to report on the status of activities undertaken pursuant to its equal employment opportunity program under Title VII and pursuant to its affirmative action obligations under the Rehabilitation Act. It makes agency heads -- not only EEO directors -- responsible for ensuring the accuracy of all data, including Form 462 data, and it requires certification from both the EEO director and the agency head. Given these requirements, an agency's submission of inaccurate Form 462 data is simply unacceptable.

Other serious issues flow from inaccurate complaints data. As mentioned above, EEOC relies on Form 462 data to prepare the Annual Report on the Federal Work Force, which is submitted to the President and Congress each year and also is available to the public. Statistics on complaints "pending in hearings" are published in an Appendix Table of the Annual Report. If an agency does not accurately report a complaint as closed in a previous year's Form 462, it cannot go back the next fiscal year (FY) and correct either the Form 462 or the published Annual Report. Therefore, no data associated with the complaint closure -- including the total processing time, whether there was a finding of discrimination, a settlement, any benefits awarded to the complainant, and the bases and issues associated with that complaint -- is reported.

As noted above, EEOC audited agency hearing data provided in Forms 462 for FYs 2008 – 2010. That audit revealed that of the hearings agencies erroneously reported as open, ten had resulted in findings of discrimination with benefits and 31 had settled with benefits between FY 1999 and 2010. In the ten findings of discrimination, almost \$1.2 million dollars in monetary benefits and additional non-

monetary benefits were awarded to complainants and never reported in the agencies' Forms 462. In the 31 settlements, almost \$400,000 in monetary benefits and additional non-monetary benefits were awarded to complainants and never reported in the agencies' Forms 462. This information therefore was not included in the Annual Report.

Arguably the most dire consequence of inaccurate reporting is its effect on federal employees and applicants. EEOC's regulations set forth deadlines for each step of the EEO process. Timely completion of each step in the EEO process is critical in order to avoid substantially increasing case inventories and workloads, to ensure that documents and testimony are available and more reliable, and to promote fairness by demonstrating to complainants that the agency is committed to expeditious complaint resolution. The objective of the EEOC hearings process is to ensure fair and impartial hearings resulting in timely, well analyzed, legally and factually supported decisions. When an agency inaccurately reports a closed complaint as pending in hearing, it will appear that complaints take longer to advance through the federal EEO process.

For instance, based upon the aggregate of all agency FY 2010 462 data, the FY 2010 Annual Report states that the government-wide total days for complaints pending hearings was 5,623,966 (15,408 years) and that complaints pending in hearings took an average of 597 days. As stated above, a large percentage of these cases reported as pending had actually been closed. For example, one agency's FY 2010 Form 462 reported that the average number of days for complaints pending in hearing was 867.33, and the oldest such case had been pending for 3,262 days. OFO's audit revealed that the AJ had issued a bench decision in that case in FY 2002. This one agency reporting error added approximately 2,920 days -- eight extra years -- to the government-wide total days for complaints pending hearings as reported in the FY 2010 Annual Report.

When federal employees and applicants review inaccurate Form 462 information, it tells them that (1) they are unlikely to get a timely (generally within 180 days) AJ hearing; and (2) that they cannot predict with certainty when they might obtain an agency post hearing decision (required within 40 days of the AJ decision). Perhaps more significantly, these inaccurate Form 462 hearing statistics show that agency heads have not demonstrated a commitment to equality of opportunity for all employees and applicants by ensuring a fair and efficient EEO process. This, in turn, results in the very real costs associated with decreased morale and productivity resulting from the ineffective and inefficient use of human capital resources. Recognizing that "justice delayed is justice denied," Chief Justice Warren E. Burger wrote that a "sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people.... [One of the] three things [that] could destroy that confidence and do incalculable damage to society ... [is] that people come to believe that inefficiency and delay will drain even a just

judgment of its value....”¹ Accordingly, the current state of Form 462 data on complaints pending in hearings erodes federal employees’ and applicants’ confidence in the EEO process and adds to the public’s perception that the federal government does not value EEO principles.

Having discovered the reporting/complaint tracking issues and recognizing the consequential effects, OFO set out to (1) determine why agencies were not reporting accurately and (2) provide guidance to all agencies on how better to track and report this data. In January 2011, after the submission of FY 2010 Forms 462, OFO informally surveyed 14 agencies and 40 agency subcomponents and sets forth below the likely causes of inaccurate data.

1. EEO complaint tracking systems. The results of OFO’s survey showed that most agencies used vendor-created electronic software applications that provide the ability to process, track, manage, and report on EEO cases. Some agencies surveyed stated that they use other methods of tracking cases in conjunction with a vendor-created software application. For some, this practice has resulted in inconsistent data within the EEO office. For example, a few agencies stated that EEO staff use a software application, an Excel spreadsheet shared by all EEO staff, and Excel spreadsheets for each employee to keep track of each case. One agency employee noted that when an employee fails to update all three tracking systems, it produces inconsistent data. Another agency responded that it requires its EEO staff manually to update the software application and an internal Access database, which has the potential of resulting in a person updating only one or the other. Another agency noted that although it has a software application, it primarily depends on a poster in the EEO office to determine the status of a complaint pending in hearing.

Many agencies responded that they do not keep track of pertinent information related to the hearing in either a software application or in other hearing tracking system(s). Without this information, the status of a complaint pending in hearing is difficult to ascertain. For example, most agencies do not input into the system(s) the EEOC assigned hearing number, the EEOC district or field office to which the hearing was assigned, or the name and contact information of the EEOC AJ assigned to the hearing. Additionally, some agency EEO offices do not keep track of the agency representative contact information at the hearing level.

The above responses are consistent with comments agencies included on their Forms 462. For example, one agency reported it “does not track EEOC Hearing numbers.” Nine subcomponents of another agency commented that “[The agency] does not track cases by EEOC hearing number so [the agency] cannot provide [that information].” Another agency stated “EEOC Docket number is unknown,” for a hearing EEOC docketed in March 2010.

Another issue that may result in inaccurate reporting within the agencies' tracking system(s) is inconsistent policies and practices within each agency regarding which agency office is responsible for updating the tracking system. For example, of the subcomponents we contacted for one agency, most reported that it is the responsibility of the departmental EEO office at headquarters to update the software application once a hearing is closed; however, the remaining subcomponents stated that it was their responsibility to update the software application with this information. The result of using this method almost always resulted in incomplete or inaccurate Form 462 data.

2. Lack of intra-agency communication. While the agencies' EEO offices are tasked with keeping track of complaints at each stage of the EEO process, another office in the agency usually defends the complaint while it is at the hearing level. The survey responses revealed that there is often a lack of communication between the departmental EEO office, the subcomponent EEO office(s) (if applicable), and the agency representative regarding the status of complaints pending in hearings. Some agencies responded that the agency representative often receives notification that the AJ has issued a decision and the hearing process has ended, but that this information is not always shared with the EEO office. Similarly, in an agency with subcomponents, the agency representative may share the information with the departmental EEO office but the information may not trickle down to the subcomponent EEO offices. Consequently, the complaint remains marked as "open" in the subcomponent's tracking system and is reported as such in its Form 462.

Additionally, many agencies stated that the agency representatives and EEO offices do not have regular communication, if any at all, regarding the status of complaints pending in hearing; many agencies noted that once an EEO office turns over the complaint file to the agency representative's office, the EEO office is not likely to hear from the agency representative again.

3. Lack of due diligence. An important element of tracking EEO complaints is an agency's use of due diligence to ascertain the status of all EEO complaints. The survey responses and the Form 462 data revealed that many agencies do not follow up on the status of complaints after a hearing request. A few agencies stated that there is never follow-up on the status of a complaint once a hearing is requested. Many agencies responded that there is only follow-up on the status of a complaint if it has been pending in hearing for over a year, or if a complainant or representative requests status information. Other agencies noted that the only follow-up occurs when it is time to submit the Form 462.

These survey results were consistent with agencies' FY 2010 Form 462 comments: many an agency stated that it had taken no steps to follow up on the status of hearings after complainant requested a hearing ("Complainant indicated that a

hearing was requested on 3/5/02 (no hard copy on record)...”; “We have not received any information on the EEOC docket number [for a hearing requested in 2007]”; “The agency has yet to receive an acknowledgement order of EEOC decision to date [for a hearing requested in 2008]”).

Another indication that agencies are not routinely conducting status updates is that some agencies have reported the same complaint each year in their Form 462 as the oldest complaint pending in hearing, even though that complaint has been closed for a number of years. For example, an agency reported the same complaint as the oldest complaint pending in hearing in its FY 2008, FY 2009, and FY 2010 Forms 462, even though the hearing was closed in 2002. Another agency reported the same complaint for three years, even though the hearing had been closed in 2005. A third agency reported the same complaint for three years even though the hearing had been closed in 2007. Still another agency reported in FY 2010 a complaint was pending in hearing for 3,586 days and attributed it to being “destroyed at the World Trade Center on 09/11/2001 and no reference to the EEOC Hearing number exists.” EEOC’s New York district office, however, confirmed that it has no pre-9/11/2001 hearings pending from this agency.

Finally, many agencies informed us that the EEO office is responsible for writing the final order notifying a complainant whether the agency will fully implement the AJ decision, or, in the alternative, that it will not fully implement the decision and will appeal it to OFO. If the agency EEO office does not know that a hearing was closed, the agency likely will not issue a final order to complainant.

Based upon this information, we offer the following recommendations.

1. Comprehensive Complaints Tracking Systems. Agencies should use comprehensive complaints tracking systems and continually should take steps to ensure that the system is updated with the most current information at each stage of the EEO process. If an agency uses multiple tracking systems, it should create a policy containing control steps that the EEO office must take to ensure accuracy. For larger agencies, Excel spreadsheets and posters alone may not be sufficient.

Agencies must ensure that they are recording all data necessary to track complaints at the hearing stage. This data includes the EEOC assigned hearing number; the EEOC field or district office to which the hearing is assigned; the EEOC AJ assigned to preside over the hearing; and the contact information for the agency representative assigned to defend the case. Agencies using software applications might consider administratively adding these data captures to their application or instructing their vendor to do so. One agency responded that it recently added fields to its agency-specific system in order to keep track of pertinent hearing information. As a result, the system is able to auto-populate information that was previously entered into the system, such as the contact

information for an EEOC office, AJ, or agency representative. The addition of these fields resulted in readily available information needed to ascertain the status of cases at the hearing stage, and ultimately helped the agency effectively monitor and more efficiently conduct status updates.

Agencies should consider creating clear and consistent policies that detail which office and which individuals are responsible for updating complaint information in the tracking system. The policies should be consistently enforced by subcomponents as well. Agencies could consider making timely and accurate data recording a performance measure in responsible staff evaluations.

2. Increased Communication between Responsible Agency Offices. Although it is important to maintain neutrality and keep a firewall between the EEO office and the agency representative defending the agency, it is also important that these two entities are diligent in communicating the status of the complaints pending in hearings. Agencies should consider creating a policy where notification is sent to the agency office responsible for updating the tracking system once the case files and/or the decision is received from the EEOC AJ. For example, if the AJ decision and the case file are sent to the agency representative, the agency representative could be held responsible for forwarding that information to the appropriate EEO office to update the tracking system. Similarly, if the decision and case file are sent to the departmental EEO office, that office could be responsible for forwarding the information to the appropriate subcomponent EEO office if the subcomponent EEO office is responsible for updating the tracking system. The agency could consider increasing communication with the EEOC AJ by providing to her the correct agency office and address to which the decision and case files should be sent.

Agencies could also consider giving agency representatives restricted access to the EEO tracking system so that they would have the limited ability to enter the status of complaints at the hearing stage. The agency could allow the agency representative the ability to keep track of open and closed hearings, and also various stages of the hearing process (discovery, motions, settlement agreements, hearing, etc.). Once a complaint has been closed by an agency representative, the tracking system could be programmed to send a message to the EEO office that further processing (i.e., a final agency order) is required or that an agency final order was issued.

Agencies could hold monthly face-to-face meetings between the agency representative office and the EEO director in which the agency representative provides an update on all complaints currently pending in hearing. For smaller agencies, where the volume of hearings might be low (i.e. fewer than five active hearings a year), such meetings could be replaced by monthly emails. Further, the departmental EEO office could provide a monthly report of all complaints pending in hearings to the agency representative and all subcomponent EEO offices. The

agency representative could then confirm that the list of pending hearings is accurate, and the subcomponent EEO office(s) could ensure that all information in the tracking system is up-to-date and accurate.

3. Diligently Pursue the Status of All Complaints Pending in Hearing.

Agencies could create a policy that requires the active pursuit of the status of all complaints at all stages of the EEO process, including those pending in hearings. If an EEO office contacts an agency representative for the status of a complaint pending in hearing, it should ensure that the agency representative is in routine contact with either a representative from the EEOC field or district office assigned to the hearing or the EEOC AJ assigned to the hearing regarding the status of any pending motions, conferences, hearings, and decisions. As suggested above, the EEO director could have regular meetings (i.e. monthly) with the agency representative regarding the status of all complaints pending at the hearing level. The status updates should include information regarding at what stage the hearing is and in what ways the EEO office could help the agency representative ensure smooth processing of the complaint (such as the efficient transfer of case files and decisions at the conclusion of the hearing).

Conclusion

All federal agencies should strive to attain a model agency EEO program. Accurate complaint data is an essential element of model EEO status, and MD-715 and EEOC regulations place that responsibility squarely with the agency head and EEO director. We look forward to working with all reporting agencies to improve the quality and accuracy of future Form 462 data submissions.

¹ Burger, What's Wrong With the Courts: The Chief Justice Speaks Out, U.S. News & World Report (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970).