

**UNITED STATES GOVERNMENT**  
*National Labor Relations Board*  
**Office of Inspector General**



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# **Internal Controls in the Office of Equal Employment Opportunity**

Report No. OIG-AMR-67-12-01

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January 9, 2012

## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>BACKGROUND.....</b>	<b>2</b>
<b>OBJECTIVE, SCOPE, AND METHODOLOGY.....</b>	<b>2</b>
<b>FINDINGS.....</b>	<b>4</b>
<b>ANALYSIS .....</b>	<b>4</b>
<b>INTERNAL CONTROLS.....</b>	<b>4</b>
Recommendation.....	5
<b>PROCESSING TIME PERIODS .....</b>	<b>6</b>
Recommendation.....	8
<b>CASE FILES .....</b>	<b>9</b>
Management Comments .....	9
OIG Response.....	10
Recommendation.....	10
<b>DATA ACCURACY AND RELIABILITY .....</b>	<b>10</b>
Recommendation.....	14
<b>FORMAL COMPLAINT PROCESS .....</b>	<b>14</b>
Recommendations .....	17
<b>APPENDIX</b>	

Memorandum from the Acting Director, Office of Equal Employment  
Opportunity, Response to Inspector General's Audit Report, dated  
January 3, 2012

*National Labor Relations Board  
Office of Inspector General*

**EXECUTIVE SUMMARY**

We conducted this audit to determine whether controls in the National Labor Relations Board's Office of Equal Employment Opportunity are designed and implemented in a manner that ensures that its mission is accomplished. The scope of our review was the 41 cases pending in the National Labor Relations Board's equal employment opportunity process during Fiscal Year 2010.

We found that the Office of Equal Employment Opportunity does not have sufficient internal controls. The Office of Equal Employment Opportunity does not have documented procedures related to the accuracy or quality of its investigative work or for the reports that are issued to the Equal Employment Opportunity Commission. Our review also found that the Office of Equal Employment Opportunity is not meeting the regulatory time limits associated with the processing and investigation of complaints. After comparing the case files to the case processing database, we concluded that the data is not reliable and that there are not sufficient control procedures in place to assure database accuracy/completeness given the errors and missing cases identified. We also found errors in the reports issued to the Equal Employment Opportunity Commission. We made several recommendations to improve the internal control environment.

During the course of the audit, complaints regarding quality of the investigations were provided to us by management officials and issues of restraints on the investigative process were brought to our attention by Office of Equal Employment Opportunity personnel. Based on our review of the investigative procedures, interviews with Agency personnel, and comments of the Equal Employment Opportunity Commission's Office of Federal Operations, we are recommending that the Office of Equal Employment Opportunity develop new investigative procedures that provide for the "prompt, fair and impartial processing" of complaints in accordance with the Equal Employment Opportunity Commission's regulations and policies.

The Acting Director, Office of Equal Employment Opportunity, provided comments to the draft report stating general agreement with the findings and recommendations -- with the exception of those related to the maintenance of the complaint files. The Acting Director also stated that the Office of Equal Employment Opportunity is committed to its statutory mission to effectuate equal employment opportunity principles at the National Labor Relations Board. The comments are provided as an appendix to the report.

## **BACKGROUND**

Each Federal agency is required to appoint a Director of Equal Employment Opportunity, who shall be under the immediate supervision of the agency head. The Equal Employment Opportunity Director is responsible for the implementation of a continuing affirmative employment program to promote equal employment opportunity and to identify and eliminate discriminatory practices and policies that are based upon race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

At the National Labor Relations Board (NLRB or Agency), the Equal Employment Opportunity Director is the Director of the Office of Equal Employment Opportunity (OEEO). The OEEO has several responsibilities that include complaint processing and Alternative Dispute Resolution; affirmative employment and minority recruitment; diversity awareness and harassment/respect in the workforce training; and technical assistance. This report focuses only on the complaint processing.

Employees and applicants initiate the complaint process by first contacting a counselor. This phase of the equal employment opportunity process is the “informal stage.” If the matter cannot be resolved in the informal stage, the employee or applicant can elect to file a formal complaint.

In Fiscal Year (FY) 2010, there were 41 cases pending in the NLRB’s equal employment opportunity process. Of those cases, 18 did not proceed beyond the informal stage, 21 involved a formal complaint either during or after FY 2010, and 2 were informal cases that were processed by the OEEO through the counseling stage for another agency.

## **OBJECTIVE, SCOPE, AND METHODOLOGY**

The objective of this audit was to determine whether controls in the OEEO over the informal counseling and investigation of allegations of discrimination are designed and implemented in a manner that ensures that the office's mission is accomplished. Our scope was the 41 cases

pending in the NLRB's equal employment opportunity process during FY 2010.

We reviewed Title 29 CFR Part 1614 and the U.S. Equal Employment Opportunity Commission Management Directive 110, Federal Sector Complaint Processing Manual (EEO MD-110).

We interviewed OEEO staff about the office's policies and procedures and the OEEO's case processing database known as EEONet that is used to prepare reports and track cases. Based on the information that was provided to us, we identified and tested key controls. We also determined if the OEEO processed the cases in accordance with regulatory time frames.

We obtained data from EEONet and hard copy reports prepared by EEO counselors to determine the universe of complaint cases that were pending during FY 2010. The universe of cases consisted of 41 total cases, which included 18 informal counseling and 21 formal complaint cases at the NLRB and 2 informal counseling cases that were processed by the OEEO through the counseling stage for another agency. For those cases, we reviewed the reports submitted to OEEO by the counselors, the case files for any formal complaints, and any other documentation maintained by OEEO that was related to a particular case. We then compared the information that we obtained from those sources to the data in EEONet to determine if the data was reliable.

We also tested the accuracy of the FY 2010 Complaint Processing Program 462 Report that OEEO submitted to the Equal Employment Opportunity Commission's Office of Federal Operations.

The comments on the draft report submitted by the Acting Director, Office of Equal Employment Opportunity, stated that the audit report does not critique the quality of their investigations. We interpret that statement to address the quality or reliability of the information reported through the Office of Equal Employment Opportunity's investigative process. We note that such a critique was not within the scope of this audit, and the Office of Inspector General expresses no opinion on the quality or the reliability of the

information contained in the Office of Equal Employment Opportunity's investigative reports.

We conducted this performance audit in accordance with generally accepted government auditing standards during the period March 2011 through November 2011. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## **FINDINGS**

We found that the NLRB's OEEO does not have sufficient internal controls to prevent or detect errors in the processing of complaints, the reporting of its complaint processing statistics, or in its database of investigative cases. We also found that the current OEEO investigative practices should be reviewed to ensure the "prompt, fair and impartial processing" of complaints in accordance with the Equal Employment Opportunity Commission's regulations and policies.

## **ANALYSIS**

### **INTERNAL CONTROLS**

The U.S. Government Accountability Office's (GAO) *Standards for Internal Control in the Federal Government* states that internal control activities help ensure that management's directives are carried out. Control activities are the policies, procedures, techniques, and mechanisms that enforce management's directives. They include a wide range of diverse activities such as approvals, authorizations, verifications, performance reviews, and the creation and maintenance of related records which provide evidence of execution of these activities. The standards also note that internal control is not one event, but a series of actions and activities that occur throughout an entity's operations and on an ongoing basis.

### *Control Procedures and Reviews*

The U.S. GAO's *Standards for Internal Control in the Federal Government* states that internal control and all transactions and other significant events need to be clearly documented, and the documentation should be readily available for examination in management directives, administrative policies, or operating manuals.

In response to our request for documentation of policy and procedures, OEEEO staff provided to us a desk manual, a handbook for counselors, and an investigator training manual that was issued by the Equal Employment Opportunity Commission. The OEEEO staff stated that the desk manual was in the process of being updated. Our review of these items found that they did not sufficiently identify or document internal control procedures related to the accuracy or quality of the investigative work or the reports that were issued by the OEEEO to the Equal Employment Opportunity Commission.

OEEEO staff also described procedures that were not memorialized in a policy document. Those procedures included supervisory review of investigative evidence and reports. When we tested the implementation of that control, we found the OEEEO staff did not record or maintain documentation of supervisory reviews. We also found that OEEEO had not developed checklists or documented the criteria that a supervisor should utilize to conduct a review of an investigative file or Equal Employment Opportunity Commission report. OEEEO staff also stated they use an acceptability checklist once the complaint and counselor's report are received. For six cases (28.6 percent), we found that the acceptability checklist was missing from the case files.

### **Recommendation**

We recommend that the OEEEO Director:

1. Develop and document internal control procedures and processes to ensure supervisory review of OEEEO investigations and that the Equal Employment Opportunity Commission's regulatory requirements are met.

## PROCESSING TIME PERIODS

### *Initiating Contact with EEO Counselor*

The regulations state that an employee or applicant must initiate contact with a counselor within 45 days of the date of the matter alleged to be discriminatory. Under certain circumstances, the time limit can be extended.

To determine whether the time limit for initiating contact with the counselor was met, we reviewed the informal counseling source documents and formal case files maintained by OEEEO; EEONet; and the counselors' annual reports. For the 21 cases that resulted in formal complaints, there was adequate documentation of the date of the incident and initial contact with the counselor. We found that for those 21 cases, contact was made with the counselor within the 45-day regulatory period or an appropriately extended period of time. For the 18 cases that did not result in a formal complaint, we were unable to find a record of whether individuals contacted the counselor within 45 days of the incident date. For this testing, we did not include the two informal counseling cases that were processed for the other agency.

### *Informal Counseling Time Limits*

The Equal Employment Opportunity Commission's regulations require that counselors conduct the final interview with an employee or applicant within 30 days of the date of the initial request for counseling. The regulations also state that prior to the end of the 30-day period, an employee or applicant may agree in writing to postpone the final interview and extend the counseling period for an additional period of not more than 60 days. The following chart details the timeliness of the informal counseling process:

	<b>Cases</b>	<b>Percent</b>
Exceeded 30-day Limit (No extension)	5	12.2%
Exceeded 90-day Limit (30 days plus a 60-day extension)	11	26.8%
No Records	4	9.8%
Met Regulatory Limit	21	51.2%

For informal counseling cases that exceeded the regulatory time limit, we determined that the average number of days in excess of the limit was 15 days and the range of days was from 1 to 76 days.

We also found that OEEO did not actively monitor the informal counseling process. OEEO staff stated that they became aware of an informal counseling case if the counselor or aggrieved individual brings the case to their attention, or if a formal complaint is filed. If a matter involving informal counseling is not brought to the attention of OEEO, the staff relies upon the counselors' annual reports.

#### *Accept/Dismiss Decisions*

The Equal Employment Opportunity Commission's regulations require that the entire complaint be dismissed if the complaint is not filed within 15 days from the receipt of the notice from the counselor of the right to file a complaint.

We identified two cases in which a formal complaint was filed after the 15-day limit expired. In one case, OEEO dismissed the complaint. In the other case, OEEO issued a Report of Investigation after processing the complaint for 500 days; thereafter, the Agency settled the case. Based on our review of that case file, we determined that an incorrect date was used when OEEO performed the acceptability review of the complaint. We observed that the case file did not contain any evidence that a waiver of the time limit was requested, that a waiver was considered or granted, and we could find no documentation of a factual basis for estoppel or an equitable tolling of the time limit. We were also unable to find documentation that the error was discovered by the OEEO staff prior to the audit.

#### *Investigations*

The regulations require that an agency complete its investigation within one of two time periods. For cases involving an allegation that is only within the jurisdiction of the Equal Employment Opportunity Commission, the time limit for the investigation is 180 days after the date of filing of a complaint. If a complaint is amended, an agency is required to complete the investigation within the earlier of

180 days after the last amendment or 360 days after the filing of the original complaint. If an allegation is also appealable to the Merit Systems Protection Board, it is considered a “mixed” case and the time limit to complete the investigation is 120 days. The regulations also allow for an extension of time under certain circumstances. If an investigation is not completed within the time limits, the employee or applicant may request a hearing before the Equal Employment Opportunity Commission or, for a mixed case, make an appeal to the Merit Systems Protection Board or file a civil action.

We tested the timeliness of the 13 completed investigations. We found six investigations were completed within the regulatory time limits, one investigation was completed within the extended time limits, and six investigations exceeded the time limits. For the six investigations that exceeded the time limits:

- Two of the cases exceeded the 180-day limit;
- Two cases exceeded the time limit for amended complaints; and
- Two mixed cases exceeded the 120-day limit.

When we reviewed the six case files, we found that there was no documentation that an extension had been approved or agreed to by the parties. We also interviewed OEEO staff about the causes for not meeting the regulatory time limits. The staff explained that causes of late investigations included uncooperative complainants that did not submit evidence or continuously canceled appointments with the investigator; coordination of schedules between the investigator, complainant, and the complainant’s representative; and the Agency requiring OEEO to reassign an investigation from one OEEO attorney to another. These reasons do not meet the regulatory requirements for an extension of time.

## **Recommendation**

Recommendation 1 addresses the finding related to timeliness noted above.

## CASE FILES

EEO MD-110 requires that OEEO assemble a complaint file that includes a title page and contains all of the documents pertinent to the complaint. EEO MD-110 is very specific with regard to the features of the complaint file and requires the files to have a case index; tabbed sections for documents, exhibits, and explanatory material; and a typed summary of the investigation that is signed and dated by the investigator. EEO MD-110 also suggests a format for the complaint file.

OEEO does not maintain complaint files as directed or suggested by EEO MD-110. OEEO policy is to maintain two files for each of the formal complaints. One file is referred to as a “Report of Investigation” and the other file is referred to as an “administrative file.” When we reviewed these files, we found that together they did not meet the requirements set out in EEO MD-110 as a complaint file. Specifically, the files lack a complete index; the administrative files were not consistently tabbed; and a title page had been modified and does not include the same information as the model title page.

We also reviewed the case files to determine if the contents included the various documents that are produced during the investigation of a complaint. As a result of our review, we identified four documents missing from one or more case files. The chart below details our findings:

<b>Document not Found</b>	<b>Applicable Cases</b>	<b>Cases Where Files Were Incomplete</b>
Notice of Rights and Responsibilities	21	10
Extension of Informal Counseling	14	8
Notice of Election Rights	13	1
Resolution/Settlement	7	1

### Management Comments

The Acting Director, Office of Equal Employment Opportunity, commented that they disagree that the complaint files do not meet the requirements of EEO MD-

110. The Acting Director also commented that all pertinent documents are included in the Report of Investigation.

### **OIG Response**

As stated in the chart above, we found that case files did not in fact contain all pertinent documents. Because almost half of the case files were missing at least one document, it cannot be said the Office of Equal Employment Opportunity is maintaining the case files in accordance with EEO MD-110.

### **Recommendation**

We recommend that the OEEO Director:

2. Develop a case filing system that adheres to the requirements and follows the guidance of EEO MD-110.

### **DATA ACCURACY AND RELIABILITY**

The U.S. GAO's *Standards for Internal Control in the Federal Government* states that information should be recorded and communicated to management and others within the entity who need it and in a form and within a time frame that enables them to carry out their internal control and other responsibilities. The standards also note that for an entity to run and control its operations, the data must be relevant, reliable, and timely.

#### *Case Processing Database*

We found that all 21 formal complaint cases were entered into EEONet. We then tested 41 data elements from EEONet against the information in those case files. The data elements were selected based on their relevance to Federal sector processing requirements and key processing events in a case. As indicated in the chart below, we identified errors in 33 data elements:

<b>Data Element</b>	<b>Applicable Cases</b>	<b>Cases with Errors</b>
Docket Number	21	4
Basis/Issues	21	1
Incident Date	21	20
Initial Contact [Date Field]	21	2
Counselor Assigned	21	1
Initial Interview [Date Field]	21	13
ADR Offer Status	21	2
ADR Date	3	1
Amendment Date(s)	8	7
Extension Granted	14	4
Days Granted	14	4
Final Interview Letter Mailed/Delivered [Date Field]	21	1
Final Interview Letter Received [Date Field]	21	7
Pre-Complaint Closure Date	21	9
Filed Formal Complaint [Date Field]	21	2
Counselor Report Received [Date Field]	21	3
Investigator Assigned [Date Field]	19	1
Investigation Cost	13	11
Investigation Completed [Date Field]	13	3
Final Agency Decision without an Administrative Judge (AJ) Decision	2	1
Hearing Requested [Date Field]	10	5
Hearing Files Mailed [Date Field]	9	6
EEOC Hearing Number	6	2
Disposition by AJ	5	2
AJ Remand Received [Date Field]	5	2
Final Agency Action with an Administrative Judge (AJ) Decision: AJ Decision Not Fully Implemented	1	1
Dismissed/Closed [Date Field]	12	6

<b>Data Element</b>	<b>Applicable Cases</b>	<b>Cases with Errors</b>
Closure Method	12	3
Notes	8	1
Appeal Number	3	2
Agency Initiated Appeal	3	2
Appeal Type	3	2
Appeal Filed [Date Field]	3	2

Based on our interviews with OEEO staff, we found that OEEO is not performing data integrity or quality reviews of the EEONet data. As a result of our testing and statements by the OEEO staff, we conclude that the EEONet data is not reliable and that there are not sufficient control procedures in place to assure database accuracy/completeness.

#### *Informal Counseling Controls*

OEEO does not maintain a complete filing system for informal counseling cases that do not result in the filing of a formal complaint. OEEO also does not seek or require counselors to submit informal counseling documentation unless a formal complaint is filed. Although OEEO staff stated that informal counseling cases are entered into EEONet as a precursor for the formal complaint, we found that 13 (72 percent) informal counseling cases at the NLRB were not entered into EEONet. Neither of the two non-NLRB informal counseling cases were entered into EEONet.

OEEO, however, does require all EEO counselors to submit annual reports at the end of the year listing their informal counseling cases along with key processing events. OEEO stated that they use the counselors' annual reports to verify that the Pre-Complaint Activities section of the complaint processing report submitted to the Equal Employment Opportunity Commission is complete. We reviewed the format of the counselors' annual reports and determined that it does not capture the incident date or extensions to the counseling period. That information is required to complete the OEEO annual report to the Equal Employment Opportunity Commission and to allow for sufficient monitoring of the timeliness of case processing.

We identified 17 cases from the counselors' 2010 annual reports that resulted in the filing of a formal complaint. Federal regulations require the counselors to submit written reports 15 days after a formal complaint; the report is then maintained in the complaint case file. We tested the counselors' annual reports against their written reports in OEEEO's case files for the 17 cases. We identified five cases (29 percent) in which the counselors inconsistently recorded key processing data on the annual reports and written reports for formal complaints.

#### *Annual Report to EEOC*

The Equal Employment Opportunity Commission's Office of Federal Operations produces an annual report on the Federal workforce that includes, among other data, information on equal employment opportunity complaints. This data is collected from each agency in the Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (EEOC Form 462).

To test the accuracy of the OEEEO's FY 2010 EEOC Form 462, we interviewed OEEEO staff and reviewed the documentation that was provided by the staff to support the report. Because we were unable to reconcile the supporting documentation to the EEOC Form 462, we then recalculated the data using the counselor reports, EEONet, and case files. Based on our recalculation, we determined that the OEEEO's FY 2010 EEOC Form 462 was inaccurate.

We then compared our recalculation to the documentation that was provided to us by the OEEEO staff. After doing so, we made reasonable assumptions as to the cause of the errors. The results of our recalculation and assumptions are stated below.

#### Pre-Complaint Activities Section

We found that the number of initiated informal counseling cases and the number of completed informal counseling cases were both overstated by four. Based on our review of the counselors' reports and the information provided by OEEEO staff, we found some evidence indicating that two cases were counted twice and one of the two non-NLRB cases was included in the number of cases reported, but

given the state of the supporting documentation we could not determine the exact cause of the error. This error also appears to have caused additional errors in the numbers of cases reported for the counseling time periods. We also determined that four cases that did not have a closing date recorded in documentation or data maintained by OEEEO were included in the report based upon information informally provided to OEEEO by the counselors. In the section that reports the outcome of the counseling (Part D), we determined that OEEEO reported incorrect data in two categories. We observed that an informal settlement that was counted in the report was not reduced to writing as required by the Equal Employment Opportunity Commission's procedures.

#### Formal Complaint Activities Section

We found that OEEEO reported two investigations as being completed when in fact they completed three. We also determined that the status of two cases was misstated. One case was reported as pending a hearing when it had in fact been settled, and the final action on a mixed case was misstated. OEEEO also recorded the incorrect number of days for four cases as a result of errors in its electronic case management system. Also, because one case was not included in the number of completed investigations, it was

not counted in the OEEEO's estimate of Agency personnel investigation costs.

#### **Recommendation**

We recommend that the OEEEO Director:

3. Develop and implement processes and procedures to ensure that the OEEEO case processing data is reliable and that reports to the Equal Employment Opportunity Commission are accurate.

#### **FORMAL COMPLAINT PROCESS**

During the course of the audit, complaints regarding the quality of the OEEEO investigations were provided to us by management officials, and issues of restraints on the

investigative process were brought to our attention by OEEEO personnel.

In May 2002 the Board and General Counsel issued a memorandum detailing the OEEEO's investigative process. The memorandum appears to be the result of about 4 years of consideration of the OEEEO's investigative process at the NLRB. During that time, there was considerable debate regarding the OEEEO investigative techniques and its release of information to management during an investigation. In December 2004, the procedures were implemented with slight modifications.

The following is a synopsis of the investigative requirements outlined in the memorandum:

- OEEEO must provide formal complaints and complainant's affidavits to the Special Counsel;
- Special Counsel should represent the Agency and its managers at all stages of the complaint process, and fully participate in the investigation, mediation, and settlement process;
- Except in unusual circumstances, written interrogatories and management-prepared affidavits are the preferred method of obtaining information from management witness;
- Unusual circumstances are described as situations when the witness refuses to cooperate, is incapacitated, or is otherwise unable to provide the information through the use of interrogatories or an affidavit and requires the assistance of the investigator;
- Face-to-face and telephone interviews should not be recorded or transcribed by court stenographer, tape recorder, video camera, or other similar device in lieu of, or for the purpose of, creating an affidavit; for a face-to-face interview, the OEEEO investigator must provide written questions to management and the Special Counsel a reasonable time in advance of scheduling the interview; and

- Requests to deviate from the “traditional” method of using interrogatories must be made in writing to the OEEEO Director and detail why different investigative methods are necessary for the “prompt, fair and impartial processing” of the complaint.

The Equal Employment Opportunity Commission’s Office of Federal Operations, an office with the authority to review and ensure compliance of Equal Employment Opportunity Commission laws and regulations by agencies, reviewed the OEEEO procedures and twice expressed concern regarding the restriction on investigative procedures. The Office of Federal Operations also expressed concern about the role of the Agency’s Special Counsels and stated that the “NLRB has blurred the required separation between the neutral investigative and adjudicative functions of the agency’s complaint process and the defensive arm of the agency, potentially undermining the EEO Office’s independence and impartiality, and creating at least an appearance of a conflict of interest.”

The OEEEO staff generally stated that the procedures inhibit their ability to conduct investigations. The OEEEO staff also stated that they have not exercised their authority to deviate from the use of interrogatories because to do so would have been futile.

We were also provided information by Agency management officials and the Special Counsels regarding the quality of the OEEEO investigative process. Their concerns can generally be categorized as a lack of supervisory oversight of the investigators and complaint processing; poor quality of the interrogatories and information requests; and not being kept sufficiently updated on the cases under investigation.

In general, we share the concerns of the Office of Federal Operations regarding the procedures that were implemented in December 2004. We believe that those procedures, combined with the nature of the representation of management by the Special Counsels and sense of futility expressed by OEEEO, results in a process that may impede or prevent the prompt, fair, and impartial investigation of complaints.

## Recommendations

We recommend that the OEEO Director:

4. Develop investigative procedures that meet the requirements of EEO MD-110 and address issues noted by the Equal Employment Opportunity Commission's Office of Federal Operations. In doing so, we suggest that the OEEO Director:

Survey equal employment opportunity offices of other agencies to determine what, if any, standard procedures have been developed;

Seek guidance from the Equal Employment Opportunity Commission's Office of Federal Operations; and

Solicit observations of the OEEO process from managers and employee unions.

5. Present the investigative procedures to the Board and General Counsel to ensure that the process meets their responsibility of providing for the "prompt, fair and impartial processing" of complaints in accordance with Equal Employment Opportunity Commission regulations and policies.

## **APPENDIX**

UNITED STATES GOVERNMENT  
National Labor Relations Board  
Office of Equal Employment Opportunity



Memorandum

**Date:** January 3, 2012

**To:** David Berry,  
Inspector General

**From:** Brenda Valentine Harris, Acting Director  
Office of Equal Employment Opportunity

**Subject:** Response to Inspector General's Audit Report

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The Office of Equal Employment Opportunity (OEEO) has carefully reviewed the draft report issued by the Inspector General dated December 1, 2011 and considered its analysis, findings and recommendations. This memorandum responds to said analysis, findings and recommendations.

The Office of EEO is committed to its statutory mission to effectuate equal employment opportunity principles and policies on behalf of the NLRB and all Agency employees, and appreciates this opportunity to examine and improve its internal operations. The audit report discusses a number of critical deficiencies in the internal operations of OEEO. This response agrees with the vast majority of the recommendations<sup>1</sup>, and discusses the underlying framework from which problem areas can be more fully understood, for the sole purpose of identifying the appropriate resolution. It should be noted that the audit does not critique the quality of the OEEO investigations. OEEO stands by the quality of its investigations, noting that the EEOC has not remanded any cases for additional investigation. The overall thrust of this audit has been that OEEO does not have sufficiently developed processes to measure what it does and to ensure accuracy in its reporting. We embrace this opportunity to correct the stated deficiencies.

### **Insufficient Internal Controls**

The Office of EEO agrees that it lacks sufficient documented procedures from which to measure the accuracy and quality of its investigative work. OEEO uses certain internal controls on a routine basis, including reliance on federal sector EEO regulations, the EEOC's Management Directive 110 (MD110), authorizations for investigators and performance reviews. Other than the regulations and MD110, and performance review documents, formal records as described by the IG were not maintained to provide evidence of the execution of these activities.

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<sup>1</sup> The Office of EEO respectfully disagrees with the IG's assertion that its files do not comport with the requirements of the EEOC's Management Directive 110.

Former Director of OEEO, Robert J. Poindexter,<sup>2</sup> presided over the growth of the Office of EEO during lean budget years wherein the OEEO expanded its staff using existing NLRB attorneys and support staff, who did not have all of the requisite EEO training. In this regard, due to budgetary restrictions over a number of years, OEEO staff did not receive all necessary training in a timely manner. In addition, the staff experienced at least two rounds of turnover, during which there were little or no transition activities or cross-training. Informal and formal cases were and are processed with some level of success, but in fiscal years 2009 and 2010, there was an uptick in the number of formal complaints filed. The staff remained focused on day-to-day operations and processed cases without the routine use of thorough checklists and other mechanisms for quality control. Investigators routinely relied on requirements in the federal sector EEO regulations, the EEOC's Management Directive 110, and case law for guidance in processing complaint cases. Quality control consisted of daily supervisory discussion and review, but these contacts were not recorded. Management used mid-year verbal and annual written reviews with individual employees to address weaknesses and manage performance. In addition, management relied on its EEONet database for its most basic functions such as issuing its monthly reports, but did not fully exploit all of the database features and did not develop a mechanism for measuring the reliability of the data in the database.

The IG audit report has shown that the lack of internal controls have led to serious consequences, as discussed in the analysis of data reliability. The Office of EEO adopts the recommendation that it develop and document internal control procedures and processes to ensure supervisory review of OEEO investigations and to ensure consistent compliance with all EEOC regulatory requirements. The Office of EEO is prepared to develop and establish the necessary internal controls in order to ensure that its mission of complaint processing is accomplished without error. OEEO will enlist the support of outside units and organizations with expertise in business organization and strategic planning to supplement its staff's proficiency in the application of substantive and procedural EEO law.

### **Processing Time Periods**

The IG audit report reviewed OEEO compliance with critical time requirements at each stage of processing informal and formal discrimination complaints.

### ***Informal Complaints***

As a small independent agency, the Agency utilizes a cadre of collateral duty EEO counselors to perform this function. There are approximately 44 such counselors throughout the Agency; at least one counselor is assigned to each Region and there are 8 counselors assigned to Agency headquarters in Washington, DC. The counselors are Agency employees, largely attorneys and examiners (investigators), who take on the additional volunteer function of assisting their colleagues in the EEO

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<sup>2</sup> Mr. Poindexter passed suddenly on October 12, 2011, after the IG audit had been completed, but before the report issued.

process by seeking first to resolve any matter of alleged discrimination and by providing information about the process.

The collateral duty EEO counselors are supervised by the Office of EEO. OEEO appoints the counselor, ensures that the individual receives the 32-hour basic training required by the EEOC, and provides the annual 8-hour training requirement. As well, OEEO conducts Agency based training for all of its collateral duty personnel by holding conferences on a recurring basis, and provides both training manuals and reference materials to assist the individual in handling a case.<sup>3</sup> OEEO provides guidance to each counselor on specific cases, if that individual requests such assistance. OEEO solicits annual end of year activity reports from each counselor and has instructed counselors to report each request for assistance as it occurs. While we agree with the IG's audit report that the data OEEO receives from its counselors is flawed, we disagree that OEEO "does not actively monitor the informal counseling process". OEEO actively trains, guides and solicits information from its collateral duty counselors. The IG audit report requires more frequent monitoring of informal counseling activity, and we agree.

The IG audit recognized that the statutory requirement that contact be initiated with EEO within 45 days was met for each of the 21 formal complaint cases processed in FY2010. The report was critical of the lack of records to show that timely 45 day contact was made in the 18 informal cases that did not result in a formal complaint. It is worth noting that the 45 day requirement is a factor of critical importance only if the individual files a formal complaint. In order to measure this factor, our EEO counselors are required to submit a written counselor's report, but **only** after a formal complaint has been filed. Thus, the federal sector EEO regulations at 29 CFR Part 1614.105 (c) state that "when advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints . . ." As acknowledged by the audit report, OEEO has captured that information for each of the 21 formal complaints processed in FY2010. No such requirement exists for informal cases. Indeed, because EEO counselors are neutrals and may not take any position with regard to any set of facts presented, they have no authority to dismiss any matter, even if untimely. So it is of no consequence in the informal stage if the 45 day requirement has not been met. Regardless, OEEO desires to improve the completeness of all data and will as an initial step, amend its end of year counselor's report by including a field to capture the date of each reported event of alleged discrimination, to enable accurate measurement of the 45 day criteria for the universe of informal cases.

The OEEO is proud of the cadre of dedicated volunteer EEO counselors, which it appoints, trains, guides and relies on. However, because the function is collateral duty, there is no mechanism to manage performance of the counselor function. OEEO has no input into a collateral duty counselor's performance appraisal. These unique individuals assist their colleagues with internal employment disputes, while working full time as Agency employees investigating charges of unfair labor

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<sup>3</sup> Although OEEO prefers a 3-year cycle, budget constraints have limited the conferences to every 5 years.

practices, prosecuting complaints under the NLRA, conducting representation case hearings, holding elections, and more. OEEO is exploring ways to increase the frequency of regular contact with collateral duty counselors and ways to bolster how we support their role and will report on its action plans in this regard in the follow-up report.

### ***Formal complaints***

The IG audit found one case of the 21 formal complaints that was accepted for investigations, although it had been filed one day late. OEEO has looked into this matter and determined that human error caused the transposing of the day and year on the postmark. OEEO management reviews each letter of acceptance and documents critical to the acceptance process, including the formal complaint, the counselor's report, and the acceptability checklist. It is not clear why the human error was not caught, and OEEO will address this issue in an action plan to ensure that this error does not recur.

With regard to timeliness in investigations, OEEO agrees that the obstructions identified by the IG do not meet regulatory requirements for extensions of the investigative timeframe. OEEO will address this in an action plan responsive to the IG audits recommendation that it develop internal controls.

### **Case Files**

All formal cases have an Administrative file. The Administrative file houses all of the formal documents in the EEO process. Each of those critical documents is also included in the final Report of Investigation (ROI) (compiled and issued after a completed investigation). The Administrative file also houses internal OEEO documents such as notes between OEEO staff, emails of internal correspondence related to scheduling appointments and the like, i.e. material clearly not relevant to the body of work gathered during the investigation.

When a formal complaint is received and before any investigation begins, OEEO issues a letter acknowledging receipt of the complaint, and solicits and receives the written EEO Counselor's report. Federal sector regulations at 29 CFR Part 1614.107 require that cases which do not meet certain requirements be dismissed before an investigation commences. Some cases are not investigated (they may be dismissed in their entirety because the complaint did not meet statutory requirements). Other complaints have been withdrawn for a variety of reasons including but not limited to settlement.

The Office of EEO appreciates the insight of the IG audit on the maintenance of OEEO's case file, but respectfully disagrees that its files do not comport with the requirements of the EEOC's Management Directive 110. MD110 requires that complaint files contain a case index, tabbed sections for documents, exhibits and explanatory material and a typed summary of the investigation signed and dated by the investigator. MD110 includes an Appendix with examples of suggested formats

for the variety of documents generated in the EEO process. The OEEO complaint file, i.e. the ROI, always includes: a summary of the investigation signed and dated by the investigator, a case index, tabbed sections for documents, exhibits and explanatory material. In the past fiscal year, prior to the IG audit, OEEO had begun to tab the contents of its Administrative files. Again, all pertinent documents from the Admin file are included in the ROI, which is appropriately organized and tabbed; however, internal OEEO documents such as notes between OEEO staff, emails of internal correspondence related to scheduling appointments etc. are not included as they are not relevant to the body of work gathered during the investigation. The ROI (which includes a summary of investigation) can only be compiled after the investigation is finished. And because some formal complaints are dismissed, settled and/or withdrawn prior to the completion of an investigation, not all formal complaints will result in an ROI.

In summary, OEEO is confident that its complaint files have comported with MD110 requirements and that its administrative files, which are currently being organized and tabbed, also comport with requirements. That being said, because the OEEO ROI title page only identifies the Agency and the case name and number, we are revising our ROI title page as recommended by the IG audit report, to include information consistent with a suggested format of the MD110 Appendix, specifically, Agency letterhead, Complainant's address, Agency head, and Agency address.

### **Data Accuracy and Reliability**

The IG audit report acknowledged that all 21 formal complaint cases had been entered into the database. Because of issues of reporting from EEO Collateral Duty counselors, not every informal complaint reported by counselors in the end of fiscal year report had been entered into the database.<sup>4</sup> The number of inaccuracies reflected in the IG audit report is alarming. OEEO has long had concerns about the EEONet database as it does not allow an OEEO administrator to input or correct information after the end of the fiscal year. Rather, this must be done by the outside vendor creating inefficiency and potential inaccuracies. OEEO will include in its action plan a system to receive reports from EEO Collateral Duty counselors on a more frequent and regular basis with the last reporting cycle occurring just before the end of the fiscal year to minimize the number of entries that may need to be made by the outside vendor. It is expected that informal complaints occurring after that final reporting cycle will be minimal and will be reported immediately to OEEO. OEEO will also include in its action plan a review of the functionality of the database with the vendor and steps to perform data integrity and quality reviews of the EEONet data. It was correctly noted that the two informal counseling cases that Agency counselors handled for other small independent agencies were not included in the database for Agency cases. OEEO will develop a mechanism to accurately account for any outside cases it handles. Data inaccuracies and reliability will be examined from several vantage points, including developing internal controls, training, and reviewing features of the product with the vendor.

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<sup>4</sup> The Office of EEO obtains end of year data within a week after the conclusion of the fiscal year,

## **Formal Complaint Data**

Once a Report of Investigation issues and a complainant requests a hearing before an EEOC administrative judge, the OEEO is not the primary point of contact on the case. The IG report disclosed a case that our database continued to report as active at the EEOC, when in reality it had been settled by Agency special counsel. OEEO had not been informed. OEEO and Agency Counsel share information on a regular basis at monthly meetings and on an as needed basis. The miscommunication in this one instance was rare. As stated previously, OEEO adopts the recommendation that it develop and implement processes and procedures to ensure that the case data is reliable and to ensure accuracy in its reporting.

## **II. Formal Complaint Process**

The Office of EEO agrees with the IG's audit report about ensuring that investigative procedures meet the requirements of MD110 and address the recommendations of EEOC's Office of Federal Operations. OEEO notes that it has been able to perform quality investigations using existing procedures, although these procedures have exacerbated inefficiencies in the investigative process. That being said, OEEO has been willing and looks forward to participating in discussions with Agency management about the findings of the IG report that "those procedures combined with the nature of the representation of management by the Special Counsels and sense of futility expressed by OEEO, results in a process that may impede or prevent the prompt, fair and impartial investigation of complaints." It is expected that these discussions will address utilizing OEEO's discretion to take face-to-face affidavits, when appropriate, as opposed to exclusive use of interrogatories to gather evidence from management witnesses, and exploring alternatives to the current practice of providing the complainant's evidence to management prior to their submission of evidence. OEEO continues to be available to collaborate with Agency management and other stakeholders in an effort to further enhance its high quality investigations.

  
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