



U.S. Equal Employment Opportunity Commission

Best Practices in EEO Conflict Case Management for Federal Agencies

June 2020

Introduction

The Equal Employment Opportunity Commission (EEOC) enforces the statutes that prohibit workplace discrimination in the federal government, including Section 717 of Title VII of the Civil Rights Act of 1964, the regulations that are codified in the Code of Federal Regulations at 29 C.F.R. § 1614, and relevant guidance including the EEOC Management Directive 110 (MD-110) (complaint processing manual). Additionally, EEOC has the responsibility to provide guidance to federal agencies on all aspects of the federal government's equal employment opportunity (EEO) program and to aid all agencies in the goal of the federal government to be a model employer. In keeping with that responsibility, EEOC will provide suggested best practices for federal agencies on relevant topics.

One of an agency's main EEO functions is to process and investigate allegations of employment discrimination. When processing these complaints, an agency is responsible for the fair, impartial processing and resolution of complaints of employment discrimination. Conflicts of interest, real or perceived, can arise when the responsible management official who is alleged to have engaged in discriminatory conduct is within the EEO office, or has undue influence over agency personnel.

See MD-110 at Chap. 1, § IV.B. For example, a complainant may allege discrimination by the agency's EEO director.

While the MD-110 provides federal agencies with guidance in processing conflict of interest cases ("conflict cases"), the EEOC decided to conduct a program evaluation of the processing of conflict cases within federal agencies to obtain and share best practices. For this program evaluation, the EEOC decided to (1) determine how EEO offices across the federal sector currently handle conflict cases; (2) gather recommended practices that work; and (3) share best practices for handling conflict cases with federal agencies. For this program evaluation, the EEOC met with a limited number of federal agency officials, sent a survey to all the federal sector EEO directors, conducted two focus group sessions with agency officials responsible for processing federal sector employment discrimination complaints, and reviewed examples of submitted agency documents related to conflict case processing.

The EEOC found that best practices for federal agencies in the processing of conflict cases include defining a conflict case, creating written policies and SOPs for the processing of conflict cases, ensuring confidentiality of conflict cases, creating detailed MOUs between agencies who agree to mutually process the other's conflict cases, and delegation of writing a Final Agency Action in conflict cases.

Background

Over the past few years, the EEOC's Office of Federal Operations received various inquiries regarding the processing of conflict of interest cases within federal agencies. For example, complainants have expressed concerns about the way an EEO office processed a conflict case, and agencies have sought guidance on how to process such cases with limited resources. For these reasons, the EEOC decided to conduct a program evaluation of the processing of conflict cases within federal agencies to provide ideas and best practices, which are already used by some agencies, to the entire federal EEO community.

Process

Survey

As an initial step, the EEOC created a voluntary survey and sent it to federal sector EEO Directors and some Deputy Directors regarding the processing of conflict cases

at their respective agencies. The survey was announced at the EEO Directors Meeting, held on July 16, 2019, and sent on August 8, 2019. (Appendix A) The EEOC received 55 responses to the survey out of an approximate 200[1], a response rate of 27.5%. These included EEO Directors (24), Complaints Managers (18), Deputy Directors (4), and various other roles (9).[2] Responses showed that most responding agencies processed four or less conflict cases each year (87%), few agencies have any written policies or procedures regarding the processing of conflict cases (21.8%), and few agencies have written agreements with other agencies, or external parties, to process their conflict cases (32.7%).

Individual Agency Meeting- USDA

An official from the United States Department of Agriculture (USDA) volunteered to share their process for conflict cases, noting that they had a separate division that processes conflict cases. On August 7, 2019, the EEOC met with EEO officials from the USDA, including the Associate Assistant Secretary for Civil Rights and leaders of the Conflicts Complaints Division. The USDA's Conflicts Complaints Division processes approximately 80-90 informal and 40-45 formal conflict complaints each year. They conduct informal EEO counseling in-house, unless the complaints name the Associate Assistant Secretary for Civil Rights, in which case they are sent to other agencies for processing. Investigations are all conducted by contract investigators. The USDA has written Processing Guidelines for Conflict of Interest Cases, and an SOP for processing conflict cases. (Appendix C[i])

Focus Groups

To further explore the processing of conflict cases through dialogue, EEOC decided to conduct two focus group sessions. Following the close of the survey, in which the EEOC requested volunteers to participate in focus group sessions, the EEOC led two sessions; one on September 6, 2019, with seven participants, and the other on September 10, 2019, with three participants. The participants represented the following agencies:

- Department of Commerce
- Department of Homeland Security
- Department of the Interior
- Department of Justice

- Department of the Navy
- Federal Housing Finance Agency
- General Services Administration
- Office of the Director of National Intelligence
- United States International Trade Commission

The EEOC inquired about the specific challenges that the agencies faced when processing conflict cases and their recommendations for other federal agencies. (See Appendix B for focus group questions). For example, the participants were asked the following questions:

- What struggles do you have in processing conflict cases?
- What suggestions would you like to share with your fellow EEO offices about conflict cases?
- What mistakes have you made, or seen made, in processing these cases?
- What are your lessons learned?

Many respondents shared their concerns with finding an available alternate agency to process their conflict cases, and when such an agency was found, a lack of quality and timeliness in processing them.

Agency Documents

Through a designated EEOC email address given in the survey, the EEOC also asked agencies to share any documents they had regarding the processing of conflict cases and received the following six documents:

- Department of Agriculture's New Processing Guidelines for Conflict of Interest Complaints dated January 16, 2014;
- Department of the Army's Conflict of Interest Guidance (Army Regulation 690-600, Section III)
- General Services Administration Internal Conflict of Interest Cases Standard Operating Procedures (Draft)

- Sample Memorandum of Understanding between the General Services Administration and an Agency
- Interagency Agreement between the Office of the Director of National Intelligence and the Railroad Retirement Board
- Modification of Reimbursable Agreement between the Railroad Retirement Board and the Social Security Administration

Recommended Best Practices

The EEOC found that best practices for federal agencies in the processing of conflict cases include defining a conflict case, creating written policies and SOPs for the processing of conflict cases, ensuring confidentiality of conflict cases, creating detailed MOUs between agencies who agree to mutually process the other's conflict cases, and delegation of writing a Final Agency Action in conflict cases.

Written Agency Policy

MD-110 states that conflict cases may arise when the alleged responsible management official is the head of the agency, an immediate staff member of the agency head, someone who occupies a high-level position of influence at the agency, or the EEO Director or a supervisor in the EEO office. See MD-110 at Chap. 1, § IV.B. However, the EEOC notes that federal agencies have varied organizational structures, and there could be additional situations when a named responsible management official creates a conflict of interest. Therefore, the EEOC suggests as a best practice that an agency create a written policy which clearly defines what constitutes a conflict case at the agency.

Sometimes complainants will claim to have a conflict case when there is no true conflict of interest. For example, they believe that employees in the EEO office are biased. If an agency has a written definition of a conflict case, it can refer the complainants to the definition and explain why their cases are not in fact conflict cases, and that they will process the complaints through their normal channels.

In addition to a definition of a conflict case in a policy, agencies may find it helpful to include a specific person, such as the director of the EEO office, who is responsible for making the ultimate determination regarding the nature of a

complainant's alleged conflict case. This will also assist agencies in maintaining consistency in its determination of which cases are conflict cases.

Additionally, when complainants have a conflict case naming a manager within an agency's EEO office, they may not feel comfortable contacting the EEO office directly to initiate the complaint. As a best practice, the EEOC suggests that agencies provide a specific point of contact for conflict cases. Ideally, this information will be readily available on both the agency's public website and intranet site.

Written Standard Operating Procedures and Designated Conflict Case Manager

The EEOC finds that another best practice is to develop an SOP as a separate internal document for those employees who will be involved in the processing of conflict cases.

In the SOP, a best practice is to designate one person (a "Conflicts Case Manager"), and an alternate, and outline their responsibilities. For example, the Conflicts Case Manager will be responsible for the general oversight of the conflict cases in order to ensure timely processing of counselings and investigations for conflict cases. If the conflict case is processed outside of the agency, the Conflicts Case Manager can serve as a point of contact to address any issues that may arise throughout the process. The agency should specify that the alternate will manage a conflict case when the Conflicts Case Manager is named in the complaint. Additionally, the SOP should stipulate that the Conflicts Case Manager and alternate are the only agency personnel who are privy to the conflict cases.

Confidentiality of Conflict Cases

A major concern is ensuring the confidentiality of conflict cases. The EEOC recognizes that many agencies use secure electronic systems for the purposes of tracking and maintaining documents for their EEO complaints. The EEOC finds that a best practice is for agencies to password protect or otherwise limit access to conflict cases to authorized users only, if possible. An alternative is to track conflict cases using a separate document, such as a spreadsheet, that is only accessible to the Conflicts Case Manager and alternate.

Memoranda of Understanding

EEOC also recommends the use of Memorandums of Understanding (MOU). The MD-110 states that agencies should have formal, or informal, arrangements with other agencies, or third parties, to process their conflict cases. See MD-110 at Chap. 1 § IV.C.1. The EEOC finds that a best practice is for agencies to create formal written MOUs or other written agreements for the sole purpose of processing conflict cases. While some larger agencies have sub-agencies, or components, and have informal arrangements to process conflict cases for each other, the EEOC notes that having the expectations in writing is preferable. The EEOC also recommends as a best practice that agencies have multiple active agreements with other agencies or entities to increase available avenues. These agreements can be in place for a set timeframe and be subject to renewal at their expiration.

The EEOC finds that a best practice is for the parties to specify as many of the details as possible in the MOU or written agreement regarding the processing of conflict cases. For example, agencies will agree to treat a conflict case in the same manner as a non-conflict complaint and ensure timely processing. Additionally, the parties can agree to the timeframe for progress updates, specify the deadlines of the actions when processing the conflict case, and detail the terms of any payment. The parties should also agree to the circumstances in which an agency can defer in accepting a conflict case for the other agency, if at all. We recommend that agencies review the General Services Administration MOU for a very detailed sample agreement. (Appendix C[iv])

Final Agency Actions

Our final recommendation relates to final agency actions. After the completion of an investigation, a complainant may request a hearing before an EEOC Administrative Judge, request an immediate final agency decision (FAD), or in some cases, file a civil action. If a complainant elects to have a hearing, an agency is responsible for issuing a final action by issuing a final order either fully implementing an Administrative Judge's decision, or not fully implementing an Administrative Judge's decision and appealing the decision to EEOC. If a complainant does not request a hearing in a timely manner, the agency will issue a FAD.

The MD-110 states that an agency may assign a third party to write the final action[i] and review the final action before its issuance. See MD-110 at Chap. 1 §

IV.C.2. The EEOC recommends as a best practice that an agency delegate the issuance of a final action in a conflict case to the external agency or party that is processing the conflict complaint.

Conclusions

The EEOC is committed to providing federal agencies with best practices for the processing of their conflict cases to help the federal government become a model employer. The EEOC found that best practices for federal agencies in the processing of conflict cases include defining a conflict case, creating written policies and SOPs for the processing of conflict cases, ensuring confidentiality of conflict cases, creating detailed MOUs between agencies who agree to mutually process the other's conflict cases, and delegation of writing a Final Agency Action in conflict cases.

When there is a conflict of interest, or an appearance of a conflict of interest, agencies should take measures to process the complaints in a way that assures the complainants that the process is not biased against them. The EEOC thanks all agencies that contributed to this evaluation by participating in the EEOC survey and focus groups and by submitting relevant documentation.

1. Appendixes

1. **EEO Directors Survey (<https://www.eeoc.gov/sites/default/files/2020-06/A-%20EEOC%20Survey.pdf>)**

2. Focus Group Questions

1. **September 6, 2019 (<https://www.eeoc.gov/sites/default/files/2020-06/B%20i-CC%20Focus%20Group%20Session%201%20Questions%209-6-19.pdf>)**

2. **September 10, 2019 (<https://www.eeoc.gov/sites/default/files/2020-06/B%20ii-%20CC%20Focus%20Group%20Session%202%20Questions%209-10-19.pdf>)**

3. Agency Documents

1. **Department of Agriculture's New Processing Guidelines for Conflict of Interest Complaints, dated January 16, 2014**
(<https://www.eeoc.gov/sites/default/files/2020-06/C%20i-%20USDA%20Conflict%20of%20Interest%20Documents.pdf>);
2. **Department of the Army's Conflict of Interest Guidance (Army Regulation 690-600, Section III)** (<https://www.eeoc.gov/federal-sector/reports/excerpt-army-submission-eeoc-september-2019-ar-690-600-2004>).
3. **General Services Administration Internal Conflict of Interest Cases Standard Operating Procedures (Draft)**
(<https://www.eeoc.gov/sites/default/files/2020-06/C%20iii-%20GSA%20Internal%20Conflict%20of%20Interest%20Cases%20SOP.pdf>).
4. **Sample Memorandum of Understanding between the General Services Administration and an Agency**
(<https://www.eeoc.gov/sites/default/files/2020-06/C%20iv-%20GSA%20Sample%20MOU%20Template.pdf>).
5. **Interagency Agreement between the Office of the Director of National Intelligence and the Railroad Retirement Board**
(<https://www.eeoc.gov/sites/default/files/2020-06/C%20v-%20IAA%20btw%20DNI%20and%20RRB.pdf>).
6. **Modification of Reimbursable Agreement between the Railroad Retirement Board and the Social Security Administration**
(<https://www.eeoc.gov/sites/default/files/2020-06/C%20vi-%20Modification%20of%20Reimbursible%20Agreement%20RRB%20and%20SSA.pdf>).

[1] EEOC utilized its email group designed to communicate with the EEO community for activities such as EEO Directors meetings, EEOC announcements, or surveys. The exact number of recipients cannot be readily ascertained as membership in the group fluctuates.

[2] The email with the survey requested that recipients forward the survey to members of their staff who are the most knowledgeable about their management of conflict cases. “Other” included EEO Specialists, Attorney Advisors, and Mediation Coordinators.

[i] Final actions refer to either a FAD or a Final Order.