

MARCH 28, 2011

**COMMENTS OF THE ADMINISTRATIVE JUDGES ASSOCIATION [AJA]
OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION [EEOC] ON:
Request for Public Comment on Plan for Retrospective Analysis of
Significant Regulations**

I. Introduction

The EEOC has notified the public that it is beginning a new, periodic retrospective review of its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed, to make the EEOC's regulatory program more effective and/or less burdensome in achieving its regulatory objectives. The EEOC is acting pursuant to Executive Order 13563, which applies across the federal government. 76 Fed. Reg. 3821 (Jan. 21, 2011), <http://federalregister.gov/a/2011-1385>.

On behalf of the administrative judges of the EEOC, the AJA submits that the regulations governing federal sector hearings require substantial modification in order to protect the rights of federal employees and federal agencies under the statutes which EEOC is charged with enforcing in the federal sector as well as the private, state, county and local sectors.

II. The Administrative Judges Association [AJA]

The AJA is a voluntary professional association of EEOC administrative judges [AJ's] who decide claims of employment discrimination brought by civilian employees of federal agencies. In FY 2009, the EEOC received a total of 7,277 requests for hearings from federal employees; and 6,779 complaints were resolved, securing more than \$44.5 million in relief for employees.

The Supreme Court has described the federal sector administrative process as "a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action, thereby encouraging quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *See West v. Gibson*, 527 U.S. 212, 219 (1999). Such a process must remain a priority in an age of increasing demands on the federal courts.

AJA is dedicated to advancing the Commission's efforts to improve the federal complaints process, and has valuable collective empirical experience within the Commission, under the current federal complaint system and the

previous federal systems. AJA has also studied earlier proposed efforts to remove or alter the process, many of which were opposed by major stakeholders. Therefore, our comments present a valuable perspective on modifications to the federal sector regulations.

III. 2009 Notice of Proposed Rulemaking

The AJA filed comments on February 19, 2010, in response to the Notice of Proposed Rulemaking concerning 29 C.F.R. 1614. The Notice stated that the proposed changes represent consensus measures identified in the report of an internal federal sector work group run by then-Acting Chair Stuart J. Ishimaru, who correctly stated that "the federal EEO process is vital for government workers, who have fewer available remedies than private-sector workers."

A. The proposed changes in 2009

The last changes proposed for the federal sector were:

- i. allow agencies to conduct pilot projects for complaints processing; conform the standard for bringing complaints of retaliation in the federal sector to private sector standards;
- ii. require agencies to notify complainants of their right to request a hearing when an agency investigation has gone on for more than 180 days;
- iii. authorize administrative judges to make final decisions on class complaints and provide for expedited processing of appeals from class certification decisions;
- iv. mandate agencies to comply with management directives and bulletins issued by the EEOC;
- v. require agencies and encourage complainants to submit filings electronically, to expedite the process and move from paper-intensive files.

As far as the AJA knows, no action has been taken on these proposed changes in the past year.

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B. AJA's 2010 Comments on proposed 2009 changes.

The AJA continues to support the changes identified as III (ii –vi) above. We have noted that proposed change (iii) was first proposed in 2003 by a coalition of civil rights groups including NELA and NAACP, federal employee groups (such as BIG) and managers (the Council of Federal EEO and Civil Rights Executives), and thus enjoyed broad support. However, while supporting the proposed transition to electronic filings, AJA submitted that the Commission must require acceptance of non-electronic filings from parties not represented by counsel. As to (ii), the federal courts have consistently supported this view, as has the Commission, EEOC Compliance Manual, Section 8: Retaliation.

Timely class action resolutions

In particular, over a year after the first Comments on the 2009 proposed changes to Federal Sector regulations, it is critically important for the Commission to revisit the previously contemplated changes to the regulations as they relate to the processing of class complaints. For example, complainant in *Walker v. USPS*, initiated contact with an EEO Counselor on January 31, 2000, alleging he was discriminated against based on disability. Appeal No. 0720060005 [March 18, 2008]. A class of approximately 26,000 potential class members was certified by an EEOC Administrative Judge on August 19, 2005. More than 2-1/2 years later, on March 18, 2008, OFO affirmed the class certification. The case has been on the merits for the past two years. The current regulations limit the AJ's authority at the conclusion of these proceedings to the issuance of "a report of findings and recommendations." See 29 C.F.R. Section 1614.204 (i).

Given the stakes, not only in *Walker*, but other pending class cases, it defies all notions of common sense, fairness and substantial justice, to have a long exhaustive administrative process in which the end result is an AJ's "recommendation" that has no real legal force or effect.

Pilot programs

The AJA continues to believe that the rule in its final form should first, confine pilot programs to the pre-hearing phase of the process; and second, provide standards for approval of such programs, as previously described in

our earlier comments. The Commission should accept input from agency employees and their representatives prior to approving or renewing any pilot program. The Commission should set forth clear and unambiguous language to be provided to agency employees before requiring them to make a decision as to whether to participate in a pilot program.

IV. Reforms necessary to improve the federal sector hearings process

The consensus recommendations proposed in 2009 omit reforms which are critical to improve the efficiency and credibility of the process. Here we focus on only two needed

A. Administrative Law Judges

One reform which is pivotal to improving the process is the appointment of administrative law judges to hear federal EEO cases. The Commission has been authorized since 1978 to retain administrative law judges, with the powers granted by the Administrative Procedures Act, to determine federal employee cases of employment discrimination law. 42 U.S.C. Sec. 2000e-4 (a) (2) provides:

The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of title 5 governing appointments in the competitive service, such officers, agents, attorneys, **administrative law judges**, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5.

(Emphasis added).

Despite this statutory power, the Commission has failed to appoint Administrative Law Judges to hear the discrimination cases filed by federal

workers. The Commission's reasons for not appointing ALJ's have never been disclosed. However, the appointment of ALJ's to hear federal employee EEO complaints would benefit federal agencies and employees, the Commission and its stakeholders. Therefore, we propose that the Commission clearly state in its regulations that its judges will conduct hearings "on the record" to emphasize the due process to which the parties are entitled and the importance of federal sector hearings to the Commission's mission.

Appointing administrative law judges under the Administrative Procedure Act would raise the quality of the proceedings by allowing parties to subpoena information, rather than being limited solely to evidence in the possession of the two parties and their agents. This would enable, for example, an agency to verify an employee's representations concerning his/her good faith searches to find employment to mitigate any damages the agency may owe upon a finding of liability.

Further undermining both the perception of power and effectiveness of its Administrative Judges, the Commission has consistently attempted to recruit and retain administrative judges at the lowest possible grade level, beginning at GS-11 positions, almost always lower than the attorneys appearing before them.¹ This has resulted in a brain drain with the most experienced judges leaving to become a United States Magistrate Judge, Administrative Law Judges at other federal agencies, and Merit System Protection Board judges, all of whom are authorized to issue subpoenas and are compensated at a more appropriate level for judicial officers resolving important statutory claims.²

¹ Under OPM Classification Standards for Series 905, General Attorneys, a position is appropriately classified at GS-11 if the job duties involve "easily resolved" legal or factual questions and require only "outlining the factual and legal issues and the recommendation for disposition of the case for the consideration of quasi-judicial officers..." The Commission hires new law school graduates with no experience for Trial Attorney positions at the GS-11 level.

² When the Social Security Administration began to hire ALJ's to determine its benefits cases, the existing judicial officers were "grandfathered" in, and the new judges were hired through OPM's normal process for hiring ALJ's, consisting of a demanding qualifications statement, written exam and oral interview. The same process should be used at EEOC.

The Commission has recently admitted that the ability to provide timely justice to parties in federal sector cases was adversely affected by the departure of experienced judges because of the terms and conditions of employment for EEOC AJs. FISCAL YEAR 2010 PERFORMANCE AND March 28, 2011 ACCOUNTABILITY REPORT, Annual Measure 2.2 [..."Additionally, the Commission's efforts to achieve this goal have been compounded by the departure of a number of AJs who accepted ALJ positions at other agencies, which prompted the reassignment of their complaints, creating larger caseloads and further delays in complaint processing"].

The Commission's consistent practice of hiring judges at unduly low experience and pay levels clearly signals that vindicating federal employee civil rights is not an important goal. Moreover, the typical duties of EEOC AJs are at least as complex as the duties of most administrative law judges in virtually all other federal agencies. Our duties plainly require advanced substantive knowledge, litigation expertise, and judicial management skills in a forum where many complainants are not represented by counsel. As noted above, a GS-14 AJ may handle a national class case involving thousands of complainants and millions of dollars of remedies, all without any administrative support of any type. Since the position was created, AJs have been responsible for awarding up to \$300,000 in compensatory damages, as warranted by the facts and the law. The Commission's jurisdiction has expanded under the Genetic Information Nondiscrimination Act [GINA], effective November 21, 2009, which protects the privacy of genetic information in the employment context, and the Americans with Disabilities Act Amendments Act [ADAAA], which greatly re-defined the rights available under the ADA since 1990. See: <http://federalregister.gov/a/2011-6056>.

B. Organizational Reporting Structure for AJs

The federal hearings process is the only component of the Commission's core programs which is not headed by a Senior Executive Service (SES) level manager reporting to the Commission; instead, AJ's report through SAJ's and the District Directors [some of whom are not lawyers] to the same SES manager who oversees the private sector investigations across the country. There is no managing judge at the SES level representing AJs and the needs of the hearings program at Headquarters. The federal hearings program therefore lacks critical access to information and decision-making at the

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highest level. The Federal hearings process deserves organizational recognition equivalent to that given to the other mission-critical programs of the Commission.

CONCLUSION

We also recognize the need for other important changes which should be considered with the input of all stakeholders as part of the Commission's review of the hearings program.

We look forward to an opportunity to discuss all of the changes which would improve the quality of the federal hearings process for all parties.

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