

September 23, 1996
ILR 96-F

President R. Lane Beattie, Co-chairman
Speaker Melvin R. Brown, Co-chairman
Members of the Audit Subcommittee
State Capitol Building
Salt Lake City, Utah 84114

Subject: Follow-up Review of the Utah Anti-discrimination Division

Dear Legislators:

As you requested, we have conducted a follow-up to **A Performance Audit of the Utah Anti-discrimination Division**, (report #96-01) released in February 1996. Our follow-up work was done to assess what progress the Utah Anti-discrimination Division (UADD) has made since the report was issued. We are pleased to report that progress has been made on our recommendations over the last six months, although some issues still need to be resolved. These recommendations and the reported action taken by the division are detailed in this letter. Even with the noted progress, we are concerned that ongoing staffing issues continue to affect the ability of the division to function effectively.

Our February audit report found a need for minor improvements in UADD's intake and alternative dispute resolution (ADR) areas, those processes at the beginning of a complainant's contact with the division. We also reported on some significant concerns with the investigations process and recommended that improvements be made in the management control of that area. Further, the report indicated that some legislative changes were needed in addition to actions that could be taken by UADD in certain areas. These include presenting cause findings in adjudicative hearings, coordinating with the Industrial Commission's Adjudication Division, restricting charging parties' ability to withdraw complaints, and finally considering whether the organizational structure of the Industrial Commission itself needs to change.

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It should be pointed out that several important changes have occurred at UADD since our report came out. A new division director was hired in April, nearly all the investigative staff who were at the division during our audit have left the division, and present investigative staffing is low because of several staff leaving the division recently. In addition, the case manager recently announced her resignation. Finally, the commissioner assigned to provide administrative oversight for UADD has changed.

While UADD has made significant progress, challenges remain. As mentioned, turnover of investigative staff has been substantial. The inventory of pending cases has grown, largely as a result of fewer investigative determinations being written. Because of the decrease in case closures, the division recently cut back its contract with EEOC by 150 cases which will mean a loss of \$75,000 in revenue. The reduction in case closures appears to us to be largely related to staff turnover. To continue to make progress, the division will need to identify and deal with the cause of staff turnover.

Chapter II Recommendations and Reported Action

The first set of recommendations came from Chapter II, titled "Minor Improvements can be Made in Intake and ADR." ADR means alternative dispute resolution and involves a mediation process conducted between the charging party and respondent that occurs prior to full investigation.

Recommendation #1

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

Reported Action: Implemented

According to UADD administration and staff, an informational video is shown to each charging party prior to having an intake interview. Audit staff also observed the video being shown to parties during our follow-up work at the division. UADD advisory committee members commented to us that the video needs some changes, and the division director has also indicated that as time and budget allow, changes will be made to improve the video.

Recommendation #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.

Reported Action: Implemented

The issue addressed by this recommendation is that people bringing in a complaint of discrimination should be provided with enough information up front to enable them to make an informed decision about proceeding with the process, and that the division obtains enough information to assess whether there is a legal basis for pursuing a case. The intake officer told us that prior to coming in for an intake interview and in addition to watching the informational video, complainants have received a packet of information on UADD and the administrative process that is followed. During the intake interview, the intake officer goes over the intake questionnaire with the party, with the aim of assessing whether there are grounds for a *prima facie* case, meaning that the alleged act of discrimination falls under one of the legal categories in the Utah Anti-discrimination Act. However, the intake officer told us that the “bottom line” is that even if it does not appear that they have the basis for a case, if a person wants to file a complaint, he/she can file it. In other words, cases may be accepted that have no chance of leading anywhere for the complainant. This causes concern in light of comments made by one of the investigators that some cases assigned to investigators were cases where there was no basis or the division had no jurisdiction according to the content of the file. We also heard from some advisory committee members who have concerns that the intake process does not adequately screen out cases that should not be accepted, resulting in wasted resources at the division.

Recommendation #3

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

Reported Action: Partially Implemented

Although not set in written policy, the intake officer position is presently filled by an experienced investigator. The division director recognizes that the intent of this recommendation is to ensure that the intake function is performed by someone with the knowledge and experience needed to answer a charging party’s questions and also to establish whether the UADD has jurisdiction in the particular complaint. Although there

does not appear to be an intention to develop a policy statement about experience needed for the intake position, the division director may want to consider that a position description be developed for the intake officer position in which the job requirements should state the necessity for investigations experience.

Recommendation #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.*

Reported Action: In Process

During the original audit, staff observed that mediators followed a variety of mediation styles and also that notes from mediation conferences sometimes ended up in investigation files. Because of this and also because both volunteer and UADD staff conduct mediations, a recommendation was made aiming to achieve greater consistency in the ADR process. Draft ADR policies provided to us during the follow-up show that all points in the recommendation are being addressed as policies are developed.

Recommendation #5

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

Reported Action: Implemented

According to UADD staff, a more informative cover letter is being sent out to the parties along with the previously sent information on the resolution process. UADD staff also noted that the video now being shown prior to intake interviews contains a section on ADR as well. The cover letter informs parties that the resolution conference is informal, voluntary, and confidential, and that it is not a hearing where a determination will be imposed. Information sent with the letter reiterates that the conference is not a formal hearing and that it is a step occurring prior to investigation.

Chapter III Recommendations and Reported Action

The second set of recommendations comes from Chapter III, titled "Management Control is Needed for Investigations." Our report found that several important improvements were needed in the investigations area.

Recommendation #1

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

Reported Action: In Process

The intent of this recommendation was to address a number of ongoing staffing concerns. These included the practice of asking temporary staff, who earn less per hour and go without benefits, to perform the same work as permanent staff earning more per hour and getting benefits. Also, because the contract staff are limited to a two-year term of employment, the time spent on training at the beginning and possibly searching for other employment at the end of the term reduces the overall effectiveness of contract staff. At the time of this follow-up work, there were no contract staff working in the investigations area. The division director indicated his intent to request two new permanent staff positions in next year's budget, and the Industrial Commission administrative services manager indicated that funds formerly used to pay contract staff salaries would pay for part of the new positions' pay.

Recommendation #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.*

Reported Action: Implemented

The February audit reported that procedures and investigation documentation varied widely among the staff; this recommendation was intended to provide for consistency in the investigations and documentation of the important work done by the staff. According to documents provided by UADD and the commissioners, procedures have been developed or in some cases updated to provide increased detail for staff, including coverage of the areas listed in the recommendation. According to the UADD case manager, the procedures are official, having been approved by the commissioners.

We reviewed a small sample of open case files from two of the three present investigators in order to look for some evidence of the new procedures having been put into practice. We were unable to ascertain from documents in the files that they have been reviewed with the case manager, although the staff indicated that regular meetings do occur during which their cases are reviewed with the case manager. In addition, some files contained an investigative plan while others did not; also, it was not always clear from the documents in a file that on-site interviews were being done. As a result, the division director may want to consider implementing a control mechanism that provides for checking off and dating when important processes are initiated and completed, so that some evidence of supervisory review is provided.

Recommendation #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.

Reported Action: Implemented

A training manual has been prepared and was used to train the two most recently hired investigators, according to the case manager. Additional training resource manuals that have previously been kept available in the case manager's office have been duplicated and provided to each investigator. Also, some training sessions have been attended by staff, and when one or two staff attend out-of-town training, the director plans to have them return and train the rest of the staff. Other outside training resources are also being identified; for example, the division director indicated that EEOC staff who come to Salt Lake City on assignment will be asked to provide training to UADD staff.

Recommendation #4

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

Reported Action: Implemented

This recommendation builds on the base provided by the previous recommendations. Once procedures are in place and training solidified, actual performance should be supervised and reviewed to ensure that procedures are followed. Discussions with the division director and the case manager as well as information provided by the division indicate that the case manager has been assigned the responsibility as lead investigator. Duties include review of all cases before they are given to the director for final approval and also supervisory responsibilities over the staff. For example, the case manager told us she meets with the investigators on a regular basis for work review. Investigators also told us they have been meeting with the case manager to review cases. Investigators must prepare an investigative plan for her approval and all subpoenas are also given to her for approval. In addition, cases achieving resolution in ADR flow through the case manager prior to going to the director.

Recommendation #5

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

Reported Action: Implemented

As indicated in the discussion for the prior recommendation, the case manager has been assigned the responsibility for investigative supervision and review. UADD's organizational chart lists the incumbent as a lead investigator, and the division director indicated that the case manager's salary has been enhanced, although the grade level has not changed as of the end of our follow-up work.

Chapter IV Recommendations and Reported Action

In Chapter IV of the February report, titled "Legislature Should Allow UADD to Participate in Formal Hearings," we discussed our view that allowing UADD to participate in formal hearings would make the investigation process more meaningful. To accomplish this, a legislative change was needed in the Utah Anti-discrimination Act. In addition to this issue, the

report recommended that better communication between UADD and the Industrial Commission's Adjudication Division was needed. Cases are sent from UADD to Adjudication if a party requests a formal hearing after a determination. The audit found that inefficiencies resulted from a lack of communication between the two divisions.

Recommendation #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.*

Reported Action: Implemented

During the 1996 Legislative session, Senate Bill 294 was passed, amending the Utah Anti-discrimination Act. The amendment gives the UADD responsibility to present the legal and factual basis for cause findings in adjudicative proceedings.

Recommendation #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 the ALJ's decision.*
- 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 ALJs' decisions to UADD.*

Reported Action: Implemented

These recommendations were made because lack of coordination between the divisions resulted in inefficiencies. The UADD case manager indicates that present practice is to keep track of all cases that are sent to the Adjudication Division. As decisions are rendered by Administrative Law Judges (ALJs), the UADD director is notified by Adjudication. In a recent case where UADD's finding was overturned in a hearing, the case was reviewed by UADD administration, then circulated to staff for their information. Both the case manager and director have indicated that decisions will be circulated to staff for feedback and training purposes. Withdrawals are communicated between the divisions as well.

Chapter V Recommendations and Reported Action

In Chapter V of the audit report, "Legislative Changes Could Control Withdrawals," legislative changes were discussed that could control withdrawals by charging parties under certain circumstances. At present, the law allows withdrawals even after a formal hearing has been held and a decision rendered. Thus, a charging party can pursue even a frivolous case through a formal hearing, then withdraw without penalty once he/she finds out legal fees will be assessed. Also, because the law presently limits relief to "reinstatement, back pay and benefits, and attorneys' fees and costs," strong cases are often withdrawn and taken to the federal system, which allows for greater relief through punitive and compensatory damages.

Recommendation #1 and #2

- 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.*

Reported Action: In Process

At the time this follow-up report was being written, the Industrial Commission and UADD director were developing some proposed legislation for the next legislative session. According to the commission's legal counsel, the early drafts of the proposed amendments include language to address both recommendations above.

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Chapter VI Recommendations and Reported Action

Finally, Chapter VI of the report, "Legislature Should Examine Organizational Structure," recommended that the Legislature consider changing the Industrial Commission's organizational structure, stating that many of the problems discussed in the report resulted from administrative weaknesses that may be linked to UADD's placement within the Industrial Commission. After raising a number of policy issues for the Legislature to consider, the report made the following recommendation.

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.

Reported Action: In Process

The Industrial Commission's response to this recommendation is that House Bill 375, which created the Department of Workforce Services during the last legislative session, provided for a study committee to review issues including the Industrial Commission's organizational structure and the location of the division. The commission indicates it is working with this work group. Our review of the work group's meeting minutes to date shows that the organizational issues have not been resolved to the point of making a recommendation.

We hope this letter provide you with the information you need. If there is any additional information you want or any point on which you would like further clarification, please feel free to contact our office.

Sincerely,

Wayne L. Welsh
Auditor General

WLW:LSM/lm