

What's Your Role in the Formal EEO Complaint Process?

By Debra L. Roth

Last year I wrote a column in *The Federal Manager* magazine that included some advice on how to deal effectively in the informal Equal Employment Opportunity (EEO) complaint process if you are the manager alleged to have engaged in EEO discrimination or reprisal. I did so because, based on experience, it is my belief that there is insufficient information and resources available to federal managers about their role in the EEO process and that the process is hampered for both the EEO complainant and management when management lacks a clear understanding of its role. I preceded my advice with a sketch of the informal EEO process, which involves an interview of the manager accused of discrimination, commonly referred to as the "responsible management official" (RMO), and could also involve some form of mediation.

In this column, I move into the next stage of an EEO complaint and provide some insight and advice to a manager who is required to participate in the EEO investigation, should you be named as an RMO in the formal complaint.

To begin with, if the EEO counseling period reaches a conclusion without an agreed upon resolution, the employee has the option of filing a "formal complaint."

He/she must make that filing within 15 days of receiving the notice from the EEO office which explains his/her right to file a formal complaint. To file a formal complaint, the employee need only complete a form provided by the EEO office. If the employee files this form on time, the complaint enters the formal stage.

Although you as an RMO usually do not get to see the actual complaint form completed by the employee, in many agencies (but not all) the EEO office will send written notification that you have been named as an RMO in the informal stage and that a formal complaint has now been filed. The notification will also state that you will be contacted by an EEO investigator for questioning if the EEO office accepts any of the allegations in the complaint for processing. Sometimes the letter from the EEO office will even notify you of the allegations accepted so that you know the accusations against you in advance of the investigator's call.

For many managers, it is receipt of this letter that informs them an employee has pursued an EEO complaint to the formal stage. If your agency's EEO office does not send out these types of letters to management, then you likely will not learn whether an employee has proceeded

from the informal counseling stage to the formal stage until you get contacted by the EEO investigator, and that could be many, many months after you initially heard from the EEO counselor.

But let's back up for a moment. As I noted above, the EEO office receives the formal complaint form from the employee and then evaluates which of the allegations of discrimination or reprisal it will "accept" for investigation. Simply because an allegation is set forth in the complaint form does not assure that the EEO office will process it. EEO offices are allowed to dismiss allegations that, for example: 1) are untimely (an employee is required by Equal Employment Opportunity Commission (EEOC) regulation to contact an EEO counselor within 45 days of learning of the alleged discriminatory act); 2) were already made in another EEO complaint pending at the agency level, EEOC or in federal court; 3) were made in a negotiated grievance proceeding or in a Merit Systems Protection Board (MSPB) appeal; 4) or, are legally moot. The complete list of claims subject to dismissal by the agency is set forth in 29 Code of Federal Regulations section 1614.107(a).

If the EEO office determines an allegation contained in the complaint form



is subject to dismissal, it will notify you of its determination in writing and those allegations are not investigated. The remaining allegations accepted by the EEO office are referred for investigation.

Agencies are required to complete the investigation and issue to the complainant a Report of Investigation within 180 days of when the formal complaint was filed. Most agencies have been meeting this deadline. That means you will hear from an investigator (not the counselor) usually two to four months after the formal complaint was filed.

The EEO investigator will contact you by telephone, e-mail or letter to inform you that he/she has been tasked with investigating the employee's formal complaint. In days gone by, investigators insisted on meeting with the RMO and other witnesses in person, conducting an interview, and then drafting up an affidavit for the RMO to review and sign; a cumbersome process. Also, RMOs often believed that the investigator's draft affidavit required substantial editing to become accurate.

To streamline the investigative process, most agencies allow the investigator to skip an interview and instead send a list of questions for you to prepare written responses to on your own, under oath. A

few agencies still require an in-person interview of the RMO by the investigator. The Department of Defense (DOD) still uses the fact-finding conference at which the entire investigation is conducted in one day before an individual who acts as a "fact finder." All the witnesses, you, and the complainant are required to testify. Your oral testimony is then transcribed by a court reporter, which you may or may not be given an opportunity to review and edit. DOD's fact finding conferences can feel like a hearing, but lack the benefits of being preceded by the traditional pre-hearing preparation.

When representing an RMO in the EEO investigation process, I prefer to have the investigator send a set of questions for a written response. First, it's a more efficient use of time than the process of meeting with the investigator for an interview and then dealing with the investigator's draft written affidavit. Investigators do not use the in-person interview to make credibility findings; they simply ask questions and write down what they understand to be the RMO's responses. As such, eliminating the in-person interview creates some efficiency. Second (and assuming the manager is putting his/her best efforts into providing full and complete, truthful written responses), providing the RMO

with a set of questions allows the manager time to review the questions, think about what information is responsive, and review any documents or records to clarify a faulty memory – all before providing an answer. For these reasons, an in-person interview can be inherently unreliable or incomplete and counter to the goal of collecting all of the relevant information in a complete and accurate manner.

In my experience representing RMOs, and assuming the RMO puts the effort into preparing full, complete and truthful responses, I have found that allowing the RMO to respond to written questions produces much more information in the record. A complete record benefits everyone, even the complainant, who is entitled to know all the information relevant to his/her allegations and from which the complainant can fairly assess his/her claim.

I have two final points to make. First, you should know that the EEO investigator will likely provide the complainant with a copy of your affidavit and offer the employee an opportunity to respond to it. On the other hand, you as an RMO are not usually shown a copy of the complainant's affidavit before or after

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you are required to provide your affidavit to the investigator.

Second, in some agencies, an attorney for the agency will ask to see your affidavit before you sign it. I think this is a good thing, even though the attorney will likely tell you that he/she represents the agency in the process and not you. While you may be concerned about turning over your draft affidavit, I think it is usually in your interest to do so. The agency attorney likely reviewed the actual complaint, has a legal understanding of the claims being made therein and probably has also seen the complainant's and other witnesses' affidavits along with any other relevant documents turned over to the investigator. With that full view of the claims and the evidence, the attorney should be in the best position to give you some guidance as you complete your affidavit. All that said, if you receive such a request from an agency attorney and you remain concerned about turning your draft affidavit over, or are unsure about following the guidance imparted to you by agency counsel, contact your own private attorney to help you decide how to proceed.

As a management official, you should respect the EEO process. That includes understanding what happens at the formal stage, what is expected of you and when. As I advised in my previous column about your role during the informal EEO stage, this benefits everyone. ■

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Additionally, Ms. Roth's agency practice includes representation of federal employees, applicants, and contractors in security clearance and suitability proceedings. Ms. Roth has a Top Secret security clearance and represents federal employees in national security agencies in connection with internal and external investigations. She has also provided legal advice and representation to several small agencies on a multitude of federal personnel law and employment discrimination matters.

Ms. Roth is the consulting attorney to FEDagent, a free weekly on-line newsletter published by SBVR for 1811s and other federal employees engaged in law enforcement and homeland security functions. Along with the other SBVR attorneys, Ms. Roth co-hosts FEDtalk, a weekly radio show produced by SBVR on Fridays, 11:00 A.M. to 12 noon (Eastern Time), on the all-federal employee internet radio station, www.federalnewsradio.com.

Prior to joining SBVR, Ms. Roth was a judicial law clerk for the Appellate Division of the New Jersey Superior Court. She is a cum laude graduate of Boston University, and received her law degree from the American University in Washington, D.C., where she was a Note and Comment Editor for The Administrative Law Journal.

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