Table of Contents

Page

Digest of a Performance Audit of the Utah Anti-discrimination Division

This report addresses a number of issues related to the administration and enforcement of employment discrimination law. The Utah Anti-discrimination Act defines illegal employment discrimination and provides an administrative process to address alleged violations of the law. The Utah Industrial Commission, including its Anti-discrimination Division (UADD) and its Adjudication Division, receives, mediates, investigates, and adjudicates allegations of illegal employment discrimination. If the commission finds a claim of illegal discrimination is valid, it orders the employer to cease discriminatory conduct and to provide appropriate relief to the individual such as reinstatement, back pay, and attorney fees. In our opinion, some parts of the anti-discrimination system operate well, while others need significant improvements. Summaries of our main findings are below:

Minor Improvements can be Made in Intake and ADR. Intake and alternative dispute resolution (ADR) are the first two steps in UADD's administrative case-handling process. Overall, we found no significant problems with the performance of these areas. Minor improvements in the intake process are possible by providing more information about the law and administrative process to complainants before they decide to file a charge of discrimination and by conducting more thorough intake interviews. We commend UADD for implementing the ADR program which has helped reduce the division's case backlog through the mutual resolution of employment disputes by the parties. We feel consistent and quality performance could be ensured at ADR by improving its policies and procedures.

Management Control is Needed for Investigations. Unlike the minor changes needed to improve UADD's intake and ADR functions, fundamental changes are needed to improve the investigation function. Because UADD lacks effective management control, we found that both the determination of whether discrimination occurred and the amount of evidence gathered to reach an investigative conclusion vary greatly from investigator to investigator. Similarly, investigators have large differences in the number of cases closed and the time it takes to close cases. We found that UADD investigators make decisions about charges based on different philosophies and with little accountability. While each investigator must exercise professional judgement and discretion in deciding what evidence to gather and how to interpret its meaning, professional judgement should be exercised within a management structure that guides and controls it. We feel UADD needs to establish basic management control to guide and direct investigations, including procedures, training, supervision, and review.

Legislature Should Allow UADD to Participate in Formal Hearings. The Industrial Commission's Adjudication Division holds *de novo* (i.e., anew) hearings on discrimination charges at the request of either party after UADD determinations are made. We agree that formal hearings should be *de novo*; administrative law judges (ALJs) should make findings

of facts and conclusions of law anew without giving any deference to the judgments of UADD's investigation. We feel that the Legislature could allow UADD to participate in the formal hearing process, without violating the *de novo* concept, either by presenting the evidence gathered and their conclusions or by representing selected cause findings. In our opinion UADD's participation in formal hearings can improve the effectiveness of the state's anti-discrimination process in eliminating discrimination and make the process more fair for charging parties. We are not implying that ALJs or hearing procedures are biased toward one party or the other, but ALJs largely rely on the parties both to inform them about the relevant facts of the case and to argue the correct interpretation of the law. Often charging parties, including those who received cause findings from a state investigation, are unable to obtain effective legal representation. Prior to 1985, Utah law allowed UADD to present the case in support of a cause finding. Also, agencies in four neighboring states have statutory authority to represent some of their cause findings. UADD participation in formal hearings also would have a very beneficial effect on investigators by making their work more meaningful and providing valuable feedback from the ALJs.

Legislative Changes Could Control Withdrawals. The Legislature may want to consider changes to the Utah Anti-Discrimination Act to address charging party withdrawals from the state administrative process. Statutory changes could address two items. First, the Legislature should consider eliminating charging parties' ability to withdraw their cases after a formal hearing. In cases where frivolous claims were pursued to a formal hearing, that change would prevent charging parties from withdrawing to avoid attorney fees assessed by the judge. Second, the Legislature may consider making Utah law more similar to federal law by allowing judges to award punitive and compensatory damages when appropriate. In cases where charging parties have strong cases, that change would make the Utah administrative process more meaningful by eliminating the incentive that now exists for charging parties to withdraw to pursue their case in federal court.

Legislature Should Examine Organizational Structure. The Legislature should consider changing the organizational structure under which anti-discrimination law is administered and enforced in Utah. In our opinion, many of the problems described in this report result from administrative weaknesses that may be linked to UADD's placement within the Industrial Commission. Both of the last two directors of UADD report that they had difficulty managing the division because of their relationship with the commission. However, current commissioners feel UADD's management and leadership difficulties have been the result of personnel problems not organizational structure. Although our work was limited to the Industrial Commission's anti-discrimination function, more comprehensive studies have concluded that administrative effectiveness is hampered because authority is vested in a three-person body. Many critics of the existing system advocate the establishment of a Human Rights Commission to assume UADD's functions. While such a commission may be a reasonable approach to providing a more cohesive anti-discrimination process, it may not be essential. Among other options, the existing commission could be restructured to clarify administrative responsibilities and segregate them from judicial functions.

Chapter I
Introduction

This report addresses a number of issues related to the administration and enforcement of employment discrimination law. The Utah Industrial Commission, including its Anti-discrimination and Adjudication divisions, receives, mediates, investigates, and adjudicates allegations of illegal employment discrimination. In our opinion, some parts of the anti-discrimination system operate well, while others need significant improvements. Chapters II through VI of this report present our recommendations for improving the anti-discrimination system. This chapter presents background information.

The Utah Anti-discrimination Act (UADA) defines illegal employment discrimination and provides an administrative process to address alleged violations of the law. UADA prohibits discrimination in employment based on *"race, color, sex, pregnancy, childbirth, or pregnancy related conditions, age, if the individual is 40 years of age or older, religion, national origin, or handicap."* If a person feels an employer has illegally discriminated, Utah law requires that the claim be addressed administratively by the Utah Industrial Commission. According to **Utah Code** 34-35-7.1(15), *"The procedures contained in this section are the exclusive remedy under state law for employment discrimination...."* Thus, the administrative process, which is described below, is the sole avenue of relief available for alleged violations of UADA. If the commission finds a claim of illegal discrimination is valid, it orders the employer to cease discriminatory conduct and to provide appropriate relief to the individual such as reinstatement, back pay, and attorney fees.

Besides administering and enforcing Utah law, the Industrial Commission has a role in the administration of federal law. Federal law also defines illegal discrimination and provides an administrative process to address claims. While the federal definition of illegal conduct is similar to Utah's, there are some significant differences in the process and in the relief available to victims of discrimination. The Equal Employment Opportunity Commission (EEOC) is the federal agency mandated to investigate, process and enforce federal law dealing with charges of employment discrimination. Under a contract between EEOC and the Industrial Commission, when a charge is filed with the Utah Anti-discrimination Division (UADD), it is automatically filed with the EEOC as well. A work sharing agreement allows UADD to investigate alleged violations of federal and state law simultaneously. EEOC pays UADD $500 per federal charge processed up to the maximum number charges specified in the contract. Generally, the disposition of the state charge made by the Industrial Commission is accepted by the EEOC for the federal charge. However, unlike the Utah law, under federal law a claimant may obtain a right-to-sue notice enabling them to move outside the administrative process and bring a suit in court. Furthermore, for some violations of federal law, the claimant may obtain greater relief than is available under state law, including compensatory and punitive damages. Under both state and federal law, individuals bear the

ultimate burden of proving by a preponderance of evidence that they were the victim of illegal

discrimination.

Administrative Process is Complicated and Challenging to Manage

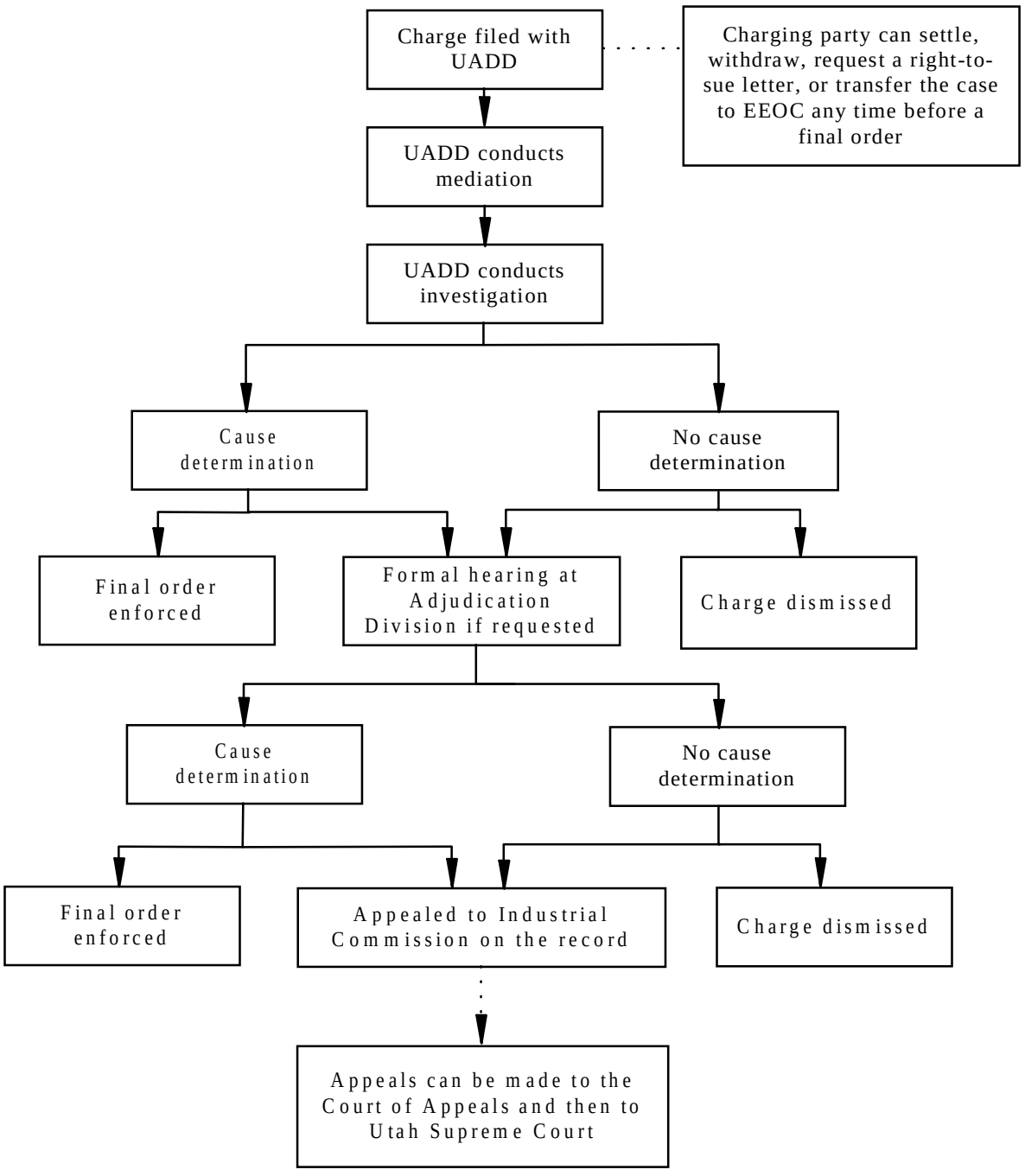
Many factors make the Industrial Commission's administration and enforcement of anti-discrimination law difficult. We feel two factors are especially noteworthy. First, the process itself may be long and complicated. A charge may be processed by the Industrial Commission for a year or more and there are numerous recourses available to the charging party. Most charges are initially handled informally in a state-sponsored mediation process, but that process can be by-passed at the discretion of either party and the charge referred directly to an investigation. However, at any time in the process the complainant can withdraw the charge from state jurisdiction and transfer it to a federal forum (a more detailed description of this process is given below and in Figure I on page 3). Second, the large volume of charges filed and the task of dealing with people who are emotionally upset because they feel they have unfairly lost their job presents a challenge.

Utah Administrative Process is Complicated

Besides the commission itself, two divisions of the Industrial Commission have major roles in the administration and enforcement of employment discrimination law: the Utah Anti-discrimination Division (UADD) and the Adjudication Division. The first contact for a person with a potential discrimination complaint is UADD. UADD processes all complaints and facilitates an informal mediation session between the complainant and the employer. Also, if necessary, UADD conducts an investigation and determines if there is cause to believe discrimination has occurred. For the purposes of this report, the mediation and investigation process offered by UADD will be called an informal process. If either party does not wish to accept result of the informal process, they may request a formal hearing before an administrative law judge (ALJ). The ALJs in the Adjudication Division conduct a formal process. The administrative court establishes the trial record that is the basis for any subsequent appeals, first to the Industrial Commission and then to the Utah Court of Appeals. In addition to the Utah Anti-discrimination Act, the Utah Administrative Procedures Act controls the conduct of the informal and formal processes. Figure I describes the Utah administrative process. Throughout the process, a charge may be settled by the parties or withdrawn by the claimant. A withdrawal may either be a final action or to pursue the charge under federal law.

The mission of UADD is *"to investigate, resolve, and conclude, as rapidly and thoroughly as possible, complaints of employment discrimination."* Agency staff consider *"eliminating discrimination"* as an important part of the division's mission. The major parts of UADD's

Figure I
Utah's Anti-Discrimination Process



informal process include intake, mediation, and investigation. The process begins when an individual, referred to as a charging party, files a charge of discrimination against an employer, referred to as a respondent. All charges received are scheduled for an Alternative Dispute Resolution (ADR) conference in an effort to resolve the claim through mediation between the parties without considering the merit of the charge. If mediation is unsuccessful, then a UADD agent is assigned to investigate and make a determination on the merit of the charge.

A completed UADD investigation results in a determination of whether or not there is reasonable cause to believe there has been illegal discrimination based on a preponderance of evidence. A cause finding means UADD believes there has been illegal discrimination and a no-cause finding means it believes discrimination has not occurred. When UADD issues a cause finding, it is accompanied by an order that the respondent cease discriminatory practices and provide relief to the charging party. The parties also are invited to participate in a conciliation conference where they may settle the dispute by agreement. Rather than agree to a settlement, the respondent may request a formal hearing on the charge within 30 days of the UADD determination. The charging party also may withdraw the charge from state jurisdiction and pursue the charge in federal court. If a cause finding is not settled, set for formal hearing, or withdrawn, the order becomes final and legally enforceable after 30 days. When UADD issues a no-cause finding, it is accompanied by an order dismissing the charge. However, the charging party may request a formal hearing within 30 days or may pursue the charge in federal district court.

Depending on the informal determination, one party or the other may request a formal hearing before an ALJ. The commission's four ALJs are housed in its Adjudication Division that has the mission: *"to conduct all formal hearings of the Industrial Commission concerning all aspects of employment-related law in a fair and efficient manner."* The formal process allows each party to present evidence and make legal arguments in an administrative court. The ALJ considers the charge *de novo* (i.e., anew) and therefore does not give any credence to the findings of fact or conclusions of law reached by UADD; instead, the ALJ independently decides all factual and legal issues. The charging party bears the burden of proof by providing a preponderance of evidence supporting his or her claim. Just as UADD does in the informal process, the ALJ issues either a cause or a no-cause finding accompanied by the appropriate order. Unless the charge is withdrawn, settled or appealed within 30 days, the order of the ALJ becomes final.

The formal hearing is recorded so its conduct can be challenged on appeal. The three commissioners of the Industrial Commission will consider an appeal of the ALJ's ruling if a motion for review is filed within 30 days. The Industrial Commission bases its review on the presentations made by the parties and the trial record of the formal hearing. The ruling of the Industrial Commission may be appealed to the Utah Court of Appeals. A decision of the Court of Appeals may be challenged in the state supreme court.

A complicating factor to the state administrative process described above is the existence of a parallel federal process. A charging party initiates a charge and may pursue it in either the state or the federal forum. Apparently to prevent a charging party from pursuing claims under state and federal law simultaneously, **Utah Code** 34-35-7.1(16) states:

> *The commencement of an action under federal law for relief based upon any act prohibited by this chapter bars the commencement or continuation of any adjudicative proceeding before the Utah Anti-discrimination Division in connection with the same claims under this chapter.*

While Utah law prevents simultaneous action in the state and federal forum, a charging party may withdraw the charge from state jurisdiction and pursue it under federal law at any time during the state process. Utah law simply requires that, *"If the aggrieved party wishes to withdraw the request for agency action, he must do so prior to the issuance of a final order."* Because federal law allows greater relief than state law, charging parties may be able to pursue federal claims even after prevailing in the state process.

Management of the Anti-discrimination Process is Challenging

Besides the complicated administrative process, the Industrial Commission's management task is difficult because of the large number of claims received annually and the emotionally charged nature of these claims. To further complicate the problem, some individuals have been dissatisfied by the state's discrimination process and its management approach, placing the agency in controversy over the past few years. Some significant changes have resulted.

The volume of charges makes management of the anti-discrimination process challenging. In federal fiscal year 1995, UADD accepted 768 charges for processing after waiving 82 charges to EEOC. That number of charges, although somewhat lower than the prior two years, represents a 48 percent increase in the last five years. In addition, many more individuals contacted the agency about possible charges, but never filed. All charges accepted for processing by UADD are routinely scheduled for mediation and may go on to be investigated and into the formal hearing process.

The work of UADD is difficult because of the emotional nature that surrounds claims of discrimination. Generally charging parties feel they have been treated unfairly, while respondents feel they have acted legally and object to being accused of discrimination. Under Utah law, an employer may legally fire an employee as long as that action is not based on a protected factor such as the employee's sex, race, age, religion, or disability. Other claims that may not involve an employee being fired, such as sexual harassment, also engender powerful emotions. Typically, charging parties and respondents view the facts of a claim very differently. UADD investigates each charge in fairness to both parties, but inevitably there is dissatisfaction when UADD makes a determination because one party wins and the other loses.

Given the many charges received, and their often emotional nature, perhaps it is not surprising that UADD has been surrounded by controversy for a number of years. In December 1992, Governor Bangerter, with Governor-elect Leavitt's concurrence, appointed a Task Force to review allegations that the Utah Anti-Discrimination Act was not being adequately administered or enforced. In addition to its findings about the agency's process, the task force reported that: *"misunderstandings and unmet expectations have aggravated criticism of the division."*

Largely because of recommendations from the governor's task force, some significant changes were made. In 1993, UADD implemented an alternative dispute resolution program that seeks to resolve all charges through mediation with the parties without an investigation of the charge. Increased resources also have enabled the division to hire additional staff to process complaints. Significant 1994 legislative changes included the establishment of a UADD advisory committee and the addition of enforcement power to the Utah Anti-Discrimination Act.

Audit Scope and Objectives

This audit was requested by Representative David M. Jones. In January 1995, the Audit Subcommittee directed the Auditor General to conduct a survey of UADD to determine if a full audit was needed. In June 1995, the Audit Subcommittee authorized a full audit.

The audit request included a wide range of concerns. Based on our survey work we narrowed the focus of our work to those issues we felt were most relevant and important. Specifically, our audit objectives included:

1. Evaluate the efficiency and effectiveness of UADD's informal charge processing, including charge intake and mediation and investigation.

2. Evaluate the fairness of the Industrial Commission's formal hearing process.

3. Evaluate the impact of the Industrial Commission's organization structure on the administration and enforcement of anti-discrimination law.

Our audit work included reviewing case files at UADD and the Adjudication Division to review intake, mediation, investigation, adjudication, appeal, and enforcement issues. We interviewed Industrial Commission staff, charging parties, respondents, UADD advisory committee members, and attorneys who had represented charging parties or respondents. We contacted staff of similar agencies in our surrounding states as well as EEOC officials. We did not attempt to evaluate the merits of individual charges or the fairness of individual case outcomes.

Chapter II
Minor Improvements can be Made in Intake and ADR

Intake and alternative dispute resolution (ADR) are the first two steps in UADD's administrative case-handling process. We audited intake and ADR and found that some minor improvements could be made in both processes. Intake and ADR process the most cases in the UADD process. In fiscal year 1995 over 800 charges of discrimination were filed at intake; of these approximately 70 percent went to ADR. Overall, we found no significant problems with the performance of these areas. However, the intake process could be improved by providing more information about the law and administrative process to complainants before they decide to file a charge of discrimination and by conducting more thorough intake interviews. In addition, consistent and quality performance could be ensured at ADR by improving its policies and procedures.

UADD's intake process accomplishes its basic function of receiving charges from complainants. However, in our opinion, the agency should take better advantage of the opportunity available at the intake stage to educate complainants and screen charges. Each charge accepted by UADD may result in significant costs to the agency, the charging party, and the respondent. We found that charging parties often do not understand their rights, responsibilities, and options under discrimination law. A video would be an effective method to inform charging parties about the law and the administrative process. We also found that UADD's practice of accepting charges regardless of appearance sometimes results in accepting charges that do not meet the legal definition of discrimination. Further, UADD's intake practice of not discussing the facts of the charge with the complainant does not give the complainant an opportunity to make an informed decision on pursuing the charge. We believe a more thorough interview with the complainant conducted by the intake officer, besides providing valuable information for subsequent charge processing, will help ensure that only complaints which meet the legal definition of discrimination are accepted and that complainants make informed decisions to pursue charges of discrimination.

The basic function of ADR is to settle discrimination cases through a mutual agreement between the charging party and the respondent. We found that ADR accomplishes its function well; 36 percent of all charges filed in fiscal year 1995 were closed at ADR. These cases are closed faster than cases that go on to investigation, thus providing potential cost savings to charging parties, respondents, and taxpayers. UADD is one of the leading civil rights enforcement agencies in the area of using ADR, and management should be commended for implementing an innovative approach to settling discrimination disputes. Our audit did find, however, that the ADR program is operating with limited policies and procedures. We believe

that UADD can ensure consistent and quality performance if policies and procedures are improved for ADR.

This chapter first addresses how providing more information to complainants before they decide to file a charge and doing more thorough intake interviews can improve the intake process. The chapter then discusses how improvements can be made in ADR policies and procedures.

More Information and Thorough Intake Interviews can Improve Intake

While we feel UADD's intake process accomplishes it basic function of accepting charges, improvements are possible in two ways. First, we think UADD should more effectively inform charging parties about the law and administrative process. Providing information about the law and process to individuals before they decide to file a charge gives them the opportunity to better understand their situation and determine how to get the appropriate help. Second, UADD should more thoroughly interview charging parties when they file a charge. Doing so will help UADD ensure that complaints meet the legal definition of discrimination and complainants are counseled on their charges so that they can choose how to proceed.

Each year UADD receives thousands of inquiries about potential employment discrimination claims that result in hundreds of charges of discrimination being filed. The intake process usually begins with an individual contacting UADD about an employment dispute. Generally, an investigator receives a telephone call, listens to the individual's explanation of the situation, and explains the basic elements of discrimination law and the administrative process. If the individual wants to proceed, he or she is mailed an intake questionnaire, along with information about filing a charge of discrimination. Once the questionnaire is filled out and returned to the office, an appointment is scheduled for an intake interview (or if necessary, the charge can be filed through the mail). During the interview, an intake officer drafts the formal charge of discrimination which must contain both an issue and a basis. The issue refers to the harm suffered by the complainant, such as being fired or being subjected to a hostile work environment. The basis refers to the discriminatory reason for the harm, which can be race, religion, gender, retaliation, national origin, age, and disability. The charging party signs a sworn affidavit with the charge.

We audited the intake process by observing numerous intake interviews and analyzing over 100 case files of all the charges filed in February 1994 and all the charges closed in May 1995. We also extensively interviewed staff and contacted some respondents and charging parties. In addition, we contacted other western states to identify their intake procedures, spoke with Equal Employment Opportunity Commission (EEOC) personnel, and reviewed

training materials from the International Organization of Human Rights Agencies (IOHRA), which is EEOC's official training organization for the civil rights agencies in the country.

More Information Should be Provided Before Intake

More information would help charging parties through a confusing system. Anti-discrimination law and its administrative process is complex. Thus, individuals seeking help for an alleged discrimination offense are faced with a system that is difficult to understand. There are many options that can be pursued to seek relief for an alleged act of discrimination. Because the state process parallels the federal process, an individual can choose to have EEOC investigate the complaint, or they can choose to take the case to federal district court. On the other hand, if charging parties stay in the state system, they can choose to send their case to mediation or straight to investigation. Furthermore, each path has somewhat different implications for the relief available and the degree of involvement required of the charging party.

Providing information about the law and process to individuals before they decide to file a charge gives them the opportunity to understand their situation and determine how to get the appropriate help. Many people come to the agency emotionally upset and asking for help with an employment dispute. They do not always know exactly how they were discriminated against; they just believe they were treated unfairly. For example, numerous individuals come to UADD with complaints that relate to management or personality conflicts. Informing these individuals about what is discrimination and what is not discrimination before they decide to file a charge can prevent them from seeking help from UADD when UADD cannot provide help. In addition, for those individuals who can be helped by UADD, information about the process will allow them to choose the best path to the desired relief.

At present, UADD takes steps to educate individuals about the system, but more needs to be done. The agency provide pamphlets, brochures, and does some education at the intake interview. However, the current intake officer explains that his workload is too heavy to effectively inform the complainants. He says that he is "*just jumping through the necessary questions*," and realizes that the individual is probably overwhelmed with information and left with many questions about the process after the intake interview. In our phone calls to charging parties, many complained that they did not understand the UADD process. In addition, the complexity of the UADD process was expressed in the number of questions by the UADD Advisory Committee members at a training session we observed. At that training session UADD staff conducted mock intake interviews. Committee members (many of whom are very familiar with the anti-discrimination process) and our audit staff had difficulty understanding the discrimination process presented. The definition and process were explained so quickly that many questioned how a complainant could possibly understand if his or her case met the legal definition of discrimination and how they should proceed in the process.

This concern is consistent with what we noticed as we observed intake interviews; that is,

the charging parties often do not understand the process they are getting into. We believe the intake process is critical to the charging party's ability to determine if their case may meet the requirements of discrimination law and how they should proceed in the administrative process. Consequently, we believe more needs to be done in the intake process to inform the charging party. In our opinion, the use of a video on the discrimination process prior to the intake interview would more effectively prepare the charging party for the intake process.

More Information Could be Provided in a Video. In our opinion, UADD should show the charging party a video on the law and process before they formally file a charge. The video could cover the differences between illegal discrimination and unfair treatment and describe the administrative process, including how the case will be handled and what choices and responsibilities the charging party has in the process. In addition, showing the video before the person decides to file allows them to understand what they are getting into and helps prevent false expectations about UADD. Showing a video will also benefit the intake officer who will not have to repeatedly give the same information about the law and process. This approach will create more time for the intake officer to conduct thorough interviews, which will be discussed later in this chapter.

Using a video to inform is not new. Some EEOC offices use a video to provide information, and a 1995 EEOC task force on charge processing recommended that a video be used to inform charging parties about the process. Moreover, UADD already has a video about anti-discrimination law and the process, which they used to show to potential charging parties. However, this video was not used during the time we audited the agency. This video, while a general overview, could be used, or a new more comprehensive video could be developed.

UADD Should Conduct More Thorough Intake Interviews

Besides better informing charging parties at the intake stage, we feel UADD should conduct more thorough intake interviews for the agency's and the charging parties' benefit. Spending a little more time at the intake interview will enable the agency to verify that the complainant's allegation is covered by employment discrimination law. Furthermore, a better interview can help identify sources of evidence that may be available to support the charge and also identify the relief the charging party is seeking to settle the complaint. In addition to benefiting UADD, a thorough intake interview would provide a valuable counseling service to charging parties and help them make informed decisions about pursuing a charge of discrimination.

Counseling charging parties about the law as it relates to the facts of the charge and counseling them on the administrative process in the context of their claim gives them the ability to choose how to proceed. For example, if an individual is seeking punitive and compensatory damages, informing them that state law does not allow these damages but federal law does, gives them the opportunity to either reconsider the relief sought or quickly remove

the case from the state process. Probing for information also can help the complainant understand the importance of evidence, especially since charging parties bear the ultimate burden of proof in discrimination cases. This will help charging parties understand what evidence it takes to prove a case of discrimination, and help charging parties make an educated choice about pursuing a charge. Furthermore, if the charging party is informed about anti-discrimination law and realizes that his or her particular situation does not meet the legal definition of discrimination, then it is hoped he or she will choose not to file a charge of discrimination. Of course, counseling should not take the form of discouraging complainants from filing if the allegation made is illegal under employment discrimination law.

Ideally, the intake process should receive all necessary and relevant information from charging parties while refusing charges not within the agency's jurisdiction. While it may not be possible to determine whether a charge has merit at intake, claims that are not even covered by the law should be refused. Accepting obviously invalid charges not only wastes agency resources, but imposes unnecessary costs on charging parties and respondents. Because of the concern that too many invalid charges were being processed by UADD, the 1993 Governor's Task Force recommended that the agency "*implement a process to identify and process meritless cases early on*." In response the Industrial Commission reported:

> *The division is providing initial early counseling to individuals requesting to file a case. This includes the investigator discussing with the individual the requirements for proving a case of discrimination and the intake officer also screening information as it is received.*

We agree with the approach described by the commission, but thorough interviews are not taking place. In our opinion, UADD could further improve the intake process by having qualified staff conduct more thorough interviews of charging parties. We endorse the commission's recent assignment of an experienced investigator as intake officer.

Thorough Interviews are Important. We feel UADD should change its approach to more effectively probe for information rather than just complete the paperwork at the intake interview. UADD now views the interview as the complainant's time to explain their case and file a charge. The intake officer listens to the facts of the case as presented by the complainant, but generally avoids any discussion of the facts of the case with the complainant and does not take any evidence from the complainant. In other words, even if the complainant cannot state any evidence to support the charge, the intake officer will not ask them if they have any evidence or tell the complainant that they may have a difficult time carrying the burden of proof. UADD's practice is to accept charges regardless of appearance or merit. We found this practice sometimes does not ensure that the agency only accepts charges which meet the legal definition of discrimination or help the charging party make an educated choice about pursuing the charge. Furthermore, little is done to identify the relief sought by the complainant or identify potential sources of evidence to support the charge.

The current practice of UADD is not to address the merits of the charge at intake. The former director stated, "*It is our policy to accept any charge of discrimination regardless of appearance, since merit is not an issue during the initial filing of a charge*." While for most charges this policy may not cause a problem, it tends to encourage the acceptance of some non-discrimination complaints into the system. In a few cases, the policy may result in the intake officer coaching the charging party into making statements needed to complete a charge even though the facts of the case do not make it a valid charge of discrimination. Some mediation and investigative staff also stated that intake should do a better job screening out cases that do not belong in the process. We also found that UADD's practice of accepting any charge regardless of its appearance is inconsistent with the practices of similar agencies.

In our observations of intake interviews and review of case files, we became concerned that in a few cases the intake officer may take a charge where the facts do not support a case of potential discrimination and coach the charging party into a charge of discrimination. We found that such cases are rare but can be a serious problem. It is our opinion that these charges were accepted into the system because the intake officer thought he or she was helping the person by accepting the charges. This stems from the agency's perspective of accepting charges regardless of appearance. We believe that UADD should adopt a more thorough approach at intake to help ensure that charging parties are at least alleging illegal discrimination.

In our observation of intake interviews, we found the emphasis was on filling out the form rather than ensuring the validity of the charge. As a result, the focus may become choosing what box to check for the issue and the basis regardless of their validity. In fact, we observed one interview where the intake officer filed a charge for a case that was not about discrim- ination by the charging party's own admission. An African-American complainant told the intake officer she was demoted because of a management and personality conflict with her boss. The intake officer asked the charging party if she wanted to file her case as race discrimination. The complainant initially declined to file under race because the woman who filled her position was also African-American. The intake officer stated that UADD can only help her if it is a race claim, but not if it is a management issue. The charging party then agreed to file the charge as race discrimination. After the interview we asked the intake officer why she accepted the charge. She stated that it was agency policy to accept all charges if the person wanted to file.

We also reviewed some case files that raised concerns about intake officers possibly coaching claimants into charges. For example, one complainant told us the intake officer framed his complaint of being unfairly fired as a charge of age discrimination because that was the best way to pursue his problem. We reviewed the charging party's affidavit and the charging party did not allege that his employment harm was the result of discrimination. In another case, an employee had a management dispute framed as a case of gender discrim- ination by the intake officer. This case was in the UADD process over 200 days before the

case was withdrawn. According to the employer it cost him over $10,000 in legal fees and staff

time.

We believe that by conducting more thorough intake interviews UADD can better screen out complaints that do not meet the legal definition of discrimination. A more thorough interview helps the UADD to identify the type evidence needed to support a complaint and discuss it with the charging party. Accepting non-discrimination complaints into a system that enforces discrimination law does not help individuals; it creates false expectations and wastes charging parties', respondents' and the state's time and money. In our opinion, UADD needs to change its perspective of intake from simply accepting charges to conducting a more thorough interview. It is also our position that UADD should accept all charges of discrimination that meet the legal definition if the charging party chooses to file the charge.

Other Agencies Conduct Thorough Interviews. Other civil rights agencies emphasize the importance of conducting thorough intake interviews to ensure that an alleged complaint meets the criteria of discrimination and to gather information about the facts of the charge. According to IOHRA, the intake officer should focus on asking the *"journalist's 'W' questions"*: i.e. the who, where, what, when, why, and how the discrimination happened. The intake officer asks these questions to determine if the complaint is within agency jurisdiction and to identify any evidence to support the charge. Doing so allows the intake officer to evaluate the charge. If the charge appears to lack evidence the intake officer should counsel the complainant about the consequences of filing a charge. As EEOC states, "*It is vital to convey fairly and honestly the consequences of filing to a potential charging party and to give them the best initial assessment of the evidence, so they can make an informed decision about whether to proceed*."

Many other states also use this practice, and some have more stringent acceptance standards. In Arizona for example, the intake officer conducts a detailed interview on the facts and circumstances of the complaint, and if the individual cannot present a case that leads to the reasonable conclusion that discrimination may have occurred the charge is not accepted. Idaho also conducts lengthy interviews to identify the merits of the charge because they do not want to *"bog down*" their system with non-discrimination complaints. Montana attempts "*to aggressively screen complaints in the intake process and classify complaints at that stage as lacking merit as appropriate. If a complainant insists on filing a complaint which we have classified as lacking merit, we will dismiss [the complaint] without requiring the respondent to provide information in the investigation*."

Effective Interviews Require Qualified Staff. For the intake process to properly determine a charge of discrimination it must be staffed by an intake officer who has knowledge and experience with anti-discrimination law. According to EEOC, *"intake must be viewed as a crucial point in the investigation and must involve a thorough interview of the charging party by experienced personnel*…." Though many of the intake problems we identified are attributed to the agency's perspective of intake, UADD also has not always used the most

qualified staff to do intake interviews.

For the past five years, UADD has often used staff without investigative experience to act as intake officers. The two individuals who conducted most of the intake interviews in the time frame of our analysis had clerical backgrounds. While having no investigative background, the main intake officer did have the knowledge gained through many years experience with the agency. The assistant intake officer, however, was a temporary contract employee, without significant relevant knowledge or experience. When both intake officers left UADD in May of 1995, an experienced investigator was designated as intake officer. Staff told us that since an experienced investigator began conducting most of the intake interviews, the number of meritless charges accepted has fallen. We endorse this change as a positive step.

EEOC recommends that intake be done by senior graded, experienced or supervisory investigative personnel. In addition, area states such as Arizona and Wyoming use investigators as intake officers. Midway through our audit, UADD did make an investigator the intake officer. We believe that step improved the intake process and that UADD should continue to staff the intake officer position with an experienced investigator.

Policies and Procedures Should be Improved for ADR

In 1993 UADD began a mediation program called Alternative Dispute Resolution (ADR). Since then ADR has been valuable in reducing case backlog through mutual resolution of employment disputes by the parties and decreasing the average amount of time it takes to process a case. UADD should be commended for the implementation of this program. In our analysis of the ADR process, we did, however, find that overall program performance can be improved by enhancing policies and procedures.

After a charge is filed at intake it is automatically scheduled for mediation to be held in 30 days. The mediation is voluntary, and if the charging party or the respondent decline to attend it is canceled and the case sent to investigation. A neutral third party mediator oversees the mediation conference. UADD uses staff and pro bono (volunteer) mediators. The conferences are confidential, no record of the proceedings is kept, and no determination of the merits of the charge is made. Both parties are given the opportunity to present their case during the conference. The mediator attempts to get the sides to understand each other and promote a settlement. If the parties reach a resolution, a negotiated settlement agreement is drafted and signed by the parties and the case is closed. If a resolution is not reached the case is sent to the investigative unit for investigation.

Mediation is a relatively new concept in civil rights enforcement and UADD has been one of the pioneering agencies in its implementation. Mediation is somewhat foreign to traditional civil rights enforcement methods. Mediation solves employment disputes by giving the parties

to the dispute the opportunity to reach a mutually agreeable resolution. This resolution is not imposed on the parties but is the product of agreement. In contrast to the more traditional civil rights enforcement approach, the uniqueness of an ADR settlement is that "*there is no determination of guilt or innocence*."

We found that the ADR program could be improved if the agency strengthened its policies and procedures. Specific items which should be considered include a policy on mediator behavior, a procedure on admission statements made during the conference, and management controls to ensure consistent mediations. The agency also should provide more information about the ADR process to parties who may attend mediation.

Policies and Procedures Could Ensure Quality Performance

The ADR program is relatively new, and while UADD has been aggressive in implementing the program, it has not given adequate attention to policies and procedures. The performance of ADR does not appear to have been significantly affected by the lack of policies and procedures. Most of the ADR participants we surveyed had some concerns about ADR, but overall they were satisfied with ADR. However, we identified that each mediator conducts mediation according to their personal preference, and as a result there is little consistency among mediators' conduct. Also, the division has not established procedures to handle the testimony given in mediation such as what should the mediator do if the charging party or respondent makes an admission to the merit of the charge. UADD has not fully developed management controls for ADR, but it is working on them. In our opinion, these problems are minor, and we found the overall performance of ADR to be good. However, as the program grows, UADD could ensure consistent and quality performance by improving policies and procedures.

Guidelines for Mediator Conduct Need to be Adopted. UADD should establish a policy to help guide mediator conduct. The mediator plays a key role in the outcome of the conference. As the facilitator, the mediator keeps the conference moving in a positive direction and tries to bring the parties to mutual resolution. UADD uses staff mediators and pro bono (volunteer) mediators. In all there are approximately 40 mediators conducting ADR conferences. In our observations of ADR conferences and interviews with mediators, we identified that mediators are allowed to use whatever mediation style they choose. As result, there is not a consistent style of mediation. According to mediation specialists, the various styles we observed fall into two general categories: the classical style and the directive style.

We observed that the two styles of mediators have different ways of conducting mediation and are focused on producing different outcomes. The directive mediator sees the purpose of ADR as closing cases in the mediation process. Doing so, a directive mediator told us *"saves the parties a lot of time and money."* A successful mediation is one that reaches a resolution. As one mediator we observed stated, if he does not settle a case at mediation he feels like he fails. To move parties toward closure, we observed directive mediators tell a charging party

"*that the employer may have been justified in firing you,… and that it will take 1 to 2 years to prove your case and cost you $10,000 to $20,000 in legal fees,"* and ask an employer *"would you like to pay a nuisance fee to settle the case."* On the other hand, the classic mediator views the purpose of mediation as an opportunity for the parties to reach a decision that is mutually satisfying. In our observations of classic mediators, rather than trying to move the parties to settle, the classic mediator worked to maintain a balanced and open conference that allows the parties to air their feelings. If the case does not settle at ADR, the classic mediator does not see this as a failure because the process does not end for the parties, that is, the case will go on to investigation. Because mediators conduct themselves very differently, UADD should establish guidelines that set parameters for appropriate mediator conduct.

Procedure on Admissions to the Merit of a Case is Needed. An ADR conference is confidential to help the parties be honest without fear of retribution for admissions; therefore, the statements by the parties in the conference are not used later in the process. In our case analysis and interviews, we identified ADR cases where one of the parties made an admission to the merit of the charge. In one case, the claimant stated that the charge was not about discrimination. The respondent heard the comment and wanted the case to be immediately closed. However, the mediator still attempted to unsuccessfully reach settlement. The case went on to investigation, and five months later the charging party withdrew the charge. If UADD had a procedure that stated if the charging party admits that a case is not about discrimination it is dismissed, then the agency could have saved the respondent, charging party, and the state time and money.

A procedure would make ADR consistent with state law. According to **Utah Code** 34-35-7.1 (3)(c): *The commission and its staff, agents, and employees shall conduct every investigation in fairness to all parties involved, and may not attempt a settlement between the parties if it is clear that no discriminatory or prohibited employment practice has occurred.* We feel UADD should develop a policy on what to do if a charging party admits that the complaint is not about discrimination during an ADR session. In our opinion, at the least the charge should not be sent on for an investigation.

Management Control Needed to Ensure Quality. At present, UADD management has little control over the ADR program. The ADR Coordinator is starting to implement management control procedures such as random observation of mediators, conducting follow-up phone calls and mediator training. In our opinion, management controls are needed to ensure that mediators are consistently conducting mediation conferences according to policy.

The need for management control is great because of the size and nature of the ADR program. UADD has three staff mediators and approximately 40 pro bono mediators who occasionally conduct mediation. In addition, the nature of ADR is such that actions of the mediator are not observed by anyone but the parties to the dispute. Management controls such as random observation of mediators and follow-up surveys or telephone calls to the participants would help ensure that mediators are acting within policy. UADD recently began conducting

follow-up phone calls to participants in ADR. This is a positive step and the division should continue its ongoing efforts to develop management controls. Further, statistics should be kept on the number of conferences conducted by each mediator and the outcome.

More Information Would Help ADR

In our audit we identified many charging parties that participated in a resolutions conference who complained that they did not receive adequate information about the process. Most complaints were about not knowing what to expect, what their rights were, or whether they needed a lawyer. Some respondents also expressed confusion about the purpose of ADR. They thought mediation was like a hearing and the charge would be dismissed by the mediator if it was not valid. In addition, we found complainants who did not know what relief they would accept to settle the case at ADR, and did not know that ADR was a voluntary option. While UADD provides parties with information through the mail, in our opinion more needs to be done.

According to EEOC's principle for ADR, education is the foundation for fair mediation. "*Each party must fully understand his or her rights in the context of the options that are available through mediation*." To ensure this, the EEOC Task Force recommends "*educational materials be provided at intake which explain the mediation process: what to expect, what will happen, and who will be attendance. These could include pamphlets, brochures, and a video featuring a mock mediation.*" In our opinion, UADD should take similar steps to provide more information to charging parties about the ADR process.

In addition to informing complainants about the ADR process, UADD should be sure to identify the relief the complainant is seeking to settle the charge at the intake interview. Although UADD sends out a remedy sheet to identify the relief sought along with the intake questionnaire, the agency does not go over the remedy sheet at the intake interview or check to see if the complainant has stated the desired relief. Knowing what relief the charging party is seeking is essential to reaching a settlement in ADR. We observed mediation conferences where the charging party did not know what they were seeking to settle the charge; this makes reaching a settlement difficult. If at the intake interview the agency documented the relief the complainant was seeking, this would help the ADR process. The ADR Coordinator agrees that the remedy sheet needs to be filled out at the intake interview.

If complainants are informed about the ADR process and know the relief they are seeking, in our opinion, they will be able to more effectively use the benefits of ADR. Moreover, we believe that UADD should ensure that complainants are verbally told that attending an ADR is voluntary. The agency currently notifies the parties in writing that ADR is voluntary. However, we had complainants tell us that they did not know ADR was an option. Further, in the intake interviews we observed the intake officer presents ADR as an automatic step in how the case will be processed and does not tell the complainant that they do not have to attend. In summary, in our opinion, the ADR program is an effective case processing alternative when

informed complainants choose to participate in mediation.

Recommendations:

1. We recommend that UADD improve the information provided to charging parties by showing them a video before they file a charge.

2. We recommend that UADD conduct thorough intake interviews to ensure charges are developed, complainants are counseled, and charges meet the legal definition of discrimination.

3. We recommend that UADD require by policy that the intake officer position be filled by an experienced investigator.

4. UADD should consider improving policies and procedures for ADR by providing:

    a. guidelines for mediator conduct.
    b. a procedure on admission statements to the merits of the charge.
    c. an approach to implementing management controls to ensure quality and consistency.

5. UADD should provide more information for charging parties and respondents about the ADR process.

Chapter III
Management Control is Needed for Investigations

Unlike the minor changes needed to improve UADD's intake and ADR functions, fundamental changes are needed to improve the investigation function. Because UADD lacks effective management control, we found that the conduct and outcome of an investigation depends largely on the staff member assigned to the case. Both the determination and the amount of evidence gathered to reach an investigative conclusion vary greatly from investigator to investigator. Similarly, investigators have large differences in the number of cases closed and the time it takes to close cases. We feel UADD needs to establish basic management control to guide and direct investigations.

All claims received at intake and not closed at ADR are assigned to the investigative function. Initially, the case is transferred to the case manager who sends a Request for Information (RFI) to the respondent based on the allegations of the charging party. After the response to the RFI is received, a copy of it is forwarded to the charging party for a rebuttal. When the rebuttal is received, the case is ready for assignment to an investigator. When the investigator receives a case, the file generally includes the charge, response, and rebuttal. The investigator is responsible for gathering whatever additional information is needed to make a determination on the merits of the charge. After an investigation is completed, if the investigator finds *"cause"* to believe discrimination occurred, then the respondent is ordered to refrain from future discriminatory conduct and to provide relief to the charging party, including reinstatement and back pay. If the investigator finds *"no cause"* to believe discrimination occurred, then an order dismissing the charge is issued. An investigation may not be completed for a variety of reasons, for example, the charging party may withdraw the charge or the parties may reach a settlement.

We found that the investigative process is not controlled by management. Each investigator dictates the course and time frame of an investigation with little or no supervision. As a consequence, the outcome of the investigation may be influenced. Certainly, each investigator must exercise professional judgement and discretion in deciding what evidence to gather and how to interpret its meaning. However, professional judgement should be exercised within a management structure that guides and controls it. We found UADD investigators make decisions about charges based on different philosophies and with little accountability. In order to improve investigations, UADD needs to establish basic management controls including procedures, training, supervision, and review. In the following two sections we present our findings on how a case investigation depends on the investigator, and what policies and procedures management need to establish to control investigations.

Case Investigation Depends on the Investigator

The inconsistency among UADD investigators is substantial. Many staff told us that the different philosophical approaches and job commitment levels of investigators affect the service received by the public. We categorize these inconsistencies into three areas. First, the determination of whether or not discrimination occurred depends on the investigator. Second, the amount and type of evidence gathered depends on the investigator. Finally, productivity varies greatly among investigators. This section addresses each of these areas.

Because of the contractual relationship between UADD and EEOC, we contacted federal officials to learn what information they had about the quality of UADD investigations. Although EEOC reviews some UADD investigations, we found that federal officials cannot be relied on for management control of UADD investigations. As part of the workshare agreement, EEOC reviews approximately one-fourth of UADD's determinations. Of the determinations reviewed last year, EEOC accepted all but two charges, giving UADD a 99 percent acceptance rate. According to both the workshare coordinator and the state and local coordinator in the Phoenix EEOC office, there is no set method or criteria for reviewing a determination. The investigative file is reviewed to see if general EEOC investigative standards are followed. If in the reviewer's judgement the facts in the file do not contradict the conclusion reached, the determination is accepted. EEOC does not question whether the appropriate evidence was obtained or the necessary witnesses interviewed. In addition, EEOC considers inconsistency among investigators to be a state agency problem and does not address it.

Determinations are Subject to Investigator Preference

The most disturbing impact of a poorly managed investigative process is that conclusions may not be based on merit. UADD staff repeatedly told us that certain investigators always write no-cause determinations while others are more inclined to write cause determinations. Based on a preponderance of evidence, a cause determination means that discrimination did occur while a no-cause determination means discrimination did not occur. To test the allegation that investigator preference affects investigative outcomes, we analyzed all of the determinations written from January 1994 through June 1995. Figure II presents the results of our analysis for those investigators who had more than 10 determinations.

Figure II

Percent of Cause Determinations by Investigator*
January 1, 1994 to June 30, 1995

Investigator	Number of Determinations	Number of Cause Determinations	Percent Cause
A	138	3	2.2%
B	89	20	22.5%
C	59	12	20.3%
D	51	7	13.7%
E	37	7	18.9%
F	35	6	17.1%
G	31	4	12.9%
H	19	1	5.3%
I	15	4	26.7%
J	15	2	13.3%
K	14	7	50.0%
L	14	1	7.1%
All Others	71	6	8.5%
Staff Totals/Average	588	80	13.6%

**The case manager is included under all others.*

Figure II shows there are clear differences in the cause determination percentages of investigators. Since the case manager assured us investigations are randomly assigned, in our opinion, the different percentages must result from investigator preference. Of the two investigators with the most determinations, investigator B has a cause finding percentage that is 10 times higher than that of investigator A. With cases assigned randomly, the statistical probability of the difference between investigators A and B being by chance is less than one chance in 10,000. We discussed our conclusion that investigator preference affects investigative outcomes with the case manager. She agreed the data shown in Figure II reflect a real difference in the likelihood of different investigators finding cause. UADD investigators

also agreed that certain investigators are more likely to write cause determinations and others are more likely to write no-cause determinations.

Without management control of investigations, management is not able to ensure that investigator preference is checked. In our opinion, this is inappropriate. Moreover, UADD staff recognize that it is inappropriate for investigative findings to depend on the investigator rather than the merits of the charge. Throughout our interviews of staff it became evident that staff believe investigations are influenced by investigator preference. One investigator told us that there are *"leftist"* investigators with an agenda who write cause determinations when the evidence does not support it. Other staff claim another investigator rarely writes cause determinations because he is philosophically opposed to the laws the agency enforces. The former director also noted the appearance of a bias toward employers in the determinations on one investigator's performance evaluation. Even one of the lawyers we spoke with expressed a concern about investigator preference, saying that if he gets a particular investigator he pulls the case from UADD.

As we discuss later in this chapter, UADD management needs to improve its guidance and oversight of staff to bring greater consistency to the agency's determinations. In particular, a meaningful review of investigative findings is necessary to hold staff accountable for their decisions. In the following section, we address how investigator preference is also evident in the evidence each investigator gathers to make a determination.

Evidence Gathered is Dictated by the Investigator

One factor contributing to the different determinations investigators make about the merit of charges is that conclusions are based on different amounts of evidence. UADD investigators base their determinations on the evidence they consider necessary. There is little in the way of procedures or supervision directing the quality or quantity of evidence gathered by an investigator to reach a determination. Each investigator works a case based on his or her professional judgement. In examining investigation files and interviewing staff, it is clear that some investigators consistently collect more evidence than others.

Through interviews with all the investigators, we found that each investigator has a distinct method of investigating a case. For example, one investigator frequently conducts on-site visits. She explains that an on-site visit is important, especially if the charging party does not have many witnesses or there is a question of the respondent's credibility. However, another investigator says that he cannot see a situation where an on-site is needed. He says that rather than being an efficient use of time, conducting an on-site visit is a way to get half-a-day off. Similarly, some investigators always interview the charging party; they feel an interview is essential to get a feel for the facts. In contrast, other investigators rarely talk to the charging party because they feel that it is a waste of time. They will base the determination solely on documentation provided by the respondent and charging party. In addition, some investigators say that they try to get affidavits or signed statements because they think it is a good practice.

However, other investigators do not try this because they think the investigative process is too informal for affidavits and signed statements, or they think they were told that they did not have to get them. Likewise, investigators handle confidential witness statements differently. One investigator told us that she weighs confidential statements heavily, because if the person does not want their name known discrimination must be really bad in the workplace. On the other hand, there are investigators who discount confidential statements as unreliable evidence.

It is clear that investigators have conflicting views of how an investigation should be conducted. One investigator said that she focuses on the human side of the investigation. She sees the role of the investigator as sympathetic to the alleged discrimination. Therefore, she spends a lot of time interviewing and talking to people in her investigations. In contrast, another investigator said that he sees himself as an objective fact finder, and feels it is unproductive to spend time talking to people. In fact, he says that most investigators are too *"gung-ho"* and ask for more evidence than is necessary because *"they want to be Perry Mason."* The fact that investigators have inconsistent practices on speaking with the charging party may influence the outcome or path of investigations. For example, one investigator told us she now makes it a point to always speak with the charging party because she once issued a no-cause determination to a charging party who she later learned was unable to answer her written interrogatories because he was dyslexic.

In our interviews with staff, two investigators were pointed to as the extremes in the differences of evidence gathering. Staff told us that one investigator never stops digging for evidence, and the other never starts. We tested this allegation by randomly selecting 10 determinations made by each of the two investigators and reviewing the case files. We calculated the number of investigator actions documented in each file. Investigative actions included investigator notes, on-site visits, witness interviews, statistical analyses, and questions mailed out to the parties. If either party contacted the investigator to find out the status of the case, or request an extension, an action was not counted.

Our case file analysis of the two investigators discussed above revealed that one investigator gathers far more evidence than the other. One of the investigators took an average of 6.4 actions per case with a high of 24 actions on a case and a low of two actions on a case. In contrast, the other investigator only averaged 0.7 actions per case, with a high of three actions on a case. On six of the 10 cases, this investigator did not take any actions, apparently basing the determination solely on the charge, response, and rebuttal included in the file before it was assigned to the investigator.

We discussed these results with the case manager. Since the differences between the investigators are so well known she was not surprised by the data. She explained that each investigator is allowed to do as much or as little work as they deem necessary to make a determination. In her opinion, the investigator who took 6.4 average actions has a tendency to go down the wrong path and does more work than is necessary. On the other hand, she stated that the other investigator does not always do enough work on a case. For example, we

showed the case manager two cases done by the investigator with 0.7 average actions, and she said that she would have done more work on the cases before issuing a determination.

We realize that the differences between these two investigators may represent the extremes, but our concern is that management allows the extremes to exist. Also, other investigators do not know what is the acceptable or preferred practice for gathering evidence. Moreover, allowing investigators so much latitude in conducting an investigation results in an inconsistent level of service to the public. The quality and thoroughness of the investigation depends on the investigator. An employer who has dealt with UADD many times, echoes this point. He says: *"I never know what I'm going to get with the investigation."* Allowing investigators the latitude to exercise professional judgement on a case is essential; however, UADD management should ensure that each investigator exercises professional judgement appropriately and consistently. The need for better management control also is found in the varying levels of investigator efficiency.

Investigator Efficiency Varies Greatly

The third major effect of inadequate management control is large differences in the efficiency of investigators. Some investigators take longer to issue determinations and complete far fewer cases than others because there is little supervision of staff during an investigation. Investigators are not held to any deadlines to finish a case and investigator progress on cases is rarely supervised during the investigation. Further, cases are assigned on an *"as needed basis"* dictated by each investigator. Since investigators approach the task differently and there is limited supervision, the amount of time it takes to complete an investigation and the number of cases closed by each investigator greatly vary.

Time Needed to Complete an Investigation Varies. Because UADD allows staff to control their work flow, the public receives very inconsistent timeliness of service. If the case is assigned to certain investigators it will be completed much more quickly than if it is assigned to other investigators. We tested the average number of days it took an investigator to issue a no-cause determination for the period of January 1994 through June 1995 to demonstrate the differences among investigators. We analyzed the no-cause determinations because they represent a completed investigation. These data were taken from UADD's computer system for the same investigators shown in Figure II.

Figure III

Average Number of Days to Issue a No-Cause Determination
January 1994 thru June 1995

Investigator	No-Cause Determinations	Average Number of Days
A	135	51
B	69	45
C	47	108
D	44	126
E	30	141
F	29	138
G	27	65
H	18	54
I	11	122
J	13	67
K	7	39
L	13	82
Staff Total/Average	443	79

Note: The case manager is excluded

Figure III indicates that some staff are able to complete, on average, a no-cause investigation in less than half the time that others require. The number of days represents the amount of time the case was with the investigator who issued the determination, not the total time the case was in the UADD process. An average case spends at least an additional 100 more days in the intake, meditation, and case management functions. It is also important to note that cases sometimes switch investigators during the investigation and the number of days a case spent with other investigators is not included in the average.

The data shown in Figure III do not present the full scope of management's lack of control over productivity. Some cases seem to remain open indefinitely with little progress toward a determination being made on them. In a review of all charges filed in February 1994, we

discovered that three cases were still open in the UADD process over 420 days later. One investigator had two of these cases assigned to her. These case were open with her for over 300 days in the investigative phase in addition to spending more than 120 days in the intake and ADR and case management processes. We asked her why these case were still open and whether anybody in management had questioned her about them. She explained that she worked the quick cases first and that the case manager did not inquire as to whether the files were being worked.

The third charge filed in February 1994 and still open over 420 days later had been assigned to the investigator for more than 300 days without being closed. The 300 days with the investigator is in addition to more than 120 days in intake, ADR, and case management. When asked why the case was not finished, the investigator explained that the charging party was *"a pain"* so she had not been working the case. The case file was just sitting in the file drawer. UADD never completed its investigation, but eventually transferred the case to EEOC in July 1995, after 500 days in the system.

Upon becoming concerned with the two investigators discussed above, we analyzed their inventories of open charges as of May 1, 1995. We found that one investigator had 21 open cases, 17 of which had been filed over 300 days earlier, and 16 of which had been assigned to her for over 200 days. Her oldest case had been filed 573 days earlier and assigned to her for 388 days. The other investigator had 15 open cases, 10 of which had been filed over 300 days earlier, and 6 of which had been assigned to her for over 200 days. Her oldest case had been filed 614 days earlier and assigned to her for 241 days. Because investigators are not adequately supervised during the investigation, the investigators dictate how long it will take to work the case without management holding them accountable.

The failure to complete investigations in a timely manner means greater costs for employers, employees, and taxpayers. For example, the failure to complete the investigation on one of the cases mentioned above was particularly costly for the state because the respondent was a state agency that was represented by the Attorney General. Therefore, it cost the taxpayer UADD's time, the agency's time, and the Attorney General's time. According to the case file, the employee was placed on probation for personal use of state vehicles and abuse of leave. An Assistant Attorney General told us he felt the charging party was using repeated discrimination charges to intimidate the state agency from taking any further disciplinary actions. Without management setting reasonable time expectations for when an investigation should be completed, it is not taking adequate steps to ensure that it is minimizing the costs for employers, employees, and the taxpayer.

Number of Case Closures Varies. Not only are there significant disparities in the amount of time it takes to make a determination, but also in the output of each investigator. We examined the average number of determinations for investigators with more than 10 determinations from January 1994 through June 1995. The results are shown in Figure IV.

Figure IV
Average Determinations per Month
January 1994 thru June 1995

Investigator	Number of Determinations	Months Worked	Average Per Month
A	138	18.0	7.7
B	89	12.1	7.4
D	51	7.5	6.8
E	37	11.5	3.2
F	35	15.5	2.3
G	31	14.0	2.2
H	19	9.1	2.1
I	15	14.0	1.1
J	15	5.7	2.6
K	14	2.9	7.9
L	14	6.3	2.2
Staff Average	458	116.6	3.9

Note: The case manager is not included. Investigator "C' from the other figures acted as case manager in early 1995, and has also been excluded.

Figure IV demonstrates that there is a great disparity in the number of determinations written per month by the investigators. Some investigators issue more than five times the number of determinations per month than others. The disparity in productivity is partly explained by non-investigative duties, including intake, mediation, statistics, and community outreach. While all investigators have some non-investigative duties, such duties are more time consuming for some investigators than for others. In our opinion, however, the vast majority of the productivity differences among staff results from a lack of management control.

UADD's method of case management helps to explain why there is inconsistency in productivity. Investigators are not given a set inventory of cases to work. Rather, each investigator works cases at their own pace, and the case manager comes around once a week and asks them if they would like more cases to investigate. However, the case manager says

that the biggest problem with investigators not closing cases is that they lose focus on the case and branch off into unnecessary areas. It is our opinion that case management and supervision includes, among other things, setting productivity expectations and working with investigators to ensure that they do not get diverted into unnecessary areas.

In summary, productivity varies greatly among investigators because the existing case management system does not exercise adequate supervision over investigators. Consequently, the service received by the public depends largely on the individual preference of the investigator assigned to a case because UADD has not effectively managed its investigative case load. The next section will address in greater detail the management controls UADD needs to develop.

Investigations Need to be Managed

The reason for the investigative inconsistency described in the first half of this chapter is the lack of basic management controls. Each investigator bases his or her efforts on their personal philosophy concerning the work and then is not held accountable for their decisions. As a result, rather than having a UADD investigative process, there are multiple investigator processes.

In order to ensure consistency and quality among investigations, UADD needs to establish management control over investigations. To do this UADD management needs to fundamentally rethink how it controls the investigative process. Specifically, we recommend that UADD evaluate the use of contract investigators, develop general investigative procedures, better train investigative staff, and strengthen its case manager position to ensure that the necessary supervision and review of investigator work is done. In this section, we discuss each of these recommendations.

Use of Contract Investigators Should be Evaluated

We feel UADD should reconsider the use of contract investigators. Contract investigators have been helpful in reducing the backlog of cases. However, the use of contract investigators may not be effective or efficient on an ongoing basis because the case investigations are being performed by staff with different levels of experience, hired with different standards, and compensated at different levels. In our opinion, this is poor management practice and bad for morale. UADD investigative staff consists of four full-time state employees and four full-time contract employees. All eight investigators do the same job, but the contract employees are paid less, have no benefits, and are limited to a two-year term of employment. The use of contract investigators results in frequent turnover of the investigative staff. As a result the agency does not develop the expertise that comes from experience. Furthermore, office morale is lowered and productivity is hurt. In our opinion, UADD should reconsider its use of contract investigators. In addition, both lawyers who generally represent respondents and

lawyers who generally represent charging parties told us they thought the agency would improve by replacing contract investigators with regular state staff.

Most contract investigators are recent graduates of law school but do not have employment law experience. While state employees go through an extensive screening process, in which employment discrimination experience is weighed heavily, contract staff are barely screened. Two contract staff were recently hired by the case manager. We asked what criteria was used to hire them. She explained that hiring contract investigators is *"very informal because they're only contract positions and they don't get benefits."* Usually they are only asked questions on why they want to work for UADD. She also stated that different standards are used to hire state employees.

In our opinion, the temporary nature of contract employment does not give investigators time to become experienced. Discrimination law is complex and takes a long time to learn; it takes considerable time to become an effective investigator. An EEOC lawyer explains that it takes more than a year and one half to learn the law and process. However, most of the contract staff for UADD do not even stay with the agency for a year and one half, and some only stay a few months. It is questionable whether UADD is creating the most efficient and effective investigative staff when just as an investigator begins to learn the process he or she leaves for more secure employment.

The productivity of investigators is affected because of morale and loyalty problems. The temporary nature leaves contract staff insecure and as a result they spend time applying for other positions. The more experience a contract employee has at UADD the more time they spend searching for new employment, especially the closer they get to contract expiration. Consequently, this situation reduces investigative efficiency because staff are not focused on their job. Moreover, this is bad for morale. As one contract investigator told us, *"For $10 an hour UADD is not getting loyalty."* To develop a more experienced and loyal investigative staff would initially cost UADD more in salary and benefits. However, we believe that the added salary and benefit costs of full-time state employee investigators would be off-set by the increased productivity of a more experienced staff.

Consistent and sound selection of investigative staff is a major step to ensure consistent and quality investigations. Because contract investigators are generally inexperienced, do not stay with the agency long enough to become experienced, and reduce agency morale, we question their use and recommend that UADD evaluate its use of contract investigators. The former director of UADD wanted to phase out the use of contract investigators but was unable to do so because the commission would not allow it. She felt it was important to have regular career service employees who will view their position differently, not as something temporary while they look for something better or until their time is up.

General Investigative Procedures are Needed

A lack of investigative procedures has been a consistent criticism of UADD. In 1993 the Governor's Task Force recommended that UADD develop standard operating procedures. In 1995, the UADD Advisory Committee expressed concern that there *"were no standardized operating procedures to guide UADD staff in their investigations of employment discrimination."* Without procedures, respondents allege that they do not know what the standards are for UADD's investigative process. They get a different investigation with each different investigator. In our analysis, we find this allegation to be valid. The former UADD director recognized that: *"There is a need to focus on the investigative portion of employment case processing in the areas of evidentiary standards and procedures, investigative techniques, training, length of time to investigate and assessing need for in-person interviews, on-site visits, fact finding, etc."* UADD staff report that outlines for procedures are being worked on.

Although UADD does have some written investigative procedures, they are not used. Written procedures from 1990 were distributed to the UADD Advisory Committee at their May 1995 meeting. However, when we surveyed the staff only three of 11 staff had ever seen the procedures and none of the staff actually used them to conduct an investigation.

We recommend that UADD establish written general investigative procedures. UADD should specifically develop a policy for investigative plans, establish standards for gathering evidence, such as on-site investigations and witness interviewing, develop procedures on issuing subpoenas, and establish procedures for allowing parties access to the investigative file.

Investigative Plan Sets the Foundation. According to the International Organization of Human Rights Agencies (IOHRA), an investigative plan should set the foundation for how each case will be investigated. The plan is one of the most important tools for an investigator and management, and should be developed in cooperation between the investigator and the supervisor because it forces the investigator to think through the charge and develop a plan of action on what evidence needs to be gathered. Also, the investigative plan helps management ensure that the investigation is starting in the right direction. At present UADD includes an investigative plan in each case file because EEOC requires it. However, there is no procedure requiring supervisor involvement in developing the plan or that it be completed early in the investigation. In fact, most investigators told us that they fill out the investigative plan at the end of the investigation because they think it is unnecessary.

Evidence Gathering Guidelines are Necessary. It is understandable that each case will require some variations in evidence gathering techniques. Nevertheless, this appears to be taken to the extreme at UADD where investigators are allowed to ignore evidence gathering techniques such as interviewing the charging party and conducting on-site investigations because they are seen as inefficient and unnecessary. Broad procedures are needed to guide investigators on what type of evidence is needed and how to collect it. There should be a procedure for when and where an on-site visit may be more helpful to investigate the charge.

In addition, a procedure for witness testimony is needed. Currently, there are no procedures for when an affidavit, a signed statement, or investigator notes is the preferred form of evidence.

Policy and Procedure on Subpoenas Would Clear up Confusion. There is a great deal of confusion over investigative subpoena procedures. Some investigators do not think UADD has subpoena power, other investigators say UADD has subpoena power, and still other investigators think the agency may have subpoena power but they do not know how to use it. Consequently, there is little use of subpoenas. Some staff will attempt to use a subpoena to get needed information from employers and others will go without similar information. According to the Industrial Commission's Legal Counsel, UADD does have subpoena power but it has not been tested in court, and the agency will not definitively know whether it has subpoena power until a subpoena is upheld in court. In our opinion, the agency should establish a clear policy and procedure on its subpoena authority and when to use subpoenas.

File Access Procedures Would Prevent Inconsistency. As noted above, investigators document evidence gathered very differently; sometimes important evidence may be included in the file only as an *"investigator note."* According to **Utah Code** 34-35-7.1(14)(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 proceedings before the commission."* Currently, investigators say that there is no procedure that explains how to let parties access the investigative file, so each investigator decides what can be viewed. Typically, investigators remove their *"notes"* from a file before providing it to parties preparing for a hearing. Since important evidence may be documented only in an investigator note, parties may not have access to information used to make the determination. A procedure on file access is needed to ensure that respondents and charging parties preparing for a formal hearing get consistent and accurate information.

The four procedures discussed above are not a comprehensive list of those needed, but are examples of the type of procedures that should be established. Besides additional procedures to guide investigators, procedures on the review and supervision of their work also are needed as are procedures for other division functions such as intake and mediation.

Investigator Training Needs to be Improved

Besides eliminating contract staff and establishing procedures, the investigative problems discussed in the first half of this chapter can be addressed by improving investigator training. Cases are investigated differently because the agency does not ensure staff have a common understanding of the purpose of an investigation nor does it adequately train staff on investigative procedures.

Investigators do not have a clear understanding of the purpose of investigations. Some

staff confusion stems from the dual mission of UADD to efficiently process complaints and to eliminate employment discrimination. Some investigators see the investigation as a relative unimportant first decision on the merits of a charge, and therefore, they do an investigation as fast as possible. Other investigators see the investigation as the only chance a charging party will have to show discrimination, and therefore, do a more thorough investigation. One investigator told us that understanding her role as an investigator is difficult because the agency in general lacks direction. Because they are not sure if they should close the case as fast as possible or pursue it further to see if discrimination took place, investigators have difficulty determining how much and what type of work is required on a case. Training investigators on the purpose of investigations will help them share a common understanding of their job. In addition, training staff on the purpose of investigations can set limits to help investigators exercise their professional judgement on when to close a case quickly and when to pursue a case further.

A second major source of confusion about the purpose of investigations stems from the appeals process. An investigator's determination may be appealed for a *de novo* hearing at which neither the evidence collected and nor the investigator's analysis of it is considered. Many investigators feel the current hearing process is inconsistent with the objective of eliminating discrimination. One investigator told us that his work is *"futile"* because the *de novo* hearing almost negates the purpose of the investigation. Even outside groups, such as the UADD Advisory Council, have questioned the purpose of investigations and discussed the possibility of eliminating the investigative process entirely because it is not meaningful. In Chapter IV, we discuss the relationship between investigative and adjudicative processes. However, regardless of any changes that may be made, UADD management must instill in staff a common understanding and belief in the value of their work.

Besides communicating a common understanding of the purpose of investigations to staff, better training on investigative procedures can help ensure consistency and quality among investigations. UADD has detailed training materials developed by IOHRA on what is quality evidence, how to collect evidence, how to interview witnesses, and how to prepare an investigative plan. In addition, the training materials provide guidelines to help investigators determine when enough evidence is collected, a decision that some UADD investigators had problems with. IOHRA explains that training investigators on the appropriate use of different procedures along with the pros and cons of different procedures helps to ensure that investigators make decisions that produce quality investigations. However, staff at UADD told us that they receive inadequate training on how to do an investigation. UADD training consists of watching a video on discrimination, reading the EEOC investigation manual and other case law, and observing the intake process. This usually lasts a couple of weeks, then new staff are given cases on which to work. For the most part, staff say they are left to learn for themselves or from each other what are the appropriate procedures to use. We recommend that UADD do more to train investigators on investigative procedures.

Supervisory Control From a Case Manager is Needed

Even qualified and trained investigators who have procedures to guide them should have their work supervised and reviewed. However, UADD has what is referred to by organizational behaviorists as a *"flat organization,"* where the organization of the agency does not have levels of management, but a single manager responsible for all staff supervision. The flat organizational structure at UADD has made adequate supervision and review of staff difficult. From the time a case is assigned to an investigator until the time a determination is written, investigators work on their own at UADD. The lack of management oversight simply gives opportunity for varied productivity and inconsistent quality. Better supervision and review can improve the effectiveness and efficiency of investigators, but an adequate delegation of authority is essential to provide the needed oversight.

UADD has had a level organizational structure. The responsibility for supervising each investigator resided with the division director who was also responsible for managing the labor and fair housing units of the division as well as the intake and ADR parts of the anti-discrimination unit. The director is responsible for the supervision of 26 FTEs. With so much supervisory responsibility residing in one person, it is not unreasonable to expect that the agency will not be effectively managed. The former director stated that it was not feasible to expect her to be able to manage all facets of the division and also provide effective supervision of the investigators. Therefore, she wanted to create an investigative supervisory position to provide the needed supervision for investigations. We find that an investigative supervisor position is the standard for other civil rights agencies. Colorado, Arizona, Montana and the EEOC all have supervisory positions.

Adequate Supervision and Review is Essential. An interactive relationship between the case manager and investigators is the basis of quality investigations. The International Organization of Human Rights Agencies (IOHRA), the official training organization for civil rights agencies in the country, states:

> *Supervisors do much more than make case assignments, schedule due dates, and review Written Findings. …[T]he most important resources in the development of quality investigations is the unit supervisor. The supervisor's role is an affirmative one, meant to ensure the effective management and development of timely, quality investigations, while nurturing and reinforcing the knowledge and skills needed to be effective. This means that supervisors are actively involved at every step of investigations; familiar with the content of files as they are developed; identifying and helping resolve problems as they occur, not when the file has been submitted for review. …Another of the supervisor's responsibilities is to meet with investigators formally, on at least a monthly basis, to review case loads and establish priorities and due dates.*

Other states we contacted also report that regular investigative staff oversight is critical. For example, in Idaho senior investigators assume oversight over less experienced

investigators. They prepare the investigative plan to help ensure that the investigation is focused yet comprehensive. According to the director, senior investigators do this because some charges are complex and *"could overwhelm a beginning investigator."* Colorado and Arizona have compliance managers who are responsible for oversight of the investigative staff. And in Montana, the investigative supervisor plays a key role in helping investigators develop the investigative plan and reviewing investigative work.

Interaction between UADD's case manager and investigators throughout the investigation helps to ensure that investigations are planned in the right direction, the appropriate evidence collection methods are used, and cases are done in a timely manner. Also, the continuing guidance provided by management helps investigators improve their knowledge and decision-making skills. Investigators complained to us about a lack of guidance and not knowing to whom to ask their questions. Many investigative staff stated that they were not supervised, and that they had difficulty at times determining when enough evidence was gathered to make a determination. This was particularly expressed by the contract investigators. Interaction is needed to guide investigators through a case.

Using a case-tracking system is necessary to guide and supervise investigations. In 1994, the investigative staff issued over 400 determinations. The case manager needs to use UADD's case-tracking system to manage these investigations. At present, even though UADD's case-tracking system has the capability to monitor the details of an investigation such as when an on-site visit is conducted, or when a charging party or respondent is interviewed, UADD does not use the system for investigations. The actions an investigator takes on a case investigation are not tracked by management. In addition, the case-tracking system is an efficient tool to monitor the amount of time investigators are working on cases. Moreover, the case manager told us that she would like to use the case-tracking system to monitor investigator work. The Industrial Commission is developing a new computerized case-tracking system which it feels will make case tracking easier. In our opinion, the case manager must use some case-tracking system to supervise and guide the actions taken on cases by investigators and to monitor the amount of time it takes investigators to work cases.

Meaningful Supervision and Review Requires Authority. UADD does have a case manager position, but according to interviews with the case manager, this person has neither the authority nor responsibility to effectively supervise investigations. The case manager performs support functions for the investigative process such as sending out the request for information and the rebuttal, and assigning cases to investigators. To effectively supervise and review, UADD needs to give the case manager position the authority and responsibility to manage investigators. At present, all formal management control for investigations is given to the director.

Delegating authority from the director to an investigative supervisor is needed to ensure active supervision and review of investigations. The current case manager does not have the authority or the responsibility to actively supervise investigations. The major responsibilities

of the current case manager are to send and receive the request for information and rebuttal, to assign cases to investigators, and to provide a mostly grammatical review of determinations. In our discussions with the case manager she explained that she would like to provide more supervision and review but does not have the authority to tell investigators how to work a case. She has made attempts to get investigators to do more work on cases or change a determination, but found that some investigators would not cooperate. In addition, the case manager explains that she does not have the time to effectively supervise and review investigator work because most of her time is spent handling paperwork and answering phone calls from charging parties and respondents. We recommend that UADD change its organizational structure to ensure that someone has the time, authority, and responsibility to supervise and review investigations.

Recommendations:

1. We recommend that UADD reconsider its use of contract investigators and replace them with regular state staff.

2. We recommend that UADD establish investigative procedures that provide general guidance to staff about how to conduct an investigation and ensure compliance with **Utah Code** requirements for evidence availability. Some of the specific policies may include:

    a. How to plan an investigation;
    b. What constitutes appropriate evidence and its documentation;
    c. When and how to issue subpoenas; and
    d. How to provide parties' access to file information.

3. We recommend that UADD improve its training to make sure staff develop a common understanding of the purpose of the investigation and investigative procedures.

4. We recommend that UADD develop procedures to ensure that investigator work is routinely supervised and reviewed.

5. We recommend that UADD change its organizational structure by giving the responsibility for providing investigative supervision and review to the case manager.

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Chapter IV
Legislature Should Allow UADD to Participate in Formal Hearings

If UADD's investigations are improved, as recommended in the previous chapter, its participation in formal hearings can improve the effectiveness of the state's anti-discrimination process. The Industrial Commission's Adjudication Division holds *de novo* hearings on discrimination charges after UADD determinations if requested by either party. We agree that formal hearings should be *de novo*; administrative law judges (ALJs) should make findings of facts and conclusions of law anew without giving any deference to the judgments of UADD's investigation. However, we feel that the Legislature should allow UADD to participate in formal hearings either by presenting the evidence gathered and its analysis or representing selected cause findings. In our opinion, UADD's participation in formal hearings does not violate the *de novo* concept.

We feel the state's anti-discrimination process would more effectively deter discrimination if UADD participated in formal hearings. Currently, UADD makes a determination about whether discrimination occurred, but does not explain or defend its conclusion if a formal hearing is requested. Instead, the charging party must prove their own case. Unfortunately, charging parties are often unable to obtain effective legal representation. As a result, even charging parties who had their discrimination claims substantiated by UADD may be at an extreme disadvantage in the formal hearing. Without competent legal counsel, charging parties' cases are often not articulated during a hearing and are dismissed. If the mission of UADD is to eliminate or minimize discrimination, then we feel that its participation in the formal hearing would be an important step in accomplishing that mission. We feel that UADD's participation in formal hearings also would provide a more fair opportunity to prevail for a charging party who may not be able to articulate his or her case. We are not implying that ALJs or hearing procedures are biased toward one party or the other, but charging parties are often at a disadvantage in a formal hearing. It should be noted that prior to 1985, Utah law allowed UADD to present the case in support of cause findings. Also, four neighboring states have statutory authority to represent some of their cause findings. UADD's participation in the formal hearings would provide investigators with valuable feedback from the ALJs. Regardless of whether UADD participates in the formal hearings, the Industrial Commission needs to implement procedures to improve coordination between UADD and the Adjudication Division.

The formal process starts when a party requests a formal hearing within 30 days of a UADD determination and order. The formal hearing conducted by an ALJ is designated as *de novo* by the **Utah Code**, meaning that all factual and legal issues are considered *"anew"* or "*afresh*," regardless of UADD's prior determination. In practice, ALJs receive a file from the

investigator including only the original charge, a response from the employer, a rebuttal from the employee, and the determination and order prepared by UADD. Although they receive UADD's determination some ALJs say that they avoid even reading it. In the formal hearing, the charging party bears the burden of proving illegal discrimination by a preponderance of evidence. Formal hearing procedures are established by the Utah Administrative Procedures Act. A record of the hearing is made so that any subsequent appeal is based on the record, thus avoiding a new hearing. If a party disagrees with the ALJ's decision, he or she can appeal it to the Industrial Commission. A party may appeal a final commission decision to the state's judicial system, first to the Court of Appeals and finally to the Utah Supreme Court. Any ruling that is not appealed on a timely basis becomes final. In the case of a final no-cause order (meaning discrimination did not occur), the charging party's claim is dismissed, but he or she may be able to file suit in federal court. In the case of a final cause order (meaning discrimination did occur), the respondent's compliance to cease discriminatory practices and to provide relief to the charging party may be voluntary or be enforced in state courts. Throughout the formal hearing process, the parties may settle. The charging party may also withdraw any time before a final order.

The issues raised before and during our audit related to the fairness and effectiveness of the formal hearings. Our audit requestor asked us whether employees have the same quality of representation as employers. The UADD Advisory Committee also has expressed concerns that formal hearings are biased against charging parties. That committee unanimously approved a motion stating that the administrative hearing process is in need of reform. To address these issues, we examined individual case files in two separate samples. First, we examined cases that requested formal hearings during a six-month period. Second, we reviewed rulings by the Industrial Commission on motions for review during a 16-month period.

Fairness of Anti-Discrimination Process may be Enhanced

Our analysis of case files coupled with testimony of the administrative law judges and attorneys raise concerns with the fairness of the anti-discrimination process to the charging parties. In our opinion, an important consideration in the fairness of the process rests on the ability of each party to effectively present their case in the formal hearing. The ALJs largely rely on the parties to inform them both about the relevant facts of the case and to argue the interpretation of the law; in the hearing, both the evidence and its analysis need to be presented. However, the charging parties often appear without legal representation, or with less effective counsel than respondents. This may be one reason why charging parties rarely win cases in the formal hearing process.

Because of UADD's mission of eliminating discrimination, this chapter focuses on formal hearings that were requested by respondents following cause findings by UADD. Charging parties who received a cause finding from UADD have good reason to believe they were

subjected to illegal discrimination since an impartial state investigator has reached that conclusion. In our case studies we identified a number of cases with cause findings from UADD that were dismissed by the ALJs because the charging party either could not find an attorney or had questionable representation. Our concern with the fairness of the process to charging parties is best illustrated when charging parties with cause findings are unable to articulate their case before an ALJ.

The analysis of our samples shows that charging parties do not generally prevail in formal hearings. To illustrate this point, Figure V shows what happened to all cases that made timely request for a formal hearing during a six-month period. During this time, UADD issued 210 no-cause and 30 cause determinations, of which 28 and 17 respectively made a timely request for a formal hearing.

Figure V
Formal Hearing Requests After UADD Determinations
March to August 1994

	No-Cause	Cause
Made Timely Request for Hearing		
Denied: No New Evidence	16	0
Remanded back to UADD	2	0
Withdrawn by charging party	0	1
Granted a formal hearing	10	16
	28	17
Granted a Formal Hearing		
Settled by parties	0	4
Withdrawn by charging party	2	2
Dismissed by ALJ: No-Cause	2	4
Hearing pending	3	4
Hearing held	3	2
	10	16
Hearing Held		
No-cause by ALJ	2	0
Cause by ALJ	0	0
Withdrawn by charging party	1	2
	3	2

The data in Figure V shows that none of the charging parties with cause findings from UADD have received a cause finding in a formal hearing. Out of 17 cases with UADD cause determinations, the hearing is still pending for four cases; thus, 13 cases have been closed. Four of those cases were lost by the charging party when the ALJ dismissed the case without holding a formal hearing. Other cases closed by settlement (4) or withdrawals (5 at various

stages of the process) may or may not represent a successful resolution for either party. For example, one of the settlements shown in Figure V appears to be a success for the charging party because a $20,000 payment was included. However as discussed later, another settlement resulted in only an insignificant cash settlement to a charging party who could not find an attorney (the terms of two other settlements were not included in the state files). Withdrawals by charging parties also may or may not represent a loss of their case. Some withdrawals shown in Figure V were requested in order to transfer the case to federal court to be decided in that forum. However, other withdrawals represented a failure for the charging party since the case did not move on to another forum. Later in this chapter we discuss the specifics of a number of these cases. In some instances, a charging party's lack of adequate legal counsel directly affects the case's outcome.

Charging parties sometimes try to participate in formal hearings without legal representation. For example, of the 16 cases shown in Figure V that were granted formal hearings after cause findings, only 10 of the 16 charging parties could find legal representation; in contrast, all 16 respondents on the same cases were represented by attorneys. As described later in this chapter, even some of the charging parties who managed to find attorneys may have less effective legal representation than the respondent. Additionally, only one of the 16 charging parties (with no-cause determinations in Figure V) that were denied a formal hearing had an attorney.

We also examined appeals made to the Industrial Commission during a 16-month period. During this period, we found only three rulings on the merits of a discrimination claim (another 17 rulings addressed the granting of formal hearings, 1 ruling involved an attorneys' fee request, and 1 ruling involved a request for UADD to reopen a closed case). On all three cases where the discrimination issue was considered, the charging party had received a cause ruling from UADD, but the ALJ had ruled no cause. In each instance, the commission concurred with ALJ's ruling and denied the charging party's appeal, indicating how difficult it is for charging parties to win in the formal process.

While it is difficult for charging parties to prevail in the formal process, it is not impossible. For example, although they did not fall within our sample, we did become aware of some cases where an ALJ issued a cause determination; in one of the cases, the charging party even presented his case without legal representation. Nonetheless, successes by charging parties in the formal hearing process are the exception.

ALJs and Attorneys say that Charging Parties are Disadvantaged without Legal Counsel

Evidence indicates that the formal hearing process may favor respondents over charging parties. As noted earlier, charging parties have difficulty finding effective legal representation. Evidence indicates that even if a charging party can find an attorney, it is difficult to win in a formal hearing. Both ALJs and respondent attorneys recognize that charging parties are often

disadvantaged in formal hearings. The following statements were made by four different ALJs:

- The "*deck is stacked*" against the charging party. The respondents "*literally blow charging parties right out of water*."

- *The Industrial Commission strongly recommends that both parties be represented by counsel in the formal hearing setting. This is advised even more so for the charging party because the charging party bears the burden of proof in a discrimination case… In most cases, this burden is a difficult one to sustain… Unlike the investigatory process, there will be no one from the Industrial Commission at the hearing that will be able to assist or advise you… You will be at an* ***extreme disadvantage*** *without counsel.* (Emphasis added)

- Respondents generally have more resources than the charging parties and can afford to drag out their case. The charging party is usually out of a job, and it is difficult to get an attorney.

- An increasing number of charging parties are representing themselves in formal hearings, and they are at a disadvantage against respondents who have legal counsel.

Besides ALJs, some respondent attorneys also are concerned that charging parties are often disadvantaged in formal hearings. The problem is obvious if the charging party does not have a lawyer; it is very difficult for a lay person to prevail in a legal forum. A less obvious problem exists in those cases where the charging party has a lawyer, but the quality of representation may not be as good as that of the respondent. For example, one respondent's attorney said that he does not concern himself with the UADD investigation because even if the charging party gets a cause determination he can request a formal hearing. The lawyer said that respondents prevail at the formal hearing because the charging party will either not be represented by legal counsel or will be "*under-represented*." Furthermore, even when the parties settle, the charging parties may be at a disadvantage if they do not have legal representation. The Chairman of the UADD Advisory Committee who is a respondent attorney wrote:

> *If a respondent perceives that the charging party has little or no chance of successfully pursuing a claim all the way through the administrative process then it will have little or no incentive to settle for a fair amount. Additionally, if a charging party finds it unduly difficult and/or costly for him or her to meet their burden of going forward in the system, he or she would seem to be faced with two choices: either settle for an* ***artificially low amount*** *or opt out of the system.* (Emphasis added)

Under the current system, some charging parties with good cases may be unable to prevail in the formal hearing because they cannot obtain effective legal counsel and are unqualified to

articulate their own case. A number of attorneys familiar with the anti-discrimination process also feel it makes sense for UADD to participate in formal hearings. As long as the respondent attorneys can challenge the information presented by UADD and also present their own cases, UADD participation would not be unfair to respondents.

Cases Show That Charging Parties Lose Without Adequate Representation

Our case analysis indicates that cause findings from UADD may be of little value to charging parties unless they can present their own cases in formal hearings. Many of the cases we reviewed show that charging parties have little opportunity to prevail in formal hearings without effective representation. We have detailed five examples (taken from the samples mentioned earlier) that illustrate the concern we have with the fairness of the anti-discrimination process.

In our first case, the charging party's case was dismissed with attorney fees charged against her even though she had a cause determination from UADD. When the charging party received a letter from the ALJ advising her to obtain legal counsel, she called five or six attorneys trying to find one to represent her on a contingency basis. One of the attorneys told her that he would not take the case because there was not enough money involved. Meanwhile, the charging party tried to participate in the discovery process on her own, but had little legal knowledge to do so properly. For example, in response to her interrogatories, she did not use the words "*admit*" or "*deny*" as required by the rules of civil procedure. The respondent attorney filed a motion to strike the response because she did not use those specific words. The charging party also did not appear for a scheduled deposition. The respondent asked the ALJ to dismiss the case because of the charging party's failure to comply with the legal discovery process. The ALJ dismissed the case and assessed attorney fees of $680 against the charging party. The charging party later declared bankruptcy because of her financial difficulties. She said, "*the system dumped me… The laws are for the rich, not for the poor… They turned their backs on me.*"

In a second case, the charging party asked UADD to dismiss the case because she could not find an attorney she could afford. Although she had received a cause determination from UADD, she was unable to present the case in a formal hearing. She wrote:

> *I, [charging party], must, much to my dismay, ask that the above case against my former employer, [respondent], be dismissed… Since mid-June I have been searching for a lawyer to represent me at the hearing. I cannot find one I can afford. At $90.00 an hour, it will be several hundred dollars in billings just to subpoena witnesses… My finances are limited to the point that paying for a lawyer is not possible. I am heartsick over this situation. I know [respondent] is guilty. I also know they will now get away with it.*

However, the ALJ did not dismiss the case. Instead, the ALJ asked the charging party to attend the scheduled prehearing conference and informed the respondent's attorney that the dismissal request was because the charging party could not afford an attorney. The ALJ told the respondent attorney that: *"I do not believe that a cause of action, if even remotely just, should be precluded from a forum on that sole basis."* Subsequently the parties settled for $350 even though she was unemployed for more than a year. This case illustrates that when charging parties do not have an attorney, they may settle for *"artificially low"* amounts.

In a third case, the charging party was initially represented by an attorney who had a contract to work with school district employees. During the investigative process, the attorney charged a nominal fee. However, when the respondent requested a formal hearing after a cause determination, the attorney withdrew because the charging party could not afford to pay thousands of dollars to represent the case in a formal hearing. The charging party contacted more than 10 other attorneys in the area but could not find anyone who would work on a contingency basis and could not afford to pay an hourly rate. The ALJ gave him time to find an attorney and has not scheduled any hearings, waiting to hear from him.

In the fourth case, the charging party was able to find an attorney on a contingency basis, but received questionable representation. The charging party said that his attorney simply "*did not do his homework*." After one of respondent's witnesses made a statement in the hearing, his attorney told him, "*we don't have a ghost of a chance*." He told the charging party that they should withdraw the case in the middle of the hearing. Although the charging party wanted to continue with the hearing, he knew he could not win the case because his own attorney wanted to withdraw. Consequently, he withdrew his case during the hearing. He still felt strongly that discrimination had taken place. He felt that if he had a more competent lawyer who was more prepared, he could have won the case.

In our last case, the charging party's attorney did not fight the respondent's motion to dismiss the case from a formal hearing. When the respondent filed a motion to dismiss the case, arguing that the Industrial Commission lacked jurisdiction over the case, the charging party's attorney did not fight the motion and agreed that the case should be closed. Although the attorney was convinced that the Industrial Commission did not have jurisdiction, UADD investigators later told us that they still believe that state and federal law gives the Industrial Commission jurisdiction in the case.

In our opinion, the five examples illustrate that UADD participation in the formal hearings could make the anti-discrimination process more fair for some charging parties. Unlike the investigative process where UADD has the burden of determining whether illegal discrimination occurred, the charging party has the burden of proof in a formal hearing. In the five examples described above UADD found illegal discrimination and issued cause determinations but charging parties could not find effective representation to continue in the formal hearing process. Consequently, their cases were dismissed, withdrawn, or settled for "*artificially low*" amounts.

Other Agencies Represent Some Cause Findings

A review of other anti-discrimination agencies within and without the state reveals that they represent their findings in formal hearings or in state courts. It is important to note that as originally enacted the Utah Anti-discrimination Act of 1965 stated that at a hearing following the investigation: *"The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents."* However, that language was eliminated in 1985 when the entire section containing it was repealed and it was not included in the new enactment. We tried to research the legislative history for the 1985 change, but could not determine the reason for the change.

Similar agencies in our neighboring states such as Colorado, Arizona, Idaho, and Montana have the statutory authority to represent their findings in administrative hearings or courts. Unlike UADD which ends its work when it issues a determination, these agencies act in behalf of charging parties when a cause determination is appealed. These agencies do more than present their investigative findings as a third party. They actually represent the charging party and present the case in formal hearings or in state courts. Because of budgetary constraints, they cannot litigate every cause determination, but choose cases to litigate based on some criteria. For example, Idaho uses the following criteria:

1. Can the charging party find a private attorney?
2. Is there a public policy interest in the case?
3. Is there an important issue in the case?
4. How strong is the case?

Similarly, Arizona uses the following criteria:

1. Is the case such that the law is at issue and the courts have to determine what it means?
2. Will a large number of people be affected by the case?
3. Is there a jurisdictional question?

Colorado, on the other hand, uses the following criteria:

1. Director's report/recommendation.
2. Hearing worthiness as determined by the Assistant Attorney General.
3. Impact: How many people can benefit from this case?
4. Uniqueness: Has the issue been addressed before?
5. Remedy: Is there a viable relief?
6. Budget: Is there funding to litigate this case?

Although the criteria are somewhat different in all three states, there are similarities. For example, all states try to limit the number of cases it litigates because of budgetary constraints. Therefore, the states may not provide assistance to all charging parties who received cause

findings that were appealed. Additionally, the states choose which cases to participate in based on the strength of the case and its public impact.

Second, the federal anti-discrimination agency, Equal Employment Opportunity Commission (EEOC), litigates in federal courts. Similar to UADD, it acts as neutral fact finder during its investigations. However, EEOC selects a number of cases for litigation in federal district courts. An EEOC trial lawyer said that some employers in Utah routinely do not cooperate with UADD investigations because they do not take the agency seriously. She added that employers consider UADD as a "*paper tiger*"; she felt employers would better cooperate with investigations if UADD had some power to defend its determinations when they were challenged.

Finally, the Utah Fair Housing Agency within the Industrial Commission represents its findings in formal hearings or in state district courts. The state fair housing program is within UADD and is managed by the UADD director. Like UADD, the Fair Housing Agency works as a neutral fact-finding agency during its investigations. But when it issues a cause finding, it no longer acts as a neutral party and acts in behalf of the charging party. It holds a conciliation conference to settle the case if it issues a cause finding. If a conciliation conference fails, the Fair Housing Agency will litigate in behalf of the charging party in formal hearings or in state district courts. The coordinator for the Fair Housing Agency told us that the agency has settled all their cases before the case has gone to litigation except for one case that was settled after the case was filed in court.

UADD Participation in Formal Hearings can Improve Anti-Discrimination Process

In our opinion, allowing UADD to participate in formal hearings would enhance the effectiveness and fairness of Utah's anti-discrimination process. Eliminating discrimination is an important part of the division's mission. Yet, after finding that illegal discrimination occurred, the division takes no active role in the case if it goes to a formal hearing. In the current system, even if a charging party's claims are substantiated by a state investigator, he or she still must find an attorney and prove discrimination in a formal hearing. At the formal hearing each party must present the case on their behalf. ALJs largely rely on the parties to inform them both about the relevant facts of the case and the law; in the hearing, both the evidence and its analysis need to be presented. However, charging parties often appear without legal representation, or with less effective counsel than respondents. Meanwhile, knowledgeable UADD staff are absent from the formal hearing. Thus, the effectiveness and fairness of the anti-discrimination process depends, in part, on the parties' ability to get effective representation for the formal hearing.

UADD investigators are, or at least should be, the best informed parties about the relevant facts and law of each case. UADD investigators may take months to gather important evidence from the charging party and respondent, and analyze it in fairness to both parties. In addition,

UADD has many lawyers on staff whose primary responsibility is the interpretation of employment discrimination law. By excluding UADD involvement in formal hearings, important and readily available information may not be considered. For example, we talked to investigators who felt that ALJs made incorrect legal rulings on cases they had investigated. However, there was no mechanism for UADD to explain its findings to the ALJ. If UADD takes the steps discussed in Chapter III to improve the quality of its investigations, then its participation in formal hearings will enhance the fairness to charging parties.

UADD's participation in formal hearings also would affect investigations by changing how investigators and respondents viewed an investigation. Some investigators told us their work does not matter if the case is appealed for a formal hearing; they also told us that their *"cause"* findings are always appealed. Some investigators, ALJs, and attorneys told us that respondents sometimes ignore UADD and do not cooperate during investigations. UADD's participation in the formal hearings would make the division's work more meaningful to its own staff and to the parties involved.

Some participation by UADD in formal hearings may already be allowed under the current statute. The Utah Administrative Procedures Act (UAPA), which specifies procedures for formal hearings, allows presentations by non-parties to the proceeding. According to UAPA, an ALJ *"may give persons not a party to the adjudicative proceeding the opportunity to present oral or written statements at the hearing."* Additionally, the Utah Anti-Discrimination Act (UADA) specifically allows investigators to participate in formal hearings as witnesses. However, statute does not specifically give UADD the responsibility to present or represent any of its findings.

To enhance the effectiveness of the anti-discrimination process and its fairness to charging parties, we feel that the Legislature should consider one or a combination of the two options as described below:

- Allow UADD presentation of evidence gathered and its conclusions in formal hearings
- Allow representation of selected cause findings in formal hearings

Under the first option, UADD would continue to act as a neutral party during the hearing, presenting all the evidence collected during investigations whether that evidence favored the charging party or the respondent. This option allows the state to maintain its neutral stance while also enhancing the fairness to charging parties by ensuring that evidence is presented and explained in the hearing. Under the second option, the state would provide legal counsel to act on behalf of the state on selected cause findings. Representation of selected cause findings would be a more costly for the state, depending on how many cases were pursued. However, representation also would provide more forceful action by the state to eliminate discrimination in selected cases. Of course, representation of selected cases would require clear criteria on how cases would be chosen. As described in the next section, we believe either of the options would have a beneficial impact on UADD investigations.

UADD's Participation in the Formal Hearing Process Will Provide Valuable Feedback

Besides enhancing the effectiveness and fairness of the anti-discrimination process, UADD's participation in formal hearings would provide feedback to investigators from ALJs that would improve future investigations. Currently, there is no mechanism to provide the investigators feedback on decisions made by ALJs in formal hearings. We found that in some cases, UADD determined that illegal discrimination occurred but when the case reached the formal hearing process, ALJs dismissed them. However, UADD staff were often not informed or aware that they were dismissed. Consequently, contradictory views of employment discrimination law are permitted to remain indefinitely. In our opinion, UADD's participation in formal hearings would provide UADD valuable feedback from ALJs that could improve future investigations.

UADD can Benefit from Formal Hearing Feedback

UADD's participation in formal hearings would help it receive feedback from ALJs about its investigations. We feel it is important for UADD to improve the quality of its investigations by incorporating the rulings of ALJs in its subsequent work. The formal hearing process provides a judicial record and a more final resolution than the UADD investigation. However, under the current system UADD often does not learn from the formal hearing process; in fact, it does not even track cases that go to formal hearings. Currently, UADD regards its work completed with its determination and simply ignores any subsequent activity except to close the case. As a result, even when ALJs find errors caused by the inadmissibility of evidence or the misinterpretation of law, UADD does not take steps to use this information to correct or improve upon future investigations. Including UADD in formal hearings would be one way to help ensure the division is aware of ALJ rulings.

We feel UADD should learn from the rulings of ALJs about law and evidence. It makes little sense for UADD to devote significant resources investigating the type of claims over which ALJs have previously ruled the agency has no jurisdiction. Yet because it has no effective mechanism to receive feedback, UADD continues to accept claims for which it apparently has no jurisdiction. Similarly, UADD may learn from instances when an ALJ conducts a formal hearing and then rules differently than did an investigator. We are not suggesting that the findings of the investigative and formal hearing processes should be the same, but only that UADD should routinely consider the findings of ALJs to identify possible improvements in its investigations.

Our review of UADD determinations that went to formal hearings revealed that UADD staff was seldom aware of case outcomes. After we informed investigators about some ALJ rulings, they explained to us why they felt the rulings were incorrect. The previous section

described how the anti-discrimination process could be improved if UADD explained the case to the ALJ when the case was pending. In this section we discuss three cases that illustrate the problem of the investigative and formal hearing process ignoring each other. In each of the following three cases UADD found cause to believe that illegal discrimination took place and issued an order requiring the respondent to take remedial action. In the formal hearing, however, in each instance, the ALJ found the charging party's claim did not meet minimal jurisdictional requirements and dismissed the claim without even holding a formal hearing.

Cases Show That UADD Could Benefit From ALJs' Feedback

The first case was dismissed without a hearing because the ALJ stated that the charging party did not qualify as disabled. The investigator wrote that the charging party was qualified as a disabled individual because the employer perceived her as such. In the determination, the investigator wrote:

> *Having recently undergone foot surgery and an hemorrhoidectomy, charging party could be **perceived** by respondent as having a handicap/disability… Respondent, by reducing her hours and expressing concern about her ability to do the work, perceived it to be so. Thus, charging party is a **qualified handicap individual**.* (Emphasis added)

However, the ALJ granted the respondent's motion for a summary judgement and dismissed the case by stating,

> *There is no dispute that charging party's hemorrhoid and foot surgeries resulted only in **temporary, non-chronic conditions of short duration**, and that she fully recovered from her surgeries within a matter of a few weeks. There is also no genuine issue of material fact that respondent did not perceive charging party as having any condition which constitutes a disability under the Utah Anti-Discrimination Act, and did not engage in any discriminatory conduct based upon any such perception.* (Emphasis added)

Even though the case was dismissed, the investigator who wrote the determination did not find out that the case was dismissed. If indeed, the ALJ was correct, UADD should have incorporated his ruling in future investigations. However, UADD did not even receive a copy of the ALJ's dismissal order. Consequently, UADD could continue to accept and investigate similar charges in the future.

Similarly, the second case was dismissed without a hearing because the ALJ stated that the Industrial Commission lacked jurisdiction. After UADD issued a cause determination, the respondent filed a motion to dismiss the case claiming that UADD did not have jurisdiction of the case. The motion stated that federal railroad laws required union employees to exhaust administrative remedies within the union before filing a discrimination case with a state agency. The charging party's attorney did not oppose the motion so the ALJ dismissed the

case. We discussed this case with the UADD investigator, who is an attorney, and she said the jurisdiction issue was never raised during the investigation. However, she has since discussed the legal issue with the case manager, who also is an attorney, and both feel that UADD does have jurisdiction. In the investigator's opinion, a union contract does not preclude an individual from pursuing action under state or federal law. Moreover, UADD continues to accept similar cases. If indeed UADD does not have any jurisdiction over such cases as ruled by the ALJ, UADD should not accept similar cases. If UADD does have jurisdiction, then it should be in a position to so inform the ALJ.

Finally, the third case was also dismissed without a hearing because the ALJ said that the charging party did not qualify for protection under disability law. The investigator wrote that the charging party was a member of the protected class even though she, herself, was not handicapped:

> *Charging party's son sustained a work-related injury resulting in the loss of his right thumb. As charging party's son is "handicapped" as defined by the Utah Act, charging party is a member of a protected class,* ***handicap by association****.* (Emphasis added)

The investigator reasoned that UADD had jurisdiction over the claim even though the charging party was not handicapped because the discrimination was based on the charging party's relationship with a handicapped person. However, before the formal hearing took place, the respondent filed a motion to dismiss the case claiming that the *"handicap by association"* category was not included in the Utah Anti-Discrimination Act. After considering the arguments from both sides, the ALJ agreed with the respondent by granting the motion to dismiss the case stating,

> *The charging party's allegations that she was discriminated against on the basis of "handicap by association" fails to state a claim covered by the Utah Anti-Discrimination Act. Further, the Industrial Commission does not have authority to expand the classes protected by the statute.*

When we talked to the investigator about this case, she still believed that she was correct in her analysis. She said that there have been several federal cases where charging parties have prevailed on *"association"* cases. More specifically, she said that under federal Title VII, charging parties can be defined to be in a protected class if they are discriminated against based on a relationship with members of a protected class.

The three examples illustrate the problems that can result from the lack of feedback to UADD from the formal hearing process. At the very least, UADD should incorporate ALJ findings so that resources are not wasted on claims for which it has no jurisdiction. The same point applies in instances where formal hearings are held, but reach different outcomes. We encountered three instances where UADD found cause, but an ALJ found no cause following a full hearing. In such instances UADD's participation in formal hearings could benefit both the

ALJs and the UADD investigative staff. On one hand, the investigator may present critical information that may not otherwise be considered by the ALJ. On the other hand, the ALJ determination is a more final outcome on a judicial record from which UADD may learn.

Coordination Between UADD and Adjudication Division Needs to Improve

Regardless of whether UADD participates in formal hearings, coordination between UADD and the Adjudication Division within the Industrial Commission needs to improve. The lack of coordination between UADD and the Adjudication Division is contributing to confusion and inefficiency of the anti-discrimination system. More specifically, UADD and the Adjudication Division operate independently and necessary communications involving withdrawals and closures do not always occur. Simply put, *"the right hand does not know what the left hand is doing."* UADD's participation in the formal hearing processes may eliminate this communication problem. Even if UADD does not participate in a formal hearing, the Industrial Commission should implement policies and procedures so that necessary communication take place between the two divisions.

UADD Needs to Better Communicate Case Withdrawals

UADD does not always communicate the withdrawal of cases in the formal hearing process to the Adjudication Division. In two separate instances, UADD did not inform the ALJs that the charging parties had withdrawn while the cases were pending formal hearings. The ALJs continued with the hearing, not knowing about the withdrawals, resulting in confusion and wasted resources. Additionally, UADD issued withdrawals in three cases at the charging parties' request even though the orders on their cases had become final months earlier.

In the first case, the charging party went to UADD and withdrew her case. However, neither UADD nor the charging party informed the ALJ about her withdrawal. The ALJ did not know that the charging party withdrew and held the prehearing conference. The respondent came to the conference, but the charging party was absent. The ALJ then wrote a letter to the charging party explaining that the case would be dismissed if she could not come up with a good reason why she did not show up at the prehearing conference. The charging party did not respond to the letter, and the ALJ dismissed the case. Even as the ALJ wrote a dismissal order, she did not know that the charging party had withdrawn.

The second case, the charging party went to UADD and signed a withdrawal form, requesting her case to be transferred to EEOC after the ALJ ruled on the merits of the case. However, UADD did not inform the ALJ that the charging party had withdrawn. The ALJ continued the adjudication proceedings. When the charging party found out that the respondent was seeking attorneys' fees, she informed the ALJ that she had already withdrawn

the case. The ALJ wrote,

> *To understand how this confusion came about, it is important to understand that the different divisions of the Industrial Commission regularly operate autonomously. In some cases, such as this one, where more than one division handles the case, some necessary communications will occur between the divisions, usually to clarify the procedural status of the case. However, in this case, this necessary communication did not occur, resulting in the jurisdictional confusion…*

Additionally, we found three cases where the charging parties withdrew their cases after the order became final. Three different cases involved related charges against a single employer. When the orders became final, they were referred to the General Counsel of the Industrial Commission for enforcement actions. Meanwhile, the charging parties managed to withdraw their cases because UADD did not check the status of the case with the General Counsel.

Adjudication Division Needs to Communicate with UADD when it Closes Cases

When cases are closed in the formal hearing process, the Adjudication Division does not always communicate with UADD. Consequently, UADD investigators cannot learn from ALJs' decisions. Additionally, cases remained open longer than necessary with UADD.

One reason for the lack of communication is the Adjudication Division not sending the ALJs' orders to UADD. When a party requests a formal hearing, the case remains open with UADD until it is resolved through the formal hearing process. Only when a case is resolved in the formal hearing process can UADD close the case properly and receive contract credit with EEOC. However, we have seen six out of 16 cases in our sample that were closed by the Adjudication Division but remained opened with UADD. Because UADD is not a party in the formal hearing process, it is sometimes not included in the mailing list of individual cases; the charging party, the respondent and their attorneys receive all correspondence from ALJs, but UADD does not necessarily know that the case has been closed. The two divisions act autonomously, and UADD often does not know what Adjudication Division is doing.

Recommendations:

1. We recommend that the Legislature consider amending the Utah Anti-discrimination Act to allow one or a combination of these two options:

    a. Presentation by UADD of evidence gathered and its analysis in formal hearings, or

    b. Representation of selected cause findings in formal hearings.

2. Regardless of whether UADD participates in formal hearings, we recommend that the Industrial Commission implement policies and procedures to better coordinate the work of its divisions, such as:

    a. UADD should actively keep track of all cases that go to the Adjudication Division. When a case is closed in the Adjudication Division, UADD should disseminate information learned from ALJs' decisions.

    b. UADD should first check the status of a case before allowing withdrawals. If a case has not received a final order, UADD should inform the ALJ that the case has been withdrawn. If a case has become final, UADD should not allow withdrawals.

    c. Adjudication Division should communicate all of ALJ's decisions to UADD.

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Chapter V
Legislative Changes Could Control Withdrawals

The Legislature may want to consider changes to the Utah Anti-Discrimination Act (UADA) to address charging party withdrawals from the administrative process. Statutory changes could address two items. First, the Legislature should consider eliminating charging parties' ability to withdraw their cases after a formal hearing. In cases where frivolous claims were pursued all the way to a formal hearing, that change would prevent charging parties from withdrawing to avoid attorney fees assessed by the judge. Second, the Legislature may consider making Utah law more similar to federal law by allowing judges to award punitive and compensatory damages when appropriate. In cases where charging parties have strong cases, that change would make the Utah administrative process more meaningful by eliminating the incentive that now exists for charging parties to withdraw to pursue their case in federal court.

It is wasteful of state resources and unfair to respondents to conduct formal hearings that have no binding effect. Two administrative law judges (ALJs) told us they were concerned that charging parties get *"multiple bites of the apple."* That is, charging parties are entitled to a hearing before the ALJ that may be appealed to the Industrial Commission. However, if the charging party does not like the result from the state forum, he or she may withdraw either to avoid paying respondent's attorney fees or to try the same case in federal court. One of the ALJs told us that many parties use the state system to test cases before going to federal district court. Both ALJs suggested that charging parties be required to choose their forum and then accept the result of that forum with its appeal process.

The state administrative process also would be more meaningful if it considered all cases rather than predominately those with less merit. One ALJ told us that the only cases that reach an evidentiary hearing are those that are either a close call or without merit. He said if the charging party has a good case it is either already settled between the parties or the charging party has withdrawn to file in federal court because greater relief is possible. The Industrial Commission's general counsel also told us that most charging parties with strong cases withdraw and pursue the case under federal law. He said that because many strong discrimination cases withdraw few have come before the commission to establish precedence to guide administrative actions.

Withdrawal Provision Makes Little Sense

Charging parties are now able to withdraw cases after they lose, even if attorney fees were ordered. Currently, **Utah Code** 34-35-7.1(3)(d) states, *"If the aggrieved party wishes to withdraw the request for agency action, he must do so prior to the issuance of a final order."*

Because of the 30-day appeal period, however, an order does not become final until 30 days **after** an ALJ issues it. A recent ruling by the Industrial Commission interprets the statute as requiring it to allow charging parties to withdraw after receiving an adverse ruling. In our opinion, it makes little sense to allow charging parties to avoid the consequences of a judge's ruling by withdrawing after the ruling is made.

Allowing a withdrawal after the judge's ruling enables charging parties to pursue frivolous cases without any fear of repercussions. **Utah Code** 34-35-7.1(8)(b) provides that with a no cause ruling, the ALJ *"may order that the respondent be reimbursed by the complaining party for his attorneys' fees and costs."* If an ALJ assesses attorneys' fees at the completion of a hearing, however, the charging party can simply withdraw the case within 30 days of the ruling and nullify the ALJ's order. We feel this result is both unfair to respondents and wasteful of state resources.

Cases Illustrate Withdrawal Problem

During our case reviews, we encountered some cases that illustrate the problem of allowing withdrawals so late in the adjudicative process. Indeed, as described below, one ALJ refused to relinquish jurisdiction because it led to a "*preposterous*" result that could not have been intended by the Legislature, allowing a charging party to abuse the state administrative process with no fear of penalty. However, a subsequent ruling on a different case by another ALJ that was upheld by the Industrial Commission reached the opposite conclusion. Apparently, the only way an Industrial Commission order that a charging party pay a respondent's attorney fees can become final is through a lack of knowledge by the charging party of their ability to withdraw.

In our first case, an ALJ denied a charging party's withdrawal request. The charging party had received a cause determination from UADD and the respondent requested a formal hearing. However, the ALJ ruled in favor of the respondent on the discrimination charge. The charging party tried to withdraw after the ALJ had issued a written no-cause order and the respondent filed a motion for attorney fees. However, the ALJ refused to accept the argument that charging parties can withdraw so late in the adjudicative process, stating:

> *…if this interpretation were utilized, every charging party would withdraw their claim after receiving a ruling against them and the commission would be engaged in a* ***pointless exercise*** *of fully litigating claims over which the commission would lose jurisdiction once a final order was issued.* ***The ALJ finds this to be a rather preposterous result that could not have been intended by the Legislature.*** (Emphasis added)

The ALJ recognized that if the charging party's case was frivolous and the respondent deserved to be paid attorney fees, it made no sense to allow the withdrawal. Allowing such a withdrawal makes little sense because there is no other forum that could address the attorney fee issue. Although the ALJ did not accept the charging party's withdrawal, she also did not

assess attorney fees. Therefore, the ALJ's interpretation of the withdrawal provision was not appealed to the Industrial Commission for its review.

In our second case, another ALJ reached the opposite conclusion about the withdrawal provision and the Industrial Commission concurred. The respondent requested a formal hearing after UADD found in favor of the charging party. The ALJ made an oral ruling from the bench, finding no cause on the discrimination claim and that the claim was frivolous. Furthermore, the ALJ ordered the charging party to pay respondent attorney fees. While the respondent was preparing the written determination and order as instructed, the charging party simply withdrew. The ALJ then dismissed the case, stating that he no longer had jurisdiction. The respondent appealed the order of dismissal to the Industrial Commission, stating:

> *…[the ALJ] merely dismissed the action* ***as though the grueling eight day hearing had never happened, as though he had never uttered his lengthy ruling from the bench****… If [the ALJ's] Order of Dismissal is allowed to stand, the message will be clear: A charging party need not hurry to federal court after receiving a favorable determination letter. To the contrary, let the respondent seek a de novo hearing so that the charging party can conduct a dress rehearsal for the later court action. The charging party can go through the formal adjudicative hearing with no fear as to the outcome. Whatever the result, including the imposition of attorney's fees, the charging party can simply erase it as though it never happened by simply withdrawing his charge after the hearing is concluded.* ***Such a message renders the whole process… a costly, time-consuming hoax.*** (Emphasis added)

Thus, this respondent made a similar argument as the ALJ on the first case: that it is preposterous to allow a charging party to withdraw after being ordered to pay attorney fees. Nonetheless, the Industrial Commission found that it was powerless to prevent such a withdrawal, stating:

> *The Industrial Commission is bound to apply the… statutory provision according to its plain language. Under subsection 7.1(3)(d) of the act, the only limitation on a charging party's right to withdraw a charge of discrimination is that the withdrawal must occur "prior to the issuance of a final order."*

Reportedly, the charging party withdrew, not to file a suit in federal court as stated on the withdrawal form, but only to avoid the attorney's fees. According to the respondent, the charging party never filed suit in federal district court.

In a third case, which is pending, the charging party may withdraw to avoid attorney fees, unless he is ignorant of his ability to do so. This charging party, unlike those on the two cases above, received a no-cause determination from UADD. He requested a formal hearing, after which the ALJ ruled no cause and that the case was frivolous. The ALJ ordered the charging party to pay over $10,000 to the respondent to reimburse them for attorney fees. The charging party then appealed to the Industrial Commission, whose decision is pending. Unless the

commission rules in his favor, the charging party can simply withdraw and avoid the assessed attorney's fees unless he does not understand his rights. Apparently, only through the ignorance of a charging party could an order against them become final.

We did encountered one case where an ALJ's order that the charging party pay respondent attorney fees became final because the charging party was unaware that she could withdraw. However, the charging party told us that the respondent had agreed not to enforce the order requiring her to pay them $680 if she agreed not to pursue her discrimination claim further.

Changing the Utah withdrawal provision would not prohibit a charging party from ultimately pursuing a case in federal courts. All no-cause orders include a right-to-sue notice from the EEOC enabling the charging party to file in federal court. Nonetheless, we feel that the state should retain jurisdiction of ancillary matters, such as attorney fees, under some circumstances. If, for example, a charging party pursues a frivolous case through the completion of a formal hearing, the respondent deserves to have the ALJ order that their attorney fees be paid by the charging party. If the charging party later wishes to file a suit in federal courts, he or she may still do so.

Legislature may Increase Relief Available Under Utah Law

If the Legislature wants to make the formal hearing process more meaningful, it may consider amending UADA to include punitive and compensatory damages. Under Utah law, a charging party who has been discriminated against may be entitled to *"reinstatement, back pay and benefits, and attorneys' fees and costs."* However, under the federal statutes, the charging party also may receive punitive and compensatory damages. Relief for things such as emotional pain and suffering are available under federal but not Utah law. As a result, many charging parties withdraw to seek greater relief in federal court. Withdrawals that occur before the formal hearing are not an obvious problem, but may have a subtle effect on the fairness and maturity of the Utah administrative process. A more obvious concern is withdrawals during and after formal hearings that may be wasteful of state resources and unfair to respondents.

Because greater relief is available under federal rather than Utah law, charging parties with strong cases tend to withdraw from the Utah system while those with weak cases remain. Two attorneys for charging parties told us that they withdraw cases from the Utah administrative process as a matter of policy because greater relief is available under federal law. One attorney said that even when he settles a case after filing in federal court, his settlements are significantly greater than what he can get in the state system. However, if the charging party's case is weak, the attorney will refer the person to UADD for a free investigation. If the investigation turns up new evidence, then the attorney may take the case. The Industrial

Commission's general counsel and ALJs also told us that the strong charging party cases tend to withdraw to file in federal court while the weak charging party cases tend to remain in the Utah system.

If, as lawyers and ALJs told us, predominately weaker cases remain in the Utah administrative process, the fairness and maturity of the process may be indirectly affected. Since ALJs believe that strong charging party cases tend to be withdrawn, their perception of the cases before them could be affected. The belief by ALJs that only weak cases tend to remain in the Utah administrative process may not be fair to charging parties who bring cases before ALJs.

A second indirect effect may be on the maturity of the Utah administrative process through procedural refinement of case law. We found it difficult to get answers to questions about the Utah process. The commission's general counsel characterizes the anti-discrimination process as relatively immature compared to other commission processes, such as worker's compensation. The reason is that few cases have completed the appellate process to a definitive end. For example, Figure V in Chapter IV showed that ALJs had made a determination on only 2 of 45 cases appealed to the formal hearing process at the time of our audit (7 cases were still pending). The commission's general counsel attributes the fact that most charging parties with strong cases withdraw to file in federal court as helping prevent cases remaining in the Utah system to establish case law. If more cases were fully litigated to a final conclusion under state law, the state administrative process would be clarified.

A more direct impact of the greater relief available under federal law occurs when charging parties first complete the Utah administrative process and then withdraw to file their claim in federal court. Charging parties who use the formal hearing process as a test before withdrawing to file in federal court are wasting state resources. Two different attorneys told us that they have kept their cases in the formal hearing process to test the strength of their cases and use it as a free discovery mechanism before filing a suit in federal courts. One ALJ estimated that as many as 80 percent of his cases are withdrawn and taken to federal courts. He said that the state is spending money and time to give only advisory opinions since many parties use the system to test cases before going to federal district court.

During our audit work, we encountered a few cases where charging parties completed the state administrative process before transferring to federal courts. The later in the process a withdrawal occurs, the more likely it is to be an unnecessary waste of state and respondent resources. Thus, a withdrawal after a formal hearing is of much greater concern than one before a formal hearing. In one of our sample cases, the charging party withdrew her case after a hearing, but before the ALJ ruled on the merits of the case. The attorney said he withdrew the case because to do so was legal under the statute. He added that although he took advantage of the system, the UADA should be strengthened so that charging parties cannot withdraw after a full hearing is held. In another instance, three charging parties withdrew their cases even after they had final orders in their favor; when UADD issued the

cause determinations, the respondent did not appeal, and the order became final. Even though the Industrial Commission's final order was enforceable in state district courts, the charging parties withdrew to pursue their claims in federal court where they could receive greater relief.

Analysis of other states' practices shows that some only allow whole relief like Utah while others have compensatory and punitive damages. For example, Arizona, Colorado, Nevada, and Wyoming only have whole relief. Montana and New Mexico, on the other hand, have provisions for compensatory damages. Idaho is the only neighboring state that allows limited punitive ($1,000 per each willful violation) and compensatory damages.

In our opinion the Legislature must decide, as a matter of policy, whether to amend UADA to allow compensatory and punitive damages. Allowing greater relief, as federal law already does, would eliminate the incentive that charging parties now have to withdraw in order to pursue their claims in federal court. Keeping cases in the system will make the state administrative process more meaningful. The drawback, however, is that more resources may be required to process those cases that stay in Utah's system.

Recommendations:

1. We recommend that the Legislature amend the Utah Anti-discrimination Act to limit charging parties' ability to avoid attorney fees by withdrawing after formal hearings are completed.

2. We recommend that the Legislature consider amending the Utah Anti-discrimination Act to allow punitive and compensatory damages.

Chapter VI
Legislature Should Examine Organizational Structure

The Legislature should consider changing the organizational structure under which anti-discrimination law is administered and enforced in Utah. In our opinion, many of the problems described in the preceding chapters result from administrative weaknesses that may be linked to UADD's placement within the Industrial Commission. Many critics of the existing system advocate the establishment of an independent Human Rights Commission to assume UADD's functions. While such a commission may be a reasonable approach to providing a more cohesive anti-discrimination process, it may not be essential. Among other options, the existing commission could be restructured to clarify administrative responsibilities and segregate them from judicial functions.

The three members of the Industrial Commission share equal authority to oversee many programs besides UADD. These other programs include the Department of Employment Security, Utah Occupational Safety and Health Division, Safety Division, Labor Division, Industrial Accidents Division, Uninsured Employers' Fund, and Employers' Reinsurance Fund. In addition, the Industrial Commission's Administration, Legal, and Adjudication divisions help it fulfill the needs of the program areas. By agreement, each commissioner assumes responsibility for a portfolio of the commission's areas. However, the commission's authority is vested in the body as a whole.

The shared authority of three members of the Industrial Commissioner is intended to ensure a balance of interests in carrying out its mission:

> *to serve the people of the state by assuring a safe, healthful, fair non-discriminatory work environment; to assure fair housing practices; and to promote the general welfare of the state's employees and employers without needless interference.*

Utah Code 35-1-1 requires that no more than two commissioners belong to the same political party. The commission chairperson explains that this requirement is intended to provide a balance of management and labor interests. In theory, Republicans are assumed to represent management and Democrats are assumed to represent labor.

While it was beyond the scope of this audit to evaluate the effectiveness of the Industrial Commission as a whole, we were asked to review its organizational impact on UADD. During our work, we learned that prior studies had recommended restructuring the commission. Furthermore, a restructuring of the commission is supported by some current and former commissioners. While others have examined the Industrial Commission more broadly, our work was limited to its anti-discrimination function. We did not attempt to evaluate other aspects of the commission's operations.

UADD has had Management Problems

During our audit we observed significant leadership and management problems at UADD. In the time frame of our audit we observed a division in turmoil so significant that the quality of performance was substantially affected. In our opinion the management problems do not have an easily identifiable or single cause. We feel those problems arose, at least in part, from a lack of administrative clarity resulting from organizational structure. However, the current commissioners feel that temporary personnel problems caused the management difficulties and that these personnel problems have been resolved.

Both of the last two directors of UADD report that they had difficulty managing the division because of their relationship to the commission. According to **Utah Code** 34-35-3, the director is the immediate supervisory head of UADD and is at all times under the direct supervision and control of the commission. However, one former director stated, *"The overall lack of support from the commission has made it impossible for me to effectively function in this position."* According to the other former director, *"The question is who is the immediate supervisory head."* The complaints of the two former directors include difficulty exercising staff leadership, commission involvement in day-to-day operations, and the inability to make staffing decisions. In contrast, the director who preceded the last two directors told us that he had a good working relationship with the commission and that the commissioners allowed him the freedom to manage the division. He reports that during his tenure, the commission always accepted his staffing recommendations and did not get involved in day-to-day operations.

According to the Industrial Commissioners the problems identified throughout the audit were caused by personnel, and not organizational structure. The commissioners explain that the most recent former director was not an effective manager and was unable to make tough decisions, particularly about staff. The commissioner over UADD felt she had to assume a more active management role of the division because the former director was not effective. Other important personnel problems at UADD included the retirement of one key staff person and the extended absence of another key staff person while on maternity leave. The commissioners believe that the most serious personnel problems of the agency now have been solved, and feel that once a new director is hired the division will improve.

Leadership of UADD has Suffered

During our audit we observed a leadership problem at UADD. Leadership problems at UADD are evident in the different visions staff members have of the division and in the distinct opposing factions that existed within the division.

Different staff members approach their jobs very differently depending on their vision of the UADD's mission. For example, Chapter III discussed how both the conduct of an investigation and its conclusions vary greatly depending on the staff member assigned to the case. One investigator also explained that she had a difficult time understanding her role as an

investigator because the division in general lacks direction. We found there is no shared vision among staff that could produce a coherent anti-discrimination policy. Early in our audit work we learned that some staff view the UADD mission broadly as eliminating discrimination while others view it more narrowly as processing complaints.

Clearly, different factions have existed within UADD staff, affecting division productivity. Early in the audit, UADD staff made it evident to us that they were divided into distinct factions. For example, some UADD staff alleged that other division members were exaggerating the success of the ADR program by inflating statistics about the performance of the program. In contrast, other UADD staff felt that some division personnel were trying to undermine the ADR program's performance by not handling paperwork appropriately, such as signing settlement agreements promptly. We also found the UADD staff split in who they regarded as the division's leader, some demonstrating an allegiance to the commissioner, others to the director. In fact, the most recent former director's leadership was criticized for failing to gain staff acceptance before preceding with projects. Her response to the criticism was that: *"Addressing the lack of leadership with staff, I will state again that it is difficult when I am not perceived as the one 'in charge'."* We asked staff members if productivity was affected by the turmoil, and many said it was.

Decision-making Authority has Been Ambiguous

In any multi-level organization, effective management requires a clear understanding of how authority is delegated. At the time of our audit, there was considerable ambiguity in the staff relationships. UADD staff told us that the poor relationship between the director and commissioner confused them and created uncertainty about decision-making authority. In some instances, staff did not know who to go to for direction. Many staff had direct contact with a commissioner on issues that normally would be handled through the division director. Staff told us that the commissioner would contact them about what other staff were doing. One staff stated that it was not uncommon for the commissioner to solicit staff information without the director's knowledge. Another staff explained that he was baffled why the commissioner would come to him on such staff issues. Because they felt the division director was unable to make staffing decisions, in January 1995 most division staff signed a written petition to the commission asking it to hire a contract clerical staff as a state employee.

Both of the last two former UADD directors were very critical of commission involvement in routine decisions. For example, one told the commissioners that: *"By making day-to-day decisions at a commission level, you erode the ability of your managers to manage. Additionally, you also run the risk of making bad decisions because you are the most removed from the information necessary to make informed decisions."* The most recent former director complained about the *"commissioners over-involvement in minute details of the division,"* and claimed that: *"The involvement of the commission in the division's daily activities, such as where people will sit, who will investigate what, who provides what clerical functions, who will answer calls, etc., is done without involving the director."* The former director felt the

commission undercut her ability to manage the division by not delegating the needed authority.

Some UADD staff as well as the commission felt the greater involvement was required because of the administrative weaknesses of the director. The commissioner told us she was sometimes drawn into decisions at the director's request because of the director's reluctance to make difficult or unpopular decisions. The former director responded that early in her tenure she willingly made the difficult decisions but the commissioner generally did not support them. The former director agrees that eventually she gave up and deferred difficult decisions to the commissioner. Some UADD staff also told us that the commissioner's involvement was very beneficial to the division by providing needed direction.

Authority to Make Staffing Decisions has Been a Concern

A particular concern of the prior two UADD directors was their inability to make decisions about their subordinate staff. Both hiring and firing decisions and staff structure changes within the division are made by the commission rather than the division director. The commissioners explain that they retain the authority to hire and fire state employees, but decisions about contract staff are delegated to the division director.

Staffing decisions are fundamental in the management of any organization. Indeed, the commission has considered such decisions to be so important that they have reserved all state employee hiring or firing decisions for all the divisions at the commission to themselves. However, in the view of two former UADD directors, the failure of the commission to delegate staffing authority inhibited their ability to manage the division. A reason cited in one resignation was that the *"commission would not support the hiring decisions of their management staff."* According to the other former director: *"Because my recommendation to terminate two individuals whose production levels were unacceptable, was never taken, it has made my job of performance management difficult."* However, the commissioner told us that the director had the authority to fire the two contract employees whose production was unacceptable, but did not exercise it. The commissioner said the most recent former director wanted the commissioner to fire contract employees that were not performing well because she "*did not want to do unpleasant things."* The former director denies her unwillingness to fire the two contract employees or take other unpleasant actions. She stated the commissioner denied her request to fire the two contract employees (for low productivity) and told her to allow them more time to prove themselves.

We observed two peculiar staffing conflicts between the director, staff, and commission during the audit that highlight the confusion over who manages UADD. One situation involved the hiring of a Support Specialist for UADD; the other involved the hiring for a clerical position in the Fair Housing Unit within UADD. While the commission states that it does the hiring and firing, it took inconsistent action on these hirings. In the former case, the commission stated that the director had the authority to make the decision, whereas in the latter, the commission stated that it made the decision as to who will be hired. In our opinion,

inconsistent practices on who does the hiring only confuses staff.

In addition to deciding whom will serve on the UADD staff, the commission also has controlled staff structure. While it certainly is important for the commissioners to retain control of their divisions' structures, the former UADD director felt the extent of that control inhibited her ability to manage. In fact, an Organizational and Staffing Proposal submitted by the most recent former director to the commission in March 1995, includes recommendations consistent with those we made in Chapter III. In particular, the former director proposed that the use of contract investigators be eliminated and that a supervisory position over investigators be created. Although the former director considered the proposed changes to be *"critical"* she was unable to get the commission to approve them.

A somewhat different organizational concern was voiced by the other prior director. She objected to reporting to different commissioners for the two divisions within the combined Labor/UADD division. In addition, she felt commissioners unreasonably expected division directors *"to keep all commissioners informed about activities unique to the division."* In her view, by *"the creation of multiple reporting relationships, you either by design or unintentionally have set me up to fail."*

Compared to observations of the past two directors discussed above, the commissioner supervising the UADD anti-discrimination function views the relationship between the commission and the UADD director quite differently. She points out that **Utah Code** 34-35-3 states the UADD director *"shall at all times be under the direct supervision and control of the commission."* The commissioner feels there is no problem with having the director report to two different commissioners for the two distinct roles within UADD of labor and anti-discrimination, and that it is not burdensome to ask the director to communicate items of importance to all three commissioners. She also states that: *"it is the commissioners that are ultimately responsible for the success and/or lack of success within a division"* and therefore they must be involved in personnel decisions. Furthermore, in response to the criticism that the commission is too involved in day-to-day decisions, the commissioner responded that rather than reflecting a failure to delegate needed authority, it represents a belief in shared decision making. It is the commissioner's *"philosophy that decisions are most effective when made by all those who are concerned including support staff and commissioners, and arriving by joint discussion at the best decision possible."*

In summary, during the time frame of our audit we observed a division with significant management and leadership problems. While these problems do not have an easily identifiable or single cause, we feel a contributing factor was a lack of administrative clarity resulting from organizational structure. As discussed below, prior studies have identified poor accountability as a key weakness with the commission form of government. Individual commissioners as well as the commission as a whole are not directly answerable for their administrative actions to anyone else in state government. The remaining sections of this chapter discuss the concerns raised by past studies about the commission form of government, and compare the

organizational structure of the Industrial Commission to the organizational structure of surrounding western states' civil rights agencies.

Organization Changes Should be Considered

We feel the Legislature should consider changing the organizational structure under which anti-discrimination law is administered and enforced in Utah. Even though personnel problems may have contributed to management problems at UADD, we feel organizational issues also are relevant to the division's problems. Of course, we did not review the Industrial Commission's other responsibilities besides employment anti-discrimination. The discussion in this chapter is only from the perspective of UADD.

Prior Studies Have Addressed Industrial Commission Structure

Although our audit field work was limited to employment discrimination issues, we did review broader studies of the Utah Industrial Commission. The commission structure helps insulate decision making from political pressure because commissioners serve six-year staggered terms of office. Thus, no more than one commissioners should be subject to pressure over possible reappointment at any time. In addition, a multi-member body may bring balance to decisions by ensuring that differing viewpoints are considered. However, the studies we reviewed recommended changing the Industrial Commission structure. Although sharing authority in a multi-member body is appropriate when making judicial rulings, its effectiveness in the administrative realm is questionable. In particular, the insulation of the commission from the governor's control and the dividing of responsibilities among commissioners does not provide clear accountability for performance. Furthermore, vesting the same body with both administrative and judicial responsibilities does not give the appearance of nor does it ensure that when administrative actions are questioned they will be impartially reviewed.

Prior studies have recommended changing the Industrial Commission's structure. Thirty years ago the Little Hoover Commission report characterized administrative commissions as *"the most significant and crippling managerial problem in state government."* The Little Hoover Commission was established by the 1965 Legislature to conduct a comprehensive evaluation of state government to promote economy, efficiency and improved services. Although its recommendation to abolish the Industrial Commission was not implemented, the Little Hoover Commission was the impetus for eliminating or changing the roles of many other state commissions. About 15 years ago the Committee on Executive Reorganization reported that only two administrative commissions remained in state government--the Industrial Commission and the Tax Commission--and recommended changing their roles. Since 1983, when the Legislature established the position of Tax Commission Executive Director, the Industrial Commission has been the only remaining administrative commission. More

recently, Governor Leavitt's Transition Committee recommended restructuring the Industrial Commission to provide stronger administration. In addition, some current and former commissioners have stated the commission's administrative structure should be changed.

The first major weakness of the commission structure is that administrative effectiveness is hampered when authority is vested in a three-person body. The Little Hoover Commission criticized administrative commissions as *"unsuited to prompt and decisive action and a major hurdle to effective executive management."* Moreover, an administrative commission may not *"be responsive to the people of Utah since no one can really be held accountable for good, bad, or indifferent administration."* The Committee on Executive Reorganization reported that: *"accountability is diffused when an agency is administered by a multi-headed mechanism like the commission."* Governor Leavitt's Transition Committee also expressed the concern that: *"Three equal commissioners assure an opportunity for all to be heard, but without strong administrative guidelines employee confusion can take place."*

The second principal weakness of the commission structure is the mixing of executive, legislative, and judicial functions. The Little Hoover Commission identified a basic management need that, *"He who judges ought not to formulate the rules and administer the program. Functions should be separated in the interest of impartiality and fairness."* The Committee on Executive Reorganization favored *"the separation of quasi-judicial appeals hearing functions from the administration of programs. Such separation tends to provide more of a impartial resolution mechanism for complaints, disputes, and appeals regarding administrative decisions of line agencies."*

Because of concerns with the commission form of administration, the Little Hoover Commission called for *"… a simplified plan of organization which can provide for more dynamic leadership in carrying out the state's important responsibilities for the protection of its labor force."* More recently, Governor Leavitt's Transition Committee reached a similar conclusion. That committee reported that: *"Careful consideration should be given to restructuring the commission to provide stronger administration… The committee further recommends that consideration be given to changing the structure to provide for a single administrator with a three-member commission to perform appellate responsibilities on a possible part-time basis."*

Some Commissioners Have Expressed Concerns. Some current and former commissioners also question the administrative effectiveness of the commission form of government. One current commissioner told us that from a management perspective one commissioner is better than three. The current commission chairman told us that after 28 years as a commissioner he now feels a change is warranted.

Two former commissioners also told us that the commission structure is not an effective way to administer an agency. One former commissioner reports that: *"The 'management by committee' approach is costly, ineffective, creates confusion and diffuses accountability in administration of the agency. Decisions are left in suspension -- no one is responsible and gridlock prevails."* Another former commissioner describes the commission structure as antiquated and claims that it makes it difficult to create direction for the agency.

Other States Organize Their Anti-discrimination Function in a Variety of Ways

As part of evaluating the organizational structure of UADD, we researched to the organizational structure of neighboring western states to help legislators better understand UADD. The Utah Industrial Commission is unlike the agencies that administer and enforce anti-discrimination law in other states. At the request of legislators, we contacted the employment anti-discrimination agencies in the seven other intermountain states and reviewed their authorizing legislation. We specifically addressed the role of the commissioners to identify who is responsible for the daily administration of the agency and who is responsible for the judicial function in the agency. Figure VI provides a brief summary of the organization and responsibilities of other states' civil rights agencies.

Figure VI
Organizational Structure of Other States

State Agency	Responsibilities of Commission
UTAH Industrial Commission, Anti-Discrimination Division	■ The Industrial Commission is directly responsible for administering a number of areas of law including workers compensation, employment security, occupational health and safety, and anti-discrimination. Three commissioners are the executive administrators for the commission. In addition, the commissioners are the judicial board for appealed anti- discrimination and other decisions.
ARIZONA Arizona Office of Attorney General, Civil Rights Division	■ Arizona does not have a commission. The agency is within the Attorney General's office.
COLORADO Dept. of Regulatory Agencies, Colorado Civil Rights Division	■ The Division has commissioners. The judicial and administrative functions are separate. The judicial function for the division is done by the Civil Rights Commissioners who serve part-time. The daily administration for the agency is handled by the executive director.
IDAHO Idaho Human Rights Commission	■ The commissioners have judicial and administrative power, but do not perform any administrative functions. They delegate the daily admin- istration of the commission to a director. The commissioners serve part- time and handle judicial functions.
MONTANA Montana Department of Labor & Industry, Human Rights Commission	■ The commissioners have judicial and administrative authority. However, the commissioners only perform a judicial function and delegate the daily administration of the commission to an administrator. The commissioners serve part-time.
NEVADA Dept. of Employment Training & Rehabilitation, Nevada Equal Rights Commission	■ The commissioners fulfill an advisory function. All administrative functions are performed by the Department of Employment Training & Rehabilitation.
NEW MEXICO New Mexico Department of Labor, Human Rights Division	■ The division has commissioners. The judicial and administrative functions are separate. The commissioners for the Human Rights Commission perform the judicial function and serve part-time. The division is administered by the director.
WYOMING Wyoming Department of Employment, Labor Standards Division	■ Wyoming does not have a commission; its Labor Standards Division is within the Department of Labor.

As shown in Figure VI, the Utah Industrial Commission is unique compared to commissions in other states. We found the western states are organized in a variety of ways, but no other

states have commissioners performing the administrative function, no other states have multiple administrators like Utah, and no other states have their commissioners performing administrative and judicial functions like Utah. In addition, Utah is the only state that has commissioners responsible for administering and adjudicating more than one area of law. The commissions in all other states are specific to civil rights enforcement, and most only serve in a judicial and legislative advising capacity. Further, all other commissions either do not have administrative responsibilities or have delegated those responsibilities to a chief administrator, as in Idaho and Montana.

Many Organizational Options Exist

If the Legislature finds it necessary to change the organizational structure under which anti-discrimination law is administered and enforced in Utah, many alternatives are available. In our opinion, if any change is made, the guiding principles should be those identified 30 years ago by the Little Hoover Commission. First, management effectiveness is enhanced by *"fixing authority and responsibility and by insuring accountability for performance*" in a single administrator. Second, fairness of administrative actions is enhanced by *"separation of judicial function from administrative activity to guard against arbitrary administrative action."*

In recent years, critics frequently have questioned the placement of UADD in the Industrial Commission. For example, while the Governor's 1993 task force was not asked to address the organizational placement of UADD, the issue was raised in its meetings. The task force deferred any action to the Legislature, recommending: *"the formation of a legislative study committee to study the establishment of a Human Rights Commission in Utah."* Another option, which some prior studies recommended is restructuring the Industrial Commission. While only these two options are discussed below, many different organizational structures could be designed.

Human Rights Commission has Been Proposed. Advocates of a Utah Human Rights Commission point to those in other states as successfully enforcing employment discrimination laws. While we did not find a single model for a Human Rights Commission in the other western states, under this alternative the Legislature could give the commission only judicial responsibilities; another individual (not a commissioner) could be given administrative responsibility over UADD. According to the agency directors in Idaho, Colorado, and Montana the advantage of an independent commission is that it helps to insulate the work of civil rights enforcement from political interests that may be opposed to civil rights enforcement. In addition, they explain that establishing a Human Rights Commission makes a strong statement about the government's commitment to a fair workplace.

Establishing an independent Human Rights Commission is a policy decision. Our audit cannot draw any conclusion about how an independent commission may perform. Idaho is the only state that has an independent Human Rights Commission. In all other states, excluding Arizona, the civil rights enforcement agency is placed in a department. According to the

directors in Montana and Colorado, their agencies are only placed in a department for budget purposes, and the agencies operate independent of the department. With the exception of Wyoming, these states have appointed commissions within the department that function in a judicial capacity.

Industrial Commission Could be Restructured. A second way to change the organizational structure under which anti-discrimination law is administered and enforced is to restructure the Industrial Commission. Under this alternative, UADD would remain part of a larger organization such as the current commission or perhaps a department of labor. However, administrative responsibility for the department level organization would be fixed in a single individual rather than the three-member body. The three-member commission could be retained for appellate functions only.

Because our work was limited to an evaluation of the anti-discrimination process, we have not assessed how other commission responsibilities would be affected by the proposed restructuring. However, as noted earlier, some current and former commissioners believe some change is needed and a number of prior studies have recommended a commission restructuring.

If the commission's administrative responsibilities were eliminated, it could be retained as an adjudicative body. One model is a part-time commission that could hear appeals from hearings conducted by the administrative agency. Another model is to eliminate the commission entirely and have appeals go straight to the judiciary. The commission's former presiding administrative law judge felt the lay commissioners should be removed from the adjudication process entirely because they were not qualified to make judicial reviews.

Recommendation:

1 We recommend that the Legislature consider changing the organizational structure under which anti-discrimination law is administered and enforced in Utah. Many organizational options exist including establishing a Human Rights Commission, or restructuring the Industrial Commission.

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Agency Response