216 WORKS

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EEOC: The Great Pretenders

By Gabrielle Martin, Council 216 President

EEOC has a very important mission — Justice for victims of illegal employment discrimination. With the recent headlines acknowledging the reality of the epidemic of sex based discrimination, its role has become more critical. Yet, EEOC is more concerned with pretending that it is upholding its mission, as it artificially reduces closure rates and processing times. Workers are living the reality of discrimination, while EEOC presses its staff to close out their cases.

The vehicle of EEOC's pretense is the controversial new evaluation system shoved through in 2017. Investigators must count up phone contacts with charging parties, spend a great deal of time updating logs and close cases in intake or without statements of position from employers, all to meet the arbitrary numbers EEOC put in their evaluations and to keep their jobs.

EEOC now pretends there are fewer cases that should be designated as "B's," robbing workers of EEOC's substantive assistance and Mediators of their pool of cases. Then to make up for the deficit, EEOC puts mediators in a compromising ethical position by requiring them to hawk the program to employers while acting as a neutral facilitator to both parties during a mediation.

Through case processing, closure, and summary judgment requirements in their new evaluations, EEOC tells its Federal sector judges to pretend cases don't need discovery and then to close cases that

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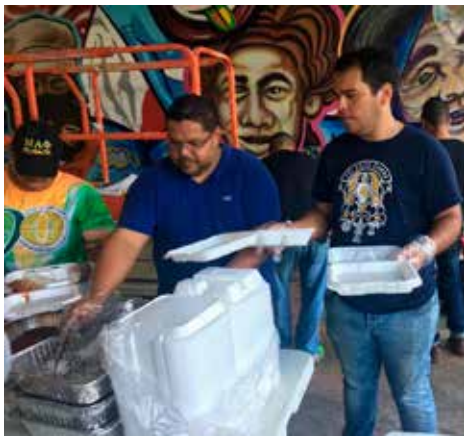
Puerto Rico Se Levanta



San Juan Investigator Luis Calzada (center) volunteering at a makeshift soup kitchen. "It was sad to hear people say this would be the only hot meal of the day. The storm was the worst that had hit us, yet it brought the best out of us as people. #puerto·rico·se·levanta (Puerto Rico will stand up)"

The Calls Worked: *Did You?*

By Rachel Shonfield, AFGE Local 3599

This year has been very hard for Federal employees, including at EEOC. The budget called for cuts to Federal employee retirement, pay, and employee rights.

Specifically, the budget would have increased retiree contributions over six years by 6%, meaning a 6% cut to take home pay. Despite the extra cost, the plan was to reduce benefits, including eliminating the FERS supplement. Destroying this bridge for retirees not yet eligible for social security, would have effectively added years until many could retire. And no cost of living adjustment for retirees - forever. There were also proposals to eliminate official time for your Union representatives to assist you individually or negotiate working conditions for the bargaining unit.

Yet, thanks to thousands of calls by Federal employees, their families, and friends to their local representatives in Congress, these harmful schemes did not get implemented. This year.

Don't be fooled into thinking that the texts, e-mails, and newsletters were unnecessarily alarmist or ginning up unwarranted urgency. It could have easily gone the other way. We all owe a debt of gratitude to those who jumped in and made the calls that saved us from cuts that would have hit us all in the wallet.

Maybe you were too busy and relied on others. That may have worked in 2017. Do you want to gamble your financial wellbeing on that strategy in 2018? How would you pay your bills with 6% less take-home pay? Think of when you plan to retire and add a few years. Imagine not having a Union steward.

It will take more calls to make a difference next year. This affects you. Don't leave your fate to others. Act to secure your fate.

At EEOC we appear to have escaped a half-baked plan to merge us with DOL's OFCCP. However, a fifth straight year of level funding means few backfills and more "do more with less."

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Loss of Professionalism Has Poisoned Labor Management Relations

By Sharon Baker, Chief Negotiator

Professionalism should accompany labor-management relations despite our differences. I can recall a time when personnel in HR were open to discussing all matters involving the bargaining unit. We were able to respectfully meet on issues of concern when proposed changes impact the working conditions. Before adverse action would be given, we were heard on the best way with consideration of the employee involved. Often we would get to a win-win for all, meaning not necessarily getting what you want but what all could live with.

Members, it does not exist, nor does it appear to be a priority with this existing headquarters management in OCHCO/ Labor Employment Relations Division (LERD). Let me explain my perspective through example.

1. Staff Development Enhancement Program (SDEP): LERD staff decided to initially bypass the joint negotiated developed program requirements and institute their own process without conferring with the Union, resulting in unnecessary discussions and delays.
2. Performance Plans – While the Union does not legally have a right in what the agency puts in the plans, the Union does have a right to bargain over the impact and implementation of the plans. However, LERD constantly argued against the Union exercising our rights which led to an Unfair Labor Practice (ULP) — decided in favor of the Union. The result is that LERD is required to negotiate with the Union on the impact and implementation of the contents in the performance plans. Unfortunately, negotiations impassed, and more processes are necessary.
3. Table of Penalties – LERD contacted the Union, as what they considered to be a courtesy, to inform the Union that they would be issuing the Table of Penalties to all employees. When the Union requested discussion and issued a demand to bargain, we were told that there would be no discussion. This resulted in another ULP being filed that FLRA ruled in favor of the Union.

LERD's repeated response to the Union is that they are protecting "Management Rights." However, they to fail to read the rest of the law that provides the Union the right to negotiate the impact and implementation of management's execution of its rights, if more than de minimis.

LERD is staffed with attorneys whose goal, in my experience, is to act as prosecutors of the employees. The advisory role of LERD and OCHCO has been changed, to essentially direct the supervisors. They are telling office supervisors/directors to consult with them on any decisions regarding an employee. In some offices the supervisors believe they have to do as told regardless of other available options. OCHCO's directive (not advice) often conflicts with and is more aggressive than what local management may want to do. OCHCO is doing what they accused the Union of doing, encroaching on management rights.

We know from past precedent that management can meet with labor to discuss issues; reasonable settlements can be worked out; disagreements don't need to lead to retaliation; requests for information can be properly and timely responded to; ULPs can be rare; there can be compassion for employees, who have contributed to the agency, but may have had a hiccup in their career that can be resolved with appropriate corrective action, instead of being disposed of by LERD. Management's current conduct is counterproductive. There is a better way.

POINTS TO PONDER

- How did management rate employees for FY17 since they still can't explain the performance stds?
- Where is the justice for the CP's in the 12,000 cases EEOC dumped from its backlog in FY17?
- Isn't it a conflict for HR's LERD attorneys to hold themselves out as advisors to those they prosecute?
- Should EEOC continue to hire vets if it can't figure out how to process their paperwork?
- Why reasonable accommodations at EEOC are second guessed?
- Has EEOC ever heard of FMLA as it goes after employee sick leave usage?
- Why EEOC Schedule A Disability hires rarely meet their probationary periods?
- How many ULPs does it take for EEOC to comply with the law?
- Will EEOC apply its civility training to its managers or just to employees?

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Official Publication of the National Council of EEOC Locals No. 216 AFGE/AFL-CIO
C/O Denver District Office #410, 303 E. 17th Avenue, Denver, CO 80203

ATTN: Gabrielle Martin, President

Phone: 1-303-866-1337

e-mail: Prezc216@gmail.com

In case you missed it, AFGE issued this important press release on November 14, 2017:

Labor Union Warns Justice Denied by EEOC's Great Case Dump

Agency Slashes Case Backlog By 16%, Raising Concerns of Rush Job

WASHINGTON – The union representing career civil service employees at the Equal Employment Opportunity Commission says the agency has set off alarm bells by announcing that it has slashed a decades-long backlog in discrimination cases.

"Realistically, justice could not have been served for 12,000 Americans complaining of workplace discrimination who got moved off of EEOC's books this year," said Gabrielle Martin, president of the American Federation of Government Employees' National Council of EEOC Locals No. 216.

The sudden drop in cases is inconsistent with long-running statistics on EEOC's workload challenges, Martin said. EEOC's backlog typically has gotten bigger from year to year. An exception was when the backlog improved slightly from 2011-2012, as some new frontline staffing backfills came on board. But overall, EEOC's backlog of discrimination charges has stubbornly stood at over 70,000 cases for a decade.

Just last year, EEOC still had 73,508 cases piled up, even after a modest 3.8 percent improvement over the previous year. But now, EEOC has announced that as of September 30, the backlog miraculously shrunk to 61,621 cases — a 16 percent reduction.

"Each case in the backlog represents a worker waiting for EEOC for help with a claim of discrimination," Martin said. "Justice delayed is a problem, but it is still better than justice denied."

The agency is attributing the jolting drop in the backlog to several factors: prioritizing the problem, sharing strategies between offices, and a new digital charge system. But Martin is not buying these explanations. "The backlog has always been a priority, interoffice communications is not new, and the digital charge system should eliminate paper — not cases."

Martin believes the EEOC's controversial new performance management system is the real culprit. For the first time, EEOC included case processing quotas in EEOC's new performance plans, which rate professional employees on arbitrary numerical requirements.

"Realistically, justice could not have been served for 12,000 Americans complaining of workplace discrimination who got moved off of EEOC's books this year,"

"To get a passing grade, EEOC is relentlessly pressing staff to reduce cases over a certain number of days old to below an arbitrary percentile of their caseload," Martin said.

"EEOC is trying to solve its backlog problem by taking a page from an *'I Love Lucy'* episode and speeding up the conveyor belt. But discrimination cases are not widgets — each complaint is a different set of facts. Workers filing discrimination complaints want both a fair and timely process, not just a quick closure."

A straight line can be drawn from the percentile requirements in the EEOC's new rating system and the drastic shift in the backlog numbers.

"The civil rights community and all those who care about justice should get EEOC to push the pause button on the new rating system until its impact on appropriate charge processing can be determined."

Recent headlines underscore the importance of EEOC as the agency that enforces laws preventing sexual harassment and other discrimination in the workplace.

"Unquestionably, discrimination is alive and well in our times. Unfortunately, EEOC has been hobbled by budget constraints that have not allowed for adequate frontline-staffing to keep up with new filings and the backlog. But EEOC's answer to short-staffing should not simply be a rush to dump old cases," Martin said.

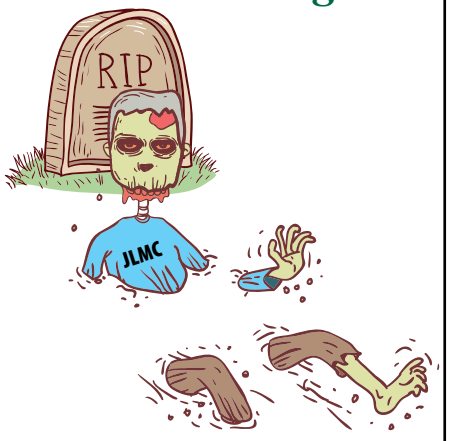
Resolve to Answer the Call

Continued from page 1

Go ahead — take a moment to breathe. But know that the budget for FY19 will be released in February. The parade of horrors will surely jump out of those pages. If for FY18, EEOC's budget was to remain level when absorbing OFCCP, what will FY19 look like if that is no longer the plan? Major cuts will mean furloughs or RIFS. Those who care about civil rights will raise a battle cry. Will you, for your own job?

Answering the call to make the call should be your New Year's resolution.

JLMC Dead Again



On December 14, 2017, EEOC informed the Union that it is rescinding the Joint Labor Management Council MOU, per its interpretation of executive order. EEOC's Zombie JLMC was already the walking dead, because the agency never embraced the benefits of collaboration.

The New Performance Standards Radically Change How EEOC Does Business

By David Norken, AJ
Local 3614, Treasurer and Delegate

The new performance standards put federal sector Administrative Judges (AJs) at risk and at the mercy of supervisors and radically change how EEOC does business.

The new performance standards impose bizarre and arbitrary numerical performance standards that will strongly encourage EEOC AJ's to find more often in favor of agencies. This will be true even when Complainants might have been able to prove discrimination if allowed to complete the hearings process.

The first problematic new performance standard, requires EEOC AJ's to categorize almost all cases within 60 days of assignment. This recipe can deny some complainants any discovery—the parties cannot complete discovery within 60 days of a case assignment to an AJ. Pro Se complainants will be hit hardest. Conducting some discovery is the only way complainants can force agencies to turn over information that could help them win their cases. Discovery is the only way to keep the EEO process fair.

The second problematic performance standard is the requirement that AJ's issue decisions within 90 days after hearing - 85-89% of cases for fully successful and 95% for outstanding. This undermines findings of discrimination. Damages hearings and a mandatory 60 days for attorney's fees petitions prevent issuance of case finding of discrimination in 90 days. Also, class/complex cases are treated as a simple case which discourages proper administration of complex cases.

The standards do not take into consideration that disparity in case loads - some AJ's only have 80 cases while some have 120 cases or more. This negatively impacts the ability to hit the closure requirements for outstanding cases — 50% for fully successful and 70% for outstanding. Often the year opens with cases more than 300 days old. A related performance standard imposes a closure requirement for outstanding cases within 180 days of the initial conference. This all must be done without adequate support such as paralegals and writing attorneys.

Another performance standard susceptible to abuse through micromanagement is for AJs to issue bench decisions where appropriate. I know of one office where the supervisor has required that all decisions be issued via bench decision.

These are a series of interlocking standards which create strong pressure to close cases. The obvious way for AJs to survive these standards is to find in favor of the agencies. Complainants, Complainant attorneys and stakeholders should be especially concerned about these standards. If you have this concern, you should tell EEOC and Congress.

New FY18 Mediator Standards are Troubling for Mediators, CPs, Rs, and Future of ADR

By an EEOC Mediator

Mediation is offered by EEOC as an alternative to the traditional investigative or litigation process. EEOC procedures/processes are Mandatory, with the exception of its Mediation program. Mediations are voluntary, confidential, and conducted by a "Neutral" representative of EEOC, the Mediator.

However, EEOC has made troubling changes to its evaluation system that threaten the very neutrality of the Mediator. The FY18 Performance Plan requires that the Mediator, sell the Universal Agreement to Mediate (UAM) program to the Respondent during the mediation. A UAM is an agreement between EEOC and an employer to mediate eligible charges against the employer, allowing for opt-out.

Now, the Mediator must sell one UAM for "Fully Successful" evaluation and four to get "Outstanding." So, while the Charging Party (CP) waits in the caucus room, perhaps thinking that the Mediator is helping the parties get closer to an agreement, the Mediator will be working to get a better performance rating by selling the UAM to Respondent.

Although the term used is "recruit," rather than "sell," either requires the mediator to persuade, convince, influence, or lure the Respondent to buy into the UAM program, not in exchange for money of course, but for helping the Mediator with their evaluation. This takes away from the expected neutrality of the mediator. It also causes energy to be directed away from helping the parties resolve the dispute to helping the Mediator.

The parties and their attorneys would understandably look unfavorably upon the Mediator's new UAM task, if they understood it. The CP may think the Mediator could tip the balance in the Respondent's favor, to obtain the UAM. Respondent may think they need to agree to the UAM, not to upset the Mediator and tip it to CP. It seems more appropriate instead of the Mediator, to have perhaps HQ or the ADR coordinator, as it used to be, recruit Respondents for UAM's.

Another unfair change is requiring the Mediator to conduct 3 mediations per week to be "Fully Successful" and 3.5 mediations for "Outstanding." This cannot be accomplished when Agency wide, Mediators are carrying one fourth of the case-load they did 8 months ago. The Agency is pushing for a narrowing of the "B" cases, which are primarily the cases that go to mediation. This is also unfair to stakeholders, as I have been receiving numerous complaints from private sector attorneys that their client's cases are not being sent to mediation.

Saying "A" cases sent to Mediation will increase, ignores the disproportionate amount of B to A cases. Is management planning to make up for the loss in inventory by compelling Mediators to recruit UAMs from Respondents in order to ensure that cases to come to ADR?

Also, how is this 3-3.5 mediations per week going to be evaluated? Is it based on 52 weeks? If not, exactly how many weeks? It is reasonable that Mediators know this to gage their progress.

The EEOC Mediation program was not broken. It has been a great and successful program from its inception. We are not sure exactly what HQ is trying to fix. Perhaps we should go back to the basics of what has made the program so successful.

The Making of Widget Masters

Malinda Tuazon, EEOC Investigator

There is no doubt that the Equal Employment Opportunity Commission's new performance standards have had a negative impact on not only employees but our ability to help the public. As an investigator at the EEOC, I have seen first-hand the effect these arbitrary and inexplicable performance standards have had.

The standards are all based on numbers, metrics, and quantifiable goals. There is relatively no mention of qualitative work. When the standards do discuss quality of work, it is still in a measurable way. For example, investigators are measured on the percentage of times the investigator applies the Models of Proof, theories of discrimination, and Priority Charge Handling Procedures correctly. To achieve a Fully Successful, an investigator must meet this goal 88% of the time; an Outstanding rating requires the investigator to meet the goal 93% of the time. There is no mention of how to achieve a Highly Effective rating, so we are left to presume that meeting the goal 90.5% of the time will lead to that rating. Supervisors are to somehow observe a 2.5 percent distinction. However, PCHP categorization should be a dialogue with the investigator and supervisor discussing the reasons a case should be categorized a certain way and then reaching agreement. Would every instance of such a dialogue count as an incorrect application of the PCHP principles? Thus far, nobody in management has been able to answer that question.

In addition to the vagueness of the standards and impracticability of measuring them, there are numerous ways in which the new standards have impacted employees' ability to perform our jobs and ultimately serve the public. First, because they were suddenly instituted during the middle of the fiscal year and management was generally unable to explain how the Agency would apply the new standards, employees were left scrambling to try to set new goals and timelines for ourselves without really knowing what those goals should be. For investigators, there is a conflict between working on strong cases that could lead to litigation and minimizing the backlog. Intake appears to be lower on the priority list so, once procedural requirements are met, intake has backed up and some investigators are still trying to catch up on fiscal year 2017 intake interviews as we approach the end of the first quarter of fiscal year 2018. Additionally, the standards for each position appear to have been written in a vacuum. For example, investigator goals do not match up with the goals for attorneys, which has had the unfortunate effect of pitting the positions against each other. Legal staff now have an incentive to rush investigators through investigations to meet their filing goals while investigators' priorities include intake and aged case inventory reduction. This conflict has sometimes led to worsening relationships between investigator-attorney teams.

Without clear goals that management can justify, explain in a meaningful way, and accurately measure, employees are left without guidance on how to efficiently and effectively perform our jobs. The public is also harmed by these standards, because the vast majority of cases are first delayed at intake processing and then rushed out the door to achieve backlog reduction. With these new "quantifiable" goals, the Agency clearly believes it will be able to distinguish between weak and strong performers, but it has turned staff into widget makers who are only measured on the number of widgets produced each year. Does anyone want a case of discrimination that requires thoughtful analysis handled by a widget maker?

Editors Note: The next issue will include more contributors from other positions discussing how the new evaluation system is detracting from how they perform their job and serve the public. Let's keep the dialogue going!

Get AFGE Bonus Bucks!

All members should encourage a non-member to join, so we build our strength. The bonus bucks program was extended. Get a new member to sign up and both of you receive $100. Also membership benefits include life and other insurance, credits cards, mortgage programs, purchasing things from cars to travel and other benefits. Talk to your local president for details.

DCS Phase 2 Update:

With the new fiscal year came Phase 2 of EEOC's digital charge system (DCS), including a CP portal and online appointments. The training webinar was not hands-on, so employees pretty much had to teach themselves how to take a digital charge. DCS is awkward and is buggy, because it was built on a 20th century platform, i.e., IMS. Many forms still have to be printed and mailed, others downloaded and converted to different formats. The good news is that things could have been worse. The Union gives credit where it is due. The agency included the Union in the DCS workgroup. For each phase, an MOU was negotiated. For phase 2, key management addressed concerns with the union, especially the impact of the appointment system.There is a consensus that this made Phase 2 better for employees and the public. It would be a positive development for customer service and employee relations if such engagement occurred more often.

EEOC Commits Unfair Labor Practices — Repeatedly

EEOC Lacks Moral Authority to Act as Workplace Law Enforcer

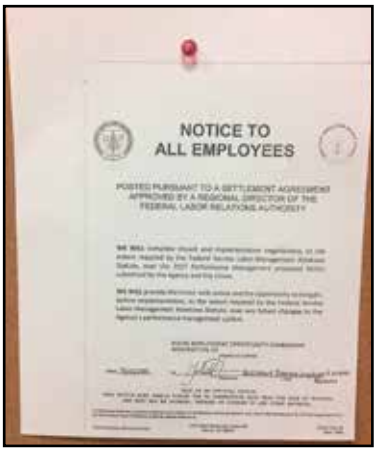
The notices you see on your break room bulletin boards are posted there because the EEOC violated the rights of its bargaining unit employees. It is sad, but EEOC repeatedly has committed unfair labor practices (ULP's) over the last two years. Each time the Union brought the violation to the agency's attention and was rebuffed. As recourse, the Union filed charges of unfair labor practices with the Fair Labor Relations Authority (FLRA).

The FLRA investigated, found merit, and issued complaints on these significant ULP's: EEOC's failure to bargain the impact and implementation of a new table of penalties; EEOC's failure to bargain the impact and implementation of the agency's unilaterally altering the processing of dues for members who opt for voluntary payroll deductions; EEOC's failure to bargain the impact and implementation of new performance standards.

Most recently, an Administrative Law Judge ruled against EEOC in a summary judgment decision and issued a stinging rebuke of the "model employer:"

> *[T]he arguments presented by the Respondent [EEOC] to justify its failure and refusal to bargain over the impact and implementation of a Table of Penalties applicable to all employees demonstrates either an ignorance or a complete misunderstanding of the relevant federal labor law. Such flawed reasoning would be troubling were it exhibited by a neophyte attorney, that it is proffered by the Agency's Employee Labor and Relations Division Director gives reason to question, whom within the EEOC could advise the Agency about its bargaining obligations under the statute. — FLRA ALJ Summary Judgment Decision, 11/7/17*

It would seem unlikely that the EEOC, given the nature of our agency, would just know its employer obligations under the federal labor statute. However, if ignorance was initially the problem, EEOC should have learned a lesson rather than repeating the same violations.



One of the notices EEOC has been required to post because of ULPs

We are at a turning point in our society. Accountability is demanded of those in positions of power, so that institutions can carry out their function without being undermined by hypocrisy. Likewise, EEOC loses all credibility by holding other employers to a high standard, while flagrantly violating laws intended to protect to its own employees. EEOC's reputation will suffer, as it did when it was labeled a "laughingstock" for violating overtime laws.

Each day, the EEOC issues press releases or inserts itself into the news of the day touting its role as the workplace law enforcer. The EEOC is there to protect all the nation's employees, against workplace violations – its own employees should have that same benefit! EEOC needs to clean up its own managerial conduct and reverse its hypocritical stance.

To regain the moral high ground, EEOC must comply with its obligations under the statute and correct its past and ongoing violations. If EEOC does not have the wherewithal to know what's right or have an advisor within the agency to show them right, then it's high time for the agency's own moment of reckoning.

Pretenders

Continued from page 1

don't have enough information. Further, the judges are required to close arbitrary numbers of cases via summary judgment decisions to keep their jobs. EEOC pretends that undermining judicial independence produces justice for the complainants.

EEOC pretends fewer staff carrying bigger caseloads can hit the same numbers. EEOC pretends employees fleeing notoriously abusive managers left for better opportunities. EEOC pretends hiring people at the end of the year helps this year's bottom line and keeps up with resignations, terminations and retirements. EEOC pretends that a 1:6 supervisor to employee ratio is efficient.

The "Model Employer" pretends that its HR department is not a joke. The agency refuses to negotiate with its Union or provide basic information to employees. A power hungry and employee hostile OCHCO takes personnel tasks away from local DRMs. Then employees are left to wait as LERD is too busy prosecuting their coworkers then to provide HR assistance.

Another area where EEOC pretends is reasonable accommodations. Although there is a person whose job it is to review the requests and make determinations, that person almost always is over-ruled by OCHCO. That means that people who qualify as individuals with disabilities are denied accommodations. The real tragedy is that veterans and others who could work with accommodations are terminated for arbitrary reasons. Yet, EEOC sings a different tune when discussing accommodations, including leave, for those not in its own workforce.

There are plenty of horror stories around the performance plans and you can read stories from those doing the work. EEOC needs to stop pretending and make justice a reality for the working public and for its own workforce.