

# **NTEU**

**The National Treasury Employees Union**

February 19, 2010

**VIA FACSIMILE: (202) 663-4114**

Stephen Llewellyn  
Executive Officer  
Executive Secretariat  
Equal Employment Opportunity Commission  
Room 6NE93F  
131 M Street, NE  
Washington, DC 20507

RE: RIN Number 3046-AA73  
Proposed Revisions to Federal Sector Complaint Processing Regulations

Dear Mr. Llewellyn:

The National Treasury Employees Union (NTEU) submits these comments in response to the Notice of Proposed Rulemaking published in the *Federal Register* on December 21, 2009. 74 Fed. Reg. 67839. The Equal Employment Opportunity Commission (EEOC) proposes revisions to its federal sector complaint processing regulations.

NTEU has long maintained that significant reform is necessary in the federal sector EEO process. As we have pointed out in testimony before the EEOC and in meetings with other stakeholders and EEOC representatives, the federal sector EEO process suffers from a number of structural flaws, most obviously an inherent conflict of interest. Where agencies are responsible for the processing of complaints filed against them, the investigative process lacks credibility with employees. We understand that the EEOC is not, at this time, addressing that problem and other fundamental and very serious issues. Instead, it is proposing some relatively minor, albeit useful, changes to its existing regulations, to clarify or build on the 1999 revisions to 29 C.F.R. Part 1614. While NTEU urges the EEOC to address the more fundamental problems with the federal sector EEO process at the earliest possible date, it generally supports those proposed changes for the reasons outlined below.

1. Require Compliance with Regulations, Management Directives, and Bulletins: The EEOC proposes to include a provision at Section 1614.102 to specify agency compliance with that part and the management directives and bulletins that the EEOC issues. NTEU wholeheartedly supports this proposed and long, overdue change. In NTEU's experience, agencies frequently ignore management directives and refuse to comply with EEOC guidelines. We also understand that only 61% of agencies reported compliance with the requirement in MD-110 that the EEO director report directly to the agency head. It is to be hoped that this regulatory change will reduce instances of noncompliance, although we note that the enforcement mechanism is simply the issuance of a "notice of noncompliance." NTEU suggests that, in lieu

of stronger enforcement mechanisms, the EEOC at a minimum make public the issuance of such a notice of noncompliance so that the force of public opinion may reinforce the need for agency compliance.

2. Pilot Projects: NTEU supports the general concept of pilot projects for processing complaints in ways other than those prescribed in Part 1614. We believe that the EEOC should set minimum standards for projects when granting variances. At the same time, it must specify that agencies and the unions that represent their employees may agree to other procedures if they so desire. Their need to agree before a pilot can be implemented should be enough of a check and balance or quality control mechanism to avoid any harm to employees. In no case should EEOC limit the current scope of negotiations. NTEU has, in the past, had success in negotiating alternative dispute resolution procedures for resolving EEO complaints; such efforts should be encouraged. In addition, NTEU urges the EEOC to give unions and other interested parties an opportunity to comment on proposed pilot projects before they are subjected to a vote by the Commissioners.

3. 180-Day Notice: NTEU strongly supports the proposal to require agencies to provide employees with a notice, after 180 days have elapsed without the completion of the investigation, to inform the employees that they have the right to request a hearing or file a lawsuit. We believe that many employees, especially those without union representation, do not understand, or may have forgotten, their rights, even if they have been informed of those rights upon the filing of the complaint (as is currently required). The notice would thus serve an invaluable reminder function, but could also serve as a prod to encourage agencies to wrap up their investigations in a more timely fashion. We note that there is precedent for such a notice: it is akin to the issuance of a letter by the Office of Special Counsel (OSC) notifying an employee of the right to file an individual right of action appeal to the Merit Systems Protection Board, if the 120-day period for investigation expires before the OSC investigation is concluded.

NTEU is nevertheless concerned that agencies will ignore their obligation to issue such a notice. In its comments, the EEOC states that the failure to provide a notice cannot be the basis of a "failure to properly process" claim. 74 Fed. Reg. at 67840. What then would be the sanction for an oversight or a deliberate failure to provide a required notice? A simple notice of noncompliance? The absence of any enforcement mechanism—or an effective one—threatens to undermine the usefulness of the proposed new requirement.

4. Proposed Personnel Actions for Retaliatory Motives: NTEU is strongly of the view that proposed or preliminary personnel actions may be highly effective forms of retaliation. Indeed, because threats to take personnel actions against an employee can be highly coercive, NTEU believes that they should also be accepted as the basis for a claim of discrimination. If, however, threats that have not yet materialized into a concrete personnel action cannot form the basis for a discrimination claim, employees should nonetheless be protected against threatened retaliation. There are sound policy reasons that counsel strongly in favor of broad protections against retaliation.

NTEU thus supports the EEOC's proposed change to clarify that complaints alleging that a proposal or preliminary step is retaliatory should not be subject to dismissal unless the alleged retaliatory action is not materially adverse—meaning that it would not dissuade a reasonable worker in the complainant's circumstances from engaging in protected EEO activity. It does not support the proposed alternative language under which only allegations of "severe or repeated threats of adverse action" that "state a claim of a hostile work environment" could constitute unlawful retaliation. Such a bar is unnecessarily high. The courts tend to demand a very high showing of proof to establish a "hostile work environment." Importation of that required showing into this context would virtually eliminate protections against retaliation based on threatened personnel action.

Finally, although NTEU is convinced that proposed or preliminary personnel actions undertaken for retaliatory motives should be recognized as the potential basis for a discrimination claim, it does have a practical concern. In NTEU's experience, some employees facing proposed action have made an ill-informed, overly hasty decision to pursue a threatened or proposed action through the EEO process when, upon reflection and consultation, the sounder decision may have been to pursue their claim through the negotiated grievance-arbitration process. The decision to pursue a matter through the EEO complaint process is an irrevocable election under 5 U.S.C. 7121(d), barring the door to the negotiated grievance-arbitration process. We therefore urge the EEOC to instruct EEO counselors to warn employees covered by a negotiated grievance-arbitration process of the consequences of filing a complaint over a proposed action.

5. Electronic Submissions: NTEU agrees that agencies should be required to submit appeals records and complaint files to the Commission electronically. Because employees may not have access to home computers for electronic submissions, NTEU agrees that they should only be encouraged but not required to submit their documentation electronically.

6. Finality of Decisions: NTEU supports the proposed revision specifying that decisions are final for purposes of filing a civil action unless a timely request for reconsideration is filed. Such a change will eliminate potential confusion among litigants who wish to seek reconsideration but who fear that such an action will make their civil action untimely.

7. Class Complaints: NTEU supports the EEOC's proposal to make an administrative judge's decision on the merits of a class complaint a final decision, just as it is in the case of nonclass complaints. We see no reason to distinguish between class and nonclass complaints in this context. Although agencies objected that this change would impede their ability to settle complaints, the EEOC rightly points out that there is no evidence of such an impact in the case of nonclass complaints. Moreover, NTEU is of the view that finality will, rather, encourage settlement. Agencies will have greater motivation to settle if faced with a final decision that they will either have to implement or appeal.

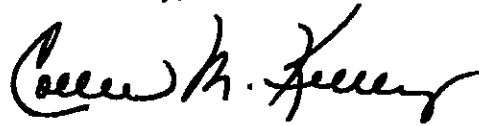
8. Time Frame for Compliance: NTEU is concerned about the proposal to extend the time frame for providing the relief ordered from 60 to 120 days. While that change will permit agencies to provide the relief only after the time for filing suit in district court has lapsed and the decision is final and unappealable, NTEU fears that employees will file suit simply because they

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do not believe the agency will comply with an EEOC order. Conversely, employees may refrain from filing suit in the expectation of compliance only to learn, after the time for filing suit has expired, that the agency will not comply. For that reason, NTEU opposes the proposed change.

NTEU thanks the Commission for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Colleen M. Kelley". The signature is fluid and cursive, with the first name being the most prominent.

Colleen M. Kelley  
National President