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Audit of NARA's Processing of Discrimination

Complaints (22-AUD-07)

April 29, 2022






Inspector General

April 29, 2022

TO: David Ferriero
Archivist of the United States

FROM: Dr. Brett M. Baker 
Inspector General

SUBJECT: *Audit of NARA's Processing of Discrimination Complaints*
OIG Audit Report No. 22-AUD-07

Attached is the Office of Inspector General's final report of our *Audit of NARA's Processing of Discrimination Complaints*. The report contains ten recommendations intended to improve management and internal controls over processing discrimination complaints. Agency staff indicated they had no comments for inclusion in this report.

Please provide planned corrective actions and expected dates to complete the actions for each of the recommendations within 30 days of the date of this report. As with all OIG products, we determine what information is publicly posted on our website from the attached report. Consistent with our responsibility under the *Inspector General Act of 1978, as amended*, we may provide copies of our report to congressional committees with oversight responsibility over NARA.

We appreciate the cooperation and assistance NARA extended to us during this audit. Please contact Jewel Butler, Assistant Inspector General for Audits, with any questions.

cc: Debra Wall, Deputy Archivist of the United States
Micah Cheatham, Chief of Management and Administration
Gary M. Stern, General Counsel
LaVerne Fields, Chief Acquisition Officer
Erica Pearson, Equal Employment Opportunity Director
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Kimberly Boykin, Audit Director
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Executive Summary

Audit of NARA's Processing of Discrimination Complaints

OIG Audit Report No. 22 AUD 07

April 29, 2022

Why Did We Conduct This Audit?

Achieving a discrimination-free work environment that includes a fair and impartial complaint resolution process is pertinent to an effective Equal Employment Opportunity (EEO).

The National Archives and Records Administration (NARA) Office of Inspector General (OIG) conducted this audit to determine whether NARA processed discrimination complaints in a timely and efficient manner.

What Did We Recommend?

We made 10 recommendations to strengthen NARA's management and internal controls over processing discrimination complaints. Management concurred with the recommendations in this report.

What Did We Find?

NARA did not always process discrimination complaints in a timely and efficient manner. We found (1) NARA did not effectively and efficiently, track, monitor, and analyze complaint activity in accordance with established guidance; (2) delays in commencing EEO investigations; (3) a majority of discrimination complaint investigations conducted exceeded the prescribed contract period of performance; (4) limited transparency in the Office of General Counsel's (NGC's) role; (5) outdated standard operating procedures (SOPs); and (6) opportunities exist to improve employee participation in Alternative Dispute Resolution (ADR).

These conditions exist because NARA did not have adequate management and internal controls in place to ensure the EEO program was operating as intended. Title 29 of the Code of Federal Regulations (CFR), Part 1614, titled, Federal Sector Equal Employment Opportunity (EEO), mandates specific time frames for federal agencies to process, investigate, and issue agency decisions on discrimination complaints. Without a timely, efficient, and fully defined EEO process, NARA is unable to ensure it has the necessary foundation for achieving a discrimination-free work environment that includes a fair and impartial complaint resolution process.

Summary of Recommendations

Finding 1: Monitoring and Tracking Complaint Activity Needs Improvement

Number	Recommendation	Responsible Office
1	Use a system-approach that complies with Public Law 116-92, EEO MD-715, and 29 CFR 1614.	Deputy Archivist of the United States, in collaboration with the Office of Equal Employment Opportunity Programs

Finding 2: Delays Initiating EEO Investigations

Number	Recommendation	Responsible Office
2	Review and evaluate current processes, procedures, and practices, including but not limited to, issuing notices of acceptance to the complainant and requesting funding for investigative services from the responsible office; make revisions; and implement guidance to improve efficiencies and timeliness associated with assigning the case to the contract investigator.	Office of Equal Employment Opportunity Programs
3	Review and evaluate current processes, procedures, and practices, make revisions, and implement guidance to improve efficiencies associated with obtaining contract award for conducting investigations and drafting final agency decisions.	Office of Equal Employment Opportunity Programs, in collaboration with the Office of the Chief Acquisition Officer.

Finding 3: Contract Oversight of EEO Investigations Needs Improvement

Number	Recommendation	Responsible Office
4	Develop and implement processes and procedures to ensure the contractors adhere to the Statement of Work for Equal Employment Opportunity services, to include, but not limited to (1) completing investigations timely, (2) submitting authorizations for extensions, if necessary, and (3) submitting weekly status reports; and where applicable enforce any associated penalties for delays.	Office of Equal Employment Opportunity Programs

Finding 4: Clarification and Documentation of the Office of General Counsel’s Role is Needed

Number	Recommendation	Responsible Office
5	Define and formalize the roles and responsibilities of the Office of General Counsel in the processing of discrimination complaints. Specifically, implement policies and procedures to demonstrate the agency has a fair and impartial Equal Employment Opportunity process, to include but not limited to, ensuring: a clear separation between the agency’s Equal Employment Opportunity complaint program and its defensive function, and the agency representative does not intrude or have the appearance of intruding upon Equal Employment Opportunity counseling, investigations, and final agency decisions.	Office of Equal Employment Opportunity Programs, in collaboration with the Office of General Counsel
6	Establish and implement procedures to ensure agency responses submitted to Equal Employment Opportunity Commission in its EEO MD-715 submissions are accurate, complete, and supported by documentation.	Office of Equal Employment Opportunity Programs, in collaboration with the Office of General Counsel

Finding 5: Outdated Standard Operating Procedures

Number	Recommendation	Responsible Office
7	Review, revise, update, and implement standard operating procedures for processing discrimination complaints and ensure applicable staff are trained on the procedures.	Office of Equal Employment Opportunity Programs
8	Develop and implement controls to ensure standard operating procedures are kept up to date to reflect subsequent organizational, policy, or procedural changes that can affect processing of discrimination complaints.	Office of Equal Employment Opportunity Programs

Finding 6: Opportunities Exist to Improve Employee Participation in Alternative Dispute Resolution

Number	Recommendation	Responsible Office
9	Ensure the production and implementation of the alternative dispute resolution training module is completed and distributed widely throughout the agency via Learning Management System.	Office of General Counsel
10	As recommended by Equal Employment Opportunity Commission, conduct a climate assessment survey to ascertain the reasons why employees are reluctant to participate in alternative dispute resolution, communicate the results to applicable stakeholders, develop a plan to address the results, and implement the planned action.	Office of Equal Employment Opportunity Programs, in collaboration with the Office of General Counsel

Background

An Equal Employment Opportunity (EEO) complaint is an allegation of discrimination because of race, color, national origin, religion, sex (including pregnancy, sexual orientation, gender identity or transgender status), age (over 40), disability, genetic information, retaliation for engaging in Equal Employment Opportunity (EEO) activity, marital status, political affiliation, and status as a parent. The complaint may arise from a specific personnel action, such as employment, promotion, work assignment, selection for training, disciplinary action, or separation, or it may relate to prevailing conditions in an organization. NARA is responsible for implementing complaint processing procedures required by *Title 29 of the Code of Federal Regulations, Part 1614, titled, Federal Sector Equal Employment Opportunity*, which mandates specific time frames for federal agencies to process, investigate, and issue agency decisions on discrimination complaints. These procedures are included in the Equal Employment Opportunity Commission (EEOC or Commission) Management Directive 110 (EEO MD-110), effective August 2015.

EEO MD-110 provides federal agencies with Commission policies, procedures, and guidance relating to the processing of employment discrimination complaints governed by the Commission's regulations in 29 CFR part 1614. This complaint processing manual ensures that agency personnel responsible for complaints processing are in possession of all current Commission guidance materials so that the Commission's policies, procedures, and regulations are consistently and uniformly applied government-wide. *EEO Management Directive 715 (EEO MD-715)* provides policy guidance, standards for establishing and maintaining effective affirmative programs of equal employment opportunity, and general reporting requirements.

NARA 395, Equal Employment Opportunity Complaints Program (NARA 395) advises applicants for employment, employees, and supervisors of their rights and responsibilities, and explains how discrimination complaints are processed in compliance with 29 CFR part 1614. The Director of the Equal Employment Opportunity (NEEO) Program is a part of the Office of the Archivist of the United States. NARA's Complaints Program is located in NEEO. The Director of NEEO, plans, develops, and manages NARA's EEO program. The Director also:

- (1) reviews policies, programs, and practices to ensure nondiscrimination, and recommends changes to the Archivist of the United States (N) and Deputy Archivist of the United States (ND);
- (2) provides technical guidance and assistance to office heads/staff directors and supervisors on EEO matters;
- (3) prepares reports to EEOC and other agencies; and
- (4) prepares and issues NARA's final agency decisions (FAD) on discrimination complaints.

The Complaints Program is organized with a Complaints Program Manager, an EEO Counselor, and an EEO Specialist. These individuals coordinate EEO activities and EEO counseling, process formal complaints, and perform other EEO duties. NARA's General Counsel provides legal advice, represents the agency in EEO matters, and reviews settlement agreements and FADs for legal sufficiency. The Director of the RESOLVE¹ Program, located in the Office of General Counsel, also supports the Complaints Program by offering mediation. The Complaints Program is also augmented with contract personnel, who conduct investigations, draft final agency decisions, and provide EEO counseling services in conflict of interest matters.

EEO Complaints Process

The 29 CFR part 1614, EEO complaints process consists of two main parts – the “informal” or pre-complaint phase, and the “formal” complaint phase.² According to NARA 395, the goal of the informal complaint process is to find facts and attempt to resolve an allegation of discrimination at the earliest stage of the EEO process. The goal of the formal process is to provide a factual record and a basis upon which the outcome of the matter can be determined whether through a FAD or subsequent stages of the regulatory process. NARA 395 describes the complaint process as encompassing four stages: informal complaint, formal complaint, EEOC hearing, and FAD. Appendix A illustrates the process.

Discrimination Complaint Activity

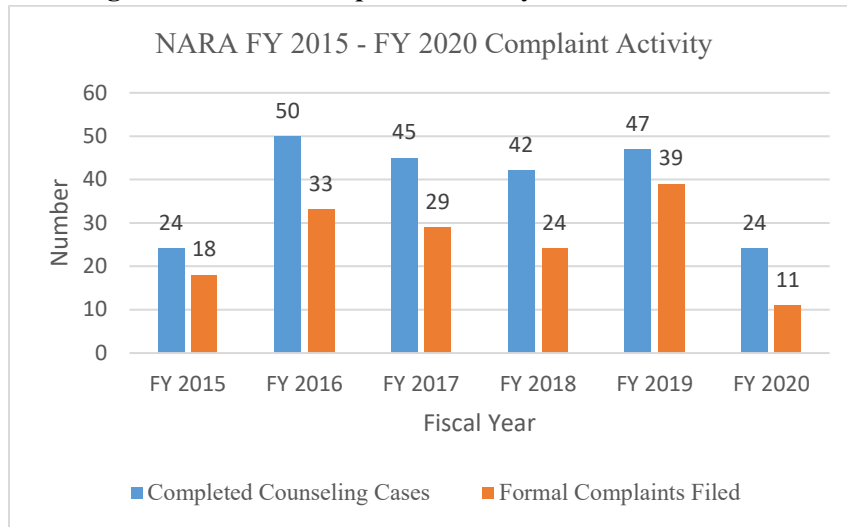
Figure 1 provides details of NARA's completed counseling³ cases and formal complaints filed from FY 2015 – FY 2020:

¹ RESOLVE is NARA's alternative dispute resolution (ADR) program.

² Aggrieved persons who believe they have been discriminated against ... must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter. The informal/pre-complaint stage consists of attempts to resolve the matter informally, typically through traditional “EEO counseling” or ADR.

³ Completed/ended counselings are counselings which were concluded either by: a written settlement agreement; a written withdrawal from the counseling process; the issuance of a written notice of the right to file a formal complaint; the forwarding of a counseling to an Administrative Judge (AJ) when requested/ordered by the Administrative Judge; or the filing of a complaint after the regulatory counseling period has expired even though not all counseling duties were performed.

Figure 1: NARA Complaint Activity, FY 2015 – FY 2020



Source: NARA FY 2020 and 2019 Annual Report to Congress on the Notification and Federal Employee Antidiscrimination and Retaliation Act (No FEAR ACT)

NARA’s completed counseling cases during FY 2016 increased significantly, as there were more than twice as many completed counseling cases in FY 2016 as compared to FY 2015. Over the next two fiscal years, completed counseling cases trended downward, with 45 and 42 completed counseling cases for FY 2017 and FY 2018. While the agency reported a slight increase in completed counseling cases in FY 2019, there was a notable decrease in completed counseling cases from FY 2019 to FY 2020, with 23 fewer completed counseling cases.

Similar to completed counseling cases, NARA’s formal complaints filed from FY 2017 through FY 2018 resulted in an overall decline; there was a significant increase in formal complaints filed during FY 2019. The year-over -year formal complaint activity increased from 24 complaints filed in FY 2018 to 39 formal complaints filed in FY 2019; a 63% increase. Furthermore, there was a significant decrease in activity from FY 2019 to FY 2020 with 28 fewer formal complaints filed.

Table 1 provides the average number of days to complete investigations⁴ and close complaints between FY 2015 and FY 2020:

⁴ Investigation completion is calculated from the date of complaint filing **or** from the date on the remand order after a hearing or an appeal to the date the investigative file and the immediate decision/hearing election letter were issued to the complainant.

Table 1: Average Number of Days to Complete Investigation and Close Complaint

Fiscal Year	Number of Completed Investigations	Average Number of Days to Complete Investigation	Number of Closed Complaints	Average Number of Days to Close Complaint
FY 2015	5	174	12	257
FY 2016	18	188	20	428
FY 2017	22	242	24	266
FY 2018	16	256	20	579
FY 2019	12	327	39	478
FY 2020	35	262	23	672

Source: FY 2015 to FY 2020 Annual Federal EEO Statistical Report of Discrimination Complaints

For investigations completed between FY 2015 to FY 2020, we determined it took NARA on average eight months to complete an investigation. For complaints closed between FY 2015 to FY 2020, the agency reported it took on average 15 months to close complaints.⁵ NEEO and NGC management indicated there were several elements that could have impacted the timeliness of processing discrimination complaints during the period to include staffing turnover, contract award timeliness, quality of contractor services, and untimely legal sufficiency reviews (see Audit Results section of the report for further discussion).

⁵ Complaint closures include withdrawals, settlements and final agency actions and is calculated from the complaint file date to the date of closure.

Objective, Scope, Methodology

Objective

The objective of this audit was to determine whether NARA processed discrimination complaints in timely and efficient manner.

Scope and Methodology

To accomplish our objective, we performed audit procedures at Archives II in College Park, Maryland, and from the auditors' approved COVID-19 public health emergency telework location from January 2020 to September 2021.⁶ Our review included discrimination complaints processed during FY 2015 through FY 2020.⁷

Specifically, we performed the following:

- Reviewed laws, regulations and NARA policies and procedures relevant to the processing of discrimination complaints.
- Assessed the internal controls identified to determine if the controls were sufficient to ensure NARA can effectively manage and oversee the complaints management program.
- Conducted interviews with the Archivist of the United States, Deputy Archivist of the United States, and employees from the NEEO, NGC, Information Services, Office of Acquisitions, and Office of Budget to gain an understanding of NARA's complaints management program.
- Conducted interviews with EEOC personnel and other federal EEO offices to gain an understanding of the federal EEO process.
- Reviewed organizational charts, EEO complaints related reports and data, and internal control reports.
- Reviewed the Statement of Work for EEO services.
- Analyzed information and documentation of actions planned and taken to address findings and recommendations reported by the EEOC related to the audit objective.
- Analyzed information provided by NARA related to the universe of discrimination complaint cases (filed and closed) during FY 2015 – FY 2020.
- Conducted walkthroughs of sample informal and formal complaint case files.

⁶ This audit was initially delayed due to NEEO's audit readiness and subsequently impacted by the COVID-19 pandemic, and other priorities and activities.

⁷ The initial scope of the audit included discrimination complaints processed during FY 2018 through FY 2019. However, based upon the request of NEEO and due to the postponement of the audit, the scope was expanded to include discrimination complaints processed during FY 2015 through FY 2020.

- Conducted testing of a judgmental sample of all discrimination complaint cases closed during FY 2019 and FY 2020. These samples were non-statistical and cannot be projected to the intended population.

This performance audit was conducted in accordance with *Generally Accepted Government Auditing Standards*. Those standards require 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 the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. In planning and performing our audit, we identified the following components and underlying internal control principles, control objectives, and specific controls as significant to the audit objective:

- Control Environment – Demonstrate Commitment to Competency
- Control Activities – Implement Control Activities and Design Control Activities
- Monitoring - Remediate Deficiencies

We assessed the design, implementation and/or operating effectiveness of these internal controls and identified deficiencies that we believe could affect NARA's ability to process complaints in a timely and efficient manner. The internal control deficiencies we found are discussed in the Audit Results section of this report. However, because our review was limited to aspects of these internal control components and underlying principles, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

Kimberly Boykin, Audit Director; Alicia McNair, (Lead) Senior Program Auditor; and Kimberly Nikraves (Independent Referencer) Senior Program Auditor, made key contributions to this report.

Audit Results

NARA did not always process discrimination complaints in a timely and efficient manner. We found:

- NARA did not effectively and efficiently, track, monitor, and analyze complaint activity in accordance with established guidance;
- delays in commencing EEO investigations;
- a majority of discrimination complaint investigations conducted exceeded the prescribed task order period of performance;
- limited transparency in NGC's role in processing discrimination complaints;
- outdated standard operating procedures; and
- opportunities exist to improve employee participation in ADR.

These conditions exist because NARA did not have adequate management and internal controls in place to ensure the EEO program was operating as intended. Title 29 of the Code of Federal Regulations (CFR), Part 1614, titled, Federal Sector Equal Employment Opportunity (EEO), mandates specific time frames for federal agencies to process, investigate, and issue agency decisions on discrimination complaints. Without a timely, efficient, and fully defined EEO process, NARA is unable to ensure it has the necessary foundation for achieving a discrimination-free work environment that includes a fair and impartial complaint resolution process.

Finding 1. Monitoring and Tracking Complaint Activity Needs Improvement

NARA did not effectively and efficiently, track, monitor, and analyze complaint activity in accordance with established guidance. This occurred because NARA did not make it a priority to implement an effective complaint management system. EEOC's EEO MD-715, Essential Element E, guides agencies to use a complaint tracking and monitoring system that permits the agency to identify the location, status, and length of time elapsed at each stage of the agency's complaint resolution process; the issues and the bases of the complaints; the aggrieved individuals; the involved management officials; and other information necessary to analyze complaint activity and identify trends. EEO MD-715 further requires agencies to have systems in place to accurately collect, monitor, and analyze complaint data and to identify, monitor, and report significant trends reflected in complaint processing activity. Not having an effective data collection system can impede meaningful analysis and evaluation of program data and may result in inconsistent reporting.

In NARA's EEO MD-715 reports from FY 2015 to FY 2019, NARA reported it did not have an effective EEOC-complaint tracking and monitoring system or an effective and accurate data collection system in place. NEEEO management also reported the lack of a complaints tracking system as an internal control weakness at the beginning of the audit. The NEEEO office uses Microsoft Excel spreadsheets and Word documents to support their collection, tracking, and analysis. These tools have proved inadequate and inefficient for effectively tracking, monitoring, managing, and reporting on NEEEO's complaints to the EEOC to meet annual reporting requirements. The current process restricts the EEO staff's ability to conduct proper trend analysis and to produce accurate reports. The existing solution is manual, labor-intensive, lacks quality control, and is without automated backup and storage.

NARA's response to address this deficiency was to report they had plans to procure a new EEO software tracking system that would enable effective monitoring and reporting of EEO informal and formal complaints in accordance with EEO regulations and guidelines.

It is imperative that NARA establish an effective system. On January 3, 2021, Congress enacted the Elijah E. Cummings Federal Employee Anti-Discrimination Act of 2020, Public Law 116-92, which is part of the National Defense Authorization Act (NDAA) for Fiscal Year 2021. The Act states "not later than 1 year after the date of enactment of said act, each Federal agency shall establish a system to track each complaint of discrimination arising under section 2302(b)(1) of title 5, United States Code, and adjudicated through the Equal Employment Opportunity process from the filing of a complaint with the Federal agency to resolution of the complaint, including whether a decision has been made regarding disciplinary action as the result of a finding of discrimination."

Recommendation

We recommend the Deputy Archivist of the United States, in collaboration with the Director of the Office of Equal Employment Opportunity Programs:

Recommendation 1: Use a system-approach that complies with Public Law 116-92, EEO MD-715, and 29 CFR part 1614.

Finding 2. Delays Initiating EEO Investigations

We found delays in commencing EEO investigations that contributed to the overall timeliness of processing discrimination complaints.⁸ Specifically, we found delays in the issuing of the acceptance notices to the complainant and procurement of investigative services. This occurred because NEEO management did not have effective management and internal controls over processing discrimination complaints. Government Accountability Office's (GAO's) *Standards for Internal Control in the Federal Government* states management periodically reviews policies, procedures, and related control activities for continued relevance and effectiveness in achieving the entity's objectives or addressing related risks. According to EEOC, delays in issuing notices of acceptance and procuring investigative services may severely reduce the time for the actual investigation or cause the investigation to exceed the regulatory time frame.⁹ 29 CFR, 1614.106(e) (2), requires the agency to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period.

We reviewed the 62 discrimination complaint cases closed during FY 2019 and FY 2020, in which 42 discrimination complaint investigations were completed for formal complaints. We found the following:

- *Issue Notice of Acceptance to Complainant* - It took the agency an average of 86 days in FY 2019 and 106 days in FY 2020 to issue an acceptance letter to the complainant after filing a formal complaint. Additionally, the days to issue an acceptance letter to the complainant ranged from 3 to 182 days for cases closed in FY 2019 and 14 to 265 days¹⁰ for cases closed in FY 2020. Given the baseline of 180 days to complete an investigation in accordance with the regulation, delays in this step of the process consumed on average more than 45% of the total time prescribed to complete an investigation.¹¹

In its EEO MD-715 submissions for FY 2018 and FY 2019, when asked “*Does the agency issue acceptance letters/dismissal decisions within a reasonable time (e.g., 60 days) after receipt of the written EEO Counselor report, pursuant to MD-110, Ch. 5(I)?*”

⁸ We also found oversight of the EEO services contract (for investigations) needs improvement (See finding 3).

⁹ EEOC Federal Sector Investigations Time and Cost, August 2004

¹⁰ In this instance, the complainant amended the case more than 100 days after filing a formal complaint without being issued an acceptance/dismissal letter. The agency subsequently issued a partial acceptance letter to the complainant more than 150 days after the amendment.

¹¹ Under 29 CFR, 1614.106(e) (2) when a complaint has been amended, the agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint.

If so, please provide the average processing time in the comments,” NARA responded “NO.”

In FY 2019, the agency reported it took on average 96 days to accept/dismiss a complaint. The agency did not report the average days to accept/dismiss a complaint in its FY 2018 EEO MD-715 submission. While there are no specific timelines prescribed by the regulations for the acceptance of a complaint, it should be performed in as short a time frame as possible as to avoid negatively impacting the timeliness of subsequent stages in the process.

- *Procurement of Investigative Services* - The procurement of investigative services took to an average of 41 days in FY 2019 and 46 days in FY 2020. Although, we found minor delays in the individual steps to procure investigative services, there may be opportunities to improve upon efficiencies at this stage of the process, which could positively impact the start date and timeliness of investigations.

Overall, it took the agency between four to five months from the complaint file date to assign the case to an investigator. We also found concerns related to the timeliness of investigations. (See Finding 3). Furthermore, even though the EEO Program Office funds contractor services for drafting FADs, the agency likewise has to await award funding from the Office of Acquisitions for these services, which could range from 21 to 31 days. NEEEO management indicated that by the time funds are approved and awarded for these services, 30 to 50 percent of the duration allowed to issue the FAD in accordance with EEOC guidelines have passed.

Table 2 provides the timeliness of steps to initiate the investigation process for the cases reviewed.

Table 2: FY 2019 and FY 2020 Investigation Initiation Process Timeliness

Steps Leading to the Investigation Process	FY 2019			FY 2020		
	Number of Days [Low]	Number of Days [High]	Average Number of Days	Number of Days [Low]	Number of Days [High]	Average Number of Days
1. Issue Notice of Acceptance to Complainant	3	182	86	14	265	106
2. Procurement of Investigative Services						
a. Request Funding from Responsible Office	1	87	17	4	55	17
b. Receipt of Contract Award from Office of Acquisitions	0	62	20	0	85	21
c. Assign the Complaint for Investigation to Contract Investigator	0	18	4	1	40	8
Average Number of Days to Procure Investigative Services			41			46
Total Average Number of Days to Initiate the Investigation Process			127			152

Source: OIG analysis of FY 2019 and FY 2020 closed discrimination complaint cases.

Recommendations

We recommend the Director of the Office of Equal Employment Opportunity Programs:

Recommendation 2: Review and evaluate current processes, procedures, and practices, including but not limited to, issuing notices of acceptance to the complainant and requesting funding for investigative services from the responsible office; make revisions; and implement guidance to improve efficiencies and timeliness associated with assigning the case to the contract investigator.

We recommend the Director of the Office of Equal Employment Opportunity Programs, in collaboration with the Office of the Chief Acquisition Officer:

Recommendation 3: Review and evaluate current processes, procedures, and practices, make revisions, and implement guidance to improve efficiencies associated with obtaining contract award for conducting investigations and drafting final agency decisions.

Finding 3. Contract Oversight of Investigations Needs Improvement

We found a majority of discrimination complaint investigations conducted exceeded the prescribed period of performance for their respective task orders. Specifically, NARA did not always hold contractors accountable for completing investigations timely and submitting routine status reports. This occurred because NEEO management did not implement effective contract oversight. GAO's, *Standards for Internal Controls in the Federal Government* states, management among other things “establishes activities to monitor performance measures and indicators,” and “designs controls aimed at validating the propriety and integrity of both entity and individual performance measures and indicators.” Moreover, Federal Acquisition Regulation, Subpart 46.4, – “Government Contract Quality Assurance” states, “[g]overnment contract quality assurance shall be performed ...to determine that the supplies or services conform to contract requirements.” Without vigilant oversight and monitoring of contractor performance delays in investigations, timely processing of discrimination complaints. may be negatively impacted.

Untimely Investigations

We found 37 of the 42 discrimination complaint investigations closed in FY2019 and FY2020 exceeded the prescribed period of performance of 60 calendar days. NARA did not ensure contractors conducted investigations in accordance with the EEO Services Statement of Work (SOW). According to the *Statement of Work EEO Services (Investigations, Fact-finding or Management/Organizational Inquiries, and Final Agency Decisions)*, “the period of performance for each EEO investigation is sixty calendar days unless otherwise stated in the task order. In the event that an extension of the time authorization is needed to complete the investigation, the contractor shall forward all requests for the extension of authorization in writing to the Complaints Program Manager.” The contractual sixty calendar day period of performance is for the submission of the draft Report of Investigation (ROI) to the Complaints Program Manager.”

For complaint cases closed during FY 2019, it took contractors an average of 100 days,¹² to submit the draft ROI to NEEO. For complaint cases closed during FY 2020, it took contractors an average of 90 days to submit the draft ROI to NEEO. NEEO management was unable to provide evidence that the contractor requested an extension and/or that an extension was granted for 24 of the 37 investigations wherein the contractor exceeded the maximum period of performance of 60 days. Our review of documentation found investigations could take longer due to instances outside of the control of NARA or the contractor because of a complainant amending a complaint, challenges obtaining witness statements, and extensions requested from the complainant. According to the EEOC, long investigative delays have the potential to impede

¹² The OIG calculated the number of days from the date of the Case Assignment Letter to the date of the Case Certification and Clearance Form.

the primary goal of the investigative process which is to gather sufficient evidence to permit a determination of whether unlawful discrimination occurred.¹³

Section 8.7, “Quality of ROI or Management/Organizational Inquiry Report (MIR)’ of the SOW states, “if the timeframes are not met and the ROI ... is not up to standard (See Finding 4), the contractor will be penalized. NARA reserves the rights to reduce the cost of the investigation.” Although the contractor missed the period of performance for 37 cases, NEEO did not always require written requests for authorization of extensions, thereby potentially impeding the agency’s ability to take corrective action against the contractor to remedy the issues and protect the interests of NARA.

Although we found evidence that NARA did not hold the contractors accountable for delays, in its FY 2018 and FY 2019 EEO MD-715 submissions, NEEO reported that in the event of poor work products¹⁴ and/or delays, “the agency requests[ed] that the contractors not use the individual who prepared the work product anymore”. NEEO was unable to provide an example of such a request. NEEO management confirmed there were no instances where contractors were penalized for delays in submitting the draft ROI. Had NEEO consistently used available contract remedies, an opportunity may have existed for realized cost savings.

Weekly Status Reports

NEEO management did not ensure the contractor submitted required deliverables. The SOW for EEO services required the contractor provide weekly status of investigation reports until the draft ROI is received. Although NEEO management provided examples of weekly status of investigation reports submitted by contract investigators, the weekly requirement for the submissions was not always enforced. NEEO indicated only one of the three contractors consistently submitted weekly status reports for assigned cases. Not enforcing submissions of the weekly status of investigation reports could limit the Contracting Officer Representative’s (COR’s) ability to continuously monitor contractor performance via documented progress and potentially raise concerns related to the length of the investigation or the quality of performance.

Recommendation

We recommend the Director of the Office of Equal Employment Opportunity Programs:

Recommendation 4: Develop and implement processes and procedures to ensure the contractors adhere to the Statement of Work for Equal Employment Opportunity services, to include, but not be limited to (1) completing investigations timely, (2) submitting

¹³ EEOC Attaining a Model Agency Program: Efficiency, December 1, 2004

¹⁴ We also found concerns related to the quality of the ROIs submitted by the contractor (See Finding 4).

authorizations for extensions, if necessary, and (3) submitting weekly status reports; and where applicable NARA take action to enforce any associated penalties for delays.

Finding 4. Clarification and Documentation of the Office of General Counsel's Role is Needed

NGC's role in support of processing discrimination complaints is not fully transparent. Specifically, we found NGC's support of processing discrimination complaints was not fully documented and supporting documents did not always exist to support the agency had a neutral EEO process. These conditions occurred because NARA did not establish clear policies, procedures, and internal controls for NGC's role in processing discrimination complaints. GAO's *Standards for Internal Control in the Federal Government* states management periodically reviews policies, procedures, and related control activities for continued relevance and effectiveness in achieving the entity's objectives or addressing related risks; and documentation provides a means to retain organizational knowledge and mitigate the risk of having that knowledge limited to a few personnel, as well as a means to communicate that knowledge as needed to external parties, such as external auditors. Absent current documented practices, there is a potential for ambiguity and redundancies that could affect the effectiveness of processing discrimination complaints. Furthermore, the absence of documentation to support responses submitted to the EEOC regarding the agency's neutral EEO process may adversely impact the credibility of NEEO and the integrity of the EEO complaints process.

We found no formal policy exists that defined NGC's role, scope, objectives, or timing in reviews of draft ROIs. There was also no formal policy that defined the scope and objectives of NGC's reviews of draft FADs.

Factual Reviews of Draft ROIs

In December 2019, NGC began conducting factual reviews of the ROIs in support of processing discrimination complaints. The reviews were a result of NEEO and NGC concerns that the ROI may not be complete or well done by the contractor. Furthermore, NGC management noted there was a desire to streamline the legal sufficiency review process (conducted by their office), in an effort to identify upfront, any gaps in the draft ROI.¹⁵

NEEO and NGC management and staff characterized NGC's factual reviews of ROIs as:

- (1) identifying gaps in the draft ROI;
- (2) ensuring the ROI has all the information necessary to ensure a complete record;
- (3) determining if there is information or documentation missing that should be included in the draft ROI based on the issues accepted and the statements provided;
- (4) acting as another set of eyes; and/or
- (5) providing a legal perspective.

¹⁵ The information encompassed in the ROI may be used to draft the FAD.

Additionally, NGC management stated factual reviews are not intended to address the merits of the complaint, but rather, ensure the ROI has all the information necessary to ensure a complete record.

NNEO's *Work Plan for Processing Discrimination Complaints: Formal* (Work Plan) was drafted in September 2019 and effective July 2020. However, it did not include the factual review of the ROIs performed by NGC. NNEO management indicated the process could be edited at any time and as the ROI process continues to improve, NNEO may discontinue this NGC review practice in the future. Nevertheless, since December 2019, more than 18 months¹⁶ into instituting NGC's factual reviews of draft ROIs, NNEO management had not updated the Work Plan or formalized any other policies and procedures to support the change.

EEOC Guidance for the Complainant Review of the Draft ROI was Not Followed

NNEO did not provide draft ROIs to all parties for reviews. Specifically, NNEO did not afford complainants the same opportunity to review draft ROIs as NGC. EEO MD-110, Chapter 6, encourages agencies to allow complainants and their designated representatives an opportunity to examine the investigative file and to notify the agency, in writing, of any perceived deficiencies. According to NGC management, NNEO submitted draft ROIs to their office for a factual review and to the complainant concurrently. However, NNEO management confirmed draft ROIs were not provided to the complainant. The complainant is only provided the final ROI that has been reviewed by NGC and NNEO management.

While the OIG found no evidence NGC improperly interfered with, or negatively influenced the EEO process, NGC's role in conducting reviews of the draft ROI unbeknownst to the complainant and absent the complainant being afforded the same opportunity, may have the appearance of NGC guiding the evidence gathered by the investigator. According to EEO MD-110, "Ensuring a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process."

Legal Sufficiency Reviews of Draft Final Agency Decisions

NARA 395.5(h) states, "NGC provides legal advice, represents the Agency in EEO matters, and reviews settlement agreements and FADs for legal sufficiency." Prior to FY 2020, NGC's legal sufficiency reviews of draft FADs often consisted of more than a review of legal sufficiency. NGC management stated these reviews often included recommendations to make substantive changes to the style and substance of draft FADs. Moreover, NGC management stated, legal sufficiency reviews prior to FY 2020 included several questions concerning the investigator follow up on responses in affidavits and those things may have included requesting documents

¹⁶ As of June 2021

for review or changing the wording or language in the draft FAD. Conversely, NEEO management did not consider the pre-2020 NGC's review of draft FADs as "legal sufficiency reviews" and described the reviews as "just a review".

Nevertheless, NGC recognized this level of review potentially blurred the lines between NEEO and NGC roles and responsibilities and impacted the timeliness of NGC's review.¹⁷ Beginning in FY 2020 NEEO and NGC took positive steps by modifying NGC's legal sufficiency review of draft FADs to focus solely on providing a legal sufficiency review. Specifically, NGC management noted in conducting legal sufficiency reviews of draft FADs, they will confirm that each issue raised in the complaint is addressed and that there is a factual basis to support the conclusion reached on each issue. To help facilitate timely issuances of FADs, NGC and NEEO management and staff worked closely to establish timeframes for conducting legal sufficiency reviews of draft FADs; 14 days for mixed cases and 21 days for standard cases. NGC management also began tracking and monitoring the legal sufficiency reviews of draft FADs.

OIG reviewed the tracking sheet and found NGC conducted 20 legal sufficiency reviews of final agency decisions, including 4 re-reviews. The tracking sheet also revealed NGC generally met its internal timeframes for timely reviews of both mixed and standard draft FAD reviews commencing during FY 2020. After modifying the legal sufficiency reviews of draft FADs and implementing timeliness controls, NGC improved the timeliness of their reviews. The six legal sufficiency reviews of draft FAD commencing before the process change took an average of 285 days to complete and the 14 reviews after the change took an average of 13 days.

Evidence Did Not Always Exist to Support NARA had a Neutral EEO Process

NEEO did not have sufficient evidence to support NARA had a neutral EEO process in its FY 2018 and FY 2019 annual reports to the EEOC under EEO MD-715. Specifically, NARA reported the agency had a neutral EEO process whereby the agency:

- established a clear separation between its EEO complaint program and its defensive function;
- had access to sufficient legal resources separate from the agency representative;
- had a firewall that exists between the reviewing attorney and the agency representative;
- ensured the agency representative¹⁸ does not intrude upon EEO counseling, investigations, and final agency decisions; and

¹⁷ In a technical assistance letter dated September 15, 2020, the EEOC urge[d] NARA to consider providing the EEO office with legal resources, apart from OGC, to conduct legal sufficiency reviews. They recommended if NARA continues to have OGC conduct the reviews, the agency include timeframes in the performance plans of the OGC attorneys and hold them accountable for delays in the review process.

¹⁸EEO MD-110 refers to agency representative as "any or all agency employees, (for example Defense Counsel, agency counsel, or legal representative), whose job duties include defending the agency's personnel policies and/or

- had processing time frames incorporated for the legal counsel’s sufficiency review for timely processing of complaints.

Although we did not find evidence of noncompliance, in both reporting fiscal years, we did find the agency did not have sufficient policies, procedures, or supporting documentation to support these responses in the EEO MD-715 report. While we focused our attention on the neutral EEO process responses, it is important for NEEO to ensure all responses are supported by evidence.

For example, although NEEO management provided an email to the OIG dated September 2015 communicating “all legal sufficiency reviews would be conducted by [an attorney], who would no longer be assigned any EEO matters to serve as the agency representative or otherwise be involved in the defense function of the agency with respect to EEO complaints”, NEEO management indicated beyond this documentation there was no other documentation to support their response. They also could not provide support for their response related to clear separation between the EEO complaint program and its defensive function, and agency representative intrusion questions. As it relates to processing timeframes, although NEEO responded YES in its FY 2018 and FY 2019 submissions, the OIG found the processing time frames were not incorporated into legal counsel’s sufficiency reviews of draft final agency decisions until FY 2020.

According to the EEOC, there must be a firewall between the EEO function and the agency’s defensive function to ensure actions taken by the agency to protect itself from legal liability will not negatively influence or affect the agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible. NGC is involved in NEEO processes through reviewing both draft ROIs and draft FADs. In order to show all parties this does not affect the impartiality of the process, there should be readily available documentation on the firewalls in place, and how they are managed.

Recommendations

We recommend the Director of the Office of Equal Employment Opportunity Programs, in collaboration with the Office of General Counsel:

Recommendation 5: Define and formalize the roles and responsibilities of the Office of General Counsel in the processing of discrimination complaints. Specifically, implement policies and procedures to demonstrate the agency has a fair and impartial Equal Employment Opportunity process, to include but not limited to, ensuring a clear separation between the agency’s Equal Employment Opportunity complaint program and its defensive

actions. The term also includes attorneys in the Office of Human Capital and non-attorney employees whose job duties include defending the agency’s personnel policies and/or actions, for example, labor relations specialists.”

function; and the agency representative does not intrude or have the appearance of intruding upon Equal Employment Opportunity counseling, investigations, and final agency decisions.

Recommendation 6: Establish and implement procedures to ensure agency responses submitted to Equal Employment Opportunity Commission in its EEO MD-715 submissions are accurate, complete, and supported by documentation.

Finding 5. Outdated Standard Operating Procedures

NEEO's standard operating procedures are outdated. This occurred because NEEO management did not create and maintain procedures to guide current program responsibilities. GAO's *Standards for Internal Control in the Federal Government* states management periodically reviews policies, procedures, and related control activities for continued relevance and effectiveness in achieving the entity's objectives or addressing related risks. NARA Directive 101, Part 1. Office of the Archivist of the United States advises the EEO Program develops EEO policies and procedures. Without current policies and procedures, NARA cannot ensure discrimination complaints are consistently and efficiently processed according to guidance.

When the OIG requested relevant policies and procedures related to complaint program operations, in addition to other documentation, NEEO provided a copy of the *Equal Employment Opportunity and Diversity Programs Office Standard Operating Procedures (SOP)*. However, the SOP was not dated and did not have an effective or implementation date. Additionally, there were several examples of significantly outdated information contained in the SOP, including the *Internal Time Schedule for Processing Complaints*, *EEO Tracking System User's Manual*, canceled NARA directives and interim guidance, former employees, and outdated statement of work. NEEO management stated the work conducted by the program office related to discrimination complaint processing was guided by 29 CFR 1614, EEO MD-110, and EEO MD-715. NEEO management further advised the OIG that while the SOP is a good reference document, the SOP was not currently used in their office. NEEO management could not recall when the SOP was terminated for use.

Recommendations

We recommend the Director of the Office of Equal Employment Opportunity Programs:

Recommendation 7: Review, revise, update, and implement standard operating procedures for processing discrimination complaints and ensure applicable staff are trained on the procedures.

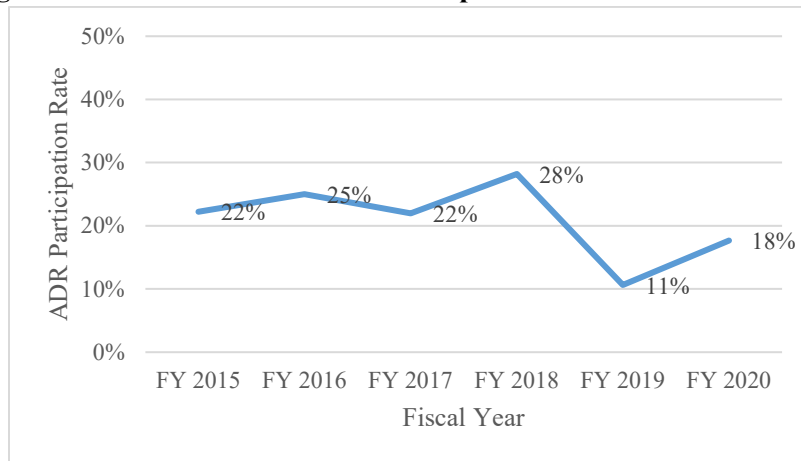
Recommendation 8: Develop and implement controls to ensure standard operating procedures are kept up to date to reflect subsequent organizational, policy, or procedural changes that can affect the processing of discrimination complaints.

Finding 6. Opportunities Exist to Improve Employee Participation in Alternative Dispute Resolution

Although EEOC reported on NARA’s low ADR¹⁹ participation rates,^{20,21} NARA has yet to complete all planned actions that may further support addressing EEOC’s finding. This condition exists because NEEO and NGC did not make it a priority to address the finding. EEO MD-110 states, to encourage the aggrieved persons to consider participating in the EEO ADR program, they will need to understand the benefits of the EEO ADR process and recommends the EEO ADR program prepare talking points to promote the use of EEO ADR. Outstanding planned actions, including plans to enhance awareness of the ADR program and assess employees’ perspective of the ADR program, could not only limit employees’ knowledge and understanding of the ADR process (including its confidentiality, neutrality, and benefits), but could also hinder the ADR program’s ability to evaluate and address potential barriers to participation.

While NARA has taken actions to address employee participation in ADR at the informal stage, the participation rate remains below the 50% target rate recommended by EEOC. From FY 2015 to FY 2020, NARA’s ADR participation at the informal stage ranged from 11% to 28%. Figures 2 and 3 below provide details of NARA’s informal ADR participation from FY 2015 to FY 2020.

Figure 2: NARA Informal ADR Participation Rate FY 2015 – FY 2020



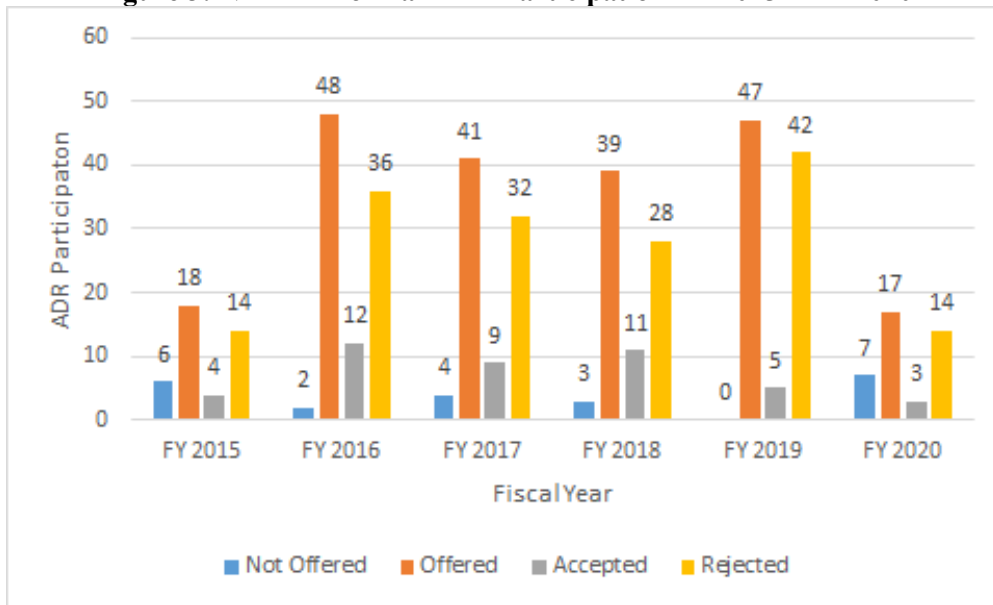
Source: FY 2015 to FY 2020 Annual Federal EEO Statistical Report of Discrimination Complaints

¹⁹ NARA’s ADR program is located in the Office of General Counsel.

²⁰ In an EEOC technical assistance letter, dated May 7, 2014, EEOC reported while [NARA’s] participation rate improved, it remains below EEOC’s goal of 50%.

²¹ In an EEOC technical assistance letter, dated September 15, 2020, EEOC reported a review of NARA’s last three Form 462 reports reflects participation in the agency’s ADR program at the informal stage decreased from 20% in FY 2017 to 11% in FY 2019.

Figure 3: NARA Informal ADR Participation FY 2015 – FY 2020



Source: FY 2015 to FY 2020 Annual Federal EEO Statistical Report of Discrimination Complaints

In most completed counseling cases during the period of review, aggrieved individuals were offered the opportunity to participate in ADR. Specifically, from FY 2015 to FY 2020, the agency’s offer rate for ADR participation ranged from 71% (FY 2020) to 100% (FY 2019). Of those aggrieved individuals offered to participate in ADR, most rejected participation. For example, in FY 2019 there were only 5 out of 47 (11%) completed counseling cases in which aggrieved individuals accepted the offer to participate in ADR. Although the agency offered mediation through NARA’s ADR Program in most completed counseling cases, the participation rate remained below EEOC’s target.

RESOLVE is NARA's ADR program. ADR is a way of resolving disputes in a consensual manner by working with a neutral third party. Participation in ADR is fully voluntary, and the parties retain control over the process. Similarly, the parties forfeit no rights and lose no legal alternative otherwise available to them. RESOLVE offers mediation and facilitation services as informal methods for agency employees to resolve issues relating to their employment.

Prior to FY 2021, NARA disseminated information on ADR via:

- Non-mandatory ADR training - Provided by NGC to managers and supervisors on an ad hoc basis.
- Supervisory Development Program - Provided an overview of the ADR program for new supervisors.
- New Hire Required Training - Includes EEO compliance training and is required for all new employees within 60 days of employment.

In order to improve participation in ADR, in FY 2021, RESOLVE initiated additional training and marketing efforts to include the following:

- February 2021 - Prepared updated brochures for distribution throughout the Agency. In addition to explaining the mediation process, the brochure describes the organizational structure for RESOLVE and its neutral function within NGC.
- February 2021 - Shared information about RESOLVE agency wide through the Civility²² initiative.
- March 2021 - Presented informational webinars to agency staff to market the program.
- April 2021 - Provided training to union representatives on available ADR.

In April 2021, NGC and NEEO reinstated²³ the practice to have all EEO aggrieved individuals referred to RESOLVE for consultation prior to electing or declining to participate in ADR. Regardless of whether an aggrieved individual elects RESOLVE or traditional EEO Counseling, the individual is referred to RESOLVE for further consultation.

Planned Actions

Although NARA initiated additional training and marketing efforts, the agency has yet to complete all planned actions that may further support addressing ADR participation rates. As far back as its FY 2017 EEO MD-715 submission, the agency reported it would develop an ADR training module for managers and supervisors to address measure 92.²⁴ The agency planned to address this deficiency by having an online ADR training module through LMS that allows managers and supervisors to become knowledgeable about the purpose, use, and benefits of ADR as required by regulations. During FY 2019, NGC developed a script for an animated ADR training video that would be made available to all employees describing the types of ADR tools available through the program. As of January 2021, production of the video was postponed due to competing priorities of the Office of Human Capital.²⁵ NGC staff shared plans to complete this initiative by the end of FY 2021.

In an EEOC technical assistance letter dated September 15, 2020, the EEOC recommended the agency conduct a climate assessment survey to ascertain the reasons why employees are reluctant to participate in ADR. In particular, the EEOC suggested that NARA focus on whether the location of the ADR program discourages ADR participation. The oversight body added,

²² Based on employee feedback, the Agency added a module on “Civility in the Workplace” within the annual required training for FY 2020 year. This module is designed to create a common understanding of civility at NARA and equip all employees with the tools needed to promote civil discourse in the workplace.

²³ Terminated years ago under the leadership of the former EEO Director and RESOLVE Director.

²⁴ Measure 92, inquires “Does the agency require all managers and supervisors to receive ADR training in accordance with EEOC regulations?” In its FY 2017 EEO MD-17 submission NARA responded, “NO”.

²⁵ The Office of Human Capital committed to supporting RESOLVE’s efforts of completing the video.

since NARA's OGC has oversight of the ADR program, the agency should assess whether employees believe the program is neutral and confidential.²⁶ NEEO management advised the climate assessment survey would be completed by the end of FY 2022.

Recommendations

We recommend the Office of General Counsel:

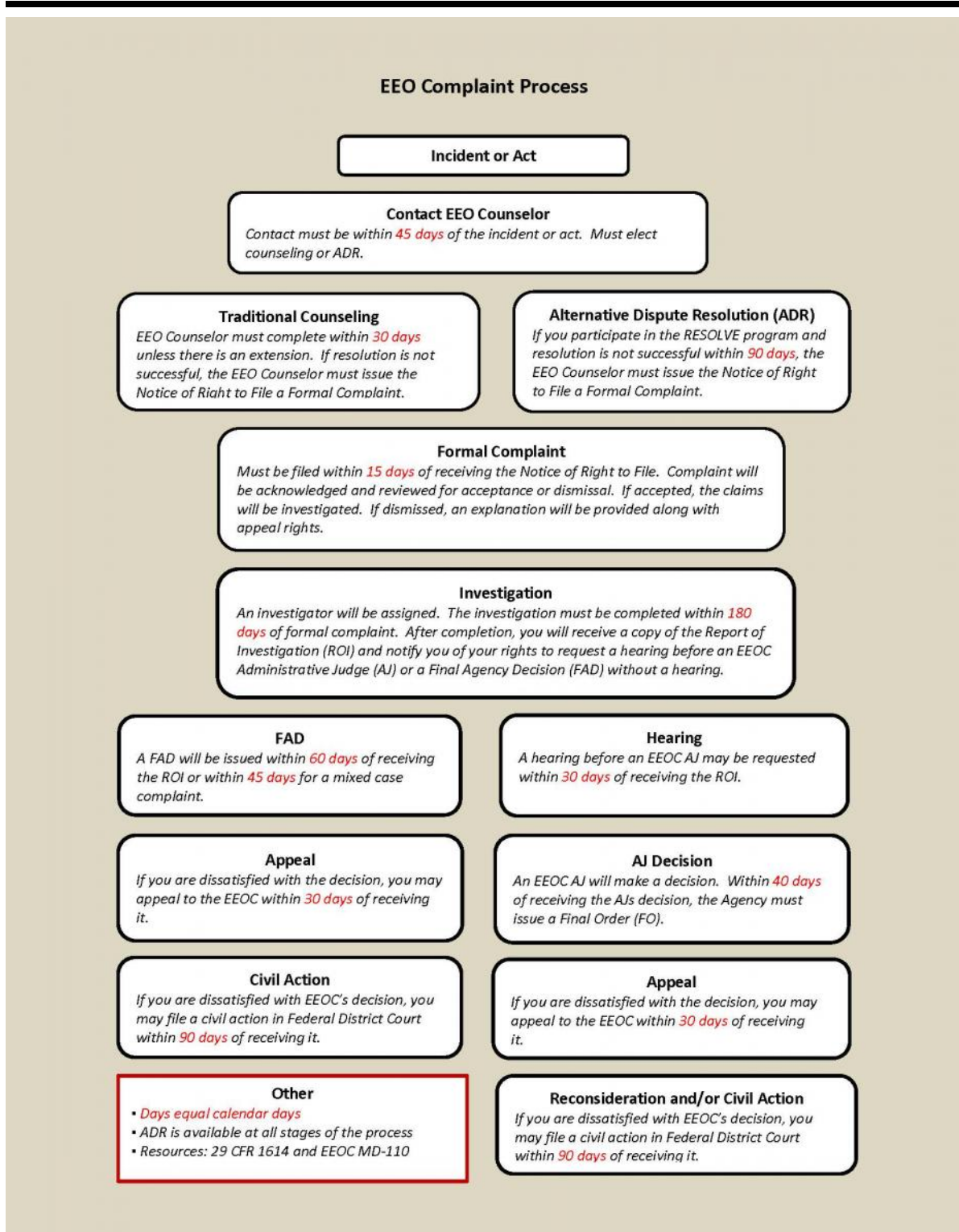
Recommendation 9: Ensure the production and implementation of the alternative dispute resolution training module is completed and distributed widely throughout the agency via Learning Management System.

We recommend the Director of the Office of Equal Employment Opportunity Programs, in collaboration with the Office of General Counsel:

Recommendation 10: As recommended by Equal Employment Opportunity Commission, conduct a climate assessment survey to ascertain the reasons why employees are reluctant to participate in alternative dispute resolution, communicate the results to applicable stakeholders, develop a plan to address the results, and implement the planned action.

²⁶ In a technical assistance letter, dated May 2014, EEOC communicated a similar concern stating "since NARA's OGC represents the agency in EEO disputes, the location of the ADR office within the agency's legal arm suggest the lack of neutrality. Employees may feel reluctant to participate in ADR if they believe that OGC will observe who enters the ADR office."

Appendix A – Compliant Process Chart



Source: NARA <https://www.archives.gov/files/flowchart-revised-eeo-complaints-process.jpg>

Appendix B – Acronyms

ADR	Alternative Dispute Resolution
AEPMS	Affirmative Employment Program Management System
AJ	Administrative Judge
CFR	Code of Federal Regulation
COR	Contracting Officer Representative
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
FAD	Final Agency Decision
FY	Fiscal Year
GAO	Government Accountability Office
LMS	Learning Management System
MD	Management Directive
MIR	Management/Organizational Inquiry Report
MSPB	Merit Systems Protection Board
N	Archivist of the United States
NARA	National Archives and Records Administration
ND	Deputy Archivist of the United States
NDAA	National Defense Authorization Act
NEEO	Equal Employment Opportunity Program
NGC	Office of General Counsel
OIG	Office of Inspector General
ROI	Report of Investigation
SOP	Standard Operating Procedure
SOW	Statement of Work

Appendix C – Agency Comments

Agency management reviewed a discussion draft and provided no comments to this report. Agency management stated their general agreement with the findings and recommendations and opted not to provide formal comments for inclusion in this report.

Appendix D – Report Distribution List

Archivist of the United States

Deputy Archivist of the United States

Chief of Management and Administration

General Counsel

Chief Acquisitions Officer

Equal Employment Opportunity Director

Accountability

United States House Committee on Government Reform and Oversight

Senate Homeland Security and Governmental Affairs Committee

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Visit www.archives.gov/oig/ for more information, or contact us:

By telephone

Washington, DC, Metro area: 301- 837-3500

Toll-free: 800-786-2551

By mail

NARA OIG Hotline

P.O. Box 1821

Hyattsville, MD 20788-0821

By email

oig.hotline@nara.gov

By facsimile

301-837-3197

By online referral form

www.archives.gov/oig/referral-form/index.html

Contractor Self-Reporting Hotline

As required by the Federal Acquisition Regulation, a web-based form allows NARA contractors to notify the OIG, in writing, whenever the contractor has credible evidence a principal, employee, agent, or subcontractor of the contractor has committed a violation of the civil False Claims Act or a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations in connection with the award, performance, or closeout of a contract or any related subcontract. The form can be accessed through the OIG's home page or found directly at www.archives.gov/oig/contractor-form/index.html.