OCA 2873-89

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 15, 1989

OCA FILE LEG

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

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Tennessee Valley Authority - Williard Phillips - 479-4412
United States Information Agency - Walter Raymond - 485-9591
United States Postal Service - Fred Eggleston - 268-2958

SUBJECT: EEOC proposed report on H.R. 1012, the "Federal Employee Discrimination Complaint Procedures Act of 1989"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than Wednesday, August 30, 1989.

Questions should be referred to Lisa Fairhall (395-3923), the legislative analyst in this office.

Naomi R. Sweeney

Naomi R. Sweeney for
Assistant Director for
Legislative Reference

Enclosures

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

DRAFT

The Honorable William D. Ford
Chairman
Committee on Post Office
and Civil Service
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request to Chairman Clarence Thomas dated February 22, 1989 that the Equal Employment Opportunity Commission provide the committee with comments on H.R. 1012, the "Federal Employee Discrimination Complaint Procedures Act of 1989."

We appreciate the opportunity to comment on H.R. 1012. Our review of the revised bill raises several major concerns which are outlined below.

H.R. 1012 imposes on EEOC extremely unrealistic processing time frames, especially for an untried system, given the current volume of federal sector complaint activity, past experience in processing federal sector complaints and the substantial increase in complaint activity which we would expect if H.R. 1012 were enacted. H.R. 1012 would require EEOC to serve a detailed notice of the filing of a charge on federal entity heads not later than 10 days after the charge was filed; to investigate complaints within 90 days of filing and to secure conciliation agreements on cause determinations within 150 days of filing; to conduct a hearing by an administrative law judge (ALJ) not later than 120 days after receiving a request and to issue an ALJ determination not later than 180 days after the conclusion of the hearing and to adjudicate appeals in 90 days. If there is no hearing by the ALJ, the determination is to be made within 270 days after the request.

During fiscal year 1988, 79,903 persons received pre-complaint counseling government-wide and 15,972 formal complaints were filed. The government-wide average for processing complaints from filing to decision during FY '88 was 607 days and 418 days for all types of closures (i.e. rejections, cancellations, withdrawals, settlements and decisions). During FY '88, EEOC received 5,279 requests for hearings and hearings were conducted on approximately 2,222 complaints with an average time of 100 days from hearing to

decision. The average time for all types of closures (i.e., settlements, withdrawals, remands and recommended decisions) was 217 days. These figures demonstrate that the time frames in the legislation are unworkable.

H.R. 1012 requires federal agencies to provide pre-complaint counseling within 45 days. Presently, the majority of pre-complaint counseling contacts do not result in formal complaints because the matters are resolved or because aggrieved persons are discouraged from proceeding under the Part 1613 procedures which are perceived by them as time-consuming and biased in favor of the agencies. We would expect that under H.R. 1012, the volume of complaints would increase substantially, since agencies would be required to provide only counseling, and at least initially, the perception of a new process should be optimistic.

We project more than 25,000 charges are likely to be filed in addition to the approximately 6,000 cases assumed by EEOC from the agencies in the first year. This assumption is based upon our assessment that the novelty of the change, the perception that the "fox [will no longer be] guarding the henhouse" and complainants' expectation of more expeditious processing by EEOC if they file complaints rather than resolve them in counseling, will cause a significant increase in charges over the current number of complaints filed per counseling contact.

The time frame within which to issue a reasonable cause decision is unrealistic. The bill requires EEOC to complete its investigation and determine whether there is reasonable cause to believe that the charge is true within 90 days after the charge is filed. When a request for information from the agency is called for, it could easily take half that time just to draft and serve the request and secure a response. Although EEOC would make every effort to expedite this process, it is not unreasonable for an agency to take 30 days to answer such a request and compile initial data sought by EEOC. Litigants in court are given a minimum of 30 days to answer interrogatories. In those instances when additional information is needed or if the agency did not provide all of the requested information, the remaining time could easily be expended on that task with no time left for analyzing the information, researching or drafting and finalizing the reasonable cause determination. Under the current section 717 process, no federal agency has reported that it is able to complete its investigations within 90 days. Even

if it could be assumed that a reasonable cause determination would require less investigative time and effort than a proposed disposition requires under the current scheme, the 90-day time frame is still unrealistic. In the private sector, EEOC investigates and issues reasonable cause determinations; very few of these reasonable cause determinations are issued by EEOC within 90 days.

Should EEOC fail to process charges within the 90-day time frame, a charging party would have the right to request a hearing by an administrative law judge. This could backlog the hearing process. On the other hand, the availability of sufficient resources will control in large part whether charges filed with EEOC will be processed within the statutory 90-day period. Insufficient appropriations or investigative resources will require additional administrative law judge resources since untimely investigated charges would result in more hearings.

The time frame within which to complete a hearing is unreasonable. Paragraph (6)(A)(i) page 6 requires a hearing to be completed within 180 days after it is requested. If there are any discovery disputes or subpoena enforcement actions, the 180 days will easily pass before a hearing can take place.

The time frame within which to decide appeals is unreasonable. Paragraph (C)(ii) page 8 requires EEOC to decide appeals within 90 days. Currently, the average time for processing appeals by EEOC's Office of Review and Appeals is 137 days. Unless the number of appeals is greatly diminished, EEOC will be unable to comply with this time limit.

It appears the total cost of implementing H.R. 1012 would be almost $44 million for just the required staffing. Added to this amount would be the cost for additional office space and support as well as training investigators in this new function.

If enacted, this bill would create a unique transfer of personnel from virtually every executive branch component to the EEOC. This situation would create monumental administrative and logistical problems for the agency, including the potential of unsupportable grades of the transferees causing a reduction-in-force to reduce the grades after the end of the one-year grace period provided in the bill.

We estimate approximately 1,048 new employees would be required to perform the functions of H.R. 1012. This figure incorporates employees transferring into the agency as well as new employees to make up for the EEO investigative work now being performed under contract for various federal departments and agencies.

increased responsibilities under the proposed legislation, e.g., in bringing civil actions for appropriate temporary or preliminary relief, in processing appeals and in conducting hearings and initiating enforcement proceedings in both the district and appeals courts. The transfer of personnel and records alone would create a personnel and recordkeeping nightmare. Without adequate authorized personnel and the funds necessary to fulfill commission responsibilities within the required time frames, H.R. 1012 will not work.

The proposed legislation limits the personnel EEOC will get and does not provide for additional funds. Although the ygencies will be losing responsibilities and personnel, no funds will be transferred from the agencies to EEOC under this provision to pay these people.

With the influx of new personnel, thought must be given to the increased space requirements imposed on the agency, especially in the Washington, D.C. area where a high number of federal employees work. We are including the space costs in our overhead figures based on staffing assumptions; we also know that the acquisition of one or more buildings to house the greatly expanded Washington Field Office would take time, as do all office space acquisitions.

EEOC's internal EEO office would be radically altered by passage of H.R. 1012. Special arrangements will be required to handle complaints filed by EEOC employees to avoid conflicts of interest.

The most serious management issues with the bill are:

- o the budgetary support required to meet the time frames of the bill;
- o failure to transfer or provide for all the personnel needed to perform the function;
- o control over and logistics of the agency personnel transfers;
- o recruiting and training efforts required within a short period of time; and
- o the need to obtain office space quickly for such a large number of new staff.

The effective date of the legislation is proposed as the first day of the second fiscal year after the date of enactment. That is a good idea because of the complexity of implementing the statute. However, all cases where there is no proposed disposition before the effective date of the act will be transferred to EEOC. Since there will be up to two years for agencies not to issue proposed dispositions on complex or inadequate investigations, perhaps the legislation also could build in an incentive for agencies to complete old cases before the effective date, such as barring the transfer of cases older than 180 days or requiring agencies to reimburse EEOC for processing transferred cases. An existing backlog would further impede the timely processing of new complaints.

It is unclear whether Congress intends to include retaliation in the proposed federal sector process. Paragraph (b)(3) page 3 repeals section 717(d) which incorporates the applicable provisions of section 706(f) - (k) into section 717. While most of these provisions have been added elsewhere by the proposed bill, this repeal may create doubts about whether section 717 prohibits retaliation. Section 717(a) does not mention retaliation and some authorities have cited the incorporation provision of section 717(d) as the basis for incorporating the private sector protection against retaliation into section 717. The proposed deletion of this incorporating provision could cast doubt upon the viability of retaliation allegations under section 717.

The definition of "government agency" is unclear when read with section 717(e). Paragraph (P) page 2 of the proposed bill defines "government agency" so as to exclude any entity of the federal government. This definition is inconsistent with current section 717(e). Section 717(e) uses the term "government agency" and is clearly intended to apply to federal agencies. Section 717(e) must be amended if this definition of "government agency" is included.

The bill contains language (e.g., if EEOC does not comply with a provision) that makes us vulnerable to Administrative Procedure Act lawsuits. Paragraph (5) page 5, subparagraph (A) states that if EEOC finds reasonable cause, it shall endeavor to eliminate the discrimination through conciliation efforts. Paragraph (B) states that if (i) the EEOC does not comply with subparagraph (A) or (ii) is unable to secure a conciliation agreement, the charging party can file a civil action or request adjudication by an ALJ. The meaning of paragraph (B)(i) is not clear; it adds to paragraph (B)(ii) some notion of illegality on the part of EEOC, i.e., failure to comply with the law. This paragraph should be deleted. The language will only serve to draw Administrative Procedure Act lawsuits against EEOC and divert resources from the statutorily prescribed process. This comment also applies to paragraph (C)(iii)(III) on page 9.

We note that H.R. 1012 does not provide for the processing of discrimination complaints under the Age Discrimination in Employment Act (ADEA) or for Equal Pay Act (EPA) complaints. Presumably, handicap discrimination complaints would, under Section 505 of the Rehabilitation Act, continue to be processed under the Title VII procedures. If not processed under Title VII procedures, ADEA and EPA complaints would have to be processed under other existing procedures, thereby creating a lack of consistency in the processing of all federal sector discrimination complaints.

EEOC cannot by regulation require that ADEA complaints be processed in the same fashion as Title VII charges under this bill. This will necessitate that two separate federal charge processes remain in effect and that agencies retain investigators and other persons involved in the current process to process ADEA complaints. It will substantially complicate if not frustrate the processing of complaints/charges alleging both age and a Title VII basis for the alleged discriminatory action.

We note that the bill provides EEOC with authority to sue other federal agencies in three instances: for appropriate temporary or preliminary relief pending disposition of a charge (paragraph 2(c)(3)(A) page 4); to enforce an order of an administrative law judge or the commission (paragraph 2(c)(6)(B)(v) pages 9-10); and to enforce a court order (paragraph 2(f) page 14). The Attorney General opposed the vetoed S. 508, Whistleblower Protection Act of 1988, which created an independent Office of Special Counsel with the authority to litigate against other federal agencies, on the ground that the litigation authority would have been an unconstitutional usurpation of the president's power to supervise and resolve disputes between his subordinates. Memorandum of Disapproval of the Whistleblower Protection Act of 1988 (Oct. 26, 1988). The bill granting EEOC litigation authority against other federal agencies raises the same issues as the vetoed Whistleblower Protection Act. In addition, the possibility of one executive branch agency such as EEOC suing another executive branch agency raises the unresolved constitutional issues relating to the case or controversy clause requirement.

Paragraph (v) page 9 allows the EEOC to file suit in order to enforce a commission or ALJ decision. Unlike paragraph (f) on page 14 which allows either the aggrieved party or the EEOC to file suit when an agency does not comply with a court decision, this provision does not allow the aggrieved party to sue when the agency does not comply with EEOC's decisions. The aggrieved party should be allowed to file enforcement actions. Like paragraph (f) on page 14, it should also allow the recovery of attorneys fees in such actions.

Paragraph 6(a) page 18 provides that operation of 5 U.S.C. subsection 7121(d) governing election of grievance procedure remains in effect. However, no corresponding provision is made to address mixed cases, those cases over which EEOC and the Merit Systems Protection Board (MSPB) have jurisdiction under 5 U.S.C. 7702 of the Civil Service Reform Act.

Administrative judges cannot under current civil service regulations be converted to administrative law judges. Establishment of an administrative law judge corps has been a major problem for agencies in the past. For example, the Civil Service Reform Act originally proposed that MSPB cases be heard by ALJs. For a variety of reasons, the ALJ requirement was never fully implemented.

The position of administrative law judge is much different than the administrative judges (attorneys) we now employ in the hearings units. ALJs are selected from OPM registers generally at the GS-15/16 level and carry with them virtual autonomy with respect to their duties and responsibilities. If ALJs are required by H.R. 1012, personnel costs will increase significantly and operational oversight of the hearings functions will decrease in similar proportion. We would recommend that from a budgetary viewpoint the ALJ position be changed to administrative judge or attorney in the language of the bill.

Paragraph (iv)(III) page 11 provides that a court of appeals shall sustain the EEOC's or an ALJ's findings if they are supported by a preponderance of the evidence. This is an unusual appellate standard of review because it allows the reviewer to substitute its own opinion for that of the lower tribunal, in essence allowing de novo review.

The meaning of the bill's reference to standards and procedures in 706(b) is unclear. Paragraph (D) page 6 states that the standards and procedures applicable under section 706(b) shall also apply to reasonable cause determinations in federal sector cases. The intent and meaning of this provision is not clear. Section 706(b) does not contain or mandate any specific standards or procedures governing reasonable cause determinations other than requiring EEOC to accord substantial weight to the findings of state and local agencies, a provision which is obviously inapplicable to federal sector complaints. If the intent is to require EEOC to use the same standards and procedures for federal complaints as it uses for private sector complaints, this is not possible within the time frames mandated by the bill. The private sector provisions of Title VII do not provide any maximum amount of time during which the EEOC must act. In fact, it provides at least 180 days during which EEOC

can process the charge before a charging party can go to court. None of the procedures currently in use by the EEOC would permit the investigation and issuance of reasonable cause determinations within 90 days. If the intent of this provision is to require EEOC to use the identical standards and procedures, the provision would require the use of procedures which would violate the section of the bill requiring action within 90 days.

The requirement that judgments be paid from agency funds would discourage settlements. Paragraph (j) page 15 requires that all judgments be paid from agency funds. This provision could discourage settlements by agencies seeking to prevail in litigation to avoid diminution of agency funds.

Finally, we believe that if Congress amended Section 717 in only two respects, the commission's stature and authority in federal sector cases would be enhanced sufficiently to render unnecessary any extensive changes in the process. Specifically, section 717(c)(6)(C)(vi) of the proposed legislation provides authority for the commission to order withholding of pay in enforcing its orders and could be added to section 717; and section 717(j) of the proposed legislation should be revised to provide for settlement at the administrative level to be paid from the judgment fund, and payments of orders to be paid from agency appropriations, and then incorporated into current section 717.

Sincerely,

Deborah J. Graham
Director of Communications
and Legislative Affairs

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
August 16, 1989

SPECIAL

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LEGISLATIVE REFERRAL MEMORANDUM

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SUBJECT: OPM proposed letter to Senator Wilson, sponsor of S. 38, the "Federal Employees Long-term Care Insurance Act of 1989."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than Wednesday, August 23, 1989.

Questions should be referred to Lisa Fairhall (395-3923), the legislative analyst in this office.

(Signed) Naomi R. Sweeney

Naomi R. Sweeney for
Assistant Director for
Legislative Reference

Enclosures

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

Honorable Pete Wilson
United States Senate
Washington, DC 20510-0502

Dear Senator Wilson:

Thank you for your kind letter of June 15. I very much appreciate the support you have given me as I enter upon my new responsibilities as Director of this agency, and I look forward to working with you in this capacity. I also appreciated your discussion concerning how your "Federal Employees Long-term Care Insurance Act of 1989," S. 38, would complement the Administration's goals of providing both more effective Federal personnel programs and better access to essential health services for all Americans.

S. 38, would amend the Federal Employees' Group Life Insurance (FEGLI) law to offer Federal employees an opportunity to elect long-term care (LTC) insurance coverage for themselves and their spouses at group insurance rates and, if an employee so chooses, to trade off a portion of basic FEGLI coverage to offset some of the LTC premium cost. The new LTC insurance would provide benefits under one or more plans to offset expenses associated with extended periods of nursing home confinement, or similar home health services, required by chronic, debilitating illnesses. OPM has been working in support of this proposal for more than 2 years, and continues to strongly support its enactment.

Four features distinguish S. 38 from the proposal OPM submitted to the last Congress: (1) a short title for the bill is inserted as part of the enacting clause; (2) a definition of "long-term care insurance," based on model LTC legislation prepared by the National Association of Insurance Commissioners, would be included in the law; (3) starting 5 years after the new program's inception, employees under age 50 would be able to qualify for LTC insurance in accordance with OPM regulations; and (4) insurance carriers would be required to reinsure portions of their LTC liability with other interested insurance companies under conditions OPM would determine. OPM agrees that these modifications to our earlier proposal are desirable.

In summary, S. 38 would accomplish several highly desirable objectives, without any additional cost to taxpayers. It would allow Federal employees to protect themselves and their spouses against the potentially catastrophic financial impact of LTC arrangements through a voluntary, low-cost program

Moreover, it would permit the Federal Government, as an employer, to provide leadership to other employers in confronting and resolving a growing national health care problem. I commend you, Senator, for your prompt action to introduce this bill in the 101st Congress and for your continuing efforts to gain ever-widening support for it. OPM is hopeful that Congress will take early and favorable action on this bill.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Constance Berry Newman
Director