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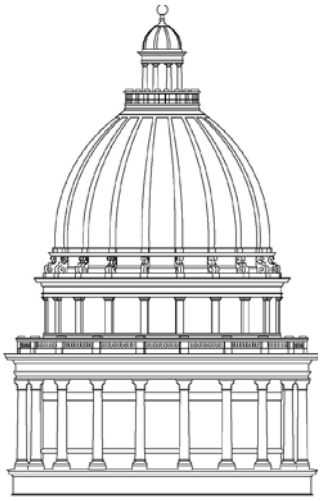

A Performance Audit of the Utah Antidiscrimination and Labor Division

January 2010

Office of the
LEGISLATIVE AUDITOR GENERAL
State of Utah

STATE OF UTAH
Office of the Legislative Auditor General

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JOHN M. SCHAFF, CIA
AUDITOR GENERAL

January 19, 2010

TO: THE UTAH STATE LEGISLATURE

Transmitted herewith is our report, **A Performance Audit of the Utah Antidiscrimination and Labor Division** (Report #2010-02). A digest is found on the blue pages located at the front of the report. The objectives and scope of the audit are explained in the Introduction.

We will be happy to meet with appropriate legislative committees, individual legislators, and other state officials to discuss any item contained in the report in order to facilitate the implementation of the recommendations.

Sincerely,

John M. Schaff

John M. Schaff, CIA
Auditor General

JMS/lm

Digest of A Performance Audit of the Utah Antidiscrimination and Labor Division

Chapter I: Introduction

The Utah Antidiscrimination and Labor Division (UALD or the division) administers and enforces antidiscrimination laws by providing a forum for the public to bring complaints and obtain relief. In fiscal year 2009, complainants filed 659 employment and 61 housing discrimination complaints. The complaint process is currently divided into three phases: intake, mediation, and investigation. Parties may appeal determinations issued by the division through a formal appeal process that is separate from UALD's informal process.

Chapter II: Legislature Should Establish Time Limits For Processing Employment Complaints

Some Employment Cases Are Neglected for Long Periods. Although UALD's informal complaint process is required to be completed promptly, we found 30 employment cases that remained under investigation for over 500 days after the complaint was filed. Many of those cases were over 1,000 days old, and there were often time gaps where no investigative activity occurred. Investigators are not required to complete the oldest cases but focus more on closing easier cases in order to meet federal contract quotas. Parties involved with old cases expressed frustration that the cases took so long to complete and that so many different investigators were involved in these cases. Currently, Utah sets specific time limits for processing housing complaints, but there are no time limits for employment complaints.

1. We recommend that UALD process complaints in the order in which they are received when practicable.

2. We recommend that UALD establish a goal to complete each employment discrimination investigation within 180 days or less.

3. We recommend that the Legislature consider requiring UALD to complete its employment discrimination investigations within set time limits.

Chapter III: Complaint Process Needs Better Compliance and Could Be Streamlined

UALD Should Consider Modifying Mediation Procedures. To learn why some cases are delayed and if the division complied with its policies, we reviewed a sample of both employment and housing discrimination cases. We found no significant concerns with intake procedures. Intake officers did not always comply with the time limits for processing complaints, but the delays were minimal. Delays during the mediation phase were more significant, and time limits were often overlooked. We think procedures could be modified to make mediation a parallel rather than a sequential process.

Investigative Procedures Need Additional Oversight. The most serious delays result from investigative procedures. Cases are not assigned to investigators for many months after complaints are filed, and investigators do not maintain frequent contact with parties as required by division policy. The case manager focuses too much on doing case work rather than on overseeing investigators. We also think customer service would be enhanced if the investigator responsible for the case was assigned as soon as the complaint is filed rather than months later.

1. We recommend that UALD review staff assignments to try to reduce the amount of time employment discrimination investigations take to complete.

2. We recommend that UALD consider modifying its complaint procedures by making the following changes:

- Integrating mediation as a parallel instead of a sequential phase of the complaint process
- Requiring the case manager to provide more oversight over investigations to ensure that cases are completed promptly and that parties are contacted on a regular basis
- Assigning an investigator to be responsible for each case when the complaint is filed until the case is completed

Chapter IV: Some Fair Housing Procedures Raise Concerns

UALD Should Change Some Procedures. Whenever a reasonable cause determination in a fair housing case is indicated, UALD should require a final interview to discuss their evidence with the respondent. It is important that UALD test the reliability of their evidence because the Attorney General may pursue court action against the respondent. The use of state resources to litigate makes it difficult for a respondent to prevail without spending significant resources. In addition, we think the Utah Labor Commission should reconsider its involvement in UALD investigations. In accordance with statute, it should limit its legal reviews for substantial evidence to cases that are appealed.

1. We recommend that the Labor Commission only provide legal reviews of evidence sufficiency for housing discrimination complaints that are appealed.

2. We recommend that UALD modify its complaint procedures as follows:

- Require that the housing investigator and manager conduct final interviews to review evidence with respondents when reasonable cause determinations are indicated.
- Consider changing its preliminary determinations to not specify proposed damages and penalties and to protect the identity of witnesses when appropriate.
- Ensure that a mediator rather than the case investigator conduct the conciliation conference.

REPORT TO THE

UTAH LEGISLATURE

Report No. 2010-02

A Performance Audit

of the

Utah Antidiscrimination and Labor Division

January 2010

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Chapter I
Introduction

This report addresses the process used by the Utah Antidiscrimination and Labor Division (UALD or the division) to administer and enforce antidiscrimination laws. The division investigates, mediates, and resolves complaints of employment and housing discrimination. Although the division has initiated several improvements, some cases are not well managed, with the investigative phase of the process taking far too much time to complete.

Chapter I provides background information about the division and describes the phases of the complaint process. Chapters II and III discuss delays in processing complaints and suggests ways to make the process speedier. Chapter IV identifies concerns specific to fair housing investigations.

UALD Investigates Employment And Housing Discrimination Complaints

UALD helps protect the public from illegal discrimination. Utah's employment and housing laws prohibit discrimination against any person otherwise qualified because of race, color, national origin, gender, religion, age, and disability. Employment laws also prohibit discrimination on the basis of pregnancy, childbirth, or pregnancy-related conditions. Housing laws prohibit discrimination based on familial status or source of income in the rental, purchase, and sale of real property.

UALD investigates employment and housing discrimination complaints and enforces Utah's wage laws.

Discrimination complaints must meet jurisdictional limits. Employers with fewer than 15 employees and owner-occupied buildings with less than 4 units, single-family homes sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members are exempt from these antidiscrimination laws. Additionally, to be within UALD's jurisdiction, violations must have occurred within the past 180 days.

UALD Protects the Public from Discrimination

UALD provides a forum for the public to bring complaints of illegal discrimination and obtain relief. The division is divided into three units: employment discrimination, fair housing, and wage claim. Our focus was on employment and housing discrimination which are governed by the Utah Antidiscrimination Act (***Utah Code*** 34A-5) and the Utah Fair Housing Act (***Utah Code*** 57-21). This audit did not evaluate the wage claim unit.

UALD's fiscal year 2010 budget is about $1.6 million. The division has work-sharing agreements with the Equal Employment Opportunity Commission (EEOC) and Housing and Urban Development (HUD). During fiscal year 2010, about 40 percent of the division's total funding relates to these agreements. The federal funding portion of UALD's budget is built on contractual obligations to close a certain number of cases within the federal fiscal year.

The division employs 21 FTEs, and its fiscal year 2010 budget was $1.6 million.

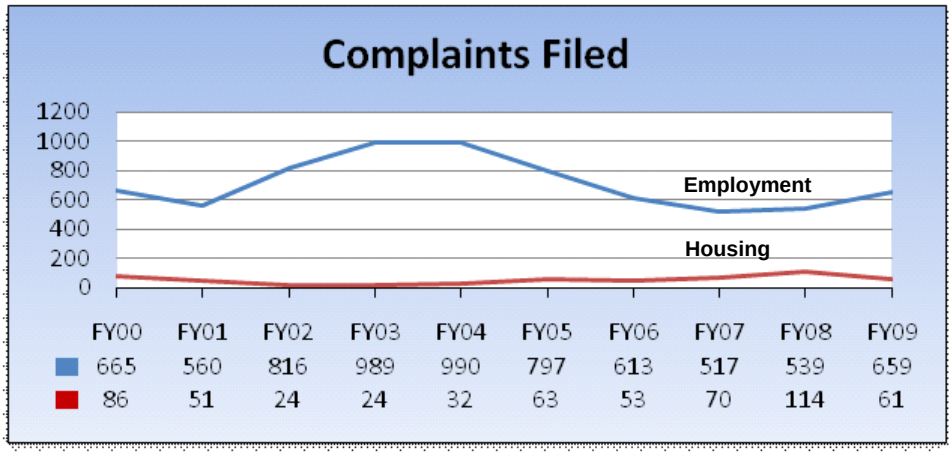
The division currently employs 21 full-time-equivalent employees (FTEs). Those involved with employment and housing discrimination complaints include about 13.5 of those FTEs, including 2 intake officers, 1.4 mediators, 2 case managers, 5 investigators, and 2 support staff. The director also spends most of her time on these complaints.

We believe the division has recently made improvements in managing discrimination complaints. Improvements include establishing a policies and procedures manual to guide how employment discrimination complaints should be processed, resolving complaints more quickly than in the past, and reducing the number of backlogged cases. While the improvements are commendable, this audit report discusses additional changes that we feel can help the division better fulfill its mission.

Caseload Fluctuates Over Time

UALD receives many more employment discrimination complaints than housing discrimination complaints. In fiscal year 2009, UALD opened 659 employment discrimination and 61 housing discrimination cases. Some past years have had a higher number of complaints filed, for example there were over 1,000 total complaints in fiscal years 2003 and 2004. Figure 1.1 shows changes in the number of complaints filed over the past 10 years.

Figure 1.1 Complaints Filed, FY 2000 to 2009. Most complaints involve allegations of employment discrimination. The number of complaints filed declined after fiscal year 2004, but there is an upward trend.



In FY2009, 659 employment and 61 housing discrimination complaints were filed.

After a case is filed, it may be resolved in a variety of ways. Some cases are resolved very quickly because they are outside the division's jurisdiction, waived to the EEOC, or withdrawn by the complainant. Other cases are resolved before the division does an investigation through a settlement between the parties. When a case is investigated it may take months or years for the division to issue a determination.

The purpose of an investigation is to evaluate the merits of the complaint. UALD determines whether or not there is reasonable cause to believe that illegal discrimination has occurred. If the division finds there is reasonable cause, then the respondent will be given another opportunity to settle with the charging party. In fact, many preliminary reasonable cause findings are settled through a late stage conciliation conference and not reported as a cause determination. The number of cases reported as settled by the division includes some that are resolved early in the process and some that are resolved late in the process.

Figure 1.2 shows the number of cases settled and determinations issued by UALD in fiscal year 2009. The figure shows that most investigations result in a finding of no reasonable cause to believe discrimination has occurred. However, 9 of the 19 housing settlements and 12 of the 126 employment settlements were fully investigated and had a preliminary finding of reasonable cause.

Most investigations result in no reasonable cause determinations.

Figure 1.2 Cases Settled and Determinations Issued, FY 2009. Withdrawals, transfers, and other administrative closures are not included in this figure.

	Employment Number of Cases	Housing Number of Cases
Settled by agreement of parties	126	19
Determination: No Reasonable Cause	328	26
Determination: Reasonable Cause	9	3
Determination: No Jurisdiction	18	1

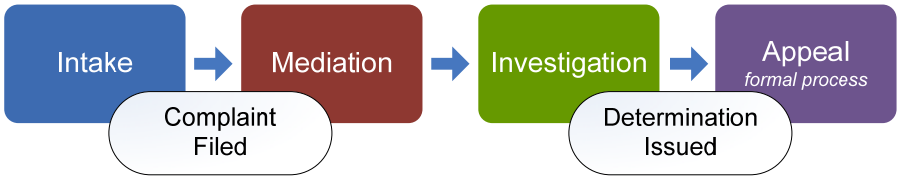
UALD's Informal Complaint Process Should Be Completed Promptly

UALD's responsibility includes the informal portion of the complaint process—intake, mediation, and investigation. After the division issues its determination that there either is, or is not reasonable cause to believe that discrimination occurred, parties have the opportunity to challenge that finding in a formal appeal process. Our review addresses only UALD's informal complaint process; each phase of the informal process is explained in the next section.

UALD's Informal Complaint Process Is Divided into Three Phases

The division is responsible for the first three phases of the complaint process: intake, mediation, and investigation.

The informal complaint process includes intake, mediation, and investigation.



Intake. Two intake officers handle approximately 10,000 inquiries annually by phone, email, or in person. After the intake officer interviews complainants and screens complaints, eliminating those not within the division's jurisdiction, the complainant submits a questionnaire, which is summarized into a formal charge of discrimination. The complainant returns the signed and notarized charge, and the case is opened. The respondent is provided a copy of

the complaint and asked to respond to the charge. The complainant is provided a copy of the response and may submit a rebuttal.

Mediation. Parties are provided an opportunity to resolve the charge of discrimination before an investigation commences. Two mediators hold informal and voluntary resolution conferences. Conference dates are set within 30 days after the complaint is filed, but parties are encouraged to mediate a settlement at any time in the process. Settlement agreements approved by the director are legal and binding.

Investigation. Cases not resolved through mediation are assigned to be investigated. An investigator gathers evidence, interviews parties and witnesses, conducts on-site visits as necessary, and recommends a determination stating there is either reasonable cause or no reasonable cause to believe that discrimination has occurred. If reasonable cause is found, a preliminary determination is issued and a final mediation is held in an attempt to settle the case before a determination is actually issued. If settled, no determination is issued.

UALD Determinations May Be Challenged Through Formal Appeal Process

If either party is dissatisfied with UALD's determination, they may appeal through a formal process that is separate from UALD's informal process. Although it was not within the scope of this audit to review the formal appeal process, the following describes how parties may appeal the determinations issued by UALD.

Parties may challenge UALD's determinations through a formal appeal process.

For employment cases, either party may request an evidentiary hearing before an administrative law judge (ALJ) employed by the Utah Labor Commission. The hearing is de novo, which means parties present their evidence new, without consideration of UALD's determination. After the ALJ has heard the case and issued a ruling, parties can request the ruling be reviewed by either the commissioner or the appeals board. Complainants also may obtain a Notice of Right to Sue, allowing them to file a claim in federal district court.

For housing cases, only reasonable cause determinations may be appealed for a de novo evidentiary hearing before either an ALJ or a district court judge. If UALD's determination is supported by substantial evidence, the Commission provides legal representation for

the complainant. For no reasonable cause determinations, the complainant may request the director reconsider the determination or file a claim in state or federal court.

Audit Scope and Objectives

This audit was initiated after concerns were raised that UALD was not effectively implementing its responsibilities to enforce equal employment and housing laws. The objective of this audit was to determine if discrimination complaints are processed effectively and efficiently so that both complainants and respondents are treated fairly. Specific audit objectives included the following:

- Evaluate UALD's procedures for processing discrimination complaints.
- Evaluate UALD's workload and case distribution.
- Determine why some cases are not completed promptly.

To accomplish these objectives, we reviewed the files of some cases that had been the source of concerns raised, but most of our work involved reviewing a sample of cases we chose. We reviewed all cases that had not been resolved 500 or more days after the complaint was filed. In addition, we reviewed all cases filed in July 2008. We worked closely with UALD staff to help us understand their case handling procedures. We also interviewed several parties involved with these cases. In addition, we compared UALD's caseload, process, and staffing with seven other states: Arizona, Colorado, Idaho, Montana, New Mexico, Oregon, and Wyoming.

Chapter II
Legislature Should Establish Time Limits For Processing Employment Complaints

Time limits for completing employment discrimination cases are needed to ensure the informal complaint process is completed promptly. We found some complaints of employment discrimination are neglected for years without resolution. Other states have established time limits that encourage the timely completion of this informal complaint process.

The Utah Antidiscrimination and Labor Division's (UALD's) process is an informal, administrative remedy for resolving discrimination complaints. After the informal process is completed, complaints may continue in a formal process, either at the Utah Labor Commission or in the court system. Since the formal processes remain available to parties, we do not think complaints should be allowed to languish in the informal process. In fact, Utah employment discrimination laws require that complaints be addressed promptly:

> The division shall promptly assign an investigator to attempt a settlement between the parties by conference, conciliation, or persuasion. If no settlement is reached, the investigator shall make a prompt, impartial investigation of all allegations made in the request for agency action (***Utah Code*** 34-A-5-107(3)).

UALD is required to complete its investigations promptly.

Although UALD has many old employment complaints, we did not find a similar concern with old housing complaints. We believe one reason for the difference is that Utah's housing discrimination laws establish a specific time limit for completing investigations:

> The division shall complete the investigation within 100 days after the filing of the complaint, unless it is impracticable to do so (***Utah Code*** 57-21-9(4), (5)).

Even though exceptions could be allowed, setting a similar specific time frame in Utah's employment discrimination statute may help ensure cases are completed more promptly.

Some Employment Cases Are Neglected for Long Periods

Our review of older cases revealed that the division neglects some cases. We believe the very old cases exist because UALD's case management procedures do not make completing old cases a priority; in fact, some investigations have been ongoing for years. While additional investigators would help, we do not think a lack of staff explains the problem; other states that do not have such old cases appear to have similar staffing levels as UALD.

Many Old Employment Cases Remain Under Investigation

We reviewed all UALD cases that were still pending in the division's informal process more than 500 days after the complaint was filed. Figure 2.1 shows that as of May 2009, the division had 30 employment cases that had aged to over 500 days. No housing cases were over 500 days old. Cases in the formal appeal process were not considered; only cases without an informal determination were reviewed.

Figure 2.1 Cases Opened over 500 Days. As of May 2009, UALD had 30 employment discrimination cases pending over 500 days; 12 of the cases exceeded 1000 days.

Days Opened	Number of Cases (As of May 12, 2009)
500-750 Days	12
750-1000 Days	6
1000-1250 Days	3
1250-1500 Days	5
1500 + Days	4
Total Cases	**30**

We charted the amount of time used to complete each phase of the complaint process and identified delays. We also discussed cases with the case manager and/or investigator along with several parties involved in the cases. There do not appear to be any good reasons for the very old cases. Cases simply were set aside and neglected with

little, if any, investigative work continuing. In fact, 9 of the 30 cases did not have an investigator assigned at the time. Instead, these cases were listed as being the case manager's responsibility and awaited assignment to an investigator.

Division policy states that for employment cases, investigators are to contact parties at least once every 90 days to let them know the status of the case and to answer any questions. Our review of older cases shows that staff clearly do not comply with this policy. In fact, one case had a 700-day gap without any activity.

Reviews of the case histories of each of the 30 old cases revealed there were often time gaps where no investigative activity occurred. In fact, for several cases there was no activity recorded for a year or more. We asked the case manager and some of the investigators about the old cases, but they did not provide good explanations for the time gaps and even admitted some cases were not handled well. One investigator said it can be daunting to pick up a case that is over 500 pages long, so these cases are often set aside while investigators handle less complex cases. When questioned about several time gaps in an especially long case (over 1500 days), he acknowledged he just let the case go even though the complainant had called repeatedly about the status of the case.

Parties expressed frustration that cases took so long to complete and that many different investigators handled their case.

We discussed these old cases with some of the parties involved. One complainant expressed frustration that he had so many different investigators and that each time he had to bring them up to speed. He said he contacted the manager, director, and commissioner to get his case completed and then a determination was rushed through without adequate investigation. He is currently appealing the no reasonable cause determination. Another complainant told us she was overwhelmed with the number of different investigators involved with the case. Still another was angry her case took so long to complete. She complained several times about the lack of progress and said she would advise against going to the trouble of filing with the division.

By ignoring some cases, the division is not complying with Utah law that requires the informal complaint process to be completed promptly. In our opinion, it seems paradoxical that parties are given many deadlines but, for employment cases, the division has no obligation to provide a timely response. For example, the division

requires parties to issue a response or rebuttal within 10 days. Yet, once that information is received, the division can delay working on the case as long as they choose.

One neglected case was especially troublesome because the division was unresponsive to a complainant's plea to expedite the investigation. The case was already more than a year old when the complainant urged the division to expedite its investigation because the plant was closing within two months, making it difficult to contact witnesses. According to the case file, the division did nothing at all on the case for the next eight months. Finally, the case manager assigned the case to an investigator. Unfortunately, that investigator resigned, and the case was reassigned to still another investigator. This case is still pending almost three years after the complaint was filed. We question if it can ever be adequately investigated.

We question if the oldest cases can ever be adequately investigated.

Completing Oldest Cases Is Not A Priority

Although UALD has a work productivity standard encouraging investigators to complete their old cases, they do not have a policy requiring the oldest employment cases to be completed. The 30 old cases we reviewed clearly show that management does not press investigators to complete their oldest cases first. Division staff told us that it is easier to investigate more recent charges. They generally complete the cases that can be closed quickly and sometimes set aside the more complex or older cases that may require more time or effort to complete. At the end of the federal fiscal year, investigators focus their attention on closing the easier cases to meet the contract quotas set by the Equal Employment Opportunity Commission (EEOC).

An employee can comply with the productivity standard without ever completing their oldest cases. We tracked the old cases from May 12 through October 1, 2009 and found most (19) of the oldest cases were still pending. There were 11 closed cases, of which 4 were withdrawn or waived and 7 had reasonable cause determinations issued. Meanwhile, 12 more opened cases aged to over 500 days during this period. Figure 2.2 shows the number of cases by age range for May and for October 2009.

Figure 2.2 Old Cases For Two Time Periods. Eleven of the 30 old cases were resolved during this audit, but these generally were not the oldest cases. Meanwhile, 12 additional cases aged to over 500 days.

Days Opened	Number of Cases (As of May 12, 2009)	Number of Cases (As of Oct.1, 2009)
500-750 Days	12	6
750-1000 Days	6	11
1000-1250 Days	3	4
1250-1500 Days	5	2
1500 + Days	4	7
Total Cases	**30**	**31**

Note: Excludes cases that are in the appeal process

Investigators focus more on meeting EEOC contract quotas than on completing their oldest cases.

According to the division's work productivity standards for investigators, "At least 10 of the closures required per quarter are to be from the agent's 20 oldest charges/complaints in their inventory." However, even if investigators comply, this standard allows investigators to continue ignoring the very oldest cases. In fact, during the course of this audit, 11 cases were closed, but 4 were closed simply because the charges were withdrawn or the case was waived. However, only 3 of the closed cases were among those that were over 1000 days old.

When asked about some of the old cases, investigators indicated they did not feel compelled to complete them, especially if they could quickly close a more recent case to help meet federal contract quotas. For example, one investigator said there was no good excuse that a case was still being investigated four years after the complaint was filed. He said that he should "spend a day writing up the case." Investigators also appear to have less interest in completing old cases passed on from investigators no longer employed by the division. Although meeting federal quotas is important to maintain federal funding, in our opinion, investigators should not ignore older cases and work on easier cases simply to meet those quotas. In addition, it seems the division's concerns about meeting federal quotas would be an issue only at the end of the federal fiscal year.

Neglecting cases is not only poor customer service, but it also may alter the outcome of a case. Timeliness is one of the most important

factors in evaluating if a case has received equitable treatment. Cases that are delayed for long periods of time impact both the respondent and the complainant. Evidence is more difficult to obtain, and issues are unresolved. Final determinations can change when cases are neglected. In fact, one investigator acknowledged that a prior investigator's good job of documenting the case led to a reasonable cause determination. Otherwise, it may have resulted in a no reasonable cause determination. For the most part, we think complaints should be processed in the order in which they are received, or on a first-in, first-out basis. This is the policy in California, which requires that complaints be processed on a first-in, first-out basis with the exception of those specifically identified as having a priority status.

UALD should consider processing most complaints on a first-in, first-out basis.

UALD's Staffing Levels Are Similar to Those in Other States

We were asked to evaluate concerns that UALD is overwhelmed with high caseloads but not enough investigators to handle those cases. It would be unrealistic to set time limits for completing investigations if caseloads are already excessive. At present, the division is experiencing serious turnover problems. In fact, at the beginning of this audit, two investigator positions were not filled, and then two additional investigators resigned. However, if staffing levels are at capacity, the division's caseload appears comparable to other states. Thus, the reason cases are neglected cannot be fully attributed to lack of staff.

A challenge faced in this audit is comparing Utah's program to other states' programs. From state to state, antidiscrimination programs operate with significant differences. There are differences in the organizational structure, procedures, and jurisdictional requirements. Some states have HUD contracts, while others do not. One state uses only volunteer mediators, and another mediates only as requested by parties. All states do not necessarily have separate intake officers. Some states divide staff among regional offices. Despite the differences, the following figure provides a basic comparison of caseloads for overall staff (not per investigator).

Figure 2.3 UALD Caseload Compared with Other States. Based on the number of filed cases in fiscal year 2008, UALD averages 47 cases per staff which is similar to the average of other states.

State	Number of Cases Filed	Number of Staff	Cases/Staff
Arizona	1548	26	59
Colorado	779	20	38
Idaho	497	11	45
Montana	599	13	46
New Mexico	747	16	46
Oregon	1920	30	64
		Average	**49**
UALD	653	14	47

As shown, UALD's caseload (47 cases per staff) is similar to the average for other states, which are 49 cases per staff. Therefore, we think it is reasonable that UALD should have time limits for completing employment investigations.

Employment Cases Should Be Completed Within Specific Time Limits

The Legislature should consider setting time limits for UALD to complete its employment discrimination investigations. At present, there are specific time limits for completing housing investigations but not for employment. To ensure fair treatment of all parties, the division must have an effective process that includes completing investigations in a timely manner.

Specific time limits are set for processing housing discrimination complaints.

Utah's laws and administrative rules set the following specific time limits for processing housing discrimination complaints:

> Within *30 days* of the filing of a complaint, the Division shall commence proceedings to thoroughly investigate and, if possible, conciliate the complaint. The Division shall complete its investigation within *100 days* after filing of a complaint. If the Division is unable to do so, it shall notify the parties in writing of

the reason for the delay (***Utah Code*** 57-21-9 and ***Utah Administrative Rule*** 608-1-8, 9, emphasis added).

UALD should have a goal of completing each investigation alleging a discriminatory employment practice within 180 days or less after the complaint is filed. In addition, the Legislature should consider directing UALD to complete all investigations within one year of the complaint filing date. As with housing investigations, if unable to meet the time limit, a reasonable extension of the time frames may be granted but the investigator should be required to justify why the investigation needs to be extended and notify the parties involved of the reasons for the delay.

UALD should set a goal of 180 days or less for completing each employment investigation but all investigations should be completed within one year.

Other States Set Time Limits

A six-month (180 days) time limit to complete employment investigations appears to be a reasonable time limit when compared to the EEOC and other states. The EEOC reports the average time it takes to process an EEOC investigation is about 182 days. Figure 2.4 shows other state time limits range from 60 days to one year.

Figure 2.4 Other State Time Limits. Although they vary widely, other states we reviewed all have time limits for completing employment discrimination investigations.

Arizona	The division shall make its determination on reasonable cause as promptly as possible and as far as practicable not later than 60 days from the filing of the charge (***Arizona Code*** 41-1481(B)).
Colorado	If written notice that a formal hearing will be held is not served within 270 days after the filing of the charge, if the complainant has requested and received a notice of right to sue pursuant to subsection (15) of this section, or if the hearing is not commenced within the 120 day period prescribed by subsection (4) of this section, the jurisdiction of the commission over the complaint shall cease…The total period of all such extensions to either the respondent or the complainant shall not exceed 90 days each, and, in the case of multiple parties, the total period of all extensions shall not exceed 180 days (***Colorado Code*** 24-34-306(11).
Idaho	After 365 calendar days, if the complaint has not been dismissed pursuant to subsection (3) of this section or the parties have not entered into a settlement or conciliation agreement pursuant to subsection (2) or (4) of the section or other administrative dismissal has not occurred, the commission shall, upon request of the complainant, dismiss the complaint and notify the parties (***Idaho Code*** 67-5907(6)).
Montana	The finding must be issued within 180 days after a complaint is filed (***Montana Code*** 49-2-504(7)(a)).
New Mexico	Within one year of the filing of a complaint by a person aggrieved, the commission or its director shall (1) dismiss the complaint for lack of probable cause; (2) achieve satisfactory adjustment of the complaint as evidence by order of the commission; or (3) file a formal complaint on behalf of the commission (***New Mexico Code*** 28-1-10(G)).

Other states set specific time limits for completing employment investigations.

The division director feels some flexibility should be allowed in order to investigate more complex complaints and to ensure the division does not lose EEOC funding. She said Arizona lost funds because strict time limits did not allow them to carry cases over into the next contract year. Our sample (Appendix B) shows that currently most withdrawals and settlements occur within 180 days, but only 1 of 26 investigations was completed within 180 days.

A fair determination can only be issued if the investigation is completed in a timely manner. We think setting time limits will improve timeliness and prevent some cases from being neglected for long periods of time.

Recommendations

1. We recommend that the Utah Antidiscrimination and Labor Division process complaints in the order in which they are received when practicable.

2. We recommend that the Utah Antidiscrimination and Labor Division establish a goal to complete each employment discrimination investigation within 180 days or less.

3. We recommend that the Legislature consider requiring the Utah Antidiscrimination and Labor Division to complete its employment discrimination investigations within set time limits.

Chapter III
Complaint Process Needs Better Compliance and Could Be Streamlined

This chapter discusses the Utah Antidiscrimination and Labor Division's (UALD's) process for investigating discrimination complaints. UALD's complaint process generally takes too long to complete. Currently, no one person is responsible for a case throughout the process. Cases are instead passed through phases—from intake to mediation to a case manager and, finally, to the investigator. Although intake procedures are working well, mediation as a sequential phase of the process is inefficient, as is the investigative process. Investigators are not assigned to cases for months after a complaint is filed. Additional oversight is needed to minimize delays, prevent cases from being neglected, and improve customer service.

Complaint Process Takes Too Long

A sample of cases was reviewed to determine why delays occur and whether the division complies with specific policies.

UALD does not always complete its investigations promptly. To understand how the division processes complaints, why some cases are delayed, and if the division complied with specific policies, we reviewed the case histories of all employment and housing discrimination complaints filed during July 2008. Cases were tracked over a 17-month period (July 2008 through December 2009).

We found that employment cases take more time to complete than housing cases, which is significant because there are 10 times more employment cases. The following figure summarizes the resulting disposition of the cases in our employment and housing samples, with additional details provided in Appendices B and C at the back of the report.

Figure 3.1 Samples of Employment and Housing Cases. Complaints filed in July 2008 included 43 employment and 8 housing cases. We tracked these complaints through December 17, 2009.

	Employment Number of Cases	**Housing** Number of Cases
Transferred to EEOC (or HUD)	3	0
Withdrew Charges	4	1
Settled	10	1
Investigated	26	6
Total Cases in Sample	43	8
Disposition of Investigated Cases		
No Reasonable Cause Determination	20	5
No Jurisdiction	1	1
Investigation Incomplete	5	0
Total Cases Investigated	26	6
Avg. Days for Investigated Cases	300*	199

**Note: This average time continues to increase due to the 5 cases still being investigated. The time excludes intake and the appeal process.*

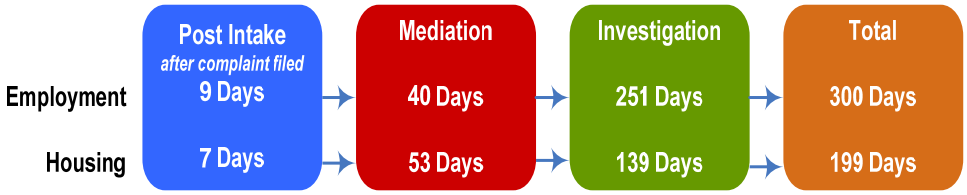
As shown in the figure, some cases were not investigated because they were transferred, the charges were withdrawn, or the cases were settled. Those that were investigated include 26 of the 43 employment cases (5 are still being investigated) and 6 of the 8 housing cases. None of the investigations resulted in a reasonable cause determination. The average total time to process each complaint was calculated starting from when a complaint was actually filed until either a determination was issued or the case was closed. Excluded is the time that intake took to draft the complaint and the time the complainant took to return the signed complaint. The division has no control over how long it takes for the complaint to be returned. In fact, many complaints are never returned. Time in the appeal process is also excluded.

Employment Cases Take More Time To Complete than Housing Cases

Our samples revealed a significant difference in the complaint processing time for employment and housing cases. Excluding cases that were settled or withdrawn, the remaining 26 employment cases

averaged 300 days, and the 6 housing cases averaged 199 days from when a complaint was filed until a determination was issued.

Figure 3.2 Average Days to Process Complaints. Employment cases averaged 300 days and housing cases averaged 199 days to investigate a complaint and issue a determination.



Employment cases take more time to investigate than housing cases.

It appears housing cases take almost 50 percent less time to complete because investigators are required to meet certain time limits, which encourages a more efficient process. Because of these requirements, housing investigators are assigned fewer cases than employment investigators. In May 2009, the employment unit had 312 opened cases. Four investigators were assigned from 28 to 48 cases, and the case manager had 121 cases. The housing unit had only 25 cases assigned to an investigator with assistance from the housing case manager.

We questioned why a separate housing case manager was needed to supervise only one investigator. Management told us they created a separate housing unit to address concerns that the division was not adequately complying with some Housing and Urban Development (HUD) requirements and could lose federal funds by not completing investigations within time limits. HUD payments are incrementally reduced based on the time it takes to complete an investigation. HUD requires that investigations be completed within 100 days, if practicable. But at least half must be completed within that timeframe.

To meet these requirements, UALD allocated a larger proportion of its resources to housing cases. As Figure 3.3 shows, the proportion of expenditures in relation to complaints investigated is significantly more for housing than for employment. Housing unit expenditures were 29 percent of the total for only 8 percent of the total complaints filed. It should be noted that, on average, housing complaints involve more work than employment complaints, and federal payments per

complaint are significantly greater. However, we do not believe the work disparity is as great as the funding disparity.

Despite the funding disparity, federal requirements may limit UALD's ability to shift funding. Figure 3.3 shows that just considering UALD costs, federal HUD funds are covering about 90 percent of housing expenditures. However, the state incurs additional expenditures for housing cases in the Adjudication and Administration divisions of the Labor Commission that could be eligible for HUD funding.

Figure 3.3 UALD's 2009 Expenditures, Number of Complaints and Federal Funding for Housing and Employment Cases.

Unit	Expenditures*		Number of Complaints	
Housing	$308,450	29%	61	8%
Employment	$769,136	71%	659	92%
Total	$1,077,586	100%	720	100%

Federal Funding		Percent of Expenditures Covered By Federal Funds
HUD Contract	$ 277,500	90%
EEOC Contract	$ 350,400	46%
Total	$ 627,900	58%

* *Note: Excludes wage claims unit*

UALD should review its staff assignments to reduce the amount of time employment cases take.

We think UALD should review its staff assignments in an effort to reduce the amount of time employment discrimination cases take. UALD is responsible to provide services in an impartial and fair manner regardless of its funding source. Even if UALD cannot internally reallocate funds, it may be able to use staff more effectively as discussed in the remainder of this chapter.

The next section reviews procedures for the three separate phases of the complaint process: intake, mediation, and investigation.

Intake Procedures Are Working Well

We found no significant concerns with the complaint intake process. Intake procedures are not always completed within the time

period that division policy requires, but most delays are minimal. The following steps make up the intake process:

- The intake officer interviews complainants and/or reviews complainant questionnaires to determine if the charges are within the division's jurisdiction and screens out those that are not.

- The intake officer drafts a formal complaint based on information provided in the complainant's questionnaire. The complaint draft must be sent to the complainant within 10 days of receiving the questionnaire. The complainant reviews the draft to determine if it accurately represents their position. Once the complainant returns the signed complaint, the intake officer opens the case.

- Within 10 days of when the complaint is filed, both the complainant and respondent (for example, an employer or landlord) are sent a copy of the complaint, including a date set for a resolution conference (mediation). The respondent is asked to submit a response to the charge within 10 days. The complainant is provided a copy of the response and may submit a rebuttal.

Intake Officers Effectively Screen Complaints

We observed intake officers interviewing walk-in clients, and we monitored their telephone inquiries. We found the officers handled complaints efficiently and professionally. Interviews often involved complainants who were upset about being treated poorly, yet their claims were not within the division's jurisdiction. Intake officers carefully explained the division's jurisdictional limitations. For complaints within the division's jurisdiction, the intake officer described the complaint process, telling a complainant that, after submitting the questionnaire, she would receive a document that must be signed and notarized before the complaint is actually filed. In one instance, an intake officer, with the assistance of an investigator, quickly drafted a complaint from the information provided and it was signed by the complainant before she left.

Complaints Are Not Always Drafted Within Time Limits, but Delays Are Not Significant

Policy requires intake to draft and mail a complaint within 10 business days after the complainant submits a questionnaire.

We were asked to evaluate concerns that intake officers were overwhelmed with work and not able to effectively respond to complaints. The division reported it was about three to four weeks behind in drafting complaints. Although we found the division was not in compliance with its policy, they were not that far behind.

Division policy requires the intake officer to draft and mail a formal complaint to the complainant within 10 business days after the complainant has submitted a completed questionnaire. For our sample, this was accomplished for 25 of 43 employment cases (58 percent) and all 8 of the housing cases.

Figure 3.4 Time to Draft and Mail Complaint to Charging Party. Division policy requires the intake officer to draft and mail the complaint within 10 business days of receiving the questionnaire.

	Employment	Housing
Processed Within 10 Days	25/43 (58%) Comply	8/8 (100%) Comply
Average Time	10 Business Days	

Intake often did not comply with policy requiring complaints to be drafted and mailed within 10 days but delays were minimal.

Although only about half the employment questionnaires were processed within the 10-day limit, we did not think this was a significant problem because delays generally were no more than a few days. On average, intake officers processed questionnaires into complaints within 10 business days for employment cases. However, two questionnaires took an exceptionally long time to be completed (20 and 32 business days). For housing cases, case histories do not identify precisely how long it takes to process questionnaires but they appear to be processed promptly.

We further confirmed that the division complies with its questionnaire processing requirement by examining the dates stamped on questionnaires currently waiting to be processed and by reviewing a sample of complaints for each month over the past year. Even though the intake officer told us she was now about a month behind, the date stamps revealed the questionnaires had all been received within the past week. Further, a review of 60 complaints drafted and

mailed throughout the past year revealed they were processed within an average of about four business days.

Many complaints are not returned. In 2009, intake officers answered over 9,500 inquiries. They drafted and mailed about 800 complaints. Most (719) are signed and returned as a filed complaint. Because intake officers have no control over when or if the complainant will sign and return the complaint, we tracked complaint processing time from when the complaint is received to when the case is actually opened.

Most Parties Are Notified Within Time Limits That Complaint Is Filed

Utah administrative rules require the division to mail a copy of the complaint to the parties within 10 business days of when it is filed. As shown, intake officers comply with this requirement most of the time.

Figure 3.5 Time to Send Copy of Filed Complaint to Parties. The division generally complies with administrative rules that require the division to send a copy of the complaint to both the charging party and respondent within 10 days of when the complaint is filed. But delays occurred in post intake because cases were not transferred to mediation.

	Employment	Housing
Copy of filed complaint sent to parties within 10 days	35/42 (83%) Comply	6/8 (75%) Comply
Average Time in Post Intake*	9 Business Days	7 Business Days

**Post intake is any time after the complaint is filed but before it is transferred to mediation.*

However, there were some unnecessary delays in transferring the case to mediation after the complaint was filed. On average, it took 9 business days for employment cases and 7 business days for housing cases before the case was transferred to mediation. We believe as soon as the signed complaint is received, copies should be sent to parties and the case assigned to mediation without delay.

UALD Should Consider Modifying Mediation Procedures

As opposed to a full investigation, mediation provides an opportunity for an early resolution to a complaint. Utah law requires that before any adjudicative proceeding, the division should "promptly assign an investigator to attempt a settlement between the parties by conference, conciliation, or persuasion" (***Utah Code*** 34A-5-107(3)). Mediation conferences or conciliations are also held at the end of investigations that result in preliminary reasonable cause determinations. These final conciliation conferences provide a final opportunity to mediate a settlement before the actual reasonable cause determination is issued. We observed both early- and late-stage conferences and interviewed parties involved in the process.

Mediation Time Limits Are Often Overlooked

Our sample revealed that the division often does not comply with mediation time limits and that most parties decline to even participate in the mediation process. Division policies state the mediation process cannot exceed 30 days for housing complaints or 90 days for employment. In addition, if a case is more than 45 days in mediation, parties must be notified that the case is being forwarded to investigation. If settlement appears imminent, the director can grant an extension. This indicates that the investigation should begin even if mediation negotiations are still pending.

Mediation often does not comply with policy requiring cases be transferred to investigation within 45 days.

Figure 3.6 shows that cases were transferred from mediation to investigation within 45 days for 24 of 41 (59 percent) employment cases and 3 of 6 (50 percent) housing cases. However, as mentioned above, there is sometimes a delay in transferring cases to mediation from intake after the complaint is filed. If this post intake time is included, compliance with policy was only 13 of 41 (32 percent) for employment cases. There would be no post intake time if cases are transferred to mediation immediately after the complaint is filed. The average time in mediation was 52 days for employment cases and 47 days for housing cases. These averages include cases that were settled or the charges withdrawn.

Figure 3.6 Cases Transferred from Mediation to Investigation, Average Time in Mediation. Cases were transferred from mediation to investigation within 45 days, as required by policy for only 59 percent of the cases. Few employment cases exceeded the maximum 90-day limit for mediation, but over half exceeded the 30-day limit for housing cases.

	Employment	Housing
To Investigation Within 45 Days	24/41 (59%) Comply	3/6 (50%) Comply
Maximum Time in Mediation	90 Days	30 Days
Average Time in Mediation	52 Days	47 Days

Complaint processing is sometimes unnecessarily delayed in mediation. It appears no one takes responsibility for the overall processing of complaints. Some of the delays we found highlight the need for better management control. For example, we found some cases that were not transferred to the investigation unit immediately after the one of the parties declined to participate. A party declined mediation, but the case was not moved to the investigation phase for three weeks. The case was overlooked until the originally scheduled mediation date arrived. Another case was assigned to mediation for 80 days even though a party had declined mediation 15 days after the complaint was filed. The investigation was delayed for over two months because the division was not monitoring compliance with its policies.

Another example that identifies the need for better oversight involves parties who settled the case on their own and withdrew their charges 130 days after the complaint was filed, which included 117 days assigned to mediation. Although some of the delays occurred while parties attempted to reschedule the mediation conference, most delays were because no one at the division was responsible for tracking the progress of the case. The case sat inactive for several months until support staff finally asked the attorney involved about the status of the case, and the complainant withdrew her charges.

Mediation Could Be Parallel Rather than Sequential Process

Currently, investigations do not commence until after the mediation phase is completed. However, we think that mediation could be a parallel rather than a sequentially separate phase of the

complaint process. As mentioned previously, most (59 percent) parties decline to participate in mediation, and the case is investigated. Delaying the investigation while a case is assigned to mediation for long periods of time is inefficient.

Delays in obtaining the complainants rebuttal is another inefficiency in current procedures. After a complaint is filed, staff mail a copy of the complaint to the respondent and request a response be submitted within 10 days. This response generally is received while the case is assigned to the mediation phase of the process. Upon receipt, a copy of the response is sent to the charging party, and they are asked to submit a rebuttal within 10 days. However, this rebuttal request letter is not sent until after the case is reassigned from mediation to the investigations unit. When asked why the rebuttal request letter was not sent as soon as the response was received, the case manager said parties may be encouraged to settle if they can avoid the legal expenses associated with drafting the rebuttal.

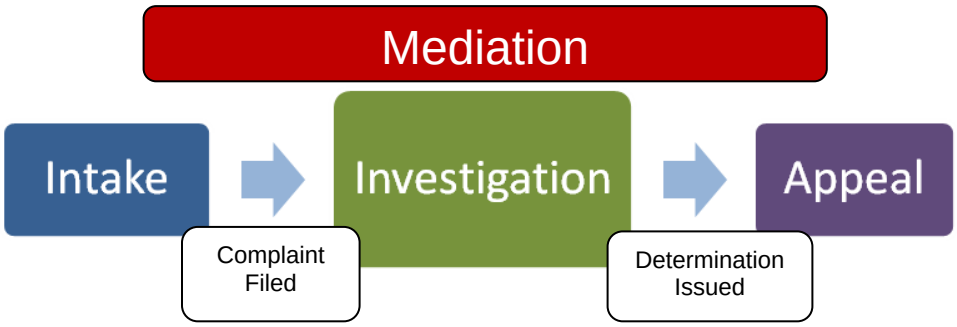
In our opinion, these preliminary stages of the investigation should not be delayed based on the chance that parties could settle. The rebuttal request letter should be sent as soon as the response is received. If parties agree to participate in mediation, they can request an extension to the 10-day deadline.

Mediation is approached differently in other states we contacted. For example, Washington investigators are assigned to the case when the complaint is filed and monitor the situation for opportunities to mediate an early resolution. Arizona cases are also immediately assigned to an investigator. The director reviews each new case and determines which ones are more likely to be resolved through mediation. Colorado cases only go to mediation if requested by the parties involved, which includes only a small number of cases. Several states do not have in-house mediators.

Delays in mediation are unnecessary because mediation does not need to be a separate phase of the complaint process.

As in other states, the investigation does not have to be delayed until after the scheduled mediation date. Figure 3.7 shows how the overall complaint process could be streamlined if mediation was integrated as a parallel rather than a sequential part of the investigative process.

Figure 3.7 Mediation Could Be Integrated into Process. It is logical for mediation to be a parallel process because most parties decline to participate in mediation early in the process, but a settlement is to be encouraged at any time during the process.



Mediation as a parallel process would allow the investigation to occur simultaneously.

This model allows mediation and investigation to occur simultaneously. In fact, this model is already being used for some housing cases in order to meet certain time limits. Because mediation is encouraged at any point in the process, investigators could monitor each case to determine whether a mediated settlement is possible.

Investigative Procedures Need Additional Oversight

Most of the complaint process involves investigation time. Our case reviews revealed several concerns with how that process is managed. First, the investigator responsible for the case is not assigned for many months after the complaint is filed. In addition, investigators do not always contact parties as frequently as they should. We also identified some investigative procedures the division may want to consider changing.

Cases Are Not Assigned to Investigators for Many Months

Although investigations are the most time-intensive step in the process, cases are not assigned to investigators until almost five months after a complaint is filed. During most of this time, the case manager has the case. She waits for the complainant to submit a rebuttal before assigning the case to an investigator.

In our employment sample, the investigator ultimately responsible for the case was not assigned until an average of 132 days (4 l/2 months) after the complaint was filed. Figure 3.8 shows the average number of days for each phase of the process from when the complaint was filed up until the case was assigned to an investigator. The post-intake phase excludes the time used by intake to interview complainants and draft complaints.

Cases were not assigned to investigators until an average of 132 days after the complaint was filed.

Figure 3.8 Time Until Investigator Was Assigned to Case. On average, employment sample cases were assigned to an investigator 132 days after the complaint was filed.

Phase	Average Days*
Post-Intake (after complaint filed)	10
Mediation	40
Case Manager	82
Total Days Before Investigator Assigned	132

**Averages are based on 26 cases that were investigated or are being investigated plus 2 cases that charges were withdrawn during the investigation.*

As shown, the case manager held cases for an average of 82 days before assigning them to investigators. Currently, all cases are assigned first to the case manager before the case is assigned to an investigator. The case manager begins the early stages of the investigation, which gets the case up and running and also allows the case manager to become familiar with each case. As of May 2009, the case manager was assigned more cases than the investigators. The case manager was assigned 121 of 312 employment cases, and the remaining 191 cases were divided among four investigators.

Case Manager Does Not Always Assign Cases to Investigators Within Time Limits

Cases were not always assigned to investigators within 10 days of receiving rebuttal.

Division policy requires the case manager to assign the case to an investigator within 10 business days of when the rebuttal is received. Our sample indicates this occurs only about half of the time. The case manager may hold the case for a longer time because the complainant has not returned the rebuttal. Sometimes, this involves an unreasonable amount of time. For example, for one case in our sample, the case manager waited to receive the rebuttal for 159 days before finally assigning the case to an investigator.

Although the case manager's intent is to help get the investigation moving, one investigator feels this can be less effective because parties are communicating with the case manager and not the investigator. Communicating with parties provides investigators an opportunity to ask questions and request additional evidence.

We recognize that the division has experienced significant turnover of its investigative staff, which requires the case manager to be involved in cases more frequently. However, we think the case manager should have less involvement in the routine processing of cases and should focus more on providing oversight, including tracking cases, troubleshooting problems, and ensuring that policies are followed and work activity standards are met.

Investigators Do Not Always Maintain Frequent Contact with Parties

Division policy requires investigators to contact parties at least once every 90 days for employment cases and every 30 days for housing cases. Contact may be made by phone, email, or letter.

Figure 3.9 Maintaining Contact With Parties. Contact with parties was maintained every 90 days for 64 percent of employment cases and every 30 days for 71 percent of housing cases.

	Employment	Housing
Contact Maintained	23/36 (64%) Comply	5/7 (71%) Comply
Maximum Days Between Contact	90 Days	30 Days

Parties often are not contacted within the time limits established in policy.

The figure shows that contacting parties has not been a priority of investigators. In fact, several parties in our sample cases contacted the division multiple times to ask about the status of their case. One complainant who called many times was told the investigation would begin and, after no contact, was told the same thing when she called over 200 days later. The case manager should monitor compliance with the important policy that parties are contacted on a regular basis.

Investigators Could Be Responsible For Cases Throughout the Process

Investigators could be assigned to a case as soon as the complaint is filed and be responsible for that case throughout the process. This may minimize some unnecessary delays and enhance customer service.

Assigning investigators to cases as soon as the complaint is filed may minimize delays and enhance customer service.

We think customer service would be enhanced by having the same investigator responsible for the case throughout the process because parties would know whom to contact. Currently, parties are frustrated because the case is passed to so many different staff. For example, the record of the case discussed previously identified the complainant's frustration with being passed from one staff to the next. The case has changed hands 11 times and still is not resolved.

Recommendations

1. We recommend that the Utah Antidiscrimination and Labor Division review staff assignments to try to reduce the amount of time employment discrimination investigations take to complete.

2. We recommend that the Utah Antidiscrimination and Labor Division consider modifying its complaint procedures by making the following changes:

    - Integrating mediation as a parallel instead of a sequential phase of the complaint process

    - Requiring the case manager to provide more oversight over investigations to ensure that cases are completed promptly and that parties are contacted on a regular basis

    - Assigning an investigator to be responsible for each case when the complaint is filed until the case is completed

Chapter IV
Some Fair Housing Procedures Raise Concerns

Our evaluation identified concerns with procedures specific to housing cases that should be reviewed and, in some instances, changed. Unlike other Utah Antidiscrimination and Labor Division (UALD or the division) actions, a reasonable cause determination in a housing complaint leads to the state litigating the case through the Attorney General's Office. In order to help ensure the process is fair and appears fair to respondents, we think the Utah Labor Commission and UALD should reconsider some procedures.

UALD should reconsider some housing procedures.

Most procedures for processing employment and housing complaints are the same except, as previously mentioned, there are specific time limits for processing housing complaints. However, there is a major difference if the division finds there is reasonable cause to believe housing discrimination occurred. Of most significance, the state provides legal representation on behalf of the complainant for reasonable cause determinations that are appealed. Respondents must pay their own legal fees regardless of the outcome, while the state provides legal representation to complainants free of charge.

Three housing discrimination cases were brought to our attention that involved charges against homeowner associations. The volunteer board members of the homeowner associations felt the complaint process was unfair. All three cases were settled—one during the investigative process, one during the final conciliation conference, and one after an appeal was filed. However, the board members felt coerced into settling under the threat of large legal fees and civil fines; they also expressed concerns the division was biased in favor of complainants. Although we could not reinvestigate their cases, this chapter addresses their concerns in addition to issues we identified while reviewing these and other cases.

Federal and State Fair Housing Laws Dictate Many Process Requirements

Both state and federal statutes specify fair housing requirements. In order to receive federal funding from the U.S. Department of Housing and Urban Development (HUD), state laws and operations must be substantially equivalent to those of HUD. For example, providing legal representation to complainants is a HUD requirement that cannot be changed if the state wants to continue to receive federal funding. However, state law adds a required review by the Labor Commission to ensure the discrimination case merits litigation.

State Process Must Meet HUD Requirements To Receive Federal Funding

To receive federal funds, UALD's process must be certified as substantially equivalent to HUD processes.

In order for the state to receive federal funding, HUD must certify that state fair housing laws and processes are substantially equivalent to federal laws and processes. UALD receives about $300,000 per year in federal funding because it is certified as substantially equivalent. While HUD reviews a number of elements to determine substantial equivalency, only those that apply to reasonable cause findings are discussed here.

Federal regulations specify requirements that apply when the state finds reasonable cause to believe that housing discrimination has occurred. The state agency must be able to assess both actual damages and civil penalties. Furthermore, the state must provide for "adjudication in court at agency expense" to enforce its findings. In accordance with federal requirements, Utah law provides for the Labor Commission to provide legal representation to complainants if respondents appeal a reasonable cause determination (***Utah Code*** 57-21-10(3)). In addition, Utah law provides for civil penalties against respondents of up to $10,000 for a first offense. However, the law protects charging parties from any costs or penalties in order to not discourage the filing of complaints.

Labor Commission provides legal representation to complainants if respondents appeal UALD's reasonable cause determination.

State Law Requires Labor Commission Review Evidence Prior to Litigation

Some respondents have been concerned that they must pay their own legal fees and are subject to being assessed damages and penalties, while charging parties bear no risk. Even if respondents feel they have

a good case, it may be cost prohibitive to pursue a court case when the Attorney General represents the opposing side. In response to landlord concerns about weak cases being pursued, the 1999 Legislature amended Utah law.

Utah law now requires a Labor Commission review of evidence after reasonable cause determinations from housing discrimination investigations are appealed. Adjudication before an administrative law judge (ALJ) or in court at agency expense is only pursued if the Commission concludes the determination is supported by substantial evidence. Thus, the Attorney General is only brought into the case if the Labor Commission's legal review determines the investigative evidence meets minimum standards.

Before providing legal representation, Utah law requires the Labor Commission to evaluate if there is substantial evidence to support UALD's determination.

In practice, we found that in addition to the required legal review of evidence after an appeal is filed, the Commission also conducts a legal review before the division has completed its investigation and issued a determination. In the next section, we discuss some concerns raised by the Commission's involvement in the UALD investigation. In a later section, we conclude that a fair process can be better ensured by having UALD test the reliability of its evidence through a final interview with respondents who the division believes may have illegally discriminated.

Labor Commission Should Reconsider Early Involvement in Housing Investigations

We think the Labor Commission should reconsider its involvement in UALD housing investigations. The Commission's early assessment of the investigative evidence is outside of the statutory process. While the early involvement initially seems reasonable, it compromises the independence of the Commission's subsequent review. Furthermore, it may encourage UALD to place undue reliance on the Commission's review rather than its own quality control processes.

Current practice is for the Labor Commission to review evidence before the division issues a determination and again if it is appealed.

Steps for Processing Housing Complaints Are Outlined in Utah Law and Rules

According to Utah law and administrative rules, housing investigations that result in a reasonable cause determination include the sequence of steps described in Figure 4.1.

Figure 4.1 Steps for Processing Housing Complaints Resulting in a Reasonable Cause Determination. Current practice varies from these steps in that instead of reviewing evidence only if a case is appealed (step 4), the Labor Commission reviews evidence before an investigation is completed (step 1) or a determination is issued.

1. **Director finds reasonable cause.**
   Investigator concludes the investigation and prepares a final investigative report. The director reviews the report and determines whether reasonable cause exists to believe that an unlawful housing practice has occurred.

2. **Conciliation conference attempted.**
   The division attempts to eliminate unlawful housing practice by conducting a conciliation conference. If conciliation is successful, parties sign a settlement agreement and the case is closed. If unsuccessful, director issues a determination ordering appropriate relief.

3. **Respondent files formal appeal.**
   A respondent disagreeing with the director's determination may obtain de novo review (appeal) by filing a written request. Review is conducted by Commission's Adjudication Division unless any party elects to have such review conducted in court.

4. **Commission reviews evidence.**
   If review (appeal) is requested, the Commission considers whether the determination is supported by substantial evidence. If the Commission concludes the determination is supported by substantial evidence, the Commission provides legal representation to support the determination in the de novo review proceeding. The Commission's conclusion is not subject to further agency or judicial review.

5. **State provides counsel.**
   If a de novo review proceeding is to be conducted in court and the Commission has concluded the determination is supported by substantial evidence, the Commission shall commence a court action to support the determination.

Source: Utah Code 57-21-9(7); 57-21-10(1-3); Utah Administrative Rules R608-1-9 thru 14.

The process only runs its full course if the requirement of each step is met. Thus, even if the director finds reasonable cause, the state only provides counsel if conciliation fails, the respondent appeals, and the Commission finds the determination is supported by substantial evidence.

Early Labor Commission Involvement May Compromise Prescribed Process

Actual Labor Commission procedures vary from those specified in rules and listed in Figure 4.1. UALD requests and the Commission conducts an evidentiary review before the investigation is completed (step 1) and the final conciliation conference is held. Initially, it seems reasonable to have a commission attorney review the evidence to ensure it meets minimal standards before UALD makes a determination. However, we think this involvement in the investigation may compromise the Commission's ability to independently evaluate the evidence if an appeal is filed.

The Labor Commission's involvement during investigation may compromise independence.

The purpose of the early legal review by the Commission is to help ensure the investigation is done correctly in the first place. Rather than identify evidence weaknesses after an appeal, it seems to make sense to provide early feedback. The deputy commissioner told us he has emphasized to the commission attorneys who complete the legal review that it cannot be a negotiation with UALD. The Commission's intent is not to identify what additional evidence investigators should collect in order to satisfy the subsequent legal review of evidence.

Despite the Commission's good intentions, we are concerned about whether the Commission can objectively review the adequacy of evidence when it has previously had input into the investigation. Depending on the comments received from the pre-determination legal review, the investigator may secure additional evidence leading to a reasonable cause determination. If the determination is later appealed, the independence of the Commission's evidentiary review is compromised. Even if the subsequent legal review were not affected, the process could appear unfair to respondents.

We also question the necessity of the Commission's early involvement; UALD should be able to rely on its own internal review processes to assess the adequacy of the investigation. The division's

housing case manager and director review all reasonable cause determinations and are able to assess the evidence. Furthermore, the division employs a number of attorneys who should be able to perform a preliminary legal review. It should not be necessary for UALD to rely on the Commission for a preliminary review.

Another concern involves evidentiary standards. A UALD determination is based on a reasonable cause standard, meaning a preponderance of evidence. In comparison, the Commission review is based on a lower substantial evidence standard. Substantial evidence may exist as long as there is some reasonable evidence, even though it is something less than a preponderance of evidence. Theoretically, the early legal review applying a lower standard of evidence could lead UALD away from the higher standard it must apply. The deputy commissioner told us he thinks that, in practice, the evidentiary standards used are similar, but it was beyond the scope of our work to analyze the application of evidentiary standards.

The Labor Commission should avoid reviewing evidence before UALD issues a determination.

In conclusion, we think the Commission should avoid involving itself in UALD's investigation by completing a preliminary review of evidence before a determination is issued. The division should be capable of establishing an adequate internal review process of its own. The Commission should preserve (in fact and in appearance) its ability to complete an independent and objective review of reasonable cause determinations that are appealed.

UALD Should Change Some Procedures

UALD should change some of its procedures for handling housing cases that result in reasonable cause findings. First, the investigator and housing case manager should always conduct a final interview with the respondent. Such an interview would be consistent with HUD procedures and would give respondents an opportunity to rebut the evidence gathered by the investigator. Second, UALD should reconsider its practice of providing written preliminary reasonable cause determinations to the parties prior to the conciliation conference. Our concerns with this practice are that it could affect parties' participation in the final conciliation conference, and it may inappropriately reveal witness identities that should be protected.

Final Interviews Should Be Required

We believe requiring final interviews with respondents before reasonable cause determinations are made can help ensure good investigations are conducted. As discussed in the prior section, UALD has relied on the preliminary legal review by the Labor Commission to ensure it gathers sufficient evidence. Instead, we think UALD should strengthen its own internal review and investigative processes. UALD reports that recently it instituted a practice of having the housing case manager complete a fact check for determinations. Besides that, we feel a final interview, allowing respondents to comment on the evidence against them would not only help ensure a thorough investigation but may also help parties feel they are treated more fairly.

UALD should require a final interview with respondents for all reasonable cause determinations.

Some of the respondents we spoke with felt UALD did not do a thorough investigation. To some extent, such complaints may be sour grapes. It is not surprising that respondents who the division found to be illegally discriminating would complain. However, some of the complaints appear valid. There are steps UALD can take to increase the parties' confidence in its work. While there are not many reasonable cause determinations in housing cases, they should be investigated with care because of the serious implications of these findings.

HUD Requires Final Interviews. Although UALD's investigative procedures generally correspond to HUD procedures, UALD does not require a final interview. HUD procedures state:

> The final interview is important in order to give each party (and particularly the party against whom the Department will probably find), the opportunity to comment upon the totality of the evidence in the case.

A final interview allows respondents to comment on evidence and helps ensure a fair investigation.

The procedures also state the following:

> If a reasonable cause determination is recommended, the investigator must summarize the evidence of the investigation and solicit any rebuttal evidence from the respondent. Whenever a respondent or complainant provides additional information, the other party should be given an opportunity to respond to the new information or evidence.

Rather than requiring a final interview, UALD investigators decide on a case-by-case basis if interviews are needed. We feel UALD should require final interviews for all cases that could result in a reasonable cause determination. Ideally, both the investigator and the housing case manager would participate in the interview.

Final Interviews Are Important. Holding a final interview with the respondent before an investigator concludes that reasonable cause exists should be a critical step in the division's investigation. It allows the division to validate its facts and test the reliability of its evidence by confronting the respondent with the information. If there are details missing or alternative explanations for the information, the investigator should obtain them at that point.

The division director told us that while they do not require final interviews, they will accept and consider additional information provided by respondents after the preliminary determination is given to the parties. However, the letter sent to the parties indicates otherwise, by stating that the division is prepared to act on its investigative findings. Regardless, we think it is too late at that point. As Figure 4.1 shows, the conciliation conference occurs after the final investigative report is prepared.

Finally, another important benefit of a final interview is that parties whom the division decides against may be treated more fairly. A significant complaint from the three homeowner association cases we reviewed was that they did not get a fair investigation. For example, one of the respondents expressed concerns that the investigator did not give them the opportunity to respond to additional evidence or statements obtained after interviewing witnesses. After the case was closed, a witness recanted an earlier opinion after obtaining additional information. A final interview may have brought this information to light before a determination was made. Another respondent we contacted had similar complaints; she claimed, "They did not let me submit evidence or offer a rebuttal." While these claims may be unjustified complaints of losing parties, holding a final interview to specifically confront respondents with the evidence and to solicit rebuttal information may make the process more fair to the parties involved.

UALD Should Reevaluate Its Preliminary Determination Practices

UALD should reconsider its current practice of issuing written preliminary reasonable cause determinations.

UALD should reconsider its current practice of issuing a written preliminary reasonable cause determination to both parties. The preliminary determination is the investigative report identified in Figure 4.1 (step 1) and includes a full review of the evidence, legal analysis, and proposed remedies and penalties. If conciliation is successful and the case is settled, a final determination is never issued. Issuing a preliminary reasonable cause determination is not required by Utah law. While issuing a preliminary determination informs parties about the division's anticipated conclusions, it may lead to some problems during the final conciliation meeting. Also, the preliminary determination may disclose too much information.

Preliminary Determinations May Affect Parties' Perception at Final Conciliation Conference. We examined the conciliation conference process because some respondents complained about being coerced into settling. Of course, we recognize that emotions run high in discrimination complaints. Therefore, in addition to talking with parties, we spoke with some attorneys involved and observed two conciliation sessions.

We did not identify major problems with the conferences. We found the mediators to be evenhanded and professional. One attorney we spoke with expressed a similar opinion. However, some concerns did emerge.

If conciliation is successful, the determination is never issued but confidentiality cannot be effectively protected.

One concern is whether providing a preliminary determination helps the process. HUD guidance indicates that UALD should not provide too much information prior to the final conciliation conference. According to HUD, "Although a conciliator may discuss aspects of the investigative record with the parties, he/she must not disclose recommendations as to the disposition of any issues raised in the complaint." According to HUD, conciliation allows parties to advance specific proposals "before the case determination is prepared."

We think there are some potential problems from providing so much preliminary information. It may be premature to specify damages and penalties, since the UALD director told us that the final

determination may incorporate new information that is presented at the conciliation conference. Also, providing specific damages and penalties may contribute to the respondents feeling coerced or may make the complainant less willing to settle for less. Furthermore, if conciliation is successful, the determination is never issued, and the information may be considered confidential in the division's files. However, since both parties have the preliminary determination, it cannot be effectively protected.

A second concern is that the housing investigator sometimes conducts the conciliation conference. One respondent we spoke with felt that the investigator was already biased and by conducting the conference became "judge and jury." Both conferences we observed were conducted by one of the division's mediators rather than the investigator. We think the division should ensure that a mediator always conducts the conciliation conference.

Use of Witness Names in Preliminary Determinations Should Be Reconsidered. UALD should review its practice of listing witness names on preliminary reasonable cause determinations. HUD recommends that witness names or other identifying information not be revealed during conciliation because witnesses may be at risk for reprisal. HUD procedures state evidence may include damaging testimony by other tenants who fear retaliation by the respondent landlord. On employment determinations, UALD does not list witness names (initials are sometimes listed) and, in fact, division policies clearly state that witness names will not be disclosed.

Witness names should not be revealed during conciliation because witnesses may be at risk for reprisal.

Determinations and conciliation agreements are public records once they are actually issued. However, even then, Utah law protects the identity of witnesses. Fair housing law states:

> Conciliation agreements and the director's determination and order are public records. Neither the Commission nor its staff may divulge or make public information gained from any investigation, settlement negotiation, conciliation, hearing, or administrative proceeding before the Commission except as follows: (a) Information used by the director in making any determination may be provided to all interested parties for the purpose of preparation for and participation in the investigation and any proceedings before the commission or court. (b) General statistical

information may be disclosed provided identities of individuals or parties are not disclosed. . . . (***Utah Code*** 57-21-13)

It appears contradictory for the division to carefully redact names when parties request file information for an appeal but to list names on the preliminary reasonable cause determination. In our opinion, the division should follow HUD procedures by not disclosing witness identities.

A related concern involves denying access to file information for cases that are settled and a final determination has not been issued. A respondent we interviewed felt the homeowners association should have access to the case information even though the case was settled. A Colorado official told us they not only provide information to parties involved in investigations, but parties are given statutory authority to review their file before a determination is ever issued. However, under Utah law, the case file is protected if the investigation is not completed. We think Utah law reasonably allows file access for completed investigations so a party can evaluate whether to appeal the determination or to help them prepare for proceedings before the commission or court. But, if a case is settled when the investigation is only partially completed, it seems appropriate to keep the partial investigation results confidential.

In summary, to preserve the independence of the Commission's evidence review, legal reviews should be completed only for cases that are being appealed. UALD should also reevaluate its procedures for fair housing reasonable cause determinations including requiring a final interview and consider changing the content of preliminary determinations.

Recommendations

1. We recommend that the Utah Labor Commission only provide legal reviews of evidence sufficiency for housing discrimination complaints that are appealed.

2. We recommend that the Utah Antidiscrimination and Labor Division modify its housing discrimination complaint procedures as follows:

    - Require that the housing investigator and manager conduct final interviews to review evidence with respondents when reasonable cause determinations are indicated.

    - Consider changing its preliminary determinations to not specify proposed damages and penalties and to protect the identity of witnesses when appropriate.

    - Ensure that a mediator rather than the case investigator conducts the conciliation conference.

Appendices

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Appendix A
Employment Cases Opened For More Than 500 Days

		A	B	C	A+B+C	D	A+B+D	
		POST-INTAKE	MEDIATION	INVESTIGATION	TOTAL TIME	INVESTIGATION	TOTAL TIME	CASE DISPOSITION
Sample #	Investigator	After Complaint Filed		As of May 12	As of May 12	As of Oct 1	As of Oct 1	
		Days	Days	Days	Days	Days	Days	
1	A-Case Mgr	5	28	1555	1588	1697	1730	Not Yet Determined
2	A-Case Mgr	5	12	1571	1588	1713	1730	Not Yet Determined
3	A-Case Mgr	5	34	1516	1555	1658	1697	Not Yet Determined
4	A-Case Mgr	1	29	1434	1464	1517	1547	No Cause-Appealed
5	A-Case Mgr	12	222	1121	1355	1263	1497	Not Yet Determined
6	A-Case Mgr	2	54	945	1001	1087	1143	Not Yet Determined
7	A-Case Mgr	3	36	742	781	884	923	Not Yet Determined
8	A-Case Mgr	4	27	673	704	773	804	No Cause
9	A-Case Mgr	12	49	624	685	724	785	No Cause-Appealed
10	B	1	23	1272	1296	1321	1345	Cause-Appealed
11	B	7	144	462	613	510	661	Withdrawal
12	C	0	206	803	1009	945	1151	Not Yet Determined
13	C	9	35	796	840	938	982	Not Yet Determined
14	C	15	80	484	579	611	706	Waived
15	C	7	87	439	533	447	541	No Cause
16	D	0	101	1418	1519	1560	1661	Not Yet Determined
17	D	5	91	931	1027	972	1068	No Cause
18	D	2	153	469	624	485	640	No Cause
19	D	20	31	558	609	700	751	Not Yet Determined
20	E	0	32	1450	1482	1592	1624	Not Yet Determined
21	E	9	46	785	840	927	982	Not Yet Determined
22	E	17	7	747	771	889	913	Withdrawal (10/29)
23	E	5	184	552	741	692	881	Withdrawal
24	E	6	14	679	699	821	841	Not Yet Determined
25	E	8	66	456	530	598	672	Not Yet Determined
26	F	19	22	1371	1412	1513	1554	Not Yet Determined
27	F	14	52	827	893	969	1035	Not Yet Determined
28	F	2	117	679	798	821	940	Not Yet Determined
29	F	4	70	630	704	772	846	Not Yet Determined
30	F	10	21	635	666	777	808	Not Yet Determined
Average		7	69	887	964	1006	1082	

Investigators B and C are no longer employed by the Division.
Investigator E is no longer an employment investigator.

Appendix B
Employment Discrimination Sample Cases

		A	B	C			A+B+C		COMPLIANCE QUESTIONS				
	INTAKE**	POST-INTAKE	MEDIATION	INVESTIGATION			TOTAL TIME	CASE DISPOSITION		1	2	3	4
x= investigation not completed	Complaint Drafted	After Complaint Filed		Case Mgr	Invest	Total	From Complaint Filed Until Case Closed or Determination Issued	As of 12/17/09	Mediation Held?	Complaint Drafted	Parties Notified	Transfer Med to Inv	Contact With Parties
Sample #	Business Days	Days	Days	Days			Days			10 Days	10 Days	45 Days	90 Days
1x	14							Transferred to EEOC	n/a	no	no	n/a	n/a
2x	10	11					11	Transferred to EEOC	n/a	yes	n/a	n/a	n/a
3x	10	19	94				113	Transferred to EEOC	no	yes	no	no	yes
4x	7	13	36				49	Withdrawal w/ Benefits	no	yes	yes	yes	yes
5x	12	16	42	83		83	141	Withdrawal	yes	no	yes	yes	yes
6x	11	13	117	23		23	153	Withdrawal w/ Benefits	no	no	yes	no	yes
7x	15	14	35	184	34	218	267	Withdrawal	no	no	yes	yes	no
8x	14	12	36				48	Settled w/ Benefits	yes	no	yes	yes	n/a
9x	12	13	45				58	Settled w/ Benefits	yes	no	yes	yes	n/a
10x	17	17	50				67	Settled w/ Benefits	yes	no	no	no	n/a
11x	11	6	64				70	Settled w/ Benefits	yes	no	yes	no	n/a
12x	5	8	64				72	Settled w/ Benefits	yes	yes	yes	no	n/a
13x	5	6	95				101	Settled w/ Benefits	yes	yes	yes	no	yes
14x	1	5	116				121	Settled w/ Benefits	yes	yes	yes	no	yes
15x	9	9	117				126	Settled w/ Benefits	yes	yes	yes	no	yes
16x	5	11	128				139	Settled w/ Benefits	yes	yes	yes	no	yes
17x	7	6	156				162	Settled w/ Benefits	yes	yes	yes	no	yes
1	32	13	35	42	65	107	155	No Cause	no	no	yes	yes	yes
2	9	5	22	84	71	155	182	No Cause	no	yes	yes	yes	yes
3	11	6	51	36	98	134	191	No Cause	no	no	yes	no	yes
4	7	3	29	64	106	170	202	No Cause	no	yes	yes	yes	yes
5	7	6	36	34	129	163	205	No Cause-Appealed	no	yes	yes	yes	no
6	13	13	16	50	130	180	209	No Cause	no	no	yes	yes	yes
7	10	5	37	83	86	169	211	No Cause	no	yes	yes	yes	yes
8	4	5	77	126	9	135	217	No Cause	yes	yes	yes	no	yes
9	8	13	47	50	112	162	222	No Cause	no	yes	yes	no	yes
10	6	3	80	75	72	147	230	No Cause	no	yes	yes	no	yes
11	15	20	22	63	127	190	232	No Cause	no	no	no	yes	yes
12	4	14	38	48	132	180	232	No Cause	no	yes	yes	yes	no
13	20	1	42	110	84	194	237	No Cause-Appealed	no	no	yes	yes	yes
14	18	13	36	39	156	195	244	No Cause	no	no	yes	yes	no
15	12	16	34	59	167	226	276	No Cause-Appealed	no	no	no	yes	yes
16	1	4	32	91	183	274	310	No Cause-Appealed	no	yes	yes	yes	no
17	13	13	29	112	161	273	315	No Cause	no	no	yes	yes	no
18	10	14	73	88	150	238	325	No Cause	yes	yes	yes	no	yes
19	17	8	34	259	2	261	303	No Jurisdiction	yes	no	yes	yes	no
20	7	3	36	55	260	315	354	No Cause	yes	yes	yes	yes	no
21	9	19	66	208	62	270	355	No Cause-Appealed	yes	yes	no	no	no
22	7	6	66	159	282	441	513	Not Yet Determined	no	yes	yes	no	no
23	7	7	43	64	407	471	521	Not Yet Determined	yes	yes	yes	yes	no
24	1	12	38	56	420	476	526	Not Yet Determined	no	yes	yes	yes	yes
25	14	13	9	15	490	505	527	Not Yet Determined	no	no	yes	yes	no
26	7	6	22	50	435	485	513	Not Yet Determined	no	yes	no	yes	no
Avg-Full*	10	9	40	82	169	251	300	Compliance	17 yes	25 yes	35 yes	24 yes	23 yes
Avg All Mediation (41 cases)			52	85					24 no	18 no	7 no	17 no	13 no

* Average for 26 cases that went through full UALD process so that investigations were completed or pending as of December 17, 2009.

** Intake is not counted into total time because the division has no control over the time for complainant to return notarized complaint.

Compliance Questions:

1. Was complaint drafted and mailed within 10 days from when questionnaire was recieved?
2. Was charge sent out including resolution conference letter within 10 days of when complaint was filed?
3. Was case transfered to investigation after no more than 45 days in mediation?
4. Was the time between contact with parties no more than 90 days?

Appendix C
Housing Discrimination Sample Cases

	A	B	C	A+B+C		COMPLIANCE QUESTIONS						
	POST-INTAKE	MEDIATION	INVESTIGATION	TOTAL TIME	CASE DISPOSITION		1	2	3	4	5	6
x = investigation not completed	After Complaint Filed			From Complaint Filed Until Case Closed or Determination Issued		Mediation Held?	Complaint Drafted	Parties Notified	Transfer Med to Inv	Contact With Parties	Commence Investigation	Complete Investigation
Sample #	Days	Days	Days	Days			10 Days	10 Days	45 Days	Max 30 Days	30 Days	100 Days
1x	0	22		22	Withdrawal	yes	yes	yes	n/a	n/a	n/a	n/a
2x	3	41		44	Settled	yes	yes	yes	n/a	yes	n/a	n/a
1	6	24	70	100	No Cause	no	yes	yes	yes	no	yes	yes
2	2	27	89	118	No Cause	no	yes	yes	yes	yes	yes	no
3	13	54	73	140	No Cause	no	yes	no	no	yes	no	no
4	13	113	105	231	No Cause	no	yes	no	no	yes	no	no
5	4	65	162	231	No Cause	no	yes	yes	no	yes	no	no
6	1	32	332	365	No Jurisdiction	no	yes	yes	yes	no	no	no
Avg-Full*	7	53	139	199	Compliance	2 yes	8 yes	6 yes	3 yes	5 yes	2 yes	1 yes
Avg All Mediation		47				6 no	0 no	2 no	3 no	2 no	4 no	5 no

* Average for 6 cases that went through full UALD process so that investigations were completed.

Compliance Questions:

1. Was complaint drafted and mailed within 10 days from when questionnaire was recieved?
2. Was charge sent out including resolution conference letter within 10 days of when complaint was filed?
3. Was case transfered to investigation after no more than 45 days in mediation?
4. Was the time between contact with parties no more than 30 days?
5. Was agency investigation commenced within 30 days of when complaint was filed?
6. Was agency investigation completed within 100 days of when complaint was filed?

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Agency Response

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State of Utah
GARY R HERBERT
Governor
GREG BELL
Lt. Governor

Labor Commission
SHERRIE HAYASHI
Commissioner

HEATHER MORRISON GUNNARSON
Director

January 11, 2010

John M. Schaff, CIA
Auditor General
Office of the Legislative Auditor General
W315 Utah State Capitol Complex
Salt Lake City, UT 84114

Re: Report No. 2010-02; A Performance Audit of the Utah Antidiscrimination & Labor Division

Dear Mr. Schaff:

The Utah Labor Commission and the Utah Antidiscrimination & Labor Division ("Division" or "UALD") are pleased to provide the following response to the Auditor General's January 2010 Performance Audit ("Audit") of the UALD. The Division strongly supports the use of performance audits as an important tool to improve state government.

The Commission and Division take seriously their responsibility to impartially and professionally administer the Utah Antidiscrimination Act (Utah Code §34A-5-101 et seq.) and the Utah Fair Housing Act (Utah Code Ann. §57-21-1 et seq.) and were heartened by the Auditors' conclusion that the Division has made significant improvements in managing and processing discrimination complaints. The Division worked closely with the Auditor's Office staff throughout the audit process and appreciates their thoughtful recommendations on how the Division can improve its processes. The Commission and Division look forward to working with all stakeholders and organizations involved in employment and housing discrimination charges to affect real and positive change in how the Division processes, investigates and resolves the hundreds of claims it receives each year.

CHAPTER 1
INTRODUCTION

Chapter 1 of the Audit provides background and general procedural information for the Division, together with a statement regarding the scope of the Audit. No response from the Division is therefore necessary.

CHAPTER 2
LEGISLATURE SHOULD ESTABLISH TIME LIMITS FOR PROCESSING EMPLOYMENT COMPLAINTS

Recommendation No. 1: "We recommend that the Utah Antidiscrimination and Labor Division process complaints in the order in which they are received when practicable."

Response: The Division supports this recommendation and will modify its current employment discrimination procedures and adopt a policy which will be implemented within the next ninety days.

The Division strives to close its investigatory files as quickly and as efficiently as possible. However, with four employment investigators, each of whom currently has approximately 80 open files, it is often difficult for the Division to effectively and fairly investigate its claims and reach an accurate determination as quickly as it, or the parties, would like.[1]

Moreover, as the Audit acknowledges, the Division receives more than 40% of its budget from contracts with the Equal Employment Opportunity Commission ("EEOC") and the U.S. Department of Housing and Urban Development ("HUD"). These federal contracts require the Division to close a certain number of cases each year. Failure to meet those contract numbers will result in a reduction of federal funds. It could also mean losing the contracts completely. It is therefore imperative that the Division meet its federal contract closure requirements.[2] Because

[1] The Audit calculated the Division's caseload at 47 cases/*staff* member, including all support and clerical staff—none of whom carry a case load. In reality, the Division has only four employment investigators, each of whom currently has an average case inventory of 80 active cases.

[2] Under its current EEOC contract, the Division is obligated to close 562 investigations this fiscal year.

the Division had to focus on closing a high volume of cases, it allowed certain cases (typically ones which are larger or more difficult) to age.

That being said, the Division recognizes and is concerned that it has a small percentage of cases that are unacceptably old. (Exhibit A, attached, shows that as of January 6, 2010, only 41 cases out of a total of 543 (or 7.5%) were older than 500 days.) Therefore, the Division is fully supportive of the Audit's recommendation that it amend its policies and procedures to require that investigators process their cases in the order in which they are received, when practicable. This policy will help ensure that cases are not allowed to languish. The Division will also amend the performance standards for investigators to incorporate this new requirement.

Recommendation No. 2: "We recommend that the Utah Antidiscrimination and Labor Division establish a goal to complete each employment discrimination investigation within 180 days or less."

Response: The Division agrees with this recommendation.

The Division acknowledges that, while it strives to investigate claims as quickly and as efficiently as possible, it simply needs to do a better job. It will therefore establish an internal goal of completing each employment discrimination investigation within 180 days. The Division does, however, recognize that it is unrealistic to expect its investigators to meet this goal immediately. Given the auditors' concerns about the cases that are older than 500 days, the Division's focus for the next several months is to close those cases; indeed, it has established the goal of closing its twenty oldest cases by February 1, 2010. The Division will thereafter set reasonable interim age goals so that by October 1, 2010, it has no cases older than 450 days; by February 1, 2011, it has no cases older than 350 days; and by October 1, 2012, it has no cases older than 180 days. The Division will report how closely it is meeting these goals in both its monthly balanced scorecard report to the Governor's Office, and in its Annual Report to the Legislature and the public.

Recommendation No. 3: "We recommend that the Legislature consider requiring the Utah Antidiscrimination and Labor Division to complete its employment discrimination investigations within set time limits."

Response: The Division supports this recommendation.

However, as outlined above, the Division believes that through internal policies, it can complete its employment discrimination investigations within less than 350 days by February 2011 and within 180 days by October 2012. On the other hand, if the Division is unable to meet these goals through new policies and performance standards, or if the legislature believes it necessary to amend the Utah Antidiscrimination Act to establish required time limits, the Division will certainly welcome the opportunity to work closely with legislators to establish reasonable case processing deadlines.

CHAPTER 3
COMPLAINT PROCESS NEEDS BETTER COMPLIANCE AND COULD BE STREAMLINED

Recommendation No. 1: **"We recommend that the Utah Antidiscrimination and Labor Division review staff assignments to try to reduce the amount of time employment discrimination investigations take to complete."**

Response: The Division agrees with this recommendation.

The Division has already undertaken a review of its current staff assignments to take advantage of case processing efficiencies, and over the next several weeks, will be reassigning staff to different tasks. The Division is also reviewing its database program to configure new calendaring reminders and case processing safeguards.[3]

One of the Audit's recommendations was to re-examine whether it made sense to have one investigator and one case manager devoted to investigating housing cases. Prior to 2005, the

[3] For example, the Division recently adopted a tickler that is automatically emailed to the clerk and case manager on cases where notice of the Charge of Discrimination has not been sent out within five days. Although the Audit did not find any substantive concerns with the Intake process, the Division Director (while conducting her regular monthly internal audit of cases) discovered that some of the notices were not being sent out within ten days, as required by policy and statute. She therefore set up the email ticklers to better ensure that the notices were sent out timely. Since the auditors were reviewing case files that pre-dated this tickler system, the Audit makes no mention of this improvement.

Division's employment and housing investigations were integrated, with five investigators and one case manager investigating both employment and housing cases. As a result, the Division experienced significant difficulties in closing housing cases in the time frame HUD required. Because 50% of housing cases *must* be closed within 100 days,[4] and because HUD requires considerably greater detail in its investigative reports and file documentation, investigators had to set aside either their employment investigations to focus on getting the housing cases closed within the tight 100 day time frame, or allow their housing cases to age considerably beyond the HUD requirement so that they could close employment claims. Therefore, after very careful and thoughtful consideration, the Division determined that it made better business and fiscal sense to split the discrimination unit into two: a separate employment unit, with four employment discrimination investigators and a case manager; and a housing discrimination unit with one investigator and a case manager. In the Division's opinion, re-integrating the two units would be inefficient and highly problematic, given HUD's contractual requirements. However, the two units work very closely and cooperatively together, and should there come a need to "borrow" an investigator from one unit or the other to help out with a particularly heavy caseload or emergency, they are free to do so.[5]

Recommendation No. 2A: **"We recommend that the Utah Antidiscrimination and Labor Division consider modifying its complaint procedures including the following: Integrate mediation as a parallel instead of a sequential phase of the complaint process."**

Response: The Division agrees with this recommendation.

The ADR program plays an important role in the UALD case process, and the Division is committed to its success. In fiscal 2009, about 31% of all cases were settled with benefits totally nearly $590,000. The success of the ADR program has resulted in quicker closures for the parties, and fewer cases for the Division to investigate. The Division would therefore be reticent to do anything which would discourage parties from attending mediation.

[4] Failure to meet this contractual requirement would jeopardize the Division's contract, which is worth about $275,000 annually.

[5] For example, the Division has asked the Fair Housing Manager to help finish the investigations of five of the oldest employment discrimination claims so that they can be closed within the next six weeks.

That being said, the Division is committed to running the most efficient and well-organized program that it can, and it greatly appreciates the Audit's thoughtful recommendation that integrating ADR as a parallel, rather than a sequential, phase of the complaint process may result in quicker case processing. During the next ninety days, the Division will modify its policies and procedures manual, together with relevant case letters and its database management system, to implement an opt-in mediation program that will run parallel to the investigation track. If the new procedures result in the continued success of the ADR program, the changes will be made permanent at the end of the federal fiscal year.

Recommendation No. 2B: "We recommend that the Utah Antidiscrimination and Labor Division consider modifying its complaint procedures including the following: Require the case manager to provide more oversight over investigations to ensure that cases are completed promptly and parties are contacted on a regular basis."

Response: The Division agrees with this recommendation.

Beginning in February, the case manager will be required to meet with the intake and investigative staff on a bi-monthly basis to ensure that consistent work is being done on cases, that parties are being contacted on a regular basis, and that investigators are closing their 10 oldest cases each quarter (as opposed the ten *of* their oldest cases, as is currently required). She will also continue to conduct fact-check reviews of each file prior to its closure to ensure that the quality and impartiality of the investigations remain high.

Recommendation No. 2C: "We recommend that the Utah Antidiscrimination and Labor Division consider modifying its complaint procedures including the following: Assign an investigator to be responsible for each case when the complaint is filed until the case is completed."

Response: The Division agrees with this recommendation.

Intake staff will assign investigators to the case on a rotational basis, as soon as the completed and signed Charge of Discrimination has been received. Within 10 days of receiving the completed Charge, letters will be sent to the parties identifying the investigator and providing them with contact information. The letter will also explain the Division's mediation process and

offer it as an option to the parties. The investigator assigned to the case will remain responsible for that case until the time it is closed, and will work closely with the mediator on cases which opt-in to the mediation program. The Division will amend its policies and procedures manual to reflect these changes within ninety days.

CHAPTER 4
SOME FAIR HOUSING PROCEDURES RAISE CONCERNS

Recommendation No. 1: "We recommend that the Utah Antidiscrimination and Labor Division only provide legal reviews of evidence sufficiency for housing discrimination complaints that are appealed."

Response: The Division supports this recommendation and has already modified its current housing procedures to implement it, as follows:

> Chapter 8.6: If a party appeals the Division's FIR [or Final Investigative Report] Cause Finding, the Division will submit the FIR and the case file to the Utah Labor Commission's legal counsel for legal review of the sufficiency of the evidence used to find cause. The Division will not submit cases for legal review until they have been appealed. Upon certification from the Utah Labor Commission that the FIR has sufficient evidence to support a finding of reasonable cause, it will be submitted to the Utah Attorney General's office for further action, as necessary.

Recommendation No. 2A: "We recommend that the Utah Antidiscrimination and Labor Division modify its complaint procedures as follows: Require that investigator and manager conduct final interviews to review evidence with respondents when for probable cause determinations are indicated."

Response: The Division supports this recommendation and has already modified its current housing procedures to implement it, as follows:

Chapter 8.1: Upon completion of a thorough investigation by the Investigator, the contents of the case file and the documenting reports (FIR, Preliminary Investigative Summary, Informal Finding of Cause) shall be given to the Fair Housing Manager for editing and fact checking. The Fair Housing Manager must ensure that sufficient legal and factual bases exist to support the Investigator's findings; and that proper grammar, spelling, and punctuation, and tone are used.

Chapter 8.2: Once the investigator believes that the outcome of a complaint will be a finding of Reasonable Cause, the investigator will prepare a Preliminary Investigative Summary (PIS) for the Respondent(s). The PIS will review evidence for the Respondent and show the factual basis for the Investigator's belief that a Reasonable Cause finding is warranted.

The PIS will also set a time for the Investigator and Fair Housing Manager to meet with the Respondent(s) and/or their counsel to discuss whether the Division has received all the materials that Respondents wish to submit as evidence. The Fair Housing Manager is to act as an intermediary in this meeting and must remain neutral. After the exit interview, the Investigator will revisit any evidence submitted by the Respondent. In the event that the Fair Housing Manager acted as the investigator, the Investigator will act as the intermediary during the exit interview.

Note that all witness identifications are to be kept confidential during the exit interview and in the PIS. Also, no damages or prospective damages are to be given in the PIS.

<u>Recommendation No. 2B</u>: "We recommend that the Utah Antidiscrimination and Labor Division modify its complaint procedures as follows: Consider changing its preliminary determinations to not specify proposed damages and penalties and to protect the identity of witnesses when appropriate."

<u>Response</u>: The Division supports this recommendation and has already modified its current housing procedures to implement it, as follows:

Chapter 5.17: A witness may request to keep his identity confidential. If a witness requests confidentiality, the Investigator must assure that the witness's name and contact information is not included in the FIR. The witness should be told that his or her identity will be kept in the investigative file, but not included in the FIR.

Chapter 8.4: After the PIS and the exit interview, if the outcome of the investigation is a finding of Reasonable Cause, the Investigator will draft an Informal Finding of Cause and submit it to the Fair Housing Manager. After the Fair Housing Manager is satisfied that the Informal Finding of Cause contains adequate legal and factual findings to support a reasonable cause finding, the document will be submitted to the Director for final review. This document will not contain information that identifies witness's identities. Additionally, no damage awards will be alluded to or identified in the Informal Finding of Cause.

After issuing of the Informal Finding of Cause, a conciliation conference must be proffered by the Division. If the parties wish to attend this conference, a mediator will conciliate the case between the parties. (See Chapter 4, Section 13).

Chapter 8.5: If the conciliation conference fails to result in a settlement agreement, the Division will issue a FIR outlining that reasonable cause has been found. This FIR will contain witness identities, except for any and all witnesses that have requested that their identities remain anonymous. Additionally, the FIR will contain any and all damages computed by the Division.

Recommendation No. 2C: "We recommend that the Utah Antidiscrimination and Labor Division modify its complaint procedures as follows: Ensure that the mediator rather than the case investigator conduct the conciliation conference."

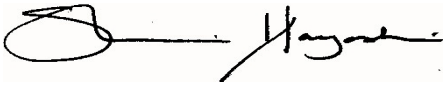
Response: The Division supports this recommendation and has already modified its current housing procedures to implement it, as follows:

> Chapter 14.13: Conciliation will be offered for all cases that result in a finding of Reasonable Cause by the Division. A Mediator shall conciliate the case. In no wise shall the case investigator conciliate the case between the parties.

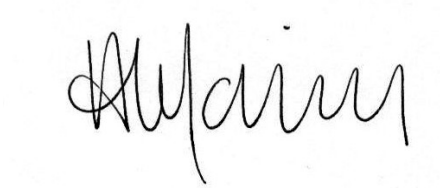
CONCLUSION

The Commission and Division appreciate the effort put forth by the Auditor General's staff in conducting this audit. The staff exhibited the highest level of professionalism, thoughtfulness and concern about "getting it right." The Audit's recommendations will help the Division improve how it performs its crucial work of helping protect Utah's public from illegal discrimination. The Division looks forward to implementing all of the Audit's recommendations over the next several months.

Sincerely,



Sherrie Hayashi
Commissioner



Heather Morrison Gunnarson
Director

Age of All Open Cases as of January 6, 2010

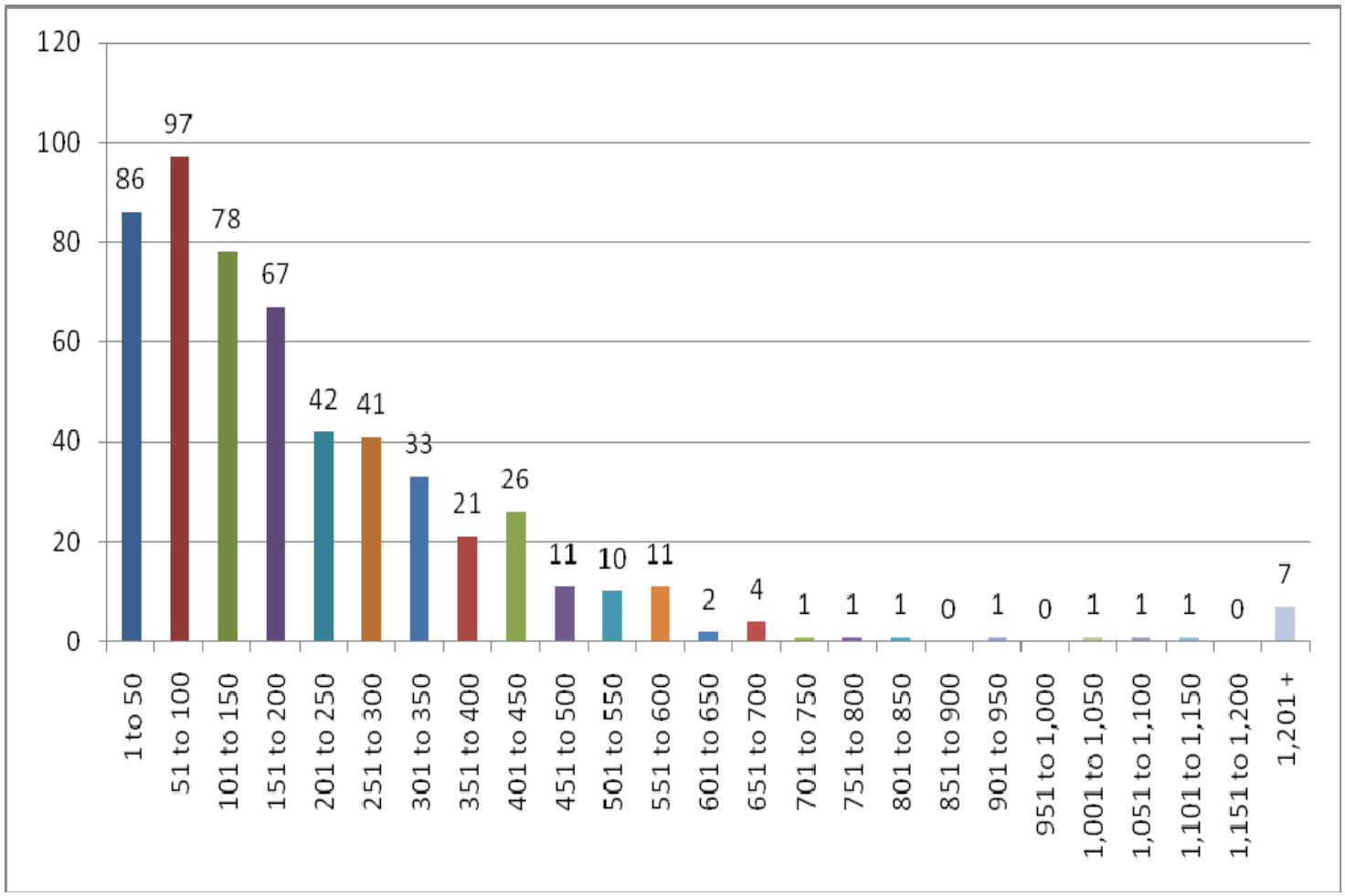


Exhibit A