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STATEMENT OF
J. CLAY SMITH, JR., ACTING CHAIRMAN
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE
HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE
SUBCOMMITTEE ON CIVIL SERVICE
OCTOBER 1, 1981

Good morning, Chairwoman Schroeder and members of the subcommittee. I am pleased to have the opportunity to appear before you to discuss the activities of the Commission with regard to its equal employment opportunity and affirmative action responsibilities pursuant to the Civil Service Reform Act of 1978 and Reorganization Plan No. 1 of 1978.

As you know so well, equal employment opportunity was a key component of the Civil Service Reform Act, and that important piece of legislation, in conjunction with the Reorganization Plan, focused attention as never before on EEO and affirmative action within the Federal government. EEOC became the primary agency responsible for implementation of the programs and goals contained in those measures, namely, setting government-wide equal employment opportunity standards, monitoring the processing of complaints of discrimination filed against agencies of the government, ruling on appeals of agencies' decisions, and directing and monitoring affirmative action plans drawn up by Federal agencies.

The Congress, in its consideration of reforms of the civil service, recognized that minorities and women were not adequately represented in many levels of the Federal government, and so adopted the Garcia Amendment to the Civil Service Reform Act of 1978. That measure established the Federal equal opportunity recruitment program (FEORP), which required that Federal agencies establish affirmative recruitment programs for minorities and women whenever underrepresentation is found, the goal being adequate representation of these groups in applicant pools used by selecting officials to fill Federal jobs. Recruitment, of course, has long been recognized by EEOC as a key component in addressing underrepresentation of minorities and women, and therefore we were pleased that the Amendment directed the Commission to develop guidelines to be used by the Office of Personnel Management (OPM) in writing its regulations implementing FEORP.

Although OPM was given statutory responsibility for the enforcement of agencies' adherence to FEORP, the Commission is involved in the review of their FEORP plans. During the transition period, that is, 1979 through Fiscal Year 1981, EEOC required agencies to submit their FEORP plans to the Commission along with their affirmative action plans and to implement special recruitment programs whenever there was identified, severe underrepresentation of women and/or minorities, especially in those four job categories having the severest underrepresentation. For the five-year period beginning in Fiscal Year 1982, EEOC has instructed agencies to submit FEORP plans designed to establish applicant pools which include female and minority candidates for all job categories where there is severe underrepresentation as identified in their affirmative action plans.

With a contracting Federal budget, most Federal agencies have severely cut back on recruitment activities. While I do not see any change in that situation in the foreseeable future, there are innovative techniques that can and should be used by Federal agencies to minimize the impact of hiring freezes and reductions-in-force on minorities and women, such as promotions, encouraging employees to work part-time, and establishing outreach programs to find alternate employment for employees who otherwise would be separated through a reduction-in-force. The Commission's views on this matter are clearly delineated in the policy statement it issued on September 12, 1980, a copy of which I request be entered in the hearing record. I plan to reissue it shortly to heads of all Federal agencies.

EEOC's own experience in this regard is a good example of what can be done. Early this year, we were directed by the Office of Management and Budget to reduce our personnel ceiling by 287 positions. Because we notified our employees early in

the process, encouraged them to consider part-time employment, and established an active outreach program, by the effective date of the reduction-in-force, August 14, only 30 employees had to be separated from the Commission. Some 60 percent found other jobs and over 13 percent converted from full-time to part-time employment.

Another major EEOC responsibility in the area of equal employment opportunity is oversight of affirmative action planning and programming by Federal agencies with respect to women, minorities and the handicapped. Our primary goal during the transition period (January 1979 through Fiscal Year 1981) was to introduce, via our directives to Federal agencies, the basic concepts and methodology necessary to guide them in developing a systematic approach to affirmative action planning so that management, personnel, EEO and data-processing units were integrated into the planning process, thereby enabling them to draw up meaningful affirmative action plans. Through our review and analysis of agencies' affirmative action plans and other contacts we have had with the agencies, we believe that they have acquired, in the main, the methodology necessary to develop good affirmative action plans and that they are now capable of developing and implementing them.

Our secondary goal during the transition period was to instill the idea that accountability for meeting goals must be set at the lowest, i.e., local management levels, if affirmative action planning is to succeed. The transition period demonstrated that local managers are familiar with the planning process, are capable of using it to develop local affirmative action plans, and understand that they will be held accountable for meeting their plans' goals.

With Fiscal Year 1982, we begin a new era. Agencies now are required to submit five-year plans to us and are expected to fully utilize the systematic approach and methodology they learned during the transition period, to implement programs to take full advantage of what they learned, and, of course, to make good-faith efforts to meet their goals.

Since 1979, the Commission has issued several directives to Federal agencies on how to develop affirmative action plans, and like them, the one issued early this year for the period beginning October 1, 1981 was subject to the approval of the National Archives and Records Service (NARS), the agency charged with the responsibility of assuring that new interagency reporting requirements do not duplicate existing data systems. Some five months after our provisional instructions for Fiscal Years 1982 through 1986 were issued, NARS informed the Commission that they disapproved them, believing that the data we required agencies to submit in their affirmative action plans would duplicate data maintained by and obtainable from OPM. Since our directive had required that agencies submit their plans to us by August 1, on June 15, I informed heads of all Federal agencies of NARS' ruling. However, I also advised them that EEOC would allow certain variances from its directive issued in January so that agencies could continue to develop their affirmative action plans until the NARS matter was resolved. After concluding that OPM's data would not meet our needs, NARS approved our directive, as modified, in early August, and on August 12 I again contacted all agency heads. I informed them of NARS' approval and that they should complete their plans in time to implement them beginning with the new fiscal year. While submission of the plans to EEOC by that date was not required, due to the delays resulting from NARS' initial

disapproval of our instructions, we expect virtually all agencies to submit their plans to us in the first quarter of Fiscal Year '82, which we find reasonable and acceptable under the circumstances.

The other major Commission area of responsibility regarding equal employment opportunity is processing complaints of employment discrimination filed against Federal agencies by employees and applicants for employment. When the Commission assumed this responsibility from the old Civil Service Commission, it adopted the procedural regulations then in effect on an interim basis in order to give us time to determine what changes should be made in order to make the system work more quickly and efficiently.

Included in those regulations adopted by EEOC was the delegation of authority to each agency to investigate allegations of discrimination filed against it. As you will remember, Reorganization Plan No. 1 of 1978 had as one of its central purposes to centralize equal employment opportunity authority in one agency, namely, the Equal Employment Opportunity Commission. The Commission and others believed that EEOC, a neutral third party, should investigate complaints of discrimination against Federal agencies, thereby eliminating the major impediment to impartial, timely investigations, i.e., self-investigation. To this end, beginning in September of 1979, EEOC conducted a pilot program using some of the techniques it employs in investigating charges in the private sector to investigate over 360 charges filed against other agencies. That program clearly demonstrated that when an impartial agency processes cases, complaints can be handled far more quickly.

Although the Commission had every expectation of making permanent its role in investigating charges against Federal agencies, due to across-the-board cuts in agencies' budgets, in December of 1980 the Office of Management and Budget decided not to approve the slots which would enable us to implement this plan, and the slots have not been restored since then. Therefore, our emphasis instead will be on revising the procedures to improve the efficiency with which investigations are conducted. We are currently considering how we can adapt some of the methods EEOC uses in investigating non-Federal cases, such as placing greater emphasis on encouraging settlement early in the process, upgrading and professionalizing intake, and holding face-to-face meetings between complainants and agency representatives as soon after the complaint is filed as possible.

Other key components of the EEO case-processing system in the Federal government are hearings and appeals. EEOC is responsible for conducting hearings requested by complainants after the agency has investigated the case but before it has issued its decision. The number of requests received annually for hearings has been increasing at a steady rate:

- o In Fiscal Year 1978, the CSC received approximately 2,100 requests.
- o In Fiscal Year 1979, when hearings authority transferred from CSC to EEOC, the CSC and EEOC received a combined total of approximately 2,870.
- o In Fiscal Year 1980, the EEOC received 2,959.
- o In Fiscal Year 1981, we project receipts of 3,167.

In Fiscal Year 1980, the last period for which we have complete data, of the 2,959 hearings requests we received, we processed 2,764 as follows:

- o 1,100 were processed to the point of holding a hearing, at an average cost of \$5,000 each.
- o 1,664 were settled or remanded to the agency for further investigation.

Following the hearing, EEOC issues a recommended decision to the agency. During Fiscal Year 1980, 35 percent of EEOC's recommended decisions found discrimination, and agencies report that they adopted some 65 percent of those recommendations in whole or in part. (We have found, however, that these reports are not wholly accurate.) EEOC found no discrimination in 65 percent of its recommended decisions, and agencies report that they adopted 96 percent of those findings in whole or in part.

Following a final agency decision adverse to a complainant, he or she has the right to appeal that decision to EEOC. The Commission then determines whether the discrimination complaint was decided correctly by the agency. Preliminary figures indicate that in Fiscal Year 1981 some 3,175 appeals of agency decisions and rejections of complaints were filed with EEOC. During the same period, 2,611 appeals were processed to completion. In Fiscal Year 1982, we expect to receive over 4,000 new appeals and, with current staffing, to process to completion 2,600. It has been our experience that in those cases where EEOC reverses an agency's final decision and orders certain action on the part of that agency, there is compliance over 90 percent of the time. In those instances where timely compliance appears not to be forthcoming, moral suasion is usually successful.

One other issue you asked me to address in my statement is if the Uniform Guidelines on Employee Selection Procedures, issued by four Federal agencies in 1978, are to be

rewritten. While the Presidential Task Force on Regulatory Relief has targeted them for review, whether they will be rewritten can be determined only after the review process is complete. We have recently submitted our proposed work plan to the Task Force, and estimate that once it has been approved, it will take a minimum of eight months to complete our review and could take several months longer if we are instructed to modify either the methodology to be used or the issues to be addressed. Although the Commission has no problems with the Guidelines, some have expressed reservations regarding their recordkeeping requirements and the consistency of the validation standards with new developments in the field of psychology. As currently written, the guidelines are intended to represent professionally acceptable methods of the psychological profession for demonstrating whether a selection procedure validly predicts or measures performance for a particular job.

As you know, the requirements of these guidelines stem from United States Supreme Court decisions such as Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Since their adoption in 1978, courts have given considerable deference to the Guidelines. (Ensley Branch of NAACP v. Seibels, 616 F 2d 812, 822 n. 22 (8th Cir. 1980); Blake v. City of Los Angeles, 595 F 2d 1367, 1382 (9th Cir. 1979); U.S. v. City of Buffalo, 633 F 2d 643, 646 nn. 7 and 8 (2d Cir. 1980); and Firefighters Institute for Racial Equality v. City of St. Louis, 22 EPD §30,571 (8th Cir. 1980) cert denied).

We understand that a professional committee, called The Committee to Develop Joint Technical Standards for Educational and Psychological Testing, has been formed to develop new technical standards for the use of educational and psychological tests,

and that the committee will hold open hearings next year on those standards. This committee has been jointly established by the American Psychological Association, the American Educational Research Association and the National Council on Measurement in Education. We do not consider it appropriate for a government agency to prejudge the direction of these standards and to consider revisions to the technical standards of the guidelines until this committee has completed its work and issued a final document. In the meantime, the Uniform Guidelines stand as written.

In conclusion, I believe that we have made progress since 1979 in institutionalizing government-wide understanding of and commitment to equal employment opportunity and affirmative action planning.

I would be happy to answer any questions you may have.