The Federal Employee Advocate

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EEOC ADMINISTRATIVE JUDGE'S HANDBOOK

This issue of the Federal Employee Advocate provides our readers the handbook used by Administrative Judges of the EEOC (July 1, 2002 ed). The law continues to evolve each day with the issuance of new EEOC decisions. Before relying on this article, or any article on the law, the reader should consult an attorney experienced with the representation of Federal employees.

U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges (July 1, 2002)

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PREFACE

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing statutes which prohibit discrimination in federal employment. See Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. . 2000e et seq.; the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. . 621 et seq.; Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. . 791 et seq.; the Equal Pay Act of 1963, 29 U.S.C. . 206(d), which amended the Fair Labor Standards Act of 1938, 29 U.S.C. . 201 et seq. The Commission's regulations, set forth at 29 C.F.R. Part 1614, provide the basic framework for the processing of federal sector complaints of discrimination. Pursuant to these regulations, EEOC Administrative Judges are authorized to conduct hearings and issue decisions. 29 C.F.R. . 1614.109.

The purpose of this handbook is to provide guidance to Administrative Judges concerning the processing of hearing requests and the conduct of hearings on individual and class complaints of discrimination. This

handbook supplements the Commission's regulations and the EEOC Management Directive 110, November 9, 1999 (EEO MD-110).

A major objective of the EEOC hearings process is to ensure that fair and impartial hearings are held, and that well analyzed, legally and factually supported decisions are rendered on federal sector complaints of discrimination. In support of this objective, this handbook is designed to perform two critical functions: to provide basic guidance in the preparation for and conduct of federal sector hearings; and to provide a framework for procedural uniformity in the hearing phase of federal sector EEO complaint processing. This handbook has neither the force nor the effect of regulation, and adjudicatory error on appeal will not be established by failure to comply with a provision of this handbook.

Questions and comments concerning this handbook should be submitted to:

Equal Employment Opportunity Commission
Director, Office of Federal Operations
1801 L Street, NW
Washington, DC 20507

CHAPTER ONE

Initial Processing

I. **Commencement of the Hearing Process**

A. **Receipt and Docketing of the Hearing Request**

Absent unusual circumstances, within fifteen days of receipt of complainant's hearing request, the EEOC district or field office will send a docketing order to the complainant and the agency, in which it will provide the parties with an EEOC Hearing case number and will order the agency to forward a copy of the complaint file within the earlier of fifteen days of its receipt of the complainant's request for a hearing or receipt of the docketing order. EEO MD-110, 7-1. See Appendix A. If the district or field office receives a premature hearing request, it shall notify the parties that a hearing request can only be made after the completion of the agency's investigation or after at least 180 days following the filing of the complaint, whichever occurs first. Where a request for a hearing is

untimely filed, the request may be dismissed, the parties notified, and the complaint returned to the agency for the issuance of a final agency decision.

B. **Assignment of an Administrative Judge**

Within fifteen days of receipt of complainant's hearing request, the case should be assigned to an Administrative Judge of record. In the alternative, a supervisory Administrative Judge or a lead Administrative Judge may be assigned initially to faciliate case tracking and to ensure that appropriate orders can be issued (such as a Show Cause Order).

C. **Acknowledgment and Order**

As soon as practicable after receipt of the complaint file from the agency, the Administrative Judge should send an Acknowledgment and Order to: complainant; complainant's representative, if known; and the agency's designated point of contact or the agency's representative, if known. The Acknowledgment and Order identifies the Administrative Judge presiding over the complaint and outlines processing requirements. The standard Acknowledgment and Order appears at Appendix B. The standard Designation of Representative Form appears at Appendix C and should be issued at the same time the Acknowledgment and Order is issued. Administrative Judges should not modify the standard Acknowledgment and Order.

If the complaint file has not been received within the fifteen days set forth in the docketing order, the Administrative Judge may issue an Order to Show Cause for the agency's non- compliance which includes notice of the type of sanction the Administrative Judge contemplates imposing if the agency fails to proffer a sufficient explanation. The Order to Show Cause should grant the agency fifteen days from the date of receipt to respond, and the Administrative Judge should issue a ruling as promptly as possible upon the expiration of the response period. In the alternative, for example, the Administrative Judge may convene a conference with the parties to determine the status of the complaint file.

D. **Case Assessment**

The Administrative Judge should review the complaint file, including the investigative report, for procedural defects, potential dismissal issues and appropriateness for alternative dispute resolution efforts. See Chapter Three for further guidance regarding the referral of a complaint for alternative dispute resolution. An Administrative Judge may find it useful to schedule a conference to: (1) expedite disposition of the case; (2) establish early and continuing control so that the case will not be protracted because of lack of management; (3) discourage wasteful pre-hearing activities; (4) improve the quality of the hearing through more thorough preparation; or (5) facilitate the settlement of the case. An early conference that focuses on a discovery plan jointly submitted by the parties may make it easier for the Administrative Judge to address motions that may be filed as discovery proceeds. After such a conference, should the Administrative Judge conclude that a different time frame for discovery is required to protect the interests of a party, the Administrative Judge should issue a separate order clarifying that the discovery period will be more or less than ninety days. See Chapter Four for further guidance regarding discovery.

1. **Transferring a Case**

   If an Administrative Judge identifies a case that is not properly before that particular EEOC district or field office, such as a case falling outside the geographic jurisdiction of the office, he/she shall promptly notify and transfer the case to the appropriate office and notify both parties in writing of his/her action.

2. **Incomplete Report of Investigation**

   If the Administrative Judge reviews the investigative report and finds that the agency did not sufficiently comply with its obligation under 29 C.F.R. . 1614.108(b) to develop an impartial factual record from which a reasonable fact finder could determine whether discrimination occurred, or if no investigation has been conducted, the Administrative Judge retains jurisdiction over the complaint. In order to develop the record, the Administrative Judge may order the agency to complete an investigation within

a particular time period; allow the parties to develop the record themselves through discovery; issue orders for the production of documents and witnesses; or consider appropriate sanctions. The parties shall initially bear their own costs with regard to discovery, unless the Administrative Judge requires the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation as required by 29 C.F.R. 1614.108(e) or has failed to investigate the allegations adequately pursuant to EEO MD-110, Chapter Six.

E. **Ex Parte Communication**

EEOC Order Number 690.001 (January 30, 2002) sets forth the policy and procedures regarding ex parte communication during rulemaking and decision-making on federal sector cases. An ex parte communication is an oral or written communication between decision making personnel of the Equal Employment Opportunity Commission and an interested party to the proceeding which does not provide for the participation of the other interested parties.

Except when he/she is engaged in alternative dispute resolution, an Administrative Judge is prohibited from engaging in ex parte communication concerning the merits of a case from the time he/she learns that the complainant has requested a hearing until complainant has no further right of administrative appeal. If, for example, one party telephones the Administrative Judge and attempts an ex parte communication, the Administrative Judge should terminate the conversation. If appropriate, the Administrative Judge may convene a conference with both parties to discuss the matter raised. Another example of an ex parte communication might occur when the Administrative Judge receives a document that has not been properly served upon the other party. In this circumstance, the Administrative Judge should return the correspondence or send a copy to the other side. The Administrative Judge may wish to memorialize the ex parte communication.

Administrative Judges are permitted to engage in communication that does not concern the merits of the case but only references procedural or ministerial matters. Permissible communication includes, but is not limited to, inquiries regarding the status of the case, the date of a hearing, or the method for transmitting evidence. An Administrative Judge may also contact a party to request copies of documents that are illegible or miscopied.

II. Rulings

During ongoing case assessment, a number of matters may emerge that require the Administrative Judge's intervention, including, inter alia, consolidation or amendment of complaints, agency dismissed claims, spin-off allegations and disputes regarding official time. In all of these circumstances, the Administrative Judge's rulings must be clearly communicated to the parties in writing. Discovery disputes, which often surface early in the adjudicative process, are the subject of Chapter Four.

A. Consolidation of Complaints

Pursuant to 29 C.F.R. . 1614.606, Administrative Judges have the discretion to consolidate complaints filed by the same individual or to consolidate related complaints filed by different individuals.[(1)]

1. Consolidation Order

The decision to consolidate complaints may be made at any time within a reasonable period prior to the hearing. If the Administrative Judge decides to consolidate, he/she issues a Consolidation Order (see Appendix D), or otherwise places the consolidation ruling on the record, notifying all parties and specifying the agency complaint numbers which have been consolidated. Consolidated complaints are subsumed under one EEOC Hearing case number regardless of how many agency complaint numbers the case includes.

2. Expedited Investigative Report

The Administrative Judge has the discretion to direct the agency to conduct an expedited investigation of a complaint which the Administrative Judge has

consolidated with the complaint at bar. Expedited investigations may be ordered at the request of either party or sua sponte. In order to determine the parameters of the expedited investigation and how long a period of time the agency is granted to conduct it, an Administrative Judge may require a party requesting the expedited investigation to clearly identify the matters proposed to be investigated; state why an expedited investigation is the appropriate method of obtaining the information; identify and explain the time required for the expedited investigation; and include an investigative plan, stating with specificity the documents to be gathered and the witnesses to be interviewed. Prior to submitting the request, the party proposing the expedited investigation should confer with the opposing party and indicate in the request whether it is opposed. The non-moving party should respond with specific reasons when it believes that the scope of the investigation should be widened or narrowed.

3. **Complaints Pending Appeal**

In the event the Administrative Judge becomes aware that a matter or matters are pending on appeal which he/she believes should be consolidated with a complaint pending before the Administrative Judge, then he/she should contact the Complaint Adjudication Division of the Office of Federal Operations.

B. **Motions to Amend Complaints**

EEOC regulation 29 C.F.R. . 1614.106(d) authorizes Administrative Judges to rule on motions to amend complaints. In considering a motion to amend a complaint, the Administrative Judge should consider its impact on the existing claim, including when the amendment was brought to his/her attention and whether there will be any potential harm to the agency resulting from surprise. An Administrative Judge should issue a written ruling on a motion to amend a complaint within a reasonable period of time. The ruling should also be referenced in the Administrative Judge's decision on the merits of the complaint.

1. **Granting a Motion to Amend a Complaint**

The Administrative Judge may grant a motion to amend a complaint if the amendment consists of a new claim that is like or related to the claim(s) raised

in the pending complaint. EEO MD-110, 5-9. In deciding if a new claim is "like or related" to the original claim, a determination must be made as to whether the new claim adds to or clarifies the original claim, and/or could have reasonably been expected to grow out of the investigation of the original claim. EEO MD-110, 5-10.

2. **Denying a Motion to Amend a Complaint**

If the Administrative Judge concludes that the new claim is not like or related to any claims pending in the complaint, he/she should deny the motion and order the agency to commence processing the new claim as a separate EEO complaint. The order should instruct the agency that the filing date of the motion to amend the complaint is the date to be used to determine if initial EEO counselor contact was timely under 29 C.F.R. 1614.105(a).

3. **Scope of the Hearing**

When the Administrative Judge grants a motion to amend a complaint, the scope of the adjudication enlarges to encompass additional events or legal claims. In these situations, the Administrative Judge must decide the appropriate method for filling evidentiary voids. The Administrative Judge may order the agency to expedite an investigation within a particular time period, allow the parties to develop the record themselves through discovery, or issue orders for the production of documents and witnesses. In determining the appropriate method, the Administrative Judge may consider the size and nature of the evidentiary gap and the parties' abilities to conduct discovery to develop the record.

C. **Dismissals**

Administrative Judges may dismiss complaints pursuant to 29 C.F.R. . 1614.107 on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.[(2)] 29 C.F.R. . 1614.109(b). A complaint may also be dismissed on the grounds that the matter has been settled or withdrawn or because of the requirements for mixed case processing. The Administrative Judge shall caption the order "Order of Dismissal." See Appendix F.

1. **Agency Partial Dismissals**

The Administrative Judge shall review each complaint file to determine whether the agency has dismissed a portion of the complaint. 29 C.F.R. . 1614.107(b). The Administrative Judge shall provide complainant with the opportunity to rebut, in writing, the agency's reason(s) for dismissing a portion of the complaint prior to the hearing. If the complainant fails to oppose in writing the dismissal of a claim, the opportunity to have the Administrative Judge determine whether the dismissal was appropriate shall be deemed waived. Unless it is necessary to have oral argument on the dismissal at the hearing, the Administrative Judge shall issue a ruling affirming or reversing the agency's decision dismissing a portion of the complaint as quickly as possible in order to conserve administrative resources and the resources of the parties. The Administrative Judge's determination as to whether a claim was properly dismissed by the agency shall be reduced to writing and incorporated into the decision on the merits of the complaint.

Upon issuing a ruling reversing an agency's dismissal of a portion of the complaint, the entire complaint or all of the portions not meeting the standards for dismissal will continue in the hearing process. EEO MD-110, 5-24. The Administrative Judge may order the agency to conduct an expedited investigation within a particular time period, allow the parties to develop the record themselves through discovery, or issue orders for the production of documents and witnesses.

2. **Dismissals by the Administrative Judge**

The Administrative Judge shall review each complaint file to determine whether the complaint, or a portion of it, should be dismissed pursuant to 29 C.F.R. . 1614.107(a). If the Administrative Judge considers dismissal sua sponte, he/she must grant the parties an opportunity to respond to the proposed reason for dismissal. While notice is generally written, there may be circumstances where oral notice is acceptable. If the agency files a motion for dismissal, the Administrative Judge must grant complainant an opportunity to respond. If an Administrative Judge decides to dismiss a portion of a complaint, the

Administrative Judge must issue a ruling in writing and incorporate his/her determination into the decision on the merits of the complaint.

D. **Spin-Off Complaints**

"Spin off" complaints are complaints that allege dissatisfaction with the processing of a previously filed complaint and may be dismissed by the agency or the Administrative Judge pursuant to 29 C.F.R. . 1614.107(a)(8). In contrast, if the Administrative Judge is presented with an allegation of improper processing involving the complaint currently before him/her, the Administrative Judge should determine whether complainant proved that the allegation has merit, and if so, whether the defect had a material effect on the processing of the complaint.[(3)] If so, the Administrative Judge may impose sanctions on the agency. 29 C.F.R. . 1614.109(f)(3). Conversely, if the Administrative Judge finds that the agency's actions were inconsistent with its obligations under the 29 C.F.R. Part 1614 regulations but had no material effect on the processing of the complaint, the Administrative Judge, in the exercise of his/her discretion, may refer the matter to the Complaint Adjudication Division of the Office of Federal Operations. The Administrative Judge should document his/her determinations and actions in the hearing record.

E. **Official Time**

A complaint alleging the denial of official time is not a "spin off" complaint. If an Administrative Judge receives a complaint involving official time, he/she should require the complainant to identify with specificity the amount of time that was requested and how the time was to be used. The Administrative Judge should provide the agency an opportunity to respond. An initial oral ruling may be made, but that ruling must be memorialized in the record. The remedy for the improper denial of official time is to restore such personal leave as complainant may have used. EEO MD-110, 5-27. For further guidance concerning official time, see EEO MD-110, 6-15.

CHAPTER TWO

Official Documents Issued by an Administrative Judge

The titles of official documents issued by Administrative Judges need to be easily recognizable by parties who appear before the Commission. A document issued by an Administrative Judge must contain an appropriate caption of the case, should clearly identify the purpose of the document in its title, and should be signed by the Administrative Judge.

As stated in the Acknowledgment and Order, parties and representatives should be advised that motions must include a certification that he/she has made a good faith effort to resolve the matter with the non-moving party and, where appropriate, must indicate whether the non-moving party opposes the motion. In addition, the Administrative Judge may direct the parties to submit a draft order for the Administrative Judge if the motion is approved.

Because these are effective case management tools, parties and representatives should be reminded of these requirements if they are not heeded. After appropriate warning, future defective motions by a party, whether in the same or in a subsequent case, may be denied. In appropriate circumstances, the party should be provided an opportunity to cure the defect if it would not necessarily delay the proceeding. The Administrative Judge has the discretion to toll the deadlines for submission of motions in such circumstances.

I. **Non-dispositive Rulings**

The title of a non-dispositive ruling should appear in capital letters and identify the ruling being issued. When issuing instructions that require a party to take an action to comply, the title of the ruling should contain the word "Order." When memorializing conversations or providing information that does not require a party to take action, the title of the ruling should contain words like "Memorandum" or "Notice." Where the ruling both provides information and instructs one or both parties to take an action to comply, the title should contain words such as "Notice And Order."

The title should concisely state the purpose of the ruling in a way that differentiates it from other rulings and, when responding to a motion or request from a party, references the party's submission. Thus, the Administrative Judge should avoid the use of more generic titles such as "ORDER," "MEMORANDUM," or "MEMORANDUM AND ORDER" that may be used repeatedly within the same case. Instead, a more descriptive title should be used. For example, an order might be titled: "ORDER DENYING AGENCY REQUEST FOR AN EXTENSION OF TIME TO COMPLETE DISCOVERY"; "ORDER GRANTING COMPLAINANT'S MOTION TO COMPEL"; "ORDER TO SHOW CAUSE"; or "PROTECTIVE ORDER." A memorandum might be titled: "MEMORANDUM OF PRE-HEARING CONFERENCE"; "MEMORANDUM REGARDING DISCOVERY"; "SECOND PRE-HEARING MEMORANDUM AND ORDER"; or "MEMORANDUM OF STATUS CONFERENCE AND ORDER TO SUBMIT PRE- HEARING COMMENTS."

All rulings must clearly state what actions are required by the parties and the date by which such actions must be completed. In setting deadlines, the Administrative Judge should avoid ambiguous language such as "immediately" or "as soon as practical." Rather, the Administrative Judge should use specific dates or easily calculated deadlines such as "within ten days of receipt of the discovery request." An Administrative Judge should use the following language in an Order setting a due date for a responsive filing:

> For timeliness purposes, it shall be presumed that the parties received this ORDER within five (5) calendar days after the date it was sent via first- class mail.

II. Dispositive Rulings

A dispositive ruling on any matter that may be appealed to the Office of Federal Operations must be in one of the following forms: (1) a decision on the merits titled "DECISION"; or (2) an order dismissing the complaint in its entirety titled "ORDER OF DISMISSAL." A dispositive ruling on summary judgment on motion of a party or sua sponte should be titled "DECISION" and should indicate in the procedural history that the decision is being issued as a result of a summary judgment determination. A grant of partial summary judgment should be in the form of an "ORDER GRANTING PARTIAL SUMMARY JUDGMENT" or "ORDER GRANTING IN PART AND DENYING IN PART THE [PARTY'S] MOTION FOR SUMMARY JUDGMENT."

A. Decision on the Merits

A decision on the merits may not necessarily close the proceeding before the Administrative Judge or trigger a right to appeal to the Commission. For example, a decision favorable to a complainant may be followed by a hearing on the issue of damages or may require submissions regarding attorney's fees and costs.

So that the parties understand when a matter is subject to agency final action and appeal, the Administrative Judge shall issue an "ORDER ENTERING JUDGMENT FOR [PARTY]" at the conclusion of the hearing process. See Appendix G. Thus, it may be issued contemporaneous with a decision favorable to the agency or with a decision favorable to the complainant where there is no further need to address either the subject of damages or attorney's fees.

Otherwise, it will be issued at the appropriate time when the Administrative Judge takes an action that removes his/her jurisdiction over the case. The Order Entering Judgment must be accompanied by a Notice To The Parties. See Appendix H.

B. **Order of Dismissal**

An Order of Dismissal must clearly identify the reasons the complaint is being dismissed and must be accompanied by a Notice To The Parties. See Appendices F and H.

An Order of Dismissal is appropriate where the Administrative Judge dismisses a complaint pursuant to: (1) 29 C.F.R. . 1614.109(b); (2) a sanction under 29 C.F.R. . 1614.109(f)(3); (3) a voluntary withdrawal of the complaint; (4) a settlement of the complaint; (5) requirements for mixed case processing;[(4)] or (6) any other determination by the Administrative Judge that further consideration of the complaint is not appropriate.

III. **Commission Precedent**

Administrative Judges must follow Commission policy and precedent in adjudicating their cases. When there is a conflict between the Commission's position and that of the Circuit Court in the jurisdiction where the Administrative Judge sits, an Administrative Judge must follow Commission policy, but may acknowledge that the Circuit Court has reached a different conclusion.

CHAPTER THREE

Settlement and Alternative Dispute Resolution

I. **General**

The Commission encourages parties to seek informal resolution of their complaints. These informal methods may include:

- settlement conferences or mediation conducted by an Administrative Judge or other District Office staff;

- voluntary alternative dispute resolution programs as agreed to by the parties; and
- mediation programs conducted by volunteer mediators.

Recognizing the success of mandatory settlement processes, the Administrative Judge may order the parties to meet for the purpose of exploring settlement in good faith through mediation or other alternative dispute resolution methods. Informal resolution methods involve time and resources, and the parties must attend such efforts in good faith with the requisite authorization to resolve complaints. The Administrative Judge may not order the parties to settle. The Administrative Judge has discretion to terminate informal resolution processes (e.g., upon notice from a party of a hardship, earlier unsuccessful attempts at resolution, or other reasons as deemed appropriate by the Administrative Judge). When an Administrative Judge terminates the informal resolution process, the complaint(s) shall be returned to the formal hearing process, except under circumstances where sanctions (e.g., due to contumacious conduct during a settlement conference) lead the Administrative Judge to consider other alternatives. Cases that are referred for informal resolution attempts may be held in abeyance in the case tracking system if it is anticipated that such attempts will take at least thirty days. The Administrative Judge should notify the Supervisory Administrative Judge or appropriate Commission staff if the case is to be held in abeyance, for appropriate coding in the case tracking system.

Administrative Judges have authority to regulate the conduct of the parties at any stage of the hearings process, including settlement. The Administrative Judge has discretion to order appropriate sanctions consistent with the guidance at 29 C.F.R. . 1614.109(f)(3) and in EEO MD-110, Chapters 6 and 7.

II. Settlement Conferences

Settlement conferences may be conducted by an Administrative Judge who is not assigned as the Administrative Judge of record (the "Settlement Judge") or by the "Administrative Judge of record" in the case. The agency must designate an individual with settlement authority to attend settlement conferences or be immediately accessible to the agency representative during such conferences. EEO MD-110, 1-2.

A. Settlement Conference Conducted by a "Settlement Judge"

The "Administrative Judge of record" may require the parties to participate in a settlement conference to be conducted by a different Administrative Judge (the "Settlement Judge"). The Settlement Judge has discretion to determine the location of the settlement conference. The Settlement Judge may order the parties to appear at a specific location. Alternatively, the Settlement Judge may permit participation by telephone (e.g., when the parties or the Settlement Judge reside in different geographic locations).

During a settlement conference, the Settlement Judge may provide the parties with substantive and legal information about what the disposition of the case might be if it were to go to an administrative hearing or to court. He/she may provide the parties with possible settlement ranges for their consideration. EEO MD-110, 3-20. The Settlement Judge may hold joint or individual discussions with the parties in an effort to settle the case. Generally, the Settlement Judge must not disclose anything said or done during settlement conferences to the Administrative Judge of record. Exceptions include a recommendation for sanctions, a threat of imminent physical harm, or incidents of actual physical violence that occur during the settlement conference.

B. **Settlement Conference Conducted by Administrative Judge of Record**

Since the Administrative Judge of record will adjudicate the complaint if the parties do not settle it, unlike an appointed Settlement Judge, the Administrative Judge of record can only engage in ex parte communications regarding settlement with the express consent of the parties. Consent of a party to such communication may be withdrawn at any time. An Administrative Judge of record must be careful to encourage settlement without suggesting that he/she has made determinations which should only be made after evaluating all of the evidence in the case. It is permissible for the Administrative Judge to explain to the parties their respective burdens, the evidence usually required to prevail on cases of the type brought by the complainant, and the defenses established by law to avoid agency liability. However, the Administrative Judge should avoid discussions about the specific facts of the instant case and should instead reference generic fact patterns.

C. **Settlement Agreement**

If the parties reach an agreement, the agreement must be reduced to writing. In many cases, the Administrative Judge may offer to assist the parties to help them clearly define the terms of the agreement and legal requirements, such as the Older Workers' Benefits Protection Act (OWBPA). The agreement should specifically identify the complaints which it purports to resolve. In the event that an agreement is read into the record during a hearing, the Administrative Judge shall ascertain on the record when the parties intend to be bound by the agreement (e.g., immediately or only after it is reduced to a writing executed by both parties). The Administrative Judge is not a party to the agreement and therefore must not sign the agreement.

D. **Breach of Settlement Agreement**

The Administrative Judge should advise the complainant of his/her rights under 29 C.F.R. 1614.504 in the event the complainant later concludes that the agency has failed to comply with the terms of the settlement agreement.

Referral to Alternative Dispute Resolution Programs

Both agencies and complainants realize many advantages from participating in Alternative Dispute Resolution (ADR) procedures. ADR provides an opportunity for informal resolution of disputes in a mutually satisfactory fashion and affords both parties options that are not available in an adversarial proceeding. It also costs less than traditional adversarial proceedings.

The Administrative Judge may have an option to refer a complaint to one of many possible ADR programs. These programs range from the use of shared neutrals, mediators, Postal Service REDRESS II mediators, other agency ADR programs, and other EEOC staff. As noted above, these cases may be held in abeyance in the case tracking system when referred to one of these programs if it is anticipated that the ADR efforts will last at least thirty days. The Administrative Judge should direct the parties to report the results of the ADR effort to him/her. If ADR was successful, a copy of the settlement agreement should be provided to the Administrative Judge. In the event that ADR is unsuccessful, no additional information should be provided, and the

Administrative Judge should continue processing the case from the point prior to referral to ADR.

The Administrative Judge may find that the core principle of confidentiality in ADR is compromised by a party's attempt to use statements made in ADR during the evidentiary proceedings. In such a situation, the Administrative Judge should advise the parties that statements made during the ADR session are confidential and cannot be used as evidence or as a basis to obtain discovery in that area.

If a party raises systemic problems with an agency ADR program with the Administrative Judge, then the Administrative Judge may advise the parties to contact the Director, Special Services Staff, in the Office of Federal Operations.

CHAPTER FOUR

Discovery

I. **Generally**

The authority to conduct pre-hearing discovery is set forth in 29 C.F.R. . 1614.109(b). Chapter 7 of EEO MD-110 provides guidance on the procedures and methods regarding the conduct of discovery in the federal sector complaint process. Neither the Commission's regulations nor EEO MD-110 strictly follows the Federal Rules of Civil Procedure.[(5)] However, when a discovery question is not answered by the Commission's regulations, guidance, or federal sector decisions, the Administrative Judge may use the Federal Rules as a guide in determining the proper course of action. The Administrative Judge may decide, sua sponte or on motion of a party, to bifurcate the discovery process, restricting initial discovery to liability and then authorizing additional discovery regarding remedies only upon a finding of discrimination.

Discovery permits the parties to obtain and develop evidence regarding any matter relevant to the subject matter of the pending action, whether it relates to the claims or defenses of the party seeking discovery or the claims or defenses of any other party. The Acknowledgment and Order grants the parties the authority to commence discovery. Discovery should proceed with minimal intervention by the Administrative Judge. EEO MD-110, 7-16. While discovery is generally permitted, in appropriate circumstances, the Administrative Judge has the discretion to limit or preclude the parties from engaging in discovery.

II. Methods of Discovery

A. Written Interrogatories

Interrogatories are written questions directed to a party that require written answers by oath or affirmation. They are generally used to obtain basic information in advance of, or instead of, depositions. A party, for example, may elect to propound interrogatories to the opposing party, rather than depose a witness with confined knowledge of the relevant events. Without prior authorization from the Administrative Judge, a party may propound no more than one set of interrogatories, and this set shall contain no more than thirty interrogatories, including sub-parts. EEO MD-110, 7-17. In considering a request for additional sets of interrogatories, the Administrative Judge shall consider the number and complexity of the claims in dispute, especially in a case of amended or consolidated complaints.

B. Requests for Production of Documents

A party may request documents within the possession or control of the opposing party. Under the Federal Rules, the party to whom the document request is made is required to produce and permit the requesting party, or someone acting on their behalf, to inspect and copy any designated documents (e.g., writings, graphs, charts, photographs). See Fed. R. Civ. P. 34. As a practical matter, parties typically provide copies of the requested documents in lieu of inspection.

Absent permission from the Administrative Judge, parties are confined to one set of thirty document requests, including sub-parts. EEO MD-110, 7-18. Document requests must be specific and discrete. Combining several groups or classes of documents into a single request in an effort to exceed the maximum number of requests should not be permitted. However, multiple documents may need to be produced in response to a single request.

C. Depositions

Oral depositions consist of questions under oath to a witness with knowledge of matters relevant to the dispute. Parties are entitled to conduct a reasonable

number of depositions. What is reasonable will depend on the extent of the report of investigation and the scope and complexity of the complaint. The Administrative Judge may issue orders as appropriate to control the number and length of depositions in response to a discovery dispute.

1. **Attendance at Depositions**

   Unless otherwise ordered by the Administrative Judge, the party noticing the deposition pays for the deposition. EEO MD-110, 7-17. Deponents are required to appear for properly noticed depositions. Agencies are required to make current federal employees available for depositions and to grant the deponent official time. EEO MD-110, 7-18. Failure to appear may result in the non-appearing party bearing the expense for the missed session, or more severe sanctions. EEO MD-110, 7-17. However, the attendance of witnesses who are not current federal employees is voluntary and cannot be compelled.

   A notice of deposition must specify the date, time, and place of the deposition. Depositions may be taken by any method upon which the parties agree, provided the deposition is recorded by a court reporter. The opportunity for cross examination must be provided. In some circumstances where the deponent is unavailable for the hearing, the deposition transcript may be admitted in lieu of live testimony.

2. **Objections During Depositions**

   During the course of a deposition, the parties may note appropriate objections on the record, but, notwithstanding the objection, the deponent is required to respond unless the objection is based on a privilege. In those situations where the parties cannot resolve the dispute themselves, they may request the Administrative Judge to rule on the objection. The parties may telephone the Administrative Judge during a deposition to

request a ruling on an objection or regarding a dispute over a procedural concern such as the conduct of counsel or the length of a deposition. If the Administrative Judge is not available, another Administrative Judge may be designated to handle the matter.

The Administrative Judge should attempt to resolve the dispute during the deposition by ruling on the objection or, if possible, by helping the parties reach a compromise on the scope of the questioning. The Administrative Judge should make the ruling "on the record" of the deposition to ensure that the court reporter transcribes it. If the dispute involves too complex a question to permit an immediate ruling, the Administrative Judge may instruct the parties to brief the issue. The Administrative Judge should notify the parties that if he/she overrules the objection, he/she will provide an opportunity to exchange the information at issue, either by allowing the deposition to continue at a later date, interrogatory, or other suitable means.

D. **Requests for Admissions**

A party may submit requests that the opposing party admit or deny, in writing, factual statements. A request for admission is a mechanism to narrow the controversy at the hearing by establishing facts beforehand. Any matter admitted is deemed conclusively established for the purpose of the pending dispute. Absent authorization by the Administrative Judge, requests for admissions of fact shall be limited to thirty, including all discrete sub-parts. EEO MD-110, 7-18.

E. **Stipulations**

Stipulations may only address factual matters. The parties may not stipulate to conclusions of law. See McDonald v. Secretary of Health and Human Services, EEOC Appeal No. 01952343 (August 7, 1996), request for reconsideration

denied, EEOC Request No. 05960788 (February 5, 1998). The Administrative Judge shall ensure that any stipulations are made part of the hearing record.

F. **Medical Examinations**

Although Administrative Judges have the authority to order medical examinations, they should only do so in very limited circumstances. When a party, usually the agency, requests a medical examination (physical or psychological), the Administrative Judge should consider several factors: (1) whether the need for the evidence outweighs the invasive nature of the examination; (2) alternative methods of obtaining the information; (3) the independence of the medical examination; and (4) the availability of a medical professional skilled in the particular area. For example, the Administrative Judge may require the requesting party to identify more than one physician competent to conduct the exam and permit the responding party to select from the pool. Generally, the Administrative Judge should not permit counsel to be present during the examination. EEO MD-110, 7-11.

G. **Informal Discovery**

The Administrative Judge should encourage the parties to cooperate and to participate in informal methods of discovery because it provides the parties with an opportunity to narrow the scope of the hearing and reduce litigation costs. EEO MD-110, 7-18. When information gathering and hearing preparation takes place outside the scope of formal discovery, agencies may not restrict access to non-management employees who voluntarily cooperate with informal discovery.

III. **Time Frames for Discovery**

The Acknowledgment and Order provides for discovery to be completed within ninety days of receipt of the order. The discovery period should remain ninety days except where, in a particular case, the Administrative Judge determines that a different time frame for discovery is required to protect the interests of a party or when such a change would materially expedite the completion of the hearing process. If a party requests an alternative schedule, the

Administrative Judge should consider the complexity of the case, the relevant concerns of the parties, and the 180- day time limit for issuing a decision.[(6)]

Unless otherwise ordered by the Administrative Judge, the exchange of requests for written discovery (e.g., interrogatories, requests for production of documents, and requests for admissions) must be made within twenty days of the start of the authorized discovery period. EEO MD-110, 7-19. Failure to initiate written discovery within the first twenty days may be deemed a waiver of the right to pursue discovery.

IV. Ruling on Motions to Compel and Protective Orders

A. Motions to Compel

Administrative Judges should rule on a motion to compel within twenty days of receipt of the other party's statement in opposition to the motion or the deadline for such opposition if none is ultimately filed. The Administrative Judge should deny the motion to compel when it does not include the following: (1) a copy of the request in dispute; (2) the response to the discovery request, if any; and (3) the argument in support of the motion. In addition, where the motion to compel does not include certification that the moving party conferred with the opposing party or made a good faith effort to do so to attempt to resolve the dispute, then the Administrative Judge has the discretion to deny the motion without further consideration. In denying a motion to compel, the Administrative Judge should include a brief explanation for the basis of his/her ruling.

An Administrative Judge may deny a motion to compel if the discovery request is irrelevant, over-burdensome, repetitious, or if the information sought is privileged. These determinations must be made on a case-by-case basis. In making these determinations, the Administrative Judge should consider Commission policy and precedent and established federal case law.

B. The Privacy Act

Most documents relevant to the adjudication of an EEO complaint are available during discovery. If an agency asserts an objection based upon the Privacy Act,

the Administrative Judge must determine whether the agency's reliance on the Privacy Act is appropriate.

1. **System of Records**

As an initial matter, the agency is required to demonstrate that the requested documents are in fact kept in a "system of records" subject to the Privacy Act. 5 U.S.C. . 552a(a)(5)(definition of "system of records"). Not all government records are maintained in systems of records subject to the Privacy Act. Unless the agency can show that the requested document is maintained in a Privacy Act system of records, the agency cannot invoke the Privacy Act as a defense. For example, a discovery request for relevant job applications cannot be resisted on Privacy Act grounds if job applications are filed by vacancy announcement number and thus not maintained by the agency in a Privacy Act system of records.

Many of the records sought in discovery during an EEOC administrative hearing are likely to be contained in three government-wide systems of records which are subject to the Privacy Act: (1) EEOC/GOVT-1, EEO in the Federal Government Complaint and Appeal Records, which includes EEO complaint files maintained by the agency where the complaint was filed; (2) OPM/GOVT-1, General Personnel Records, which includes general personnel records of federal employees; and (3) OPM/GOVT-2, Employee Performance File System Records, which contains performance review and rating records.

2. **Routine Use Exceptions**

If the agency establishes that the requested document is in fact maintained in a Privacy Act system of records, it must be determined whether it is nevertheless discoverable in the EEO complaint adjudication process under any of the "routine use

exceptions" listed in the applicable system notice. 5 U.S.C. . 552a(b)(3). Because of the routine use exceptions that apply to EEO complaint files and employee personnel records, information that is maintained by an agency in any of its EEO complaint files or in employees' official personnel folders cannot be withheld on the basis of the Privacy Act. Although routine use exceptions permit agencies to disclose records, they do not require such disclosure.

EEOC/GOVT-1, OPM/GOVT-1, and OPM/GOVT-2 Systems of Records each have two routine uses that permit disclosure of records during discovery in an EEO hearing.[(7)] One of these routine uses permits disclosure of information during discovery that is relevant to the subject matter involved in a pending judicial or administrative proceeding.[(8)] Another routine use in all three systems of records permits disclosure of information to another federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a federal agency, when the government is a party to the judicial or administrative proceeding.[(9)]

As an example, during discovery on a complaint alleging sexual harassment by a co- worker, the agency cannot invoke the Privacy Act to resist discovery of the names, telephone numbers, and places of employment of those who filed sexual harassment complaints involving the same co-worker. The routine use exceptions cited above permit such discovery, depending on whether the requested information is retrievable by the agency from other EEO complaint files or from the co-worker's official personnel folder. The agency may be able to successfully argue that the requested information is not retrievable because it is kept only in EEO complaint files which are not maintained or catalogued by the names of the accused, but if the agency maintains a data base for EEO investigative reports which can

be searched by names, the Administrative Judge must determine whether the information is non-repetitive, material evidence and not unduly burdensome to retrieve. If the complainant seeks discovery regarding discipline issued to the co- worker, the agency cannot resist discovery under the Privacy Act if the disciplinary record is maintained in the co-worker's official personnel folder.

3. **5 U.S.C. 552a(b)(1)**

Finally, as a last resort, if a requested document is maintained in an agency's Privacy Act system of records but there is no routine use exception permitting its disclosure, the Administrative Judge should determine whether the disclosure is nevertheless permitted under any other statutory exception listed in 5 U.S.C. . 552a(b). For example, 5 U.S.C. . 552a(b)(1) permits disclosure of records to persons within the same agency that maintains the record if they have a need for the record in the performance of their official duties. The "need to know" exception thus allows EEO investigators to collect information from various records within an agency during an EEO investigation. If an agency, in reliance on the Privacy Act, objects to the disclosure of a record during discovery, the complainant cannot argue for the release of the record based on the "need to know" exception. However, the Administrative Judge could order the agency to conduct a supplemental investigation. The EEO investigator could then obtain a copy of the disputed record under the "need to know" exception and place it in the investigative file.

C. **Protective Orders**

During the course of discovery, one of the parties may move for a protective order. A protective order may limit disclosure, dissemination, or reproduction of information obtained through the discovery process. The Administrative Judge may grant a protective order to shield a party or person from annoyance,

embarrassment, or undue burden or expense or provide an alternative means for resolving a discovery dispute. In addition, the Administrative Judge may grant a protective order to protect proprietary, fiduciary, classified, or privileged information. The Administrative Judge may also sanction a party for violating a protective order.

The issuance of a protective order does not cure a Privacy Act problem. If there is no routine use or other exception in the statute that permits disclosure of a record to the complainant, an agency may continue to resist disclosure because the protective order will not necessarily excuse the agency from a Privacy Act violation. In appropriate circumstances, the Administrative Judge may require the complainant to set forth with specificity in his/her motion to compel, why he/she believes that the disclosure of the information sought would not violate the Privacy Act.

CHAPTER FIVE

Summary Judgment

I. **Generally**

Either party may file a motion for summary judgment, referred to in the regulations as a decision without a hearing. 29 C.F.R. . 1614.109(g). An Administrative Judge may consider summary disposition sua sponte. The Administrative Judge may grant a motion for summary judgment in its entirety, or where appropriate, may grant partial summary judgment which limits the issues in dispute. 29 C.F.R. 1614.109(g); EEO MD-110, 7-9.

A statement of undisputed material facts must appear in: (1) a party's motion for a decision without a hearing; (2) an Administrative Judge's notice of intent to a decision without a hearing; and (3) an Administrative Judge's decision issued without a hearing. This will provide both parties a full and fair opportunity to respond and will permit the Commission to have the benefit of a complete record if the final agency action is appealed.

II. **Procedure**

A. **On Motion of a Party**

Although the regulations provide that a motion for summary judgment may be filed fifteen days prior to the date of the hearing, the regulations also grant the Administrative Judge the discretion to require an earlier filing period. 29 C.F.R. . 1614.109(g). In setting deadlines for summary judgment submissions, an Administrative Judge should ensure that the deadlines allow him/her to issue a ruling on the motion sufficiently prior to the hearing. This will ensure that the parties do not engage in extensive preparation for a hearing that may not take place. In most instances, an Administrative Judge should: (1) require a party who believes that some or all material facts are not in genuine dispute to file a motion in support of this contention with the Administrative Judge fifteen days after the close of discovery; (2) grant the non-moving party fifteen days to file a response; and (3) grant the moving party five days to file a reply. In the event that a motion is filed shortly before a scheduled hearing, the Administrative Judge should evaluate the impact of the motion on the hearing process and the non-moving party. As appropriate, the Administrative Judge may entertain oral argument on a motion at the hearing prior to receiving testimony.

In the event that a motion is filed prior to the completion of discovery, the Administrative Judge should consider a response by the non-moving party that evidence being sought through discovery is necessary to adequately respond to the motion for summary judgment. Such a response must identify with specificity the nature of the information sought. Where the response does not adequately explain what information is being sought, the Administrative Judge may request further explanation before ruling on the motion for summary judgment.

In circumstances where a motion for summary judgment is filed before the parties have engaged in any discovery, or after the close of discovery, the Administrative Judge may provide the parties an opportunity for limited discovery or some other appropriate means of information gathering specifically designed to respond to the motion.

B. **On Administrative Judge's Sua Sponte Determination**

1. **Contents of Notice**

The Administrative Judge's notice to the parties regarding his/her intent to issue a decision without a hearing must: (1) indicate in whose favor summary judgment is being proposed; (2) identify the applicable legal standards and burdens of proof with respect to each claim; (3) set forth the legal standards for issuance of a decision without a hearing; (4) identify the undisputed material facts which appear to be dispositive of the case; and (5) direct the parties to cite to specific evidence contained in the report of investigation which creates a factual dispute regarding a material issue and to include any relevant documentary evidence or witness statements, interrogatory answers, admissions, or other supporting materials from outside the report of investigation, with an explanation of the relevance of all materials submitted. The Administrative Judge need only identify those undisputed material facts which would be dispositive of the case. For example, in a retaliation case, the record may show that numerous facts are in dispute, including why a letter of warning was issued or why other comparative employees were not disciplined. However, where the record does not contain evidence of any prior protected activity, the Administrative Judge may identify only that fact as being material to the disposition of the case. A model notice is attached as Appendix E.

2. **Response**

Both parties have fifteen days from receipt of the Administrative Judge's sua sponte notice to submit a response. In addition, both parties should be granted five days from receipt of each other's responses to submit a reply. The Administrative Judge should consider a response by a party that evidence being sought through discovery is necessary to adequately respond to the sua sponte notice and may provide the parties an opportunity for limited discovery or some other appropriate means of information

gathering specifically designed to respond to the sua sponte notice.

3. **Failure to Respond/Untimely Response to Notice**

A party's failure to respond to the Administrative Judge's notice of intent to issue a summary disposition is not grounds for a sanction. Where a response is not timely filed, the Administrative Judge should exercise discretion as to whether to consider the response, taking into account, among other things, whether good cause has been shown for the delay.

C. **Oral Argument or Testimony on Summary Judgment Motion**

At his/her discretion, the Administrative Judge may provide notice requiring the parties to appear and present oral argument or testimony on a motion for summary judgment. This may be particularly useful where a motion for summary judgment has been filed but it is unclear whether certain facts are in dispute, or where a pro se complainant or other party has filed an ambiguous response. The Administrative Judge may direct the agency to provide a court reporter. The oral argument may be in person or via telephone.

D. **Form of Decision**

1. **Contents**

While there is no required format for a decision without a hearing, the Administrative Judge's decision should include: (1) a statement of the claims raised; (2) identification of the parties' submissions; (3) a statement of the undisputed material facts; (4) a statement of applicable substantive law; and (5) the Administrative Judge's legal conclusions and supporting rationale with respect to each claim. The Administrative Judge's decision should reference the witness statements or other documents submitted by the parties, if relied upon in the decision. Matters

fully addressed in the record or pleadings may be incorporated by reference.

2. **Partial Summary Judgment**

Where the Administrative Judge grants partial summary judgment, he/she may issue a decision explaining his/her rationale, or may notify the parties that partial summary judgment is granted and memorialize the reasons for granting partial summary judgment at the time of the decision on the remaining issues. A Notice To The Parties should not be issued with a partial summary judgment decision because appeal rights do not attach until the Administrative Judge issues the decision that completes the hearing process.

CHAPTER SIX

Sanctions

I. **Generally**

The Administrative Judge's authority to issue sanctions is set forth at 29 C.F.R. 1614.109(f)(3). Additional guidance can be found in EEO MD-110, 7-9 and Rules 11 and 37 of the Federal Rules of Civil Procedure. In appropriate circumstances, an Administrative Judge may sanction a party for its conduct. Sanctions should be tailored to deter the party from similar conduct in the future and, if warranted, to equitably remedy any harm incurred by the opposing party. Sanctions should not be so severe that they result in inequity, nor should they be so lenient that they fail to serve as a deterrent. If a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, it may constitute an abuse of discretion to impose a harsher sanction. See Hale v. Department of Justice, EEOC Appeal No. 01A03341 (December 8, 2000). Administrative Judges must distinguish between conduct that does not warrant the imposition of a sanction and conduct which does. For example, a complainant's failure to submit a Designation of Representative Form or failure to respond to a notice of the Administrative Judge's intent to issue a decision without a hearing is not the type of conduct which an Administrative Judge should sanction. Id. However, a party's failure to obey an Administrative

Judge's order to produce a document during discovery or to expedite an investigation may be cause for a sanction.

An Administrative Judge's discretion to issue sanctions is premised on a party's failure to show good cause for the conduct at issue. There is no requirement to show that the other party was "substantially prejudiced" or that the non-complying party exhibited bad faith, although such a showing may be a factor in an Administrative Judge's determination of the appropriate sanction. See Cornell v. Department of Veterans Affairs, EEOC Appeal No. 01974476 (November 24, 1998).

Administrative Judges should consider whether the conduct at issue constitutes an attack on the integrity of the EEO process. In such a situation, a sufficiently severe sanction is appropriate. For example, where an agency repeatedly fails to comply with an Administrative Judge's order to complete an expedited investigation, the Administrative Judge could issue a decision in favor of the complainant as a sanction. See DaCosta v. Department of Education, EEOC Appeal No. 01995992 (February 25, 2000).

II. Rulings on Sanctions

A. Order to Show Cause

An Order to Show Cause directs a party to explain why a potential sanction should not be imposed. In the event that a party did not receive sufficient notice that its conduct could be sanctioned and what potential sanctions may be imposed, and did not have an opportunity to explain its conduct, an Administrative Judge must issue an Order to Show Cause, addressing these three factors. In lieu of a formal Order to Show Cause, notice and opportunity to respond could occur at the hearing or during a telephone conference. An Order to Show Cause is not necessary where a party has filed a motion for specific sanctions and the non-moving party has had an opportunity to respond.

B. Imposing Sanctions - Sanction Order

If sanctions are issued against the offending party, the Sanction Order must contain the following information: (1) a background statement of facts giving rise to the Sanction Order; (2) a brief narrative of the parties' responses to the

motion for sanctions or to the Order to Show Cause; and (3) the reason for and type of sanction imposed by the Administrative Judge.[(10)] Since there are no interlocutory appeals, the implementation of monetary sanctions imposed by the Administrative Judge during the hearing process must be incorporated as part of the Administrative Judge's final decision for compliance and appeal purposes.

Factors an Administrative Judge should consider in making a sanction determination include: (1) the degree of culpability; (2) prejudice the non-compliance had on the opposing party; (3) the significance of delaying justice; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the process as a whole. The Administrative Judge must clearly indicate, in the record, the reasons in support of his/her decision to impose sanctions. See, e.g., Anderson v. Boston School Committee, 105 F.3d 762 (1st Cir. 1997).

CHAPTER SEVEN

Hearing Process

I. **Pre-Hearing Considerations**

In determining how to proceed, the Administrative Judge should consider whether: ADR or another formal settlement procedure is possible; summary judgment is appropriate; consolidation or amendment of complaint(s) is appropriate; and any discovery matters are outstanding.

A. **Pre-Hearing Conference**

A pre-hearing conference is the opportunity for the Administrative Judge to discuss and rule upon any outstanding matters that must be resolved prior to hearing. These matters may include the following if they have not already been addressed: advising the parties of hearing procedures; explaining applicable burdens of proof; refining issues on which the hearing will be held; approving witnesses; determining whether complainant seeks compensatory damages; determining whether the hearing will be bifurcated between liability and relief; ruling on outstanding motions; ruling on the admissibility of exhibits; obtaining

stipulations of fact and stipulations as to the authenticity of documents; exploring settlement options, including ADR; arranging for a court reporter; arranging for telephone or video testimony; and arranging for any special accommodations. The Administrative Judge may consider having the parties, jointly or individually, submit the order of witnesses, showing the expected length of direct and cross examination for each witness.

A pre-hearing conference may be held in person or by telephone call with notice to the parties. The Administrative Judge shall issue, sufficiently in advance of the hearing and in writing, all necessary rulings and explanations regarding hearing procedures.

B. **Pre-Hearing Conference Memorandum/Order**

Following the pre-hearing conference, the Administrative Judge should either direct the parties to memorialize the discussion and any rulings made at the pre-hearing conference or issue to the parties his/her own written memorandum or order memorializing the discussion and any rulings. Where appropriate, the matters raised during the pre-hearing conference may be placed on the record at the hearing.

II. **Conduct of the Hearing**

A. **Scheduling Order**

At least thirty days prior to the hearing, the Administrative Judge shall issue a Scheduling Order which advises the parties regarding: the date, time, and location of the hearing; and any necessary instructions to the agency for securing the hearing facility, court reporter, and special accommodations.

In addition, the Scheduling Order may also include information regarding the requirements for a hearing room; the sequestering of witnesses; and the agency's responsibilities with respect to producing approved witnesses who are current federal employees, even if employed by another agency.

B. **Hearing Location**

The Administrative Judge shall determine the location where the hearing is to be held. The Administrative Judge should schedule the hearing to be held at a Commission office, an appropriate agency facility, or other appropriate location. If the Administrative Judge determines that a hearing should be held at an agency facility, the Administrative Judge should direct the agency to identify and secure a suitable hearing room. In determining the location for the hearing, the Administrative Judge should consider those factors identified in EEO MD-110, 7-4.

C. **Special Accommodations**

A party, witness or representative appearing before the Commission may be entitled to a reasonable accommodation for a disability. The Administrative Judge may order the agency to provide the accommodation. Administrative Judges may also order agencies to provide foreign language interpreters.

D. **Requests for Postponement of the Hearing**

The Administrative Judge should apply strict criteria in considering whether to grant requests for postponement of the hearing so as to avoid undue delay and interference with case management. The Administrative Judge may choose not to grant such requests absent extenuating circumstances (e.g., hospitalization of a representative or death in a party's family). In the event that a witness is unavailable, the Administrative Judge may wish to proceed with the hearing and arrange to take the testimony of the witness at a later date.

III. Other Matters

A. Recusal

1. Conflicts of Interest

The Administrative Judge should recuse himself/herself from both real and perceived conflicts of interest. The Administrative Judge generally should not participate in a hearing where a party is a member of his/her household, a close relative, the employer

of his/her spouse, parent or dependent child, someone with whom he/she has a business relationship, or a former employer (within the past year). If, however, the Administrative Judge determines that no reasonable person knowing all the facts would question his/her impartiality, the Administrative Judge may proceed with the hearing after disclosing the relationship and explaining the reasons why he/she does not believe there is a conflict.

2. **Bias**

The Administrative Judge should not participate in any conduct during the hearing that presents the appearance of or demonstrates actual bias in favor of or against one of the parties. For example, it is improper for the Administrative Judge to eat lunch with a representative of one party during the course of the hearing. If a party or a witness accuses the Administrative Judge of bias during the course of the hearing, the Administrative Judge should document the allegations and the response on the record.

B. **Pro Se Complainants**

The Administrative Judge may instruct pro se complainants regarding the correct method of questioning witnesses. The Administrative Judge may also facilitate the introduction of exhibits by asking questions about the relevance of proposed exhibits. The Administrative Judge may explain the substantive legal standards and burdens of proof that apply to the case. Generally, the Administrative Judge should not reject, with prejudice, filings by a pro se complainant for failing to comply with technical requirements of form, unless the violations are repeated after a clear warning and instructions as to proper form.

C. **Persons Authorized to be Present**

At the hearing, the Administrative Judge should be sure that all necessary parties are present and, because hearings are closed to the public, that

unauthorized persons are excluded. Generally, the following persons are authorized to be present at hearings:

the Administrative Judge;
the official court reporter;
the complainant;
the complainant's representative;
the agency's representative;
approved assistants or technical advisers;
interpreters and translators; and
approved witness when testifying (accompanied by his/her attorney while testifying).

In addition, the Administrative Judge, with consent of the parties, may permit other persons to attend under appropriate circumstances (e.g., a relative of the complainant, or employees or officials with the agency's EEO office where attendance is related to job training).

The agency representative and the complainant may have technical advisers at the hearing if approved by the Administrative Judge. A technical adviser is not a representative and may not address or question witnesses or make statements for the record unless called upon by the Administrative Judge to do so. The Administrative Judge should determine whether the technical adviser possesses factual knowledge relevant to the case and could be a witness for either party. The Administrative Judge may require that the technical adviser testify before any other witness to ensure that the testimony is not unduly influenced by other witnesses and/or exhibits. Alternatively, the Administrative Judge may require that the party use a different technical adviser.

D. **Preliminary and Off-the-Record Inquiries**

1. **Order of Testimony and Witnesses**

Usually the complainant will present his/her case first. The Administrative Judge may ask the representatives to estimate

the length of testimony and may set time limits on testimony if appropriate. Witness order may also be affected by availability, the need to take testimony via telephone or video conference, and differences in time zones between the hearing site and location of witnesses. The Administrative Judge should ensure that, other than the complainant, a witness is present only when testifying and should be instructed not to discuss their testimony with other witnesses. Where a party has more than one representative at the hearing, the Administrative Judge should also instruct the representatives that only one of them may examine and make objections during the testimony of each witness. Where there is more than one complainant represented by different representatives, the Administrative Judge may require the parties to determine the order and scope of examination of witnesses. When a non-attorney representative is also an approved witness, he/she should testify first. Alternatively, the Administrative Judge may require that the party use a different representative.

2. **Off-the-Record Discussions**

The Administrative Judge should inform the parties and the court reporter that only the Administrative Judge may instruct the court reporter to go on and off the record. The Administrative Judge should go off the record when necessary to prevent the record from becoming cluttered with unnecessary dialogue. The Administrative Judge may go off the record to discuss scheduling, clarify issues, explain regulations or procedures or initially caution the parties or their representatives with regard to their conduct. Such discussions should be immediately summarized once back on the record.

E. **Opening the Hearing**

The presentation of evidence at the hearing generally follows the same sequence as a trial in a civil action. The Administrative Judge convenes the hearing and makes an introductory statement.

1. **Introductory Statements**

   The Administrative Judge's introductory statement should identify the following:

   the parties and complaint number(s) (EEOC and agency numbers);
   who is present;
   the issue(s) in the complaint(s);
   any procedural or substantive discussions and rulings made prior to going on the record; and
   any stipulations agreed to by the parties.

   The Administrative Judge may permit the parties to make opening statements. Opening statements are not evidence. Generally, the complainant will have the first opportunity to make an opening statement. The agency representative's opening statement may immediately follow or may be reserved until the complainant has presented his or her entire case.

   The Administrative Judge must protect the record from irrelevant or unduly repetitious evidence and ensure that the hearing record is clear. This may mean excluding or halting repetitive or irrelevant testimony and clarifying questions or responses offered by the parties.

2. **Examination of Witnesses**

   Prior to swearing in the witness, the Administrative Judge may instruct the witness as to the process of testifying and answer any questions the witness may have. The Administrative Judge

should instruct the witness not to discuss his/her testimony (or any other matters discussed in the presence of the witness during the hearing) with anyone else.

All witness testimony is given under oath or affirmation and penalty of perjury. Either the Administrative Judge or the court reporter must administer the oath to each witness and identify the witness before the witness begins testifying. A commonly used oath is:

Do you swear or affirm under penalty of perjury that the testimony you are about to give is the truth, the whole truth and nothing but the truth?

The party calling the witness examines the witness first. When direct examination is concluded, the opposing party may cross-examine. Generally, cross-examination should not exceed the scope of the direct examination. Where both parties requested the same witness, the Administrative Judge shall determine whether the witness shall be called twice or whether the scope of cross-examination may exceed the scope of direct examination. The Administrative Judge may independently examine the witness and permit follow-up questions by the parties.

3. **Testimony**

A. **Generally**

The testimony of witnesses should be relevant and material to the case. The testimony should be specific and reflect personal knowledge or recollection. Notes should be used only to refresh the memory of the witness. Hearsay testimony may be allowed if it is relevant, material, and not unduly repetitious, but the Administrative Judge may accord it diminished evidentiary weight since

it is hearsay. Leading questions should be disallowed on direct examination unless the witness is a hostile witness or adverse to the party conducting the direct examination (e.g., if the complainant has called the responsible management official, he/she can ask leading questions). The Administrative Judge should inform the parties what a leading question is and, if necessary, assist the parties to pose questions in the proper form.

There may be circumstances when witnesses are not available to appear at the hearing. In those circumstances, the Administrative Judge may consider alternative methods of obtaining the testimony. These alternatives may include testimony by telephone or video conference or by written submissions.

B. **Expert Testimony**

If the parties seek to offer testimony or documents by experts, the experts must be qualified. This requires the Administrative Judge to determine whether the expert possesses the knowledge, skill, experience, training or education that permits the expert to offer opinion testimony. In the alternative, the Administrative Judge may ask the parties whether they can stipulate that the experts are qualified. This generally requires the party seeking to introduce expert testimony to provide a resume or curriculum vitae of the expert that adequately describes the expert's knowledge, skill, experience, training or education

in the subject matter about which he/she is being called to testify. The expert's opinion as to facts or law may not be substituted for the Administrative Judge's ultimate conclusion of facts and law. Documents prepared by experts must be authenticated and treated like other documentary evidence.

Expert witnesses who are not employed by the federal government cannot be compelled to appear. If an expert does not testify in person at the hearing, the Administrative Judge should balance the relevance and probative value of documentary evidence prepared by an expert against a party's inability to cross examine the expert. In most cases, this determination will ultimately go to the weight the Administrative Judge should give the expert's evidence, rather than to its admissibility.

4. **Objections**

Objections may be made based on relevance, prejudice, or other grounds. The Administrative Judge may consult the Federal Rules of Evidence in ruling on objections. Generally, the Administrative Judge should sustain objections where the evidence is irrelevant, cumulative or unreliable. Prior to ruling on an objection, the Administrative Judge should permit the non-objecting party to respond to the objection. The Administrative Judge may take a recess or take the arguments under advisement and continue with the hearing. In ruling on objections, the Administrative Judge should remember that admission of evidence does not speak to the weight to be given the evidence once it is admitted.

5. **Exhibits**

The parties are permitted to introduce documents as exhibits that are relevant and material to their case. The Administrative Judge must assure that the record accurately reflects when an exhibit is offered, the marking of the exhibit, any objections to its admission, and the Administrative Judge's ruling on the objections. The report of investigation is already part of the record and need not be introduced as an exhibit. The Administrative Judge should instruct the parties to make specific references to the report of investigation as necessary.

Exhibits should be marked with unique identifiers. The Administrative Judge may require the parties to exchange exhibits and submit a list of exhibits to the Administrative Judge prior to the hearing. Each proposed exhibit should be identified by number. Complainant's exhibits should be marked as hearing exhibit C-1, C-2, etc. The agency's exhibits should be marked as hearing exhibit A-1, A-2, etc. The Administrative Judge may also order that certain documents be entered into the record as the Administrative Judge's exhibits. Such exhibits should be marked as AJ-1, AJ-2, etc.

The Administrative Judge should instruct the parties as to the number of copies of exhibits required for the hearing. The Administrative Judge should instruct the court reporter to assemble and keep all hearings exhibits offered at the hearing and provide them with the bound transcript of the hearing.

a. **Offering and Admitting Exhibits**

The party offering the exhibit must formally offer the exhibit into evidence. If not already marked, the Administrative Judge or court reporter will mark the exhibit, and the Administrative Judge

will describe the exhibit for the record. The exhibit should be shown to the opposing party who must be given an opportunity to question whether the witness has some knowledge of the exhibit (voir dire) and to object to the exhibit. The party offering the exhibit should have a competent witness identify and authenticate the exhibit. If the parties cannot stipulate as to the authenticity of a document, and the complainant is not represented by counsel, the Administrative Judge may make a reasonable attempt to establish the authenticity by making the necessary inquiries at the hearing or by providing specific instructions to the complainant. Documents found by the Administrative Judge not to be authentic should be excluded. All exhibits should be referred to by number during the course of the hearing to ensure that the hearing record and transcript are clear.

b. **Non-admitted Exhibits**

Any exhibits that are not admitted into the hearing record should be retained by the Administrative Judge and clearly identified as not admitted. These documents must be transmitted with the hearing record. This is important to preserve the evidence if an appeal of the case involves examination of whether the decision to exclude the evidence was correct. If a party withdraws an exhibit, the Administrative Judge should acknowledge the withdrawal on the record and return the exhibit to the party withdrawing it.

Maintaining Order

The Administrative Judge must maintain control of the hearing. If the conduct of a party or witness disrupts, detracts from or jeopardizes the integrity of the hearing, the Administrative Judge must take appropriate action to address the misconduct. This action should include warning the offending party to abstain from the conduct with notice of the sanction which will follow if the conduct continues. Where sanctions are appropriate, the Administrative Judge should consider the nature and severity of the misconduct. If the Administrative Judge imposes sanctions, the Administrative Judge must document the record by describing the misconduct in detail, the warnings given to the offending person, the sanction issued, and the Administrative Judge's reasons for issuing the sanction.

In the case of repeated or flagrant improper conduct by a representative, the Administrative Judge may consider expulsion of the party or representative from the hearing, suspension or disqualification of the representative from future hearings, or referral of the matter to the Commission for consideration of suspension or disqualification. EEO MD-110, 7-28. If the Administrative Judge expels or disqualifies a representative from the hearing, the Administrative Judge should permit the representative's party to seek new representation. EEO MD-110, 7-27.

Rebuttal Evidence

If necessary and appropriate, the Administrative Judge may permit the parties to present rebuttal evidence. The Administrative Judge should ensure that the parties understand that the purpose of presenting rebuttal evidence is not to repeat evidence already presented or to present evidence that the parties should have reasonably been expected to present in their

case in chief. The Administrative Judge may limit the scope of rebuttal to evidence that refutes evidence which a party may not have reasonably expected to be presented.

Closing the Hearing

The Administrative Judge may permit the parties to make oral closing arguments. The Administrative Judge should explain to a pro se complainant that closing arguments are not evidence but are a summary of the party's case. The Administrative Judge may, in the alternative, permit the parties to submit closing briefs, within a specific time frame, after the hearing. It is within the Administrative Judge's discretion to permit the briefs to be submitted after the parties receive copies of the transcript. The Administrative Judge may choose not to permit closing briefs or arguments.

Copies of the Hearing Transcript

The Administrative Judge may find it useful to have copies of the transcript sent directly to the parties by the court reporter and thus should instruct the court reporter as to whom to send copies.

Outstanding Matters

The Administrative Judge must decide when any outstanding matters will be resolved, and if the record is to remain open, the reason for keeping the record open, and the date when the record will be closed. If appropriate, the Administrative Judge should state the anticipated date of the damages phase of the hearing; address the hearing's procedures; and advise the parties whether any additional discovery will be permitted.

Decision

The Administrative Judge must indicate if he/she intends to issue a bench decision and when he/she will deliver the decision if not

immediately. At this time, the Administrative Judge may want to instruct the parties that the time frames concerning their appeal rights do not begin to run until the Administrative Judge issues the decision which concludes the hearing process. See Chapter Eight.

Remedies

The Administrative Judge has the discretion to decide whether evidence on relief is presented within the hearing on liability or at a later time. The Administrative Judge must instruct the parties to be prepared to present evidence on relief at the appropriate time and ensure that the record is complete with regard to the compensatory damages and equitable relief at issue. The regulations set forth guidelines for the provision of equitable relief, including, but not limited to, back pay, reinstatement, expungement of negative personnel records and other appropriate corrective action. 29 C.F.R. . 1614.501; EEO MD-110, 9-18. An Administrative Judge must ensure that he/she has obtained any relevant information from both parties regarding changed circumstances when ordering make-whole relief and that the relief should reflect the remedial goals of the anti-discrimination statutes violated.

Taking Evidence on Relief at the Hearing on Liability

The Administrative Judge has the sole discretion to order the parties to present evidence on relief as part of the hearing on liability but must advise the parties prior to the hearing as to whether they should be prepared to do so. Factors the Administrative Judge may consider in exercising this discretion include: impact on the length of the hearing; number of witnesses to testify about relief; amount and kind of relief sought; and the effect on docket management. If attorney's fees and costs are requested as part of the relief, the Administrative Judge should set a schedule for submission of the petition for attorney's fees and costs and the agency's opposition. The Administrative Judge should make clear to the parties that the agency cannot take final

action and appeal rights do not attach until the Administrative Judge has issued a decision that encompasses liability, relief, attorney's fees, and costs, if appropriate.

Bifurcating the Hearing

An Administrative Judge may choose to bifurcate the hearing between the liability phase and the relief phase. If the Administrative Judge bifurcates the hearing, the Administrative Judge should inform the parties as early as possible and ensure that they understand the process. Factors to be considered when deciding whether to bifurcate the hearing include: expected length and complexity of a bifurcated hearing; the interests of the parties in minimizing expenses prior to a decision on liability; and docket management considerations of the Administrative Judge and the District Office. The same procedures described above should be followed for the hearing on relief.

Determining Relief Based on a Written Record

If the circumstances warrant, the Administrative Judge may determine relief based on written submissions. The Administrative Judge should not make this determination on a written record if the credibility of the complainant or key witnesses is material to the determination of relief.

The Hearing Record

The Administrative Judge is responsible for returning the complete hearing record to the agency's designated point of contact at the conclusion of the hearing process. This enables the EEO office to issue a final order based on a review of the complete record. The complete hearing record consists of:

all submissions by the parties to the Administrative Judge, including motions, pre-hearing statements, and briefs;
all decisions, orders and correspondence issued by the

Administrative Judge;
the transcript of the hearing, if a hearing was conducted; and
all hearing exhibits, including those not admitted into the record.

The hearing record does not include the report of investigation and complaint file provided by the agency. In situations where the Administrative Judge determines it appropriate, he/she may return his/her copy of the report of investigation to the agency.

The District or Field Office must retain a copy of all documents issued to the parties for a minimum of two years from the date the Office closes the case, but does not need to retain the hearing transcript or hearing exhibits. The report of investigation and complaint file may be returned to the agency if the agency provides postage or makes other arrangements to retrieve them. If the agency does not retrieve the Administrative Judge's copy of the investigative report and complaint file within sixty days, they may be destroyed.

CHAPTER EIGHT

Decisions

I. **Decisions that Trigger Appeal Rights**

Decisions which trigger an agency's obligation to take final action and permit parties to file an appeal are decisions concluding all phases of the hearing process, issued pursuant to the following regulations: 29 C.F.R. .. 1614.109(b); 109(g); 109(i) [for complaints from individual employees or applicants for employment] and 29 C.F.R. .. 1614.204(d)(2); 204(d)(7) [for class complaints]. Except for three special situations in class complaint cases discussed below, it is only the decision concluding all phases of the hearing process that triggers the agency's obligation to take final action and permits parties to file an appeal.

In order to ensure that the agency is aware that it is required to take final action as well as to advise the parties of their appeal rights following an Administrative Judge decision in the above situations, it is imperative for the Administrative Judge to clearly state whether and when his/her

decision triggers appeal rights and to attach a Notice To The Parties to that decision. See Appendix H.

II. Decisions That Do Not Trigger Appeal Rights

Certain decisions do not trigger appeal rights; for example, a decision on liability where the case has been bifurcated. It is especially important for an Administrative Judge to make clear to the parties that their appeal rights are not triggered at this time.

Administrative Judges are encouraged to issue bench decisions where appropriate because they generally expedite the hearing process. When rendering a bench decision, the Administrative Judge must inform the parties that the announcement of the decision from the bench does not trigger the time limit within which an agency must take final action or a complainant may file an appeal. When the Administrative Judge issues a bench decision, the agency's obligation to take final action will not commence until the agency receives the transcribed decision, a copy of the hearing record, and the Order Entering Judgment.

When planning to issue a bench decision, Administrative Judges may find it helpful to prepare in advance of the hearing an outline of known issues and uncontested material evidence, standard language on legal principles involved, and other standard statements that would ordinarily be made when rendering a formal decision.

An Administrative Judge should consider the following when determining whether to issue a bench decision: the number of witnesses who testified; the number of material facts in dispute; the number of credibility determinations to be made; his/her familiarity with the record; and whether the outcome is clear based upon applicable legal standards. If an Administrative Judge determines that the case is appropriate for a bench decision, he/she should consider the possibility of announcing a short recess at the conclusion of the hearing to prepare for the issuance of a bench decision. In the event the bench decision is not delivered at the conclusion of the hearing, the decision can subsequently be announced to the parties and the court reporter in person or via telephone.

III. Dismissed Claims

A. Agency Dismissed Claims

Under 29 C.F.R. . 1614.107(b), an agency may notify a complainant that some of his/her claims are subject to being dismissed under 29 C.F.R. . 1614.107(a). If a complainant requests a hearing, the Administrative Judge will have the opportunity to review that agency determination. Where an Administrative Judge upholds the agency's determination under 29 C.F.R. . 1614.107(b) and dismisses a claim, the Administrative Judge must incorporate the dismissal into the decision which addresses the merits of the complaint to ensure that the complainant will have an opportunity to appeal the rulings on the dismissed claims. See Chapter One.

B. **Administrative Judge Dismissed Claims**

Under 29 C.F.R. . 1614.109(b) an Administrative Judge may dismiss claims on the same grounds that an agency may under 29 C.F.R. . 1614.107(a). Where an Administrative Judge has dismissed some claims under 29 C.F.R. . 1614.109(b) prior to the conclusion of the hearing process or where the Administrative Judge has denied a motion to amend, the decision must restate or incorporate by reference the Administrative Judge's ruling dismissing or denying those claims. This will preserve the complainant's opportunity to appeal the ruling on the dismissed claims. See Chapter One.

C. **Transmission of the Hearing Record**

The time for an agency to take final action does not begin to run until the agency receives a copy of the hearing record, including the Administrative Judge's decision. 29 C.F.R. . 1614.110(a).

The Administrative Judge's decision and the hearing record (see Chapter 7) should be mailed to the agency's designated point of contact. The Administrative Judge, by regular mail, should send the parties a copy of the decision, a copy of the transcript if not already provided, the Order Entering Judgment and a Notice To The Parties.[(11)] The Administrative Judge should include a certificate of service.

CHAPTER NINE

Attorney's Fees and Compensatory Damages

I. **Attorney's Fees**

When the Administrative Judge makes a finding of discrimination under Title VII or the Rehabilitation Act, he/she shall award attorney's fees and costs contingent on the complainant's eligibility.[(12)] See generally EEO MD-110, Chapter 11. Where the Administrative Judge determines that an award of fees and costs may be appropriate, he/she shall order complainant's attorney to submit a statement of fees and costs with an accompanying affidavit to the Administrative Judge within thirty days. If an Administrative Judge issues a preliminary decision addressing liability, the order may be contained therein. The agency may respond to the statement within thirty days of its receipt, and, to the extent it opposes the request, must provide detailed documentation in support of its arguments. After receipt of the statement, the affidavit, and the agency's response, if the Administrative Judge deems it necessary, he/she can take oral argument or direct the parties to submit comments on a specific issue. The Administrative Judge should issue a decision determining the amount of fees and costs within sixty days of receipt of the statement and affidavit.

In reviewing a fee petition, an Administrative Judge should be aware that to be considered "reasonable," the number of hours must not be "excessive, redundant, or otherwise unnecessary." Hours falling within that category are not compensable. Where a petition contains many such charges, the Commission may apply a percentage across-the-board reduction in the number of hours claimed. Bernard v. Department of Veterans Affairs, EEOC Request No. 05910450 (August 5, 1991). However, an award may be adjusted in certain instances, including situations in which the representation and/or degree of success is exceptional. See EEO MD-110, 11-7.

The Administrative Judge should be aware that a non-prevailing party may be entitled to an award of attorney's fees as a sanction. EEO MD-110, 11-11. The Administrative Judge should require the party entitled to the fees and/or costs to submit a verified statement as soon as practical, and the Administrative Judge should promptly determine the amount of fees to be awarded.

II. **Compensatory Damages**

Under the Civil Rights Act of 1991, individuals who establish claims of unlawful employment discrimination may be entitled to recover compensatory damages. 42 U.S.C.A. . 1981a(a)(1). Compensatory damages are defined as monetary compensation for a loss or harm resulting from intentional discrimination. In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that the Commission possesses the legal authority to award compensatory damages in the federal sector EEO process. See Enforcement Guidance: Compensatory and Punitive Damages Available Under . 102 of the Civil Rights Acts of 1991, EEOC Notice No. N-915.002, (July 14, 1992)(setting standards for determining whether compensatory damages are proven and for calculating appropriate awards).

A. **Coverage**

Compensatory damages are available in claims filed under Title VII and the Rehabilitation Act.[(13)] Compensatory damages are not available in claims brought under either the Age Discrimination in Employment Act or the Equal Pay Act, although liquidated damages are recoverable under the Equal Pay Act. Since an Equal Pay Act claim may also be brought as a claim of sex-based wage discrimination under Title VII, if both Title VII and the EPA are found to be violated, both liquidated and compensatory damages may be awarded. See Miller v. Department of the Navy, EEOC Appeal No. 01943457 (December 8, 1995). Punitive damages are not available in claims brought against the federal government. 42 U.S.C.A. . 1981a(b)(1).

B. **Procedures for Processing**

The Administrative Judge should provide an explanation regarding the nature and availability of damages and ask the complainant whether he/she is seeking damages. Prior to the hearing, the Administrative Judge may also explain what evidence needs to be proffered in order to establish entitlement and may require a proffer of evidence pertaining to the entitlement. The Administrative Judge should also give the agency the opportunity to proffer any evidence that it believes mitigates the complainant's entitlement to the requested damages.[(14)] Failure to timely assert a claim for damages after appropriate notice may be deemed a waiver of entitlement to damages. EEO MD-110, 7-10. See also Chapter 7 on Bifurcating the Hearing.

CHAPTER TEN

Class Complaints

I. Generally

This chapter provides general guidance for the processing of class complaints. Administrative Judges should also consult the regulations at 29 C.F.R. . 1614.204 and EEO MD-110, Chapter 8. Whenever possible, class complaints should be assigned on a priority basis and processed as expeditiously as possible. Unique to the federal sector EEO administrative process, an individual cannot opt out of a class complaint. EEO MD-110, 8-7. An individual complaint that is filed before or after the class complaint is filed and that comes within the definition of the class claim(s) will not be dismissed but will be subsumed within the class complaint. EEO MD-110, 8-4.

II. Initial Processing

A. Individual Complaint Becoming a Class Complaint

A complaint does not have to be filed as a class complaint at the beginning of the administrative process. If, at any reasonable point during the processing of an individual complaint, it becomes apparent that there are class implications to the claim raised in the individual complaint, a complainant may move for class certification. Where the complainant had previously satisfied the EEO counseling requirement on the individual claim, the complainant is not required to undergo additional EEO counseling before moving to seek class certification on that claim. Rather, the Administrative Judge should advise complainant of his/her rights and responsibilities as the class agent.

A motion to certify a class complaint shall be denied when the complainant has unduly delayed in moving for certification. 29 C.F.R. . 1614.204(b). Such a ruling by the Administrative Judge shall include a determination of when complainant knew or suspected that the complaint had class implications. EEO MD-110, 8-2.

B. Assignment of an Administrative Judge

Unlike the processing of an individual complaint, the agency forwards the class complaint, within thirty days of receipt, to the Commission for assignment to an Administrative Judge. The agency does not have the authority to accept or dismiss a class complaint at this stage, nor to investigate the claims in the class complaint. Therefore, the complaint file usually only contains a copy of the EEO counselor's report and the complaint itself. However, because the regulations permit a complainant who initially files a non-class complaint to seek to convert it into a class complaint at any reasonable point in the process, the Administrative Judge may occasionally receive more than just the complaint and EEO counselor's report from the agency. The standard Acknowledgment and Order for Class Certification appears at Appendix I. In addition, the Administrative Judge should issue a Designation of Representative Form at the same time the Acknowledgment and Order is issued. See Appendix C.

III. **Decision on Certification**

A. **Dismissal**

When an Administrative Judge issues a decision to dismiss a class complaint, he/she must also decide at the same time whether to dismiss the individual complaint or to order the agency to resume the processing of the individual complaint. The Administrative Judge's decision shall be sent to the agency with a copy to the complainant/class agent and his/her representative, if any. 29 C.F.R. . 1614.204(d)(7); EEO MD-110, 8-6. Because the filing of a timely class complaint suspends the applicable time limits for initiating EEO counseling for all putative class members, the Commission has held that an agency must notify any putative members of the class that were identified by name during the pendency of the class complaint of the decision denying certification and of their right to initiate EEO counseling for filing individual complaints. See Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 353-54 (1983); Jones v. United States Postal Service, EEOC Appeal No. 01965858 (June 18, 1997); Mole v. Department of the Air Force, EEOC Request No. 05910578 (September 25, 1991).

1. **29 C.F.R. . 1614.107(a)**

A class complaint shall be dismissed if it meets any of the criteria for the dismissal of an individual complaint set forth in 29 C.F.R. . 1614.107(a).

2. **29 C.F.R. . 1614.204(a)(2)**

A class complaint shall be dismissed if it does not meet all of the following four prerequisites of a class complaint set forth in 29 C.F.R. . 1614.204(a)(2):

(a) Numerosity - The class is so numerous that a consolidated complaint of the members of the class is impractical. 29 C.F.R. . 1614.204(a)(2)(i). See Wood, Sr., et al. v. Department of Energy, EEOC Request No. 05950985 (October 5, 1998);

(b) Commonality - There are questions of fact common to the class. 29 C.F.R. . 1614.204(a)(2)(ii). Factors to determine commonality include: whether the practice at issue affects the whole class or only a few individuals; the degree of local autonomy or centralized administration involved; and the uniformity of the membership of the class, in terms of the likelihood that the class members' treatment will involve common questions of fact. See Woods, et al. v. Department of Housing and Urban Development, EEOC Appeal No. 01961033 (February 13, 1998).

(c) Typicality - The claims of the agent of the class are typical of the claims of the class. 29 C.F.R. . 1614.204(a)(2)(iii). The overriding principle with regard to typicality is that class agents must possess the same interest and suffer the same injury as the members of the proposed class. General Telephone Co. v. Falcon, 457 U.S. 147, 156 (1982); Johnson-Feldman, et al. v. Department of Veterans Affairs, EEOC Appeal No. 01953168 (August 7, 1997), request for reconsideration denied, EEOC Request No. 05971098 (September 10, 1999).

(d) Adequacy of Representation - The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. . 1614.204(a)(2)(iv). If the record on a class complaint satisfies the numerosity, typicality, and commonality requirements for class certification, the Administrative Judge may conditionally certify the class for a reasonable period of time so that the class agent may secure adequate representation. EEO MD-110, 8-5.

3. **Lacking Specificity and Detail**

When a class complaint lacks specificity and detail, the Administrative Judge should issue an order pursuant to 29 C.F.R. . 1614.204(d)(4) requesting the complainant to provide any additional information that may be relevant to determine the scope of the class claims. Such a request for information shall inform the class agent that the class complaint may be dismissed for failure to provide the requested information within the specified time frame.

4. **29 C.F.R. . 1614.204(d)(3)**

When a claim is not included in the EEO Counselor's report on the class complaint, the claim may be dismissed after the Administrative Judge has afforded the class agent an opportunity to state within fifteen days whether the matter was discussed with the EEO Counselor or, if not discussed, to explain why it was not discussed. 29 C.F.R. . 1614.204(d)(3). If there has been no EEO counseling on a particular claim and if complainant's explanation is satisfactory, the Administrative Judge should hold the class complaint in abeyance until EEO counseling is completed, at which time the claim should be consolidated with the class complaint. See 29 C.F.R. . 1614.204(d)(3). If complainant's explanation is unsatisfactory, the Administrative Judge should dismiss the claim.

B. Certification

If an Administrative Judge determines that a class complaint meets the criteria for certification, the Administrative Judge should issue a decision certifying the class. The Administrative Judge's decision certifying a class complaint shall be sent to the agency with a copy to the complainant/class agent and his/her representative, if any. 29 C.F.R. . 1614.204(d)(7); EEO MD-110, 8-6. The Administrative Judge's decision should also order the agency to notify all class members of the acceptance of the class complaint within fifteen days of receiving the decision or a reasonable time frame specified in the Administrative Judge's decision. See 29 C.F.R. . 1614.204(e)(1), (2). However, where it appears likely that either party may appeal the decision on certification, the agency may petition the Administrative Judge to stay the order requiring the agency to notify the class members pursuant to 29 C.F.R. . 1614.204(e) during the period that an appeal may be filed by either party. The Administrative Judge should promptly rule on any such request by the agency. If neither party appeals the Administrative Judge's decision, the Administrative Judge will resume the processing of the class complaint on the merits and lift any previously granted stay for the distribution of the notice to the class.

IV. Obtaining Evidence

A. Pre-Certification

The Administrative Judge may allow pre-certification discovery to determine whether certification is appropriate.

B. Post-Certification

The parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. This is accomplished through discovery. See Chapter 4. Generally, the Administrative Judge may find it useful to hold an initial conference to discuss the parameters of discovery. At this conference, the Administrative Judge should establish an appropriate schedule for discovery of not less than sixty days.

V. Settlement Agreements

The Administrative Judge shall provide the parties the opportunity to resolve the complaint. 29 C.F.R. . 1614.204(g)(1). The Administrative Judge should require that any settlement agreement be reduced to writing by the parties and signed by the class agent and the agency. 29 C.F.R. . 1614.204(g)(3). However, an agreement to settle a class complaint is not effective unless it is approved by the Administrative Judge after a fairness determination pursuant to the provisions of 29 C.F.R. . 1614.204(g)(4). Before an Administrative Judge may make such a determination, he/she shall require the agency to give a notice of the proposed resolution to all class members in the same manner as notification of the acceptance of the class complaint and give the class members an opportunity to file their objections, if any, with the Administrative Judge within thirty days. Id. An Administrative Judge must evaluate the fairness of the proposed resolution to the class as a whole regardless of whether any class members file objections.

A. Accepting the Class Settlement Agreement

If the Administrative Judge determines that the proposed resolution is fair, adequate, and reasonable to the class as a whole, then the Administrative Judge shall issue an order approving the settlement agreement which shall bind all members of the class. 29 C.F.R. . 1614.204(g)(4). When an Administrative Judge issues an order approving a class settlement agreement pursuant to 29 C.F.R. . 1614.204(g)(4), an appeal may be filed directly with the Commission. 29 C.F.R. .. 1614.401(c), 402(a).

In this case, the Administrative Judge must ensure that he/she not only clearly states that the order directly triggers the parties' appeal rights but also that a notice of appeal rights is given to: (a) all class members who filed petitions objecting to the proposed class settlement; (b) any class agent that might have been replaced by another class member as the class agent during the settlement approval process; (c) the class agent that originally proposed the settlement; and (d) the agency. The Administrative Judge must attach a copy of EEOC Form 573, Notice of Appeal/Petition, to such order. EEO MD-110, 8-10. The agency is not required to issue a final order following the Administrative Judge's order to approve the settlement.

B. Decision Vacating the Settlement Agreement

If the proposed resolution is not fair, adequate and reasonable to the class a whole, the Administrative Judge shall issue a decision vacating the proposed resolution. 29 C.F.R. . 1614.204(g)(4).

If an Administrative Judge vacates the settlement agreement, the agency is not required to issue a final order. An interlocutory appeal may be filed directly from the Administrative Judge's decision by: (a) either party to the class settlement; (b) any petitioner who objected to the approval of the proposed settlement; or (c) any class agent that might have been replaced by the Administrative Judge during the settlement process. The Administrative Judge must send a copy of his/her decision to each of these interested parties along with a copy of EEOC Form 573, Notice of Appeal/Petition, and inform them of their right to file an appeal with the Commission within thirty days. The Administrative Judge's order vacating the class settlement should inform the parties that the hearing shall resume at the end of the filing period if an interlocutory appeal is not filed during that time.

VI. Hearing Procedures

Hearing procedures in class complaints are the same as those applied to hearings in individual complaints of discrimination as set forth at 29 C.F.R. . 1614.109.

VII. Administrative Judge's Recommended Decision on the Merits

The Administrative Judge shall transmit to the agency a decision (entitled "RECOMMENDED DECISION") on the class complaint, including systemic relief for the class and any individual relief. 29 C.F.R. . 1614.204(i)(1). The Administrative Judge must ensure that the parties are properly advised of their obligations and rights following the issuance of the recommended decision. See Appendix J. The recommended decision shall be sent to the agency together with the entire record, including the transcript. The Administrative Judge shall also notify the class agent, in a separate communication, of the date on which the recommended decision was forwarded to the agency. 29 C.F.R. . 1614.204(i)(3); EEO MD-110, 8-11. If the Administrative Judge finds no class relief appropriate, he/she shall determine if a finding of individual

discrimination is warranted and, if so, shall recommend appropriate relief. 29 C.F.R. . 1614.204(i)(2).

VIII. Adjudication of Individual Claims for Relief

A. Individual Claims

When discrimination is found, the Administrative Judge retains jurisdiction over the class complaint in order to resolve any disputed claims by class members and may hold hearings or otherwise supplement the record on a claim filed by a class member. 29 C.F.R. . 1614.204(l)(3); EEO MD-110, 8-14. An Administrative Judge's order should advise the agency to inform him/her in writing of the agency's intent to dispute a class member's claim, and provide a copy of such notice to the class member.

B. Agency Disputing Individual Claims

Once the agency informs the Administrative Judge and the class member of its intent to dispute the class member's claim, the Administrative Judge will issue an order tolling the ninety day period within which the agency is required to issue a decision on the class member's claim. EEO MD- 110, 8-14. The Administrative Judge's order will advise the agency to provide a statement in support of its decision to dispute the class member's claim and any supporting evidence within fifteen days of the agency's receipt of the Administrative Judge's order, providing a copy of any such submission to the class member. The class member will have fifteen days from the date of service of the agency's submission to respond to the agency's submission and may file a statement and documents in support of his/her claim, providing a copy of any such submission to the agency. The Administrative Judge has the discretion to enlarge the fifteen day period at the written request of either party or on his/her own motion. EEO MD-110, 8-14.

C. Decision on Individual Claims

The Administrative Judge may determine whether he/she needs additional information or should hold a hearing in order to further develop the record

regarding the class member's claim. At the conclusion of fact finding, the Administrative Judge will issue a decision concerning the class member's claim and forward the decision to the class member and the agency. EEO MD-110, 8-14. The decision will advise the agency that the ninety day period for issuing a final decision on the claim will resume upon its receipt of the Administrative Judge's decision.

APPENDICES

Appendix A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[District/Field Office]
[Address]

_____

) EEOC No.
v.) Agency No.
_____)

ORDER DIRECTING AGENCY TO PRODUCE COMPLAINT FILE

On [date], this office received a hearing request from complainant in the above-referenced complaint. A copy of the hearing request is attached.

The agency is ordered, within the earlier of fifteen (15) days from receipt of this Order or from receipt of complainant's request for a hearing, to provide this office a copy of the complete complaint file, including the report of investigation, if any, for the above-referenced complaint. The agency also shall send a copy of the complaint file including the report of investigation to the complainant, if it has not previously done so. 29 C.F.R. . 1614.108(g); EEO MD-110, Chapter 7, Sections I-II. The complaint file must be forwarded even where there

has been no investigation or there is an incomplete investigation. If the agency cannot provide the complaint file within fifteen (15) days, it must show good cause in writing to the Administrative Judge.

If the agency fails to provide the requested materials within fifteen (15) days from the date of receipt of this Order or to show good cause why it has not done so, the Administrative Judge may require the agency to bear the costs of the complainant's discovery, including attorney's fees, or impose other sanctions as appropriate. 29 C.F.R. . 1614.109(f)(3); EEO MD-110, Chapter 7, Section III. Sanctions may also be imposed for failure to investigate the claims adequately pursuant to EEO MD-110, Chapter 6.

_____

[Name]

[Title]

Enclosure: Copy of Hearing Request

Designated Point of Contact: _____

[District Director or Supervisory Administrative Judge]

_____

[Telephone Number]

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ORDER DIRECTING AGENCY TO PRODUCE COMPLAINT FILE within five (5) calendar days after the date it was sent via first class mail. I certify that on [date], the foregoing ORDER DIRECTING AGENCY TO PRODUCE COMPLAINT FILE was sent via first class mail to the following:

[Complainant + Address]

[Complainant's Representative + Address]

[Agency EEO Representative + Address]

_____

[Name]

[Title]

Appendix B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[District/Field Office]

[Address]

_____

) EEOC No.

v.) Agency No.

_____)

ACKNOWLEDGMENT AND ORDER

This acknowledges receipt of the complainant's request for a hearing. 29 C.F.R. . 1614.109 and Chapter 7 of EEOC Management Directive 110, November 9, 1999 (EEO MD-110) govern the conduct of hearings. The regulations and EEO MD-110 are available on the Commission's website at www.eeoc.gov.

The Administrative Judge whose name appears below has been assigned to preside over this complaint. Failure to follow the orders of the Administrative Judge or to comply with the Commission's regulations may result in sanctions. See 29 C.F.R. . 1614.109(f)(3). When a conflict between the parties arises, the parties should attempt to resolve the conflict themselves before bringing it to the attention of the Administrative Judge.

I. **CORRESPONDENCE AND MOTIONS**

Each party must provide the opposing party with a copy of all correspondence that he/she sends to the Administrative Judge. The attachment of a certificate of service may demonstrate that the opposing party was provided a copy. Failure to provide a copy of submissions to the opposing party may result in return of such submissions without consideration. The parties are reminded of their ongoing obligation to keep this office informed of their current mailing address. Other than to clarify a procedural issue or during alternative dispute resolution, it is

inappropriate for the parties to engage in ex parte (one-sided) communication with the Administrative Judge.

Extensions of filing dates and postponements will not be granted, absent a prompt request in writing and a showing of good cause. Failure by complainant to obtain representation, or failure by the agency to assign this matter to a representative, will not be grounds for postponement.

On any request or motion, the requesting party shall state that he/she has made a good faith effort to resolve the matter with the non-moving party and, where appropriate, indicate whether the opposing party has an objection to the request or motion. All motions should be accompanied by a proposed order granting the relief requested in the motion.

II. DESIGNATION OF REPRESENTATIVE

The parties are entitled to be represented. However, the complainant is not required to be represented. The EEOC does not provide representatives for either party. Even if the complainant has previously designated a representative for EEO counseling and agency investigation of the complaint, he/she must renew that designation for the purpose of EEOC processing of this complaint. The parties must inform this office of the name, address and telephone number of his/her respective representative. If that representative changes, or if a currently unrepresented complainant obtains representation in the future, the party shall notify the Administrative Judge and the other party immediately.

III. PARTIAL DISMISSALS

The parties have thirty (30) calendar days from receipt of this Order to identify any claims the agency has dismissed from the complaint during the agency investigative process, pursuant to 29 C.F.R. . 1614.107(a), and to comment on the appropriateness of each dismissal. Once the opportunity for identification and comment has passed, the Administrative Judge will determine, pursuant to 29 C.F.R. . 1614.107(b), the appropriateness of the agency's decision to dismiss each claim. If the complainant fails to oppose in writing the dismissal of a claim within the thirty (30) day comment period, the opportunity to have the dismissal reviewed by the Administrative Judge shall be deemed waived.

IV. SETTLEMENT

Within thirty (30) calendar days of receipt of this Order, the parties are directed to contact each other to define the claim(s) presented, to develop stipulations (i.e., agreements between the parties that certain facts are true for purposes of adjudicating this complaint) and to discuss settlement. The parties must discuss specific settlement proposals. The agency must designate an individual with settlement authority to attend settlement discussions convened by an Administrative Judge.

V. **DISCOVERY**

The parties are hereby notified of their right to seek discovery prior to the hearing in accordance with 29 C.F.R. . 1614.109(d). The parties must cooperate with each other in honoring discovery requests. The parties are expected to initiate and complete needed discovery with a minimum of intervention by the Administrative Judge. Except as indicated below, copies of interrogatories, requests for production of documents, requests for admissions, deposition notices and transcripts, and responses to such should not be sent to the Administrative Judge.

A. Discovery shall be completed within ninety (90) calendar days from the date of receipt of this Order unless otherwise directed by the Administrative Judge. If the parties agree between themselves to extend discovery deadlines that would, in turn, extend the 90-day deadline, the parties must seek the Administrative Judge's prior approval.

B. The method and scope of discovery shall be subject to the following:

1. Interrogatories shall be limited to one set. The set of interrogatories shall contain no more than thirty (30) questions including subparts.

2. Requests for production of documents must be specific and identify the documents or types of documents requested. Requests for production of documents shall contain no more than thirty (30) requests including subparts.

3. Requests for admissions shall not exceed thirty (30) in number including subparts. This limit does not apply to admissions relating to the authenticity of documents.

4. The agency must make employees available for deposition. In addition, the agency must arrange for the appearance at deposition of former employees currently employed by the federal government.

Absent prior approval from the Administrative Judge, a party must initiate discovery within twenty (20) calendar days of receipt of this Order. If a party does not submit a timely discovery request, the Administrative Judge may determine that the party has waived the right to pursue discovery.

A party must respond to a request for discovery within thirty (30) calendar days from receipt of the request. Requests for discovery and objections to such requests must be specific. A notice of deposition does not require a written response; however, any objection to a notice of deposition must be served promptly on the moving party. A deposition may be noticed and taken at any time during the discovery period.

Discovery motions, including motions to compel, must be filed within ten (10) calendar days after receipt of a deficient response or after the response to the discovery is due, whichever occurs first. Motions to compel and other discovery motions must be accompanied by the discovery requests and responses and a declaration stating that the moving party has made a good faith effort to resolve the discovery dispute. The declaration shall indicate the efforts made to resolve the dispute and identify which items remain in dispute. Statements in opposition to discovery motions must be filed within ten (10) calendar days of receipt of the motion. Rulings will be made based upon the written submissions. The failure to timely file objections to discovery may result in the objections being deemed waived.

VI. **SANCTIONS FOR FAILURE TO FOLLOW ORDERS**

Failure to follow this Order or other orders of the Administrative Judge may result in sanctions pursuant to 29 C.F.R. . 1614.109(f)(3). The Administrative Judge may, where appropriate:

(A) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(B) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(C) Exclude other evidence offered by the party failing to produce the requested information or witness;

(D) Issue a decision fully or partially in favor of the opposing party; or

(E) Take such other actions as appropriate.

VII. DECISION WITHOUT A HEARING

Pursuant to 29 C.F.R. . 1614.109(g)(1), a party may file a motion for summary judgment if that party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility. A motion for summary judgment must include a statement of the undisputed material facts. Unless otherwise ordered by the Administrative Judge, a motion for summary judgment must be filed not later than fifteen (15) days after the close of discovery; the opposing party will then have fifteen (15) days from receipt of the motion in which to file a response; and the moving party will then have five (5) days from receipt of the response to file a reply. Motions for summary judgment, and responses to such motions, shall contain specific citations to referenced evidence (e.g., cite the specific pages of the report of investigation, or other submitted evidence, in support of an argument).

The Administrative Judge may also issue summary judgment on his/her own initiative, pursuant to 29 C.F.R. . 1614.109(g)(3).

An Administrative Judge may also dismiss a complaint pursuant to 29 C.F.R. . 1614.109(b) for any of the reasons set forth in 29 C.F.R. . 1614.107(a). The Administrative Judge may dismiss complaints on his/her own initiative, or upon the Agency's motion to dismiss a complaint.

VIII. AMENDMENT AND CONSOLIDATION OF COMPLAINTS

Pursuant to 29 C.F.R. . 1614.106(d), the complainant may move to amend his/her complaint to add claims that are like or related to the original complaint. In order to amend the complaint, the complainant shall submit a motion as early as possible to the Administrative Judge stating the new claim, the date(s) when it occurred, and why it is like or related to the original complaint. The Administrative Judge may amend the original complaint to include the new claim(s) if

he/she finds the new claim is like or related to the original complaint. Motions to amend filed late in the process may be denied.

The Administrative Judge also has discretion to consolidate complaints pursuant to 29 C.F.R. . 1614.606. The parties shall advise the Administrative Judge in writing of any other complaint(s) pending at any stage of processing and should include all case number(s) or other information identifying such complaint(s).

It is so ORDERED.

For the Commission: _____

[Administrative Judge]

[Title]

[Telephone Number]

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ACKNOWLEDGMENT AND ORDER within five (5) calendar days after the date it was sent via first class mail. I certify that on [date], the foregoing ACKNOWLEDGMENT AND ORDER was sent first via first class mail to the following:

[Complainant + Address]

[Complainant's Representative + Address]

[Agency EEO Representative + Address]

[Agency Representative + Address]

_____

[Name]

[Title]

Appendix C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[District/Field Office]

[Address]

_____

) EEOC No.

v.) Agency No.

_____)

DESIGNATION OF REPRESENTATIVE

OPTION A: ELECTION TO PROCEED WITH A REPRESENTATIVE

I hereby designate the following individual as the representative for the __ COMPLAINANT or __ AGENCY in the above-referenced EEOC case:

_____

Name of Representative Telephone No. Facsimile No.

Address: _____

_____

_____

E-mail Address: _____

OPTION B: ELECTION TO PROCEED WITHOUT A REPRESENTATIVE

I, _____, will proceed without a representative in the above-referenced EEOC case. I understand that I must notify the Administrative

Judge and the agency immediately if I obtain representation at a later date.

_____ _____

Signature of Party Date

Complainant, please also provide your current address, telephone number, fax number, and E-mail address:

_____

_____

_____

E-mail Address: _____

Appendix D

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[District/Field Office]

[Address]

_____

) EEOC No.

v.) Agency No.

_____)

CONSOLIDATION ORDER

EEOC regulations at 29 C.F.R. Part 1614 provide Administrative Judges with the discretion to consolidate complaints after appropriate notification to the parties. 29 C.F.R. . 1614.606. The above complaints are hereby consolidated under EEOC No. [ ].

The parties are directed to follow the procedures set forth in the original Acknowledgment and Order issued previously. [Discovery must be completed within (#) calendar days of the date of this Order.] [The agency is ordered to complete an expedited investigation of { } and forward the report to this Office within (#) calendar days of the date of this Order. A copy of the report should also be forwarded to complainant.] It is so ORDERED.

Date: _____

[Name]

[Title]

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing CONSOLIDATION ORDER within five (5) calendar days after the date it was sent via first class mail. I certify that on [date], the foregoing CONSOLIDATION ORDER was sent via first class mail to the following:

[Complainant + Address]

[Complainant's Representative + Address]

[Agency EEO Representative + Address]

[Agency Representative + Address]

_____

[Name]

[Title]

Appendix E

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[District/Field Office]

[Address]

_____

) EEOC No.

v.) Agency No.

_____)

NOTICE OF INTENT TO ISSUE DECISION WITHOUT A HEARING

After a review of the record, the Administrative Judge has determined that there may be no material facts in dispute, and that it may therefore be appropriate to issue a decision without holding a hearing. See 29 C.F.R. . 1614.109(g)(3). The claim(s) raised in the complaint(s) before the Administrative Judge are as follows: [identify claims]. Based on a preliminary review of the record, it appears that the following material facts are not in dispute: [identify the undisputed material facts which appear to be dispositive of the case].

Applicable Law

1. Legal Standards for Granting A Decision Without A Hearing

[**INSTRUCTION** to Administrative Judge: Insert legal standard for summary judgment. For example:

> A decision without a hearing, also known as summary judgment, is appropriate if the record shows that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. There is no genuine issue of material fact if, based on the relevant evidence in the record, taken as a whole, a reasonable fact finder could not find in favor of the opposing party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). Material factual disputes include credibility disputes where two or more people have different versions of the relevant event, and the determination of that credibility dispute will affect the outcome of the case. In determining whether there are no disputed material facts, the Administrative Judge must draw all inferences from the record in the light most favorable to the party opposing summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only disputes over facts that might affect the outcome of the case under the applicable substantive law, and not irrelevant and unnecessary factual disputes, will preclude summary judgment. Id.]

2. Applicable Substantive Law

[**INSTRUCTION** to Administrative Judge: Insert statement of current legal standards applicable to complainant's claims. The Administrative Judge should maintain current statements of applicable Commission precedent on various claims for use in this order. See EEO MD-110, Appendix L, EEOC Compliance Manual and Enforcement Guidance, and recent Commission's federal sector decisions on the "Personnet" computer research system, on Westlaw (database: FLB-EEOC), LEXIS (file:labor;library: eeopub) and on our website. Administrative Judges must apply substantive legal standards in accordance with Commission precedent and policy.]

3. Content of the Parties' Responses

When opposing summary judgment, a party must respond with specific facts showing that there is a genuine dispute as to a material fact and that the other party is not entitled to judgment as a matter of law. Anderson, 477 U.S. at 250.

If a party opposes summary judgment, he/she may not rely on mere allegations, speculation, conclusory statements, or denials. The party should cite to specific evidence contained in the report of investigation which creates a factual dispute regarding a material issue in the case. If not already contained in the report of investigation, the party should also include any relevant documentary evidence or witness statements, interrogatory answers, admissions, or other supporting materials and provide a clear and specific statement of their relevance. Where information is compiled from agency records, provide a declaration from the person preparing the evidence as to the method used to prepare it.

UNLESS A PARTY DEMONSTRATES THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE, NO HEARING WILL BE HELD IN THIS MATTER. THEREFORE, IF THE PARTY PLANS TO CALL WITNESSES TO TESTIFY IN SUPPORT OF CLAIMS OR DEFENSES, THE PARTY SHOULD OBTAIN WRITTEN STATEMENTS FROM THEM, AND SUBMIT THESE STATEMENTS IN SUPPORT OF THE ARGUMENT AGAINST SUMMARY JUDGMENT.

4. Time for Responses

Both parties have fifteen days from receipt of this notice to submit a response. In addition, both parties have five days from receipt of each other's responses to submit a reply. Each party must send a copy of his/her response and reply to the other party.

It is so ORDERED.

_____

[Administrative Judge]

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing NOTICE OF INTENT TO ISSUE DECISION WITHOUT A HEARING within five (5) calendar days after the date it was sent via first class mail. I certify that on [date], the foregoing NOTICE OF INTENT TO ISSUE DECISION WITHOUT A HEARING was sent via first class mail to the following:

[Complainant + Address]
[Complainant's Representative + Address]
[Agency EEO Representative + Address]
[Agency Representative + Address]

_____

[Name]
[Title]

Appendix F

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[District/Field Office]
[Address]

_____

) EEOC No.
v.) Agency No.
_____)

ORDER OF DISMISSAL

Notice is hereby given that the above captioned case is DISMISSED pursuant to... For the following reasons...

This office will hold the report of investigation and the complaint file for sixty days, during which time the agency may arrange for their retrieval. If we do not hear from the agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.

For the Commission: _____

[Name]

[Title]

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ORDER OF DISMISSAL within five (5) calendar days after the date it was sent via first class mail. I certify that on [date], the foregoing ORDER OF DISMISSAL was sent via first class mail to the following:

[Complainant + Address]

[Complainant's Representative + Address]

[Agency EEO Representative + Address]

[Agency Representative + Address]

_____

[Name]

[Title]

Appendix G

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[District/Field Office]

[Address]

_____

) EEOC No.

v.) Agency No.

_____)

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated [date], judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing record for the agency and a copy of the transcript for complainant and/or his/her representative.

This office will hold the report of investigation and the complaint file for sixty days, during which time the agency may arrange for their retrieval. If we do not hear from the agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.

For the Commission: _____

[Name]

[Title]

Enclosures

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing [documents] within five (5) calendar days after the date they were sent via first class mail. I certify that on [date], the foregoing [documents] were sent via first class mail to the following:

[Complainant + Address]

[Complainant's Representative + Address]

[Agency EEO Representative + Address]

[Agency Representative + Address]

_____

[Name]

Appendix H

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. 1614.403, and append a copy of your appeal to your final order. See EEOC Management Directive 110, November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. . 1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. . 1614.110(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. See EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same

time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

BY PERSONAL DELIVERY:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 2050

BY FACSIMILE:

Number: (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. . 1614.504, an agency's final action that has not been the subject of an appeal to the Commission or a civil action is binding on the agency. If the complainant believes that the agency has failed to comply with the terms of this decision, the complainant shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The agency shall resolve the matter and respond to the complainant in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the agency has complied with the terms of its final action. The complainant may file such an appeal 35 days after serving the agency with the allegations of non-compliance, but must file an appeal within 30 days of receiving

the agency's determination. A copy of the appeal must be served on the agency, and the agency may submit a response to the Commission within 30 days of receiving the notice of appeal.

Appendix I

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[District/Field Office]
[Address]

In the Certification of:	)	
	)	EEOC No.
, et al.	)	Agency No.
Class Agent,	)	
v.	)	
	)	

ACKNOWLEDGMENT AND ORDER FOR CLASS CERTIFICATION

This is to acknowledge receipt of the above class complaint. EEOC Regulation 29 C.F.R. . 1614.204 and Chapter 8 of EEOC Management Directive 110, November 9, 1999 (EEO MD-110) govern the conduct of class complaints. The regulations and EEO MD-110 are available on the Commission's website at www.eeoc.gov.

Pursuant to 29 C.F.R. . 1614.204(c), the subject class complaint was filed against the [agency]. The complaint was forwarded to this office for a decision regarding certification of the complaint as a class action. The Administrative Judge whose name appears below has been assigned to preside over this complaint. Failure to follow the orders of the Administrative Judge or to comply with the Commission's regulations may result in sanctions. See 29 C.F.R. . 1614.109(f)(3). When a conflict between the parties arises, the parties should attempt to resolve the conflict themselves before bringing it to the attention of the Administrative Judge.

I. **DESIGNATION OF REPRESENTATIVE**

The parties are entitled to be represented. However, a class agent is not required to be represented. The EEOC does not provide representatives for either party. Even if the class agent has previously designated a representative for EEO counseling and agency investigation of the complaint, he/she must renew that designation for the purpose of EEOC processing of this complaint. The parties must inform this office of the name, address and telephone number of his/her respective representative. If that representative changes, or if a currently unrepresented class agent obtains representation in the future, the party shall notify the Administrative Judge and the other party immediately.

II. CORRESPONDENCE AND MOTIONS

The parties are hereby notified and authorized to submit specific information as to whether or not this complaint meets the certification requirements under 29 C.F.R. . 1614.204(a) for a class complaint. Such submissions shall be received in this office no later than fifteen (15) days from receipt of this Order.

Each party must provide the opposing party with a copy of all correspondence that he/she sends to the Administrative Judge. The attachment of a certificate of service may demonstrate that the opposing party was provided a copy. Failure to provide a copy of submissions to the opposing party may result in return of such submissions without consideration. The parties are reminded of their ongoing obligation to keep this office informed of their current mailing address. Other than to clarify a procedural issue or during alternative dispute resolution, it is inappropriate for the parties to engage in ex parte (one-sided) communication with the Administrative Judge.

Extensions of filing dates and postponements will not be granted, absent a prompt request in writing and a showing of good cause. Failure by the class agent to obtain representation, or failure by the agency to assign this matter to a representative, will not be grounds for postponement.

On any request or motion, the requesting party shall certify that he/she has made a good faith effort to resolve the matter with the non-moving party and, where appropriate, indicate whether the opposing party has an objection to the request or motion. All motions should be accompanied by a proposed order granting the relief requested in the motion.

At his/her discretion, the Administrative Judge may permit the parties to engage in limited discovery to develop evidence as to whether the class should be certified.

III. STANDARDS FOR CERTIFICATION

The Commission must determine whether this complaint meets the four procedural prerequisites for a class complaint under 29 C.F.R. . 1614.204. Those prerequisites are numerosity, commonality, typicality, and adequacy of representation. The Commission must also determine whether it should be dismissed for any other procedural reason listed at 29 C.F.R. . 1614.107. Specifically:

(1) whether the complaint is within the purview of subpart B - class complaints of discrimination, 29 C.F.R. . 1614.204;

(2) whether the complaint was timely filed;

(3) whether the complaint consists of an allegation identical to an allegation contained in a previous complaint filed on behalf of the same class which is pending in the agency or which has been resolved or decided by the agency;

(4) whether the agent consulted an EEO counselor in a timely manner;

(5) whether the complaint lacks specificity and detail; and

(6) whether the complaint meets the following prerequisites:

(a) the class is so numerous that a consolidated complaint of the members of the class is impractical;

(b) there are questions of fact common to the class;

(c) the claims of the agent of the class are typical of the claims of the class; and

(d) the agent of the class or his/her representative will fairly and adequately protect the interests of the class.

Class action certification decisions made under Rule 23 of the Federal Rules of Civil Procedure are also used as guidance for determining whether the above cited regulations are fulfilled in

making a decision in this matter. The class agent's failure to adequately address any of these factors will result in a determination that the class should not be certified.

IV. SANCTIONS FOR FAILURE TO FOLLOW ORDERS

Failure to follow this Order or other orders of the Administrative Judge may result in sanctions pursuant to 29 C.F.R. . 1614.109(f)(3). The Administrative Judge may, where appropriate:

(A) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(B) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(C) Exclude other evidence offered by the party failing to produce the requested information or witness;

(D) Issue a decision fully or partially in favor of the opposing party; or

(E) Take such other actions as appropriate.

It is so ORDERED.

For the Commission: _____

[Administrative Judge]

[Title]

[Telephone Number]

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing ACKNOWLEDGMENT AND ORDER FOR CLASS CERTIFICATION within five (5) calendar days after the date it was sent via first class mail. I certify that on [date], the foregoing ACKNOWLEDGMENT AND ORDER FOR CLASS CERTIFICATION was sent via first class mail to the following:

[Class Agent + Address]

[Class Agent's Representative + Address]

[Agency EEO Representative + Address]

[Agency Representative + Address]

_____

[Name]

[Title]

Appendix J

NOTICE TO THE AGENCY

Attached is a report of findings and recommendations issued pursuant to 29 C.F.R. . 1614.204(i). Within sixty (60) days of receiving this report of findings and recommendations, the agency shall issue a final decision, in writing, notifying the class agent, via certified mail, whether or not the agency will accept, reject, or modify the findings and recommendations of the Administrative Judge. If the agency has not issued a final decision within sixty (60) days of its receipt of the Administrative Judge's report of findings and recommendations, those findings and recommendations shall become the final decision, and the agency shall transmit the final decision to the class agent within five (5) days of the expiration of the sixty (60) day period. The final decision shall inform the class agent of the right to appeal or to file a civil action in accordance with 29 C.F.R. Section 1614 Subpart D and of the applicable time limits. 29 C.F.R. . 1614.204(j).

Footnotes

1. An Administrative Judge should not consolidate a complaint pending at the agency level with a complaint pending hearing if the complainant does not want the complaints to be consolidated.

2. When dismissing a complaint, the Administrative Judge should be alert to possible fragmentation of the complaint. When timely raised, a series of subsequent events involving the same claim should not be treated as separate complaints but should be added to and treated as part of the first claim. EEO MD-110, 7-8.

3. In determining whether complainant proved that the allegation of improper processing has merit, the Administrative Judge may consider whether complainant has already raised the concerns with the agency official responsible for complaint processing; whether the concerns remain unresolved; and whether the

complainant raises the concerns before the Administrative Judge issues a decision on the underlying complaint. EEO MD-110, 5-26. The Administrative Judge should know whether the first criterion is satisfied because the agency official presented with the concerns is required to ensure that the allegation, and any steps taken to address it, are documented in the record for the underlying EEO complaint.

4. When dismissing for this reason, the Order of Dismissal should contain instruction to the agency to provide appeal rights to the Merits Systems Protection Board if it has not already done so.

5. The written standards for the scope of discovery differ slightly in EEO MD-110 and the Federal Rules. According to EEO MD-110, discovery requests should: (1) be as specific as possible; (2) be reasonably calculated to discover non-repetitive, material evidence; and (3) indicate (if not self-evident) the materiality of the documentary or testimonial evidence sought and the manner in which the information sought will elucidate the accepted claims. EEO MD-110, 7-20. The Federal Rules provide that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved and that the information sought need not be admissible at trial if it is reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

6. The Administrative Judge has discretion to stay discovery while the parties are engaged in ADR.

7. For the definition of "routine use," see 5 U.S.C. § 552a(a)(7).

8. EEOC/GOVT-1, routine use e; OPM/GOVT-1, routine use w; OPM/GOVT-2, routine use g.

9. EEOC/GOVT-1, routine use b; OPM/GOVT-1, routine use p; OPM/GOVT-2, routine use i.

10. The Order may properly be captioned as an "ORDER OF DISMISSAL" where the sanction imposed is dismissal of the complaint. See Appendix F.

11. The Order Entering Judgment should be issued in lieu of a transmittal letter.

12. Attorney's fees and costs are not available under either the Age Discrimination in Employment Act or the Equal Pay Act for services performed at the administrative level.

13. In Rehabilitation Act cases where the claim involves the failure to provide a reasonable accommodation, compensatory damages are not available when the agency demonstrates that it made a good faith effort to accommodate the complainant. 42 U.S.C.A. § 1981a(a)(3).

14. In limited circumstances, the Administrative Judge may order the complainant to undergo a medical examination. See EEO MD-110, 7-11.