

Discrimination Complaint Processing Update

From the Deputy Assistant Secretary
for Resolution Management
Office of Resolution Management



August 2002

From the Deputy Assistant Secretary



We have just concluded a very successful Human Resources and Administration conference, “Shaping the Future” – *Cultivating a Dynamic and Dedicated Workforce through Excellence in Human Resource Management, Diversity and Equal Employment Opportunity*. As you will see in the Secretary’s remarks on page two, the human resources challenges VA faces must be successfully addressed if we are to provide the type and quality of services that veterans and their families have earned and been promised. This is a noble calling and VA’s mission.

As Mr. Principi indicated in his opening message at the conference, complaints will arise, however, “one finding of intentional discrimination is one to many”. We know that employees involved in complaints often are not fully focused on their primary responsibilities while the complaints remain unresolved. By focusing on the following steps, we can address these issues: (1) prevent complaints by *creating environments where employees do not feel a need to file complaint*, (2) help the aggrieved and responding management official resolve their difficulties at the lowest level and as soon as possible using mediation as part of the VA’s Alternative Dispute Resolution (ADR) efforts and, (3) process complaints expertly, quickly, and with high quality. The sooner this is done, the sooner our employees will be able to fully refocus on their assigned duties.

Prevention, early resolution, and expert and timely processing of complaints are the three keys to a discrimination-free environment that helps us provide world-class service to veterans. As managers we have a part to play in creating environments where employees have the desire and freedom to be their most productive.

ORM is committed to help, not just through processing complaints, but also through feedback on the causes of complaints and by providing other tools to help you create employer-of-choice work environments. We want to hear from you on how we can help you with these issues.

/s/
James S. Jones

National Leaders' Conference

“Shaping the Future”

***Cultivating a Dynamic and Dedicated Workforce through
Excellence in Human Resources, Diversity, and Equal
Employment Opportunity***

Atlanta, Georgia, July 16 to July 18, 2002

Secretary Principi's Opening Remarks at the National Leaders' Conference

Hello, and greetings to everyone attending the National Leaders' Conference.

Let me begin by commending the Offices of Human Resources Management, Diversity Management and EEO, and the Office of Resolution Management – all part of Human Resources and Administration – for your work to ensure VA employees pursue their mission of service in an environment that respects their individual dignity and rights.

Your commitment of time and resources ensures VA leaders meeting here will reap the benefits of your broad experience in the areas of diversity, human resources and equal employment opportunity.

In addition, this conference will provide VA's leaders with tools to deal more effectively with conflict and diversity in the workplace, encouraging us to focus on creating workplaces where employees are appreciated, respected, treated fairly, and valued - creating an employer of choice environment.

VA must create and sustain a work environment that allows us to achieve our best quality and be our most productive.

This conference is also designed to help VA executives identify and evaluate workplace grievances. With the tools made available at this conference, our leaders will learn how to apply the most appropriate agency resources to address employee grievances and help VA employees continue to provide the best possible service to our nation's veterans and their families.

We will have complaints; there will always be reasonable differences among reasonable people. By applying alternative dispute resolution, we will be able to resolve complaints as early as possible.

Of course, it is preferable to prevent complaints in the first place by creating an “Employer of Choice” environment where employees feel appreciated, respected, treated fairly and valued. Prevention is always cheaper and more effective than treatment or cure.

VA is a large department employing over 220,000 people. Regardless of the size, one finding of discrimination and retaliation is one too many. Over the last 4 years there have been 105 findings of discrimination and retaliation. This is simply unacceptable. It is costly in both resources and management. And most of all someone's self respect and dignity has been negatively affected in each case.

Our employees are the foundation of the Department. Their skills and their commitment to our mission are the keys to our ability to meet the needs of America's veterans. As leaders, we should always strive to sustain a positive atmosphere where all our employees feel a part of – and vital to – our mission.

In addition to providing our employees with the tools necessary to do their jobs well, we must ensure their work environments are free of any forms of harassment, discrimination and or bias.

This is imperative and I challenge the leaders of our agency to address the initiatives of this conference.

I also must stress the importance of succession planning. The federal workforce faces a crisis as highly skilled men and women representing countless years of institutional knowledge depart our ranks. We must think ahead of that departure curve and plan for the workforce of tomorrow.

We must recruit the best men and women, and at the same time we must retain the best men and women. Let this conference be the nexus for our succession plans, and let quality and diversity be a key element in that planning.

When we as leaders have successfully met the needs of our employees, when they know they are respected for their skills, listened to for their ideas, and appreciated for who they are as partners in our mission, then will we be truly redeeming the faith and confidence America's veterans place in our Department.

In the spirit of the conference theme, you can shape the future by cultivating a dynamic and dedicated workforce through excellence in human resources, diversity, and equal employment opportunity.

This conference will take us closer to a better future for all our Nation's veterans and I encourage all of you to make the most of every aspect of this outstanding learning experience. Tomorrow's leadership begins today.”



Conference Highlights



The conference was very well attended and considered to be a success by the vast majority of those in attendance. Approximately 700 participants attended the conference, to include VA executives, EEO Program Managers, Human Resources Managers and complaint processing professionals. There were also a number of labor management representatives in attendance.

The opening session was held on Tuesday, July 16, with a video taped message from Secretary of Veterans Affairs, Anthony J. Principi. The Secretary commented during his presentation that “one finding of discrimination is too many”. He further stated that the conference would take us closer to a better future for all our Nation’s veterans.... “tomorrow’s leadership begins today.” The predominate message from the Secretary was that we must do the things in HR, diversity and EEO that will ensure that employees’ needs are met today and that we plan for a future that will ensure an environment within VA where veterans receive the highest level of service possible.

The Chief of Staff, Ms. Nora Egan, delivered the keynote address in the absence of the Secretary. Her comments were well received. She reiterated and expanded on the Secretary’s message.

Deputy Secretary, Dr. Leo MacKay, during his keynote address on the second day of the conference, stated, “ it’s VA’s quality work force that drives our quality programs and services. People are the measure of our Department’s self worth and will always hold the key to our success.” He gave a very stirring and thought provoking speech that talked about where we are and where we hope to be. He also discussed budgetary as well as other issues looming on VA’s horizon.

Assistant Secretary for Human Resources and Administration, Dr. Jacob Lozada, spoke on the topics: “Shaping the Future: Our Challenge” during the opening day and “Where Do We Go From Here” during the closing day of the conference.

VA General Counsel, Tim McClain, talked about the importance of all parties understanding the complaint process and about how to use the resources available to help navigate the process during his presentation “Reducing EEO Complaints: A Collaborative Effort.” He reiterated that General Counsel represents the agency in the EEO complaint process and not individuals.

At the awards dinner, held on the evening of July 17th, agency employees were recognized for their leadership and support. ORM presented the following awards:

- **Promoting Alternative Dispute Resolution (Pioneer Award)**
Recipients: Guy McMichael, Patricia Sheridan, and Fred Conway;
- **Training and Developing New Mediators (Pace Setter Award)**
Recipients: J. Sidney Davis, Ph.D., Gayle Sipes, J.D., Earl Parsons, J.D., Kathleen Binder, J.D., Sue Meyer, J.D., and Naomi Sweeting;
- **Developing and Producing the VA Mediation Handbook (Outstanding Achievement) – Recipients: Timothy May, Steve Becker, David Cox, Susan Cox, Gus Guerra, Carl Hensley, II, Elaine Marshall, Ada Neale, Jane Nygaard, Patricia Sheridan, Joe Simon, Naomi Sweeting, Janet Thompson, and Tom Wall.**

Panel discussions were held on: “Human Resources and Diversity Program Expectations” and “Understanding the President’s Management Agenda.” Panel participants included Dr. Lozada and other senior VA officials

Participants attended a selection of the 64 workshops offered during the conference. Each participant according to their interest chose workshop offerings in advance. Subject matter experts from within and outside the agency served as instructors for these workshops. Workshops designed specifically for the needs and interest of executives were also offered. Course offerings included: Diversity Issues; Impact on Operations; How to Survive an EEO Complaint; Enlightened Leadership; Labor Relations for VA Executives; Preventing Workplace Stress and Aggression...etc.

Guest speakers included: Stephen M. Gower, CEO, The Gower Group, “What People See When They See You Coming”; Cynthia Butler-Blucher, Vice President, Jefferson Parrish School District, “Accepting the Responsibility”; and Michael Hunt, “Dream Makers: Putting Vision and Values to Work; and Martin Luther King III.”

The conference was very interactive, with participants asking questions and providing comments throughout the proceedings.

Terry Washington, ORM External Affairs Program





ORM – How Can We Help You?

The Office of Resolution Management (ORM) processes discrimination complaints, but are there other valuable services provided by ORM to VA?

This was the topic of one of the workshops offered at the National Leaders Conference held in Atlanta, July 16 - 18, 2002. The facilitators for the workshop were: Charlotte Jones, Lillette Turner, and Alison Mangels. The workshop highlighted ORM services such as: training, case law research, settlement agreement tips, alternative dispute resolution and advice on complying with orders from EEOC and OEDCA, to name a few.

During the presentation, there was an opportunity for the participants to receive an up-date on services provided by ORM; as well, as share concerns and/or suggestions to improve ORM's delivery of services. The interactions resulted in the expression of two main concerns:

1. **Communication** - Field facilities look for guidance from ORM in the complaint process. For example, they asked for more open communication with Responsible Management Officials (RMOs), such as an explanation of the investigative process, as well as what occurs after the investigation.
2. **Consistency** - ORM was asked to share our Standard Operating Procedures (SOP) with field facilities and strive to be as consistent as possible in the application of those procedures.

The presentation of the workshop received favorable reviews and ORM as an organization was commended for the strides made in the decrease in the timeframe for processing EEO complaints of discrimination.

Alison Mangels and Charlotte Jones, Office of Resolution Management



Workplace Dispute Employee Guide

A new work place dispute employee guide is now available. This 16 page guide entitled, "*Dealing with Workplace Conflicts and Concerns*," was developed by the Board of Contract Appeals to serve as a resource to VA employees. It will be posted on the agency's Alternative Dispute Resolution (ADR) web site. Copies will also be available in HR offices. Contact your local ORM Field Office to obtain a copy of this guide or go to VA's ADR web site www.va.gov/adr for more information on VA's ADR programs.

Using Early Resolution Techniques in the Workplace

Resolving issues through informal processes at the earliest possible point in a conflict is highly recommended. Most conflicts occur as a result of miscommunication. Early one-on-one discussions about the issue can result in resolution before parties have an opportunity to develop the “I am right, you are wrong” approach.



When there is no resolution from a one-on-one discussion, several alternative dispute resolution (ADR) techniques are available.

Some commonly used ADR techniques are mediation, facilitation, arbitration and the use of ombudsman.

VA Directive 5978, Alternative Dispute Resolution (February 23, 2000) established a department-wide policy supporting the use of mediation for resolving workplace disputes. Mediation is an “interest-based” option that leaves the resolution of a conflict to the persons who have the conflict.

Mediation can help you improve communication, build relationships, and understand another person’s perspective. Mediation can be used before, during, or in place of the formal dispute resolution avenues and it provides you with a more “personal” option for addressing your concerns.

Excerpt from “*Dealing with Workplace Conflicts and Concerns*”

President Bush Signs “No FEAR Act” Into Law



On May 15, 2002, President Bush signed into law the “Notification and Federal Employee Anti- Discrimination and Retaliation Act of 2001 (No FEAR).”

Agencies are required to make employees aware of discrimination and whistleblower protection laws. They must file an annual report detailing the number of discrimination or whistleblower cases filed against them, how the cases were resolved, the amount of settlements and the number of agency employees disciplined for discriminating against other workers or

harassing them. They must also post current information on the number of EEO complaints filed against them on their web site. This legislation also requires federal agencies to pay judgements out of their own budgets when they lose or settle discrimination and whistleblower cases. Previously, these funds came from a general federal judgement fund.

An article in the May 20, 2002, Federal Human Resources Week newsletter, entitled "Agencies face financial sting, EEO exposure" stated "In FY 2000, some 6,000 court-ordered payments totaling more than \$59 million were made out of the fund for discrimination judgements." It went on to say, "In the administrative process, agencies paid more than \$30 million for EEO violations." Gary Gilbert, a former EEOC chief administrative judge, is quoted in the same article as saying, "the monetary damages that agencies are required to pay are intended to reimburse the worker for any lost income or other costs incurred, not to punish the agency for the violation. However, the hit agencies take to their budgets can make a difference."

The No FEAR Act (HR 169) was prompted by allegations of discrimination at the Environmental Protection Agency where a black senior manger won a \$600,000 verdict against the agency in a race and gender discrimination suit. Go to <http://thomas.loc.gov> to obtain a copy of this Act.

Terry Washington, ORM External Affairs Program

EEOC FY 2001 Annual Report on the Federal Work Force

The Equal Employment Opportunity Commission (EEOC) has issued its' "Annual Report on the Federal Work Force for FY 2001." The following is a comparison between selected government-wide EEO data and data for VA during the same period.

- The number of EEO complaints filed, government-wide, during FY 2001, was 23,301, a 4.99 percent decrease from the 24,524 filed in FY 2000. There were 2,129 EEO complaints filed in VA during FY 2001, compared to 2,467 filed in FY 2000.
- Non-sexual harassment was the most frequently cited issue alleged in the government wide complaints filed, followed by promotion-selection. Reprisal was the most frequently cited basis government-wide followed by race (black). VA's data followed the same pattern.
- Government-wide, EEO investigations took an average of 240 days to complete compared to VA's average of 200 days.

- **Mediation was the most popular form of Alternative Dispute Resolution (ADR), government wide, representing 96.47 percent of all ADR attempts.**
- **Where ADR was attempted government-wide during the pre-complaint process, 56.1 percent of those matters were resolved before a complaint was filed. Where ADR was attempted in VA during the pre-complaint process, 30 percent of those issues were resolved before a complaint was filed.**
- **Where ADR was attempted government-wide during the formal complaint process, 64.3 percent of those matters resulted in either a settlement or a withdrawn complaint. Where ADR was attempted in VA during the formal complaint process, 39 percent of those matters resulted in either a settlement or a withdrawn complaint.**

Terry Washington, ORM External Affairs Program

Dismissal of EEO Complaints due to Abuse of Process

An agency may dismiss an EEO complaint on the extraordinary grounds of abuse of process under Section 1614.107(a)(9) of the Code of Federal Regulations.

Abuse of process is defined as a clear pattern of misuse of the process for ends other than that which it was designed to accomplish.

The occasions in which application of these standards are appropriate must be rare; because of the strong policy in favor of preserving a complainant's EEO rights whenever possible. Therefore, such dismissals must be taken only in cases where there is a clear misuse or abuse of the administrative process.

In order to determine whether a complaint, or a number of consolidated complaints, should be dismissed for this reason under § 1614.107(a)(9), the agency or Administrative Judge must strictly apply the criteria established by the EEOC on this issue. This requires an analysis of whether the complainant evidences an ulterior purpose to abuse or misuse the EEO process.

Agencies are cautioned that numerous complaint filings alone are not a sufficient basis for determining that there has been an abuse of the process. However, multiple filings on the same issues, lack of specificity in the allegations, and the filing of complaints on allegations previously raised, may be considered in deciding whether a complainant has engaged in a pattern of abuse of the EEO process. All pending complaints from a complainant, which satisfy these criteria, should be consolidated for dismissal under this section.

Cases in which the EEOC has found an abuse of the EEO process include those where, upon review of the complainant's record, including the number and types of complaints filed, the EEOC has concluded that the complainant has pursued a scheme involving the misuse and misapplication of the EEO process for an end other than that which it was designed to accomplish.

The EEOC has also found abuse of process when the complainant presented similar or identical allegations related to the complainant's dissatisfaction with the EEO process itself. In the case of *Goatcher v. U.S. Postal Service*, EEOC Request No. 05950557 (1996), the complainant filed numerous complaints concerning the agency's purported denial of access to sufficient equipment and storage for EEO claims, denial of official time for such claims, inadequate EEO counseling, agency monitoring of time spent in the EEO process, and failure to maintain her anonymity during EEO counseling.

In *Sessoms v. U.S. Postal Service*, EEOC Appeal No. 01973440 (1998), the EEOC noted that the appellant was experienced in the EEO process, but that he pursued a clear pattern of abuse of the EEO process by filing numerous frivolous complaints. The EEOC noted, "A definite pattern of initiating the complaint machinery with respect to any matter with which appellant was dissatisfied has developed, . . . clearly has amounted to an abuse of process." See also *Kessinger v. U.S. Postal Service*, EEOC Appeal No. 0197639 (June 8, 1999) (clear pattern of abuse from multiple filings, totaling over 160 complaints and 150 appeals, many of which were duplicate complaints of earlier, dismissed filings; the EEOC found the complainant's actions an intentional effort to clog the agency's in-house administrative machinery).

The EEOC has stressed in such cases that a party cannot be permitted to utilize the EEO process to circumvent other administrative processes; nor can individuals be permitted to overburden the EEO system, which is designed to protect individuals from discriminatory practices. (Source is the EEOC Management Directive, MD 110, Chapter 5, Agency Dismissal Process.)
Terry Washington, ORM External Affairs Program

If you would like additional information concerning recent EEOC changes, adverse inference, discrimination law, rights and responsibilities, and ORM responsibilities and procedures, please access ORM's Website on the Intranet <http://vaww.va.gov/orm>, or the Internet <http://www.va.gov/orm>

The Office of the Deputy Secretary for Resolution Management publishes Discrimination Complaint Processing Update quarterly. Please E-mail Terry Washington, External Affairs Program Analyst or Tyrone Eddins, External Affairs Program Manager, to submit recommendations, suggestions, or comments on the information presented in this newsletter. We can be reached at (202) 501-2800 or by fax at (202) 501-2885.