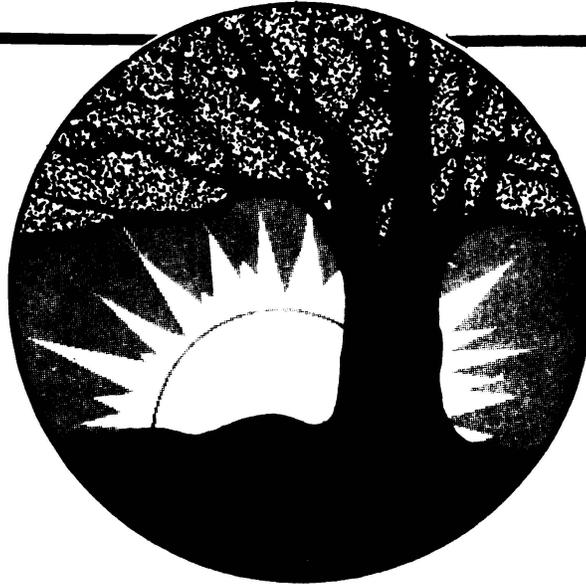


# PERFORMANCE AUDIT

**Human Rights Commission  
April 2011**



**Justin P. Wilson  
Comptroller of the Treasury**



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Comptroller of the Treasury  
Department of Audit  
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April 11, 2011

The Honorable Ron Ramsey  
Speaker of the Senate  
The Honorable Beth Harwell  
Speaker of the House of Representatives  
The Honorable Bo Watson, Chair  
Senate Committee on Government Operations  
The Honorable Jim Cobb, Chair  
House Committee on Government Operations  
and  
Members of the General Assembly  
State Capitol  
Nashville, Tennessee 37243

Ladies and Gentlemen:

Transmitted herewith is the performance audit of the Human Rights Commission. This audit was conducted pursuant to the requirements of Section 4-29-111, *Tennessee Code Annotated*, the Tennessee Governmental Entity Review Law.

This report is intended to aid the Joint Government Operations Committee in its review to determine whether the commission should be continued, restructured, or terminated.

Sincerely,

Arthur A. Hayes, Jr., CPA  
Director

AAH/dww  
10-058

State of Tennessee

# Audit Highlights

Comptroller of the Treasury

Division of State Audit

Performance Audit  
**Human Rights Commission**  
April 2011

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## AUDIT OBJECTIVES

The objectives of the audit were to determine the commission's response to a 2008 Division of State Audit investigation which found that one investigator was fabricating interviews with complainants; determine whether the commission is meeting Equal Employment Opportunity Commission performance criteria; determine whether the commission is meeting Department of Housing and Urban Development performance criteria; determine if the commission has a disaster recovery plan; determine if the commission is adhering to the Records Disposition Authorization policy for discarding investigated and closed cases; determine whether the commission is providing Title VI training to employees as stated in its Title VI plan; and determine if the commission is submitting the notice of vacancy and notice of appointment to the Secretary of State's Office during the time required in Section 10-7-605, *Tennessee Code Annotated*.

## FINDINGS

**The Tennessee Human Rights Commission Is Violating Its Contract and Workshare Agreement With EEOC by Submitting Cases to the EEOC as Closed Prior to the Exhaustion of All Administrative Remedies Available to the Charging Party, Possibly Shortening the Time Available for Complainants to Act on Their EEOC Right to Sue**

The commission's contract with the Equal Employment Opportunity Commission states that case files are not to be submitted

for contract credit until all possible appeal time limits or processes are completed. Submitting files for contract credit before the time for appeals is expired appears to infringe on the complainants' EEOC rights. For appeals, the average days remaining was 44 instead of the 90 days allowed by the EEOC (page 8).

**Employment Complainants Are Inappropriately Being Instructed to “Do Nothing” Until They Receive Notice of Determination Despite Having a Right to File a Private Action Suit in State Court Independent From THRC**

The commission’s actions are inconsistent with Section 4-21-311, *Tennessee Code Annotated*, which allows complainants to seek a different remedy independent of the commission so long as the complainant files suit prior to the agency’s determination and within one year of the alleged discrimination. Auditors did not find evidence that the investigators or management was informing complainants of their right to sue prior to the commission’s Notice of Determination, but rather, letters stated that complainants “are to do nothing” until receiving a Notice of Determination from the commission (page 13).

**The Tennessee Human Rights Commission Does Not Have a Specific Operating Procedure to Accurately and Consistently Evaluate the Timely Receipt of Reconsideration Requests for Employment Cases, Resulting in Inconsistent Treatment of Requests for Reconsideration**

Complainants can file an application for reconsideration of the commission’s decision within 30 days of receiving the

Notice of Determination. Without a written procedure, the commission cannot ensure that it is applying state law fairly to those who file reconsideration requests (page 16).

**Human Rights Commission Management Failed to Maintain a Key Internal Control That Had Been Recommended and Accepted in Response to a State Audit Investigation of Falsified Case Information**

For a limited time, the commission independently confirmed interviews conducted by investigators after one investigator falsified case records. However, the commission discontinued the practice after four months. A system of independent confirmations of interviews serves as a strong deterrent to future fraud (page 18).

**Housing Complaint Case Investigations Are Not Always Completed in a Timely Manner**

The federal Department of Housing and Urban Development noted in performance reviews that the commission did not meet performance standards for closing cases (although the commission met eight other performance standards). The commission should develop ways to increase its federal reimbursement by closing cases in the most timely manner (page 21).

**OBSERVATION AND COMMENT**

The audit also discusses the following issue: The agency’s employment case processing efficiency appears to be within contract guidelines; however, analysis of report data shows trends of activities that are moving toward noncompliance with guidelines, which could mean the agency’s efficiency is decreasing (page 26).

# Performance Audit Human Rights Commission

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# **Performance Audit Human Rights Commission**

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## **INTRODUCTION**

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### **PURPOSE AND AUTHORITY FOR THE AUDIT**

This performance audit of the Human Rights Commission was conducted pursuant to the Tennessee Governmental Entity Review Law, *Tennessee Code Annotated*, Title 4, Chapter 29. Under Section 4-29-228, the Human Rights Commission is scheduled to terminate June 30, 2011. The Comptroller of the Treasury is authorized under Section 4-29-111 to conduct a limited program review audit of the agency and to report to the Joint Government Operations Committee of the General Assembly. The audit is intended to aid the committee in determining whether the Human Rights Commission should be continued, restructured, or terminated.

### **OBJECTIVES OF THE AUDIT**

The objectives of the audit were to

- determine the commission's response to a 2008 Division of State Audit investigation which found that one investigator was fabricating interviews with complainants;
- determine whether the commission is meeting Equal Employment Opportunity Commission performance criteria;
- determine whether the commission is meeting Department of Housing and Urban Development performance criteria;
- determine if the commission has a disaster recovery plan;
- determine if the commission is adhering to the Records Disposition Authorization policy for discarding investigated and closed cases;
- determine whether the commission is providing Title VI training to employees as stated in its Title VI plan, and determine whether complainants are receiving Title VI information; and
- determine if the commission is submitting the notice of vacancy and notice of appointment to the Secretary of State's Office during the time required in Section 10-7-605, *Tennessee Code Annotated*.

## **SCOPE AND METHODOLOGY OF THE AUDIT**

The activities of the Human Rights Commission were reviewed for the period August 2008 to September 2010. We conducted this performance audit in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Methods used included

1. review of applicable legislation and policies and procedures;
2. an examination of commission files, documents, and policies and procedures; the work-sharing agreement with the U.S. Equal Employment Opportunity Commission; and the cooperative agreement with the U.S. Department of Housing and Urban Development;
3. a review of prior performance audit and financial and compliance audit reports and audit reports from other states; and
4. interviews with commission staff and board members, staff of other state agencies that interact with the agency, advocacy groups, and personnel of the Equal Employment Opportunity Commission and Department of Housing and Urban Development.

## **HISTORY AND STATUTORY RESPONSIBILITIES**

Section 4-21-202, *Tennessee Code Annotated*, provides for the Human Rights Commission to promote the creation of local human rights commissions and enter into working cooperative agreements with them; receive, initiate, investigate, seek to conciliate, hold hearings on, and pass upon complaints alleging civil rights violations; furnish technical assistance on request to help organizations further their compliance; and cooperate with the U.S. Equal Employment Opportunity Commission in its enforcement of the Civil Rights Act of 1964 and with the U.S. Department of Housing and Urban Development in its enforcement of the Fair Housing Act of 1968. Under Section 4-21-905, *Tennessee Code Annotated*, a person alleging discrimination by state agencies receiving federal funds may file a complaint with the state agency or with the commission.

## **COMMISSION COMPOSITION AND STAFF**

The commission has 15 members appointed by the Governor, 5 from each grand division of the state. The members are to be appointed on a nonpartisan basis and be broadly representative of employees, proprietors, trade unions, religious groups, human rights groups,

and the general public. Commissioners are appointed for six-year terms and may be reappointed. The commission meets bimonthly.

Section 4-21-202 gives the commission the authority to appoint an Executive Director annually and set the director's compensation, as well as to maintain offices in Shelby, Davidson, Knox, and Hamilton counties and other offices as necessary. The current Executive Director was initially appointed in July 2007.

The central office is in Nashville with regional offices in Memphis, Chattanooga, and Knoxville. The commission has 12 investigators and 15 other staff providing administrative and support services. An organization chart of the Human Rights Commission is on the following page. The investigators specialize in employment or housing cases.

## **REVENUES AND EXPENDITURES**

The commission had total expenditures of \$2,148,900 for the year ended June 30, 2010. The budget for the fiscal year ending June 30, 2011, is \$2,343,000. In that budget, \$1,594,100 (68%) will be funded from state appropriations and \$748,900 (32%) will be federal revenue under agreements with the U.S. Equal Employment Opportunity Commission and the U.S. Department of Housing and Urban Development.

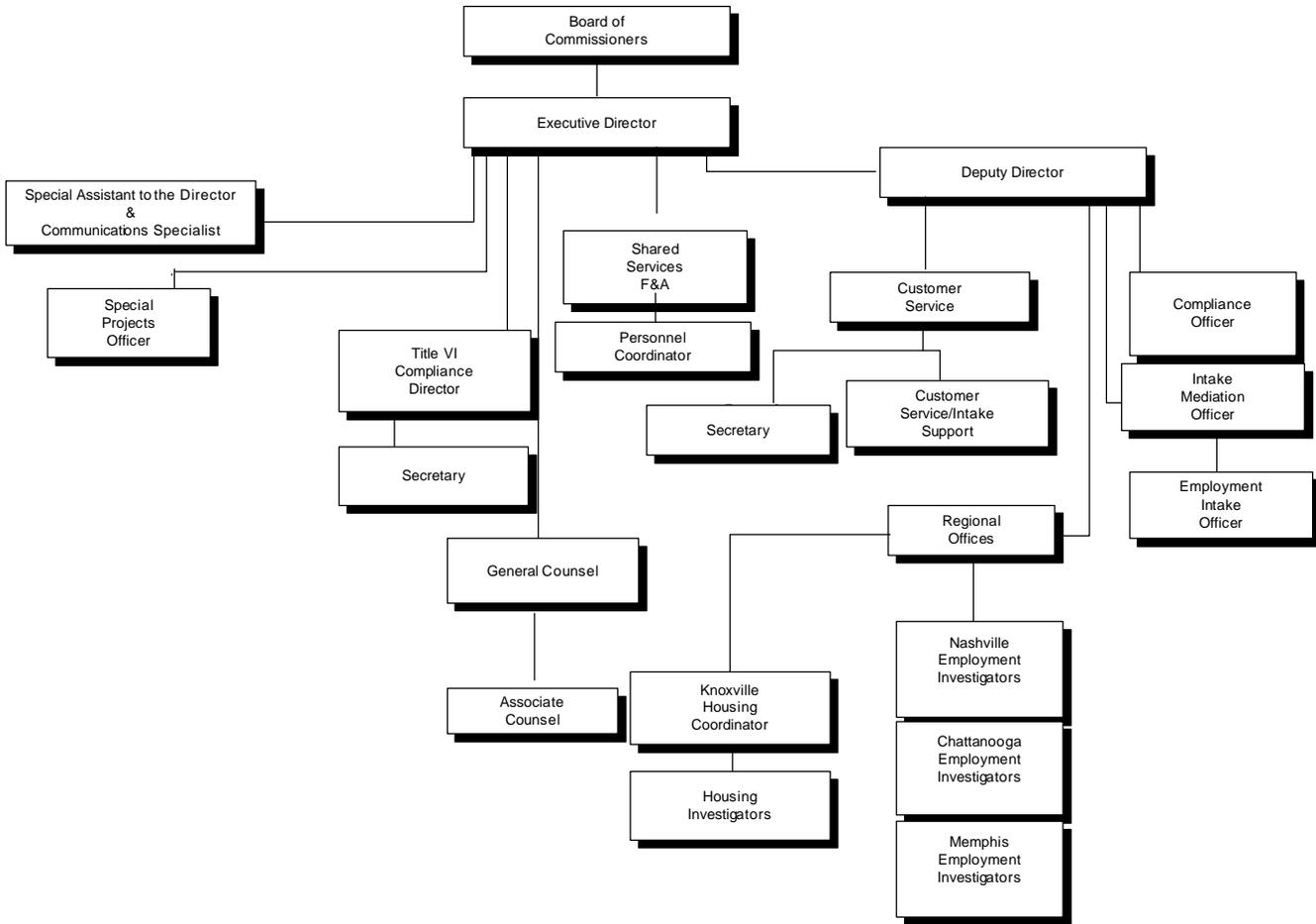
## **INTERACTION WITH FEDERAL AGENCIES**

The staff investigate charges of discrimination under federal jurisdiction through contracts with the U.S. Equal Employment Opportunity Commission and the U.S. Department of Housing and Urban Development. Federal jurisdiction complaints are dual-filed—one copy of the complaint is sent to the state and another is sent to the relevant federal agency.

### Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is responsible, under federal law, for enforcing laws against employment discrimination when the employer has 15 or more employees. Under state statute, an employer must have eight or more employees before charges of discrimination can be made. Any complaint against an employer with between 8 and 15 employees falls under state (and commission) jurisdiction only. Pursuant to a work-sharing agreement renewed annually, employment-related complaints in Tennessee against employers with 15 or more employees are filed with both the commission and the EEOC. The EEOC pays the commission \$550 for each complaint resolved and provides additional funds annually for travel expenses. The EEOC also provides the commission with \$50 for cases that make it through the intake process and are found to be non-jurisdictional for the commission. The EEOC provides guidelines for resolving and investigating complaints. Cases are reviewed by the EEOC after submission for credit against the work-sharing agreement.

# Human Rights Commission



## Department of Housing and Urban Development

The Department of Housing and Urban Development (HUD) is responsible for enforcing federal fair housing laws. Under a cooperative agreement, HUD pays the commission \$2,600 for each housing discrimination complaint investigated and closed, and additional amounts for training and administrative costs. HUD also provides guidelines for resolving complaints and reviews cases submitted by the commission for compliance with the guidelines.

### **COMPLAINT-HANDLING PROCESS**

Sections 4-21-302 through 311, *Tennessee Code Annotated*, describe the process for filing and handling charges of discrimination. Persons who believe they have been discriminated against may charge discrimination, or a commission member may bring charges on behalf of someone. The charge is a written, sworn complaint stating a discriminatory practice has occurred. A description of the alleged discriminatory act and facts sufficient to enable commission staff to identify the person or persons charged (respondent) are included. Statute requires a complaint to be filed within 180 days of the alleged discriminatory act and requires the commission to furnish the respondent a copy of the complaint within 10 days.

A central intake unit was opened in January 1998 in the Nashville office to handle the intake process for the commission. The intake unit is responsible for taking the initial complaint, notifying respondents, receiving position statements from respondents, and transmitting complainant and respondent rebuttals to the opposing party. Once these steps are completed, the Deputy Director assigns the case to an investigator. The Executive Director and Deputy Director set caseloads and closure goals and communicate this information to staff through meetings, memoranda, and individual contact with investigators.

The investigators are responsible for obtaining the necessary information to make a determination. They review the complaint and the position statement from the respondent and interview the complainant, the respondent, and any witnesses. Then the investigator makes a recommendation to the legal department regarding whether, based on the evidence gathered, discrimination has occurred. An agency attorney in the Legal Department then reviews the case for legal sufficiency. The attorney also determines if the investigator's recommendation should be upheld, overturned, or if further investigation needs to be conducted. All cases which have been recommended as reasonable cause are presented to the Executive Director to issue a final determination. Upon a finding of no reasonable cause, the complainant has the option to request a reconsideration of the case. Once a request is received, an agency attorney who did not initially review the case conducts a reconsideration and makes a recommendation to the Executive Director. The recommendation of reconsideration is then reviewed and issued by the Executive Director.

Employment and housing cases can be closed using the following types of closures:

- Administrative Closure – case closed by the commission for complainant’s failure to cooperate, withdrawal of the charges by the complainant, lack of jurisdiction, or inability to locate the complainant.
- Settlement Agreement – agreement between the complainant and the respondent reached prior to the commission’s investigation of the case or determination of cause.
- No-Cause Finding – the commission has determined after investigation that there is no reasonable cause to believe the respondent has engaged in a discriminatory practice.
- Conciliated Settlement – agreement between the complainant and the respondent after the commission has completed an investigation and reached a cause finding.
- Hearing – if a conciliated settlement cannot be reached, a hearing is scheduled before the commissioners. They can dismiss the complaint or issue a cease and desist order to the respondent. Either party can appeal the decision to Chancery Court if dissatisfied.

The following charts provide information on employment and housing complaints received and resolved by the Tennessee Human Rights Commission.

### Employment Case Resolution Summary

	<u>2009/2010</u>
Settlements	34
Withdrawals with Benefits	31
Successful Conciliation	2
No Cause	350
Administrative Closure	125
Conciliation Failed	1
<b>Total EEOC Cases Closed</b>	<hr/> 543

Total Monetary Benefits to Complainants FY 2009-2010 \$440,898

### Housing Case Resolution Summary

	<u>2009/2010</u>
Cause	2
No Cause	76
Administrative Closures	37
Successful Conciliations	30
Withdrawal without Resolution	7
Withdrawal with Resolution	5
<b>Total HUD Cases Closed</b>	<hr/> 157

Total Monetary Benefits to Complainants FY 2009-2010 \$69,502

Source: 2009-2010 Tennessee Human Rights Commission annual report and commission staff.

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## FINDINGS AND RECOMMENDATIONS

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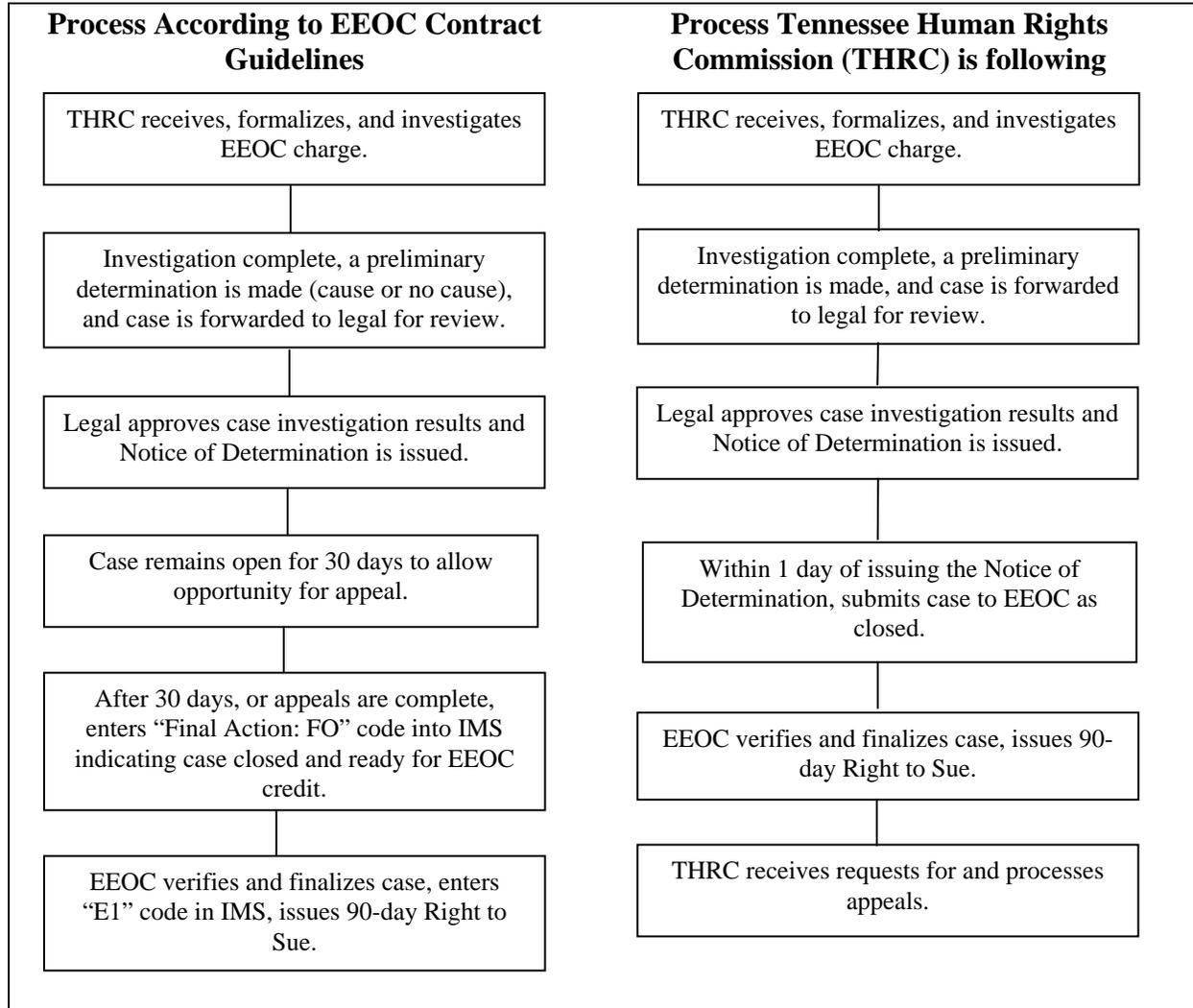
- 1. The Tennessee Human Rights Commission is violating its contract and workshare agreement with EEOC by submitting cases to the EEOC as closed prior to the exhaustion of all administrative remedies available to the charging party, possibly shortening the time available for complainants to act on their EEOC Right to Sue**

### Finding

The Tennessee Human Rights Commission is submitting cases to the EEOC as closed before the complainants' administrative right for appeal expires, despite an EEOC contract requirement that specifies case files are not to be submitted for contract credit until all possible appeals time limits or processes are completed. This practice, in certain situations, shortens the time available for complainants to act on their EEOC Right to Sue.

Auditors sampled 74 resolved cases from the past two contract years. The commission submitted each case to the EEOC as closed without waiting for the statutorily defined 30-day appeal time limit to expire. Commission staff entered a "Final Action" code into the EEOC Information Management System (IMS) indicating to the EEOC that all investigative and administrative work was complete and cases were ready to receive contract credit within one day of the commission's final determination. Furthermore, the auditors determined for the majority of the cases, the EEOC granted final closure to the cases prior to the commission completing its appeals process (reconsideration). Once the EEOC closes a case, it issues a Right to Sue Notice, which provides each complainant with 90 days to take further action in federal court. The EEOC issued a 90-day Right to Sue after the commission had completed its reconsideration in only 3 of 58 cases examined. The contract with EEOC states that the agency cannot submit cases for closure until the time for an appeal has passed and all administrative remedies have been exhausted.

## Employment Case Finalization Flow Chart



According to the EEOC Contract and Workshare Agreement, the final disposition of a charge occurs only after the time for appeal has expired or the appeal has been processed to completion. Our review shows that the consequence of THRC's submission of its dismissals of charges to the EEOC, prior to the exhaustion of all administrative remedies available to the charging party, results in the EEOC issuing a Right to Sue Notice when a charging party may still have, or may be pursuing, an administrative remedy with the THRC. Therefore, it creates an overlap by starting the clock on the federal right to sue prior to the exhaustion of all administrative remedies available to the charging party with the THRC. The remaining days to request reconsideration, or pursue ongoing reconsideration, would count against the 90-day period for filing a federal lawsuit under the EEOC Right to Sue Notice if the charging party chooses to exclusively pursue administrative remedies before the THRC. If the THRC complies with the EEOC Contract and Workshare Agreement by ensuring that the charging party has not pursued an administrative remedy within 30 days after the decision to dismiss, then the charging

party would have the exclusive remedy of pursuing a federal lawsuit under the EEOC Right to Sue Notice for the full 90 days. Additionally, if pursuant to a request for reconsideration, the THRC reverses its decision to dismiss a complaint after the EEOC has issued the Right to Sue Notice, jurisdictional and contract payment issues may arise, as all administrative remedies had not been exhausted with the THRC. The contract specifically states:

Contract credit submissions will include final dispositions of charges (i.e. final actions). When administrative appeal rights exist, the final disposition of a charge occurs only after the time for appeal has expired or the appeal has been processed to completion. In cases where the administrative appeal has been processed, the date of the notice of the final result of the appeal is the operative date. This applies in all cases where an administrative appeal is provided, whether the case is administratively resolved, dismissed, decided, or when no cause is found. The fifteen day period during which a Substantial Weight Review may be requested and/or the period during which a Substantial Weight Review is conducted is not considered for the purposes of compounding the operative date of the final disposition of a charge.

Furthermore, the Worksharing Agreement between the EEOC and the commission states:

For the purposes of determining eligibility for contract payment, a final action is defined as the point after which the charging party has no administrative recourse, appeal, or other avenue of redress available under applicable State and Local statutes.

Also, Section 4-21-302, *Tennessee Code Annotated*, establishes a complainant's right to appeal. The statute states:

(e) (1) The complainant, within thirty (30) days after receiving a copy of the order dismissing the complaint, may file with the commission an application for reconsideration of the order.

(2) Upon such application, the commission or an individual designated pursuant to its rules shall make a new determination within thirty (30) days whether there is reasonable cause to believe that the respondent has engaged in a discriminatory practice.

Prematurely submitting files for contract credit before the time for appeals is expired, in certain situations, shortens the time available for complainants to act on their EEOC Right to Sue. According EEOC officials, if a complainant requests a case reconsideration with THRC, the EEOC should rescind the Right to Sue, stopping the 90-day countdown so an overlap between the EEOC Right to Sue and the commission's processing of an administrative remedy does not occur. This apparently is not happening because, in order for the EEOC to rescind a Right to Sue Notice, it would first need to know a complainant is requesting a reconsideration. Since the Human Rights Commission does not inform the EEOC of reconsiderations, the EEOC does not consider rescinding any notices. As a result of this practice, the auditors found that at

the end of the commission's appeal process, on average, a complainant has only 44 days remaining in the issued EEOC 90-day Right to Sue period. In our file review, auditors did not find evidence that the EEOC had rescinded any of the Right to Sue notices in THRC reconsideration cases.

The commission states it would tell the EEOC of an appeal if the reconsideration results in a different decision, but in the two years of cases we reviewed, the commission always upheld its original determination. The practice of submitting cases for credit before the 30-day appeal period has expired may make overturning an appeal less likely. If the agency overturned a determination, it would have to tell the EEOC that a complainant was in fact still seeking an administrative remedy after a case has initially been submitted to them as closed.

Number of Reconsiderations Reviewed: 58

Number of Reconsiderations Upheld: 58

The commission may be prematurely submitting cases out of a need to reduce case ages. The commission has historically had a problem with timeliness in terms of their Pending and Closed Case ages (see performance audits for 1995, 1999, and 2003).

### **Recommendation**

The Tennessee Human Rights Commission should process case files in accordance with the terms of its contract with EEOC. The commission should not submit cases for EEOC credit until all possible appeal rights are expired or are resolved. Contract compliance will help ensure that complainants' rights are preserved.

### **Management's Comment**

We concur in part. The Tennessee Human Rights Commission (THRC) has historically submitted closed cases to the Equal Employment Opportunity Commission (EEOC) prior to when the 30-day reconsideration time frame runs. While this practice is inconsistent with contract provision III, C.4., it has existed in the working relationship between THRC and EEOC for a number of years and predates any of THRC's existing management as well as EEOC's current State and Local Coordinator responsible for monitoring THRC's work.

The commission has consulted with EEOC and has corrected this practice as of December 1, 2010. The commission's current process is to issue a final determination or administrative closure notice, which notifies all parties that THRC has closed the investigation, and then hold the case for 30 days. On the thirty-first day if the complainant has not requested reconsideration of the final determination, THRC enters the FO code in the Integrated Mission System (IMS) database requesting EEOC to issue credit to THRC for the case.

If the complainant does submit a timely request for reconsideration, then the case is assigned to an attorney in the office for review. After the reconsideration has been conducted and approved by the Executive Director, notification is made to the parties of the result of the reconsideration and the complainant is notified of his or her rights. If the reconsideration upheld the initial determination, then THRC will enter the FO code in IMS requesting credit from EEOC for the case.

THRC does not concur with the portion of the finding that states the commission's former practice of requesting credit for cases prior to the running the 30-day reconsideration time frame results in "shortening the time available for complainants to appeal to courts." There appear to be two misconceptions surrounding this portion of the finding: 1) that a case remains open until the 30-day reconsideration period runs; and 2) that requesting credit from EEOC prior to the running of the 30-day reconsideration period shortens the time a complainant has to appeal. These misconceptions will be addressed in turn.

First, cases do not remain open with THRC after the final determination as the chart in the finding suggests. The commission's regulations are instructive on this point. Under Tennessee Human Rights Commission Rule 1500-01-02-.01(14)(a), "The complainant, within thirty (30) days after receiving a copy of the order dismissing the complaint, may file with the commission an application for reconsideration of the order." A complainant cannot request a reconsideration until a final determination has been made. A final determination results in closure of the case with THRC. If a timely reconsideration request is received and THRC determines that the final determination should be reversed, then THRC would reopen the case for further proceedings.

Second, once THRC issues a final determination, the time frame for a complainant to appeal in state court or to request reconsideration begins to run regardless of whether or not the case has been submitted to EEOC. This is based on the Tennessee Human Rights Act and not the EEOC contract. It is THRC's issuance of a final determination that triggers the running of a complainant's time frame to appeal in state court or to request reconsideration, not submission of the case to EEOC.

Furthermore, once THRC has submitted a closed case to EEOC for credit, EEOC will issue the complainant a Notice of Right to Sue, which they must have before they can file a lawsuit in federal court. A complainant has 90 days from receipt of the Notice of Right to Sue to file a federal lawsuit in a dual-filed case. This time frame is statutory and cannot be altered by THRC. It is not necessary for a complainant to wait until THRC's 30-day reconsideration time frame has elapsed or until THRC has issued a decision on reconsideration to file a federal lawsuit as suggested in the audit finding. Complainants may do so at any time after they have received the Notice of Right to Sue from EEOC. In fact, the commission's experience has been that complainants are often anxious to file in federal court and the commission's prior practice of submitting cases to EEOC upon reaching a final determination assists them in getting the Notice of Right to Sue quicker than they otherwise would. Under our "new" process, complainants will have to wait at least an extra 30 days from THRC's final determination to receive their Notice of Right to Sue from EEOC and file in federal court.

## Auditor Comment

As a point of clarification, we do not state or imply that the consequence of sending cases to the EEOC prematurely shortens a complainant's state appeal rights or rights for a THRC Reconsideration.

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### **2. Employment complainants are inappropriately being instructed to “do nothing” until they receive Notice of Determination despite having a right to file a private action suit in state court independent from the commission**

#### **Finding**

The Tennessee Human Rights Commission consistently instructs complainants of no-cause employment cases that they “are to do nothing” until receiving a Notice of Determination from the commission, despite the complainant having a statutory right to file a private action suit in court at any time, within one year of the complaint. In “no cause” cases, the commission has found there is no basis for the complaint. This is particularly problematic because once the commission issues the notice, complainants lose their right to file a private action suit in state court independent of the agency's determination. Instead, by that time, they can only appeal the commission's decision.

Complainants are given notice of their rights initially on the commission's complaint application. On average, the commission processes a case in 249 days. When investigators complete an investigation with a no-cause recommendation, they meet with complainants in a pre-determination interview and issue a post-interview letter. During this interview, investigators inform the complainants of the results of the investigation, explain the basis for the recommendation, and provide complainants with an opportunity to add any information not yet considered. Our review of case interview notes found that complainants' options are briefly mentioned; however, the complainants' right to file a private action in state court prior to the agency's determination is not discussed. Instead, complainants are told they will receive a Notice of Determination within 30 days or more and, at that time, can file an appeal or request a reconsideration. Then complainants receive an official letter from the agency that states, “At this time, you are to do nothing. You will be notified by mail of the final approved recommendation and any appeal rights that exist in approximately 30 days.”

According to the commission's Notice of Determination, after receiving notice, the complainant has three options:

1. File a written request for reconsideration with Ms. Beverly L. Watts, Executive Director, THRC 710 James Robertson Parkway, Suite 100, Nashville, TN 37243;
2. File a private action in the state court system, Chancery or Circuit Court, within 30 days of the receipt of this notice, appealing this determination; or
3. File a private action in federal court. If a federal law is involved, this agency will send the Equal Employment Opportunity Commission (EEOC) a copy of this notice. The EEOC will then mail the parties a notice of its closure of this case and/or a right to sue in federal court. Such suit must be filed within 90 days of the receipt of the EEOC notice of closure or right to sue.

A complainant's right to private action seems important when considering that of 58 reconsiderations reviewed, the agency upheld its determination every time.

Citizens have a couple of options open to them to address complaints of employment discrimination in addition to filing with the EEOC. According to Sections 4-21-302 and 4-21-311, *Tennessee Code Annotated*, a complainant may file a complaint with the Tennessee Human Rights Commission or file a private action in state court. As noted on the complaint application, complainants can hire an attorney and file a private lawsuit in the state court system at any time during the investigation so long as it is within one year from the date of the alleged act of discrimination and prior to the commission making any determination. Complainants are not required to file a complaint with the commission, nor do they need the commission's permission to file suit. However, if a complainant files a lawsuit in state court, the commission will administratively close its investigation of the complaint pursuant to state law. If a complainant chooses not to file a private lawsuit and the commission makes a final determination in the case, then the complainant may not file a private lawsuit asserting the same allegation. Complainants may file a private action appealing the agency's determination in the state court system within 30 days of receipt of the Notice of Determination. This is the commission's official position communicated to applicants.

The Human Rights Commission's current practices can be misleading and could persuade complainants not to file a private action lawsuit even though they have the right to do so. This is especially significant in cases that do not have EEOC jurisdiction. In those situations, the complainants do not have an option to file their case in federal court because the characteristics of the case do not meet federal government requirements. A complainant's only two options in this scenario are to have the case considered through private action in state court or through the commission. Once the commission issues a determination, then a complainant can only appeal the decision.

Section 4-21-311, *Tennessee Code Annotated*, allows complainants to seek a different remedy independent of the commission so long as the complainant files suit prior to the agency's determination and within one year of the alleged discrimination. When this happens, the commission is required to administratively close the investigation. According to EEOC contracting principles, contracting agencies are not to exceed a 35% administrative closure rate.

If complainants choose to file a private action lawsuit prior to receiving the agency's determination, the agency would be forced to administratively close the case. If the agency exceeds the 35% administrative closure rate, the additional administrative cases may not be eligible to receive credit.

### **Recommendation**

The Tennessee Human Rights Commission should communicate to employment complainants during the pre-determination period in the investigative process exactly what their rights are and what conclusion the investigator has reached, i.e., cause or no cause. Agency staff should not communicate any statement or suggestion to complainants that would instruct or influence them to act or not act in any manner. The wording of the post pre-determination interview letters "At this time you are to do nothing" should be immediately removed since it is instructive and may prevent complainants from seeking additional remedies when it is their right to do so. Staff should receive additional training to ensure that they clearly advise all complainants of their rights and avoid suggesting any particular course of action.

### **Management's Comment**

We do not concur. The commission notifies at various times all complainants of their rights associated with the investigative process versus filing a state or federal lawsuit. This notification is placed on the commission's complaint form right above where the complainant must sign his or her name. Additionally, when questions arise during the investigative process, investigators quite frequently inform complainants about their options to file a lawsuit as opposed to continuing an investigation.

Once an investigation is complete, THRC investigators send the parties a letter called the "Investigator Closure Letter." Prior to the commission beginning to use this letter, complainants would frequently call their investigators for case status updates during the time that their case was under legal review. In order to reduce the amount of "case status" calls received during this legal review period, the commission developed the Investigator Closure Letter so that complainants would be aware that no further action was necessary with regard to their investigation and that they would receive notice of the final determination within a thirty-day period. The only purpose of the letter is to inform complainants that the investigation is complete, that the case is being submitted to the Legal department for review, the process for obtaining a copy of their file, and that they should receive a final determination from the commission within 30 days.

It is also important to note that this letter is sent only after an investigator has conducted a Predetermination Interview with the complainant. Predetermination Interviews are in-depth, detailed interviews with the complainant, or respondent in some cases, informing them of the evidence gathered in the investigation and what the investigator's recommendation is when the law is applied to the evidence gathered. During this Predetermination Interview, investigators

give the parties an opportunity to rebut any evidence presented by the other side and to submit any additional evidence that they would like to be considered. Investigators also explain to the complainant what the next steps are, i.e., legal review, Executive Director approval, final determination, conciliation, hearing, etc.... Therefore, when the complainant receives the closure letter, there are no surprises because the information contained within the letter has already been discussed with them.

Nonetheless, out of an abundance of caution, the commission has removed the phrase in question from the Investigator Closure Letter. The commission has also placed additional information in the letter informing the parties, once again, that the complainant may file a lawsuit in state court at any time prior to THRC issuing a final determination.

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**3. The Tennessee Human Rights Commission does not have a specific operating procedure to accurately and consistently evaluate the timely receipt of reconsideration requests for employment cases, resulting in inconsistent treatment of requests for reconsideration**

**Finding**

The Tennessee Human Rights Commission has not developed a Standard Operating Procedure that specifies how the agency is to accurately and consistently evaluate the timely receipt of reconsideration requests in employment cases. Without a written procedure, the commission cannot ensure that it is applying state law fairly to those who file reconsideration requests.

Auditors identified 10 late reconsideration requests in a review of 58 reconsiderations covering the past two contract years (2009-2010 and 2008-2009). The commission accepted 6 of the 10 (60%) for reconsideration despite the requests being beyond a required 30-day time limit (from 4 to 16 days beyond). Furthermore, our review found that the information log used to document the dates of received reconsiderations is incomplete and not accurate. Agency officials reported that two of the six accepted cases had unique circumstances. The first one coincided with the Nashville flood event. In this instance, management granted some leeway because the agency closed for a period during that time. In another case, the complainant sent an e-mail within the 30-day limit expressing the intention to file a reconsideration request, and even though the request letter was received after the cutoff date, officials used the date of the e-mail as the receipt date.

According to Section 4-21-302(e)(1), *Tennessee Code Annotated*, a complainant can file an application for reconsideration with the commission within 30 days of receiving a copy of the agency's Notice of Determination. The request must be in writing and must specifically state the grounds.

According to commission officials, the agency does not have a written procedure describing specifically how to accurately evaluate the timely receipt of reconsideration requests. Initially, commission officials stated they first begin the evaluation process by identifying the date the Notice of Determination is signed and then adding 33 days (30 according to *Tennessee Code Annotated* plus 3 for mailing) to determine a cut-off date. Then staff compares the date the request is received to the cut-off date and makes a decision to accept or deny the request. In practice, however, auditors observed that agency officials calculate the 33-day period differently. Officials first identify the day after the date the notice is signed because that is when the agency mails the notices. Also, if the 33<sup>rd</sup> day happens to land on a weekend or holiday, the request is accepted on the next working day.

Because the commission does not have a standard procedure specifying how to calculate the timeliness of reconsideration requests, the evaluations may not be consistent. Specifically, it appears that the commission is making case-by-case exceptions and adjustments during the evaluation process without documenting the reasons for these adjustments. Because of this, auditors found it difficult to accurately ascertain the circumstances that went into the acceptance or denial of a reconsideration request.

By not having a procedure and not keeping a record that verifies and briefly explains the basis for each denial or acceptance, the agency appears to be leaving itself open for criticism that all cases are being handled the same. There is little assurance that requests are being fairly evaluated for timeliness. For example, if an e-mail is accepted in one case as being “on time,” the agency must be able to show it treats other cases in the same manner.

Finally, while the commission’s Assistant Director personally evaluates requests for their timely receipt, it is not clear how the process would be consistently carried out if the Assistant Director is absent for a period of time. Not only does the agency not have a procedure stipulating how evaluations are to be performed, but the process does not use reliable logs indicating accurately when Notices of Determination are mailed or when reconsiderations are received. For example, although the Assistant Director stated it’s understood that the notices are mailed the day after being signed, she did not verify the actual mailed date before calculating timeliness in the observed evaluations. The Assistant Director acknowledged that having a procedure and an accurate log would help to ensure the consistent evaluation of the requests’ timeliness.

### **Recommendation**

The Tennessee Human Rights Commission must take care to ensure that each complainant is treated fairly and that all of its actions have the appearance of fairness. The commission should develop a written policy that clearly sets guidelines for accurately identifying dates and should apply the standard to all situations. The agency should also keep logs sufficient enough to independently verify the timeliness of each request without requiring the oral statements of any one employee to determine compliance with the written guidance.

## Management's Comment

We concur with this finding. Prior to this audit, the commission's Investigative Standard Operating Procedures (SOPs) provided general instruction for how reconsideration requests should be handled. However, the SOPs did lack specific instruction with respect to some aspects of the reconsideration process.

As a result, the commission has reiterated the importance of maintaining the reconsideration request log in an accurate and detailed manner. THRC's Compliance Officer is required to maintain a log organized by month and year which captures the case name, number, date of closure, date of reconsideration request, investigator, and attorney assigned for all reconsiderations THRC receives. In addition the commission is also requiring the Compliance Office to keep track of reconsideration information in IMS, which will make it easier for THRC to track reconsideration requests received more easily.

Lastly, the SOP manual has been updated to reflect the above changes so that anyone in the commission can use the SOP manual as a guide for how to handle reconsideration requests in a consistent and accurate manner.

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#### **4. Human Rights Commission management failed to maintain a key internal control that was recommended and accepted in response to a State Audit investigation of falsified case information**

### Finding

In August 2008, the Division of State Audit released the results of its investigation into allegations that a Tennessee Human Rights Commission investigator falsified case records to document interviews which never occurred. The investigation found that the investigator had falsified case information without detection by commission staff or management. As a result of this investigation, the division recommended steps to improve internal controls over case work. Commission officials reported that at that time, the agency took a number of steps to minimize the threat of this problem reoccurring. However, our review found that a significant element in the agency's effort to minimize the threat of case information being falsified was in fact performed for only a limited time.

Specific efforts made by the commission to address the investigation results include holding a staff meeting to discuss the importance of thoroughly and accurately conducting investigations. The commission also disseminated a memo to all staff informing them of the importance of adhering to commission policies and procedures and that all information should be accurate. The commission altered its chronology forms used in investigations to include a sentence which the investigator has to sign stipulating that all information is accurate. In addition, the commission established a practice of selecting two files weekly from each

investigator for independent confirmation of interviews. Staff other than an investigator contacted individuals listed in the files to inquire about the quality of the interview conducted. However, the Deputy Director reported that since this practice was labor intensive, and the person who made the calls left the office, it was discontinued after only four months. Agency officials report that while this effort was conducted, no problems were noted. They also report that while they have considered the possibility of electronically sending surveys to individuals involved in investigations, the office is not currently pursuing this option.

While the commission initially took a number of steps to address the results of the Division of State Audit investigation, it has not maintained the effort to independently confirm information, thereby increasing the potential for future abuse. The risk of fraud exists in any situation. However, the existence of fraud which had gone undetected was established at the commission. As a result of that fraud, the complainant's claim was wrongfully denied based on fictitious interviews. Since the bogus interviews were documented in the case file, the only effective way to identify the fraud was through independent confirmation by the persons who had allegedly been interviewed.

All controls involve some additional work and effort, but those efforts are designed to mitigate fraud. Fraud of the nature identified at the commission undermines the public trust in the fairness of a program designed to provide protection to citizens who have filed discrimination complaints. Due to the nature of the case work performed by agency investigators, an unscrupulous employee could again take advantage of a weakness in controls to falsify records to the detriment of the public. A system of independent confirmations of interviews is an effective control to thwart such efforts and serves as a strong deterrent to future fraud.

Management should have trust in the honesty and integrity of their staff. That trust should be reinforced with effective internal controls that protect honest and hardworking staff from suspicions that can be addressed by sound controls. This is particularly true in the public sector.

### **Recommendation**

It appears that instituting periodic random follow-up contacts with case witnesses would help minimize the threat of abuse. Implementation of this process could be incorporated as part of the commission's annual internal audit conducted by the housing director. Tennessee Human Rights Commission management should conduct periodic random follow-up contacts with case witnesses.

### **Management's Comment**

We concur. Recommendation One of the Special Audit released in August 2008 stated that THRC should conduct random checks to ensure that witnesses were being contacted as

documented. THRC agreed then and agrees now that random checks on witness contacts would be an effective means of deterring investigators from falsifying witness contact information.

In May 2008, THRC implemented a quality control procedure whereby a staff person was designated to place calls to the complainant, respondent, and at least one witness in randomly selected cases. The purpose of this quality control procedure was two-fold: 1) to ascertain the level of service the commission provided and 2) to serve as an internal control to reduce the risk of fraudulent witness contacts as recommended in the Special Audit. This quality control procedure was conducted through October 2008 and was very time intensive, often taking up to 20 minutes to complete one complainant or witness verification call per case. After October 2008, the agency experienced some staff losses which required the cross training of several staff members to fill in for the loss, and this cross training including the staff person designated to perform the quality control calls. Since then the commission has invested a great deal of time researching to determine if there are existing automated services that can perform this function, but again, due to staffing and budget shortages we have been unable to implement anything on a permanent basis.

The commission would very much like to conduct random calls to verify party and witness contacts but is unable to given the current staffing and budget limitations. Despite the fact that the lack of staff prevented the agency from continuing to randomly verify witness contacts, the commission continues to take steps to maintain internal controls. First, the commission reinforces the importance of maintaining accurate case files and behaving ethically in our annual all-staff training meetings and in routine staff meetings. Second, THRC also continues to use verification statements signed by all investigatory staff to affirm that investigator notes and interviews are truthful and accurate. Third, all cases are reviewed by immediate supervisors and the Legal department to determine accuracy and compliance with state and federal investigation guidelines. These reviews also include monitoring for the types of witness interview patterns that were present in the files that were falsified such as one sentence statements that a witness did not wish to participate. Often, witnesses do not wish to participate in an investigation and THRC has no authority to require them to do so. However, THRC now requires that investigators explain how THRC keeps witness identities and statements confidential and the protection against retaliation provided by the law when witnesses decline participation. The result is a much more comprehensive interview even if the witness ultimately declines to be interviewed.

Fourth, at the end of the commission's employment and housing divisions' contract year, commission staff conduct an internal audit of randomly selected cases per investigator. These audits are conducted in order to monitor compliance with state and federal guidelines, case processing time, and overall compliance with agency procedures during the investigatory process. The result of these steps is a more comprehensive review of case files than was taking place prior to 2007.

## **5. Housing complaint case investigations are not always completed in a timely manner**

### **Finding**

Based on the case process guidelines of the U.S. Department of Housing and Urban Development (HUD), the Tennessee Human Rights Commission is not processing housing complaints in a timely manner. A July 2008 Memorandum of Understanding between the commission and HUD gave the commission full certification to process housing discrimination complaints contingent upon its effective administration and enforcement of HUD's fair housing law. The commission typically receives complaints two ways: (1) the complaint can be initially filed with HUD and later referred to the commission or (2) the complaint can be initially filed with the commission and later referred to HUD. Complaints filed with both HUD and the commission are called dual-filed complaints.

#### Failure to Comply With One HUD Performance Standard

HUD conducts annual performance assessments to ensure that the commission engages in timely, comprehensive, and thorough fair housing complaint investigations, conciliations, and enforcement activities. HUD's 2009 and 2010 assessments found that the commission met eight of the nine performance standards. However, for both of these fiscal years, HUD determined that the commission was not in compliance with the HUD housing complaint investigation standards. Specifically, the agency did not close 50% of all of its dual-filed cases within 100 days of receipt within a given fiscal year as specified by HUD's performance standards. Nor did the agency close 95% of its aged cases within a given fiscal year. HUD defines aged cases as those cases requiring more than 100 days to close.

#### Increasing Federal Funding

For each case processed in a timely manner, HUD is prepared to reimburse the commission a fixed dollar amount in accordance with its payment guidelines. In general, the guidelines set a maximum amount to be paid depending on how long the case takes to investigate, with lower amounts paid for longer investigations. Although HUD sets a minimum standard of closing 50% of its cases within 100 days and closing its aged cases within a fiscal year, the commission should develop ways to go beyond these standards and increase its federal reimbursement by closing more cases in the most timely manner. While the commission may not be able to get maximum reimbursement for all cases, the more cases it closes timely, the more funding it can receive from HUD. The information below is an example of how much federal reimbursement the commission could have received if it had received the maximum reimbursement for all closed cases.

Table 1 shows the total number of commission case closures received by HUD that received HUD reimbursement for fiscal years 2009 and 2010. In FY 2009, the commission closed 120 cases. This total consisted of both administrative closure and non-administrative closures. (Administrative closures are cases which the commission was unable to close for a variety of reasons, such as the complainant's failure to cooperate, lack of commission jurisdiction

and inability to locate the complainant). The maximum HUD reimbursement rate for administrative closure cases was \$1,960 per case, and the maximum reimbursement rate for non-administrative closure cases was \$2,450 per case. If the commission had closed all 120 cases in a timely manner as specified by HUD’s payment guidelines, the commission could have received \$292,040. However, since it did not close these cases in a timely manner, HUD’s actual payment was \$250,744, or \$41,296 less than the maximum reimbursement amount of \$292,040.

In FY 2010, the commission closed 139 cases. As with the above paragraph, this total consisted of both administrative and non-administrative cases. The maximum HUD reimbursement rate for administrative cases was \$2,080 per case, and the maximum reimbursement rate for non-administrative cases was \$2,600 per case. If the commission had closed all 139 cases in a timely manner as specified by HUD payment guidelines, the agency could have received \$382,200. However, since it did not close these cases in a timely manner, HUD’s actual payment was \$241,494. The difference between the maximum potential reimbursement and the amount the commission actually received was \$140,706.

**Table 1**  
**Projected Revenue If the Tennessee Human Rights Commission (THRC) Received**  
**Maximum HUD Reimbursement**

<b>THRC Fiscal Year</b>	<b>Total Cases Closed Receiving Reimbursement</b>	<b>Maximum Possible HUD Reimbursement</b>	<b>Actual HUD Reimbursement</b>	<b>Difference</b>
2009	120	\$292,040	\$250,744	\$41,296
2010	139	\$382,200	\$241,494	\$140,706

Source: U. S. Department of Housing and Urban Development.

Two factors appear to be adversely affecting the commission’s ability to close housing complaint cases in a timely manner. First, as was identified in the commission’s official response to the 2010 HUD assessment report as a possible cause for the commission’s noncompliance, the agency has experienced high staff turnover and a lack of sufficient staff to process complaints efficiently.

A second factor is the extent to which Complaint Processing Checklists are being used by management and staff. The checklists are internal controls designed to detect and prevent case processing delays. The current checklist outlines (1) a list of activities that should be completed in 100 days and (2) the time allocations for each task to be completed. When completed, each

task requires signoffs from the THRC investigator, the supervisor, and the HUD Investigator if the investigation is jointly investigated. In the commission's November 2010 response to HUD outlining how it plans to improve the timeliness of its case processing efforts, the commission cited the need for increased usage of the Checklist as one of four corrective steps that it will be pursuing.

### Conclusion

In both FY 2009 and 2010, the commission did not close HUD complaint cases in a timely manner resulting in it being out of compliance with HUD performance standards. Further, the commission's lack of timely case closure resulted in it not receiving a greater amount of available federal funding. To maximize the amount of federal funding received in the future, the commission should take steps to improve its case closure operations.

### **Recommendation**

The Tennessee Human Rights Commission should formally identify and measure specific factors causing noncompliance with the timely closure of complaint cases and institute timely measures to improve its performance and thereby expand opportunities to receive more federal reimbursement funding. The assessment of factors and the identification of measures should be documented. There should be frequent reviews of the measures and their effectiveness so that progress can be ascertained on a regular basis and any additional steps to improve compliance can be initiated and evaluated.

### **Management's Comment**

We concur in part. THRC concurs that housing cases were not always completed in a timely manner during FY 2009 and FY 2010. In order to be able to contract with the U.S. Department of Housing and Urban Development (HUD) to receive and process fair housing discrimination complaints, THRC must satisfactorily meet nine performance standards governing case processing. Each year HUD conducts a Performance Assessment of THRC's housing division to determine if THRC's housing program should be recertified as a Fair Housing Assistance Program and eligible for HUD funding.

THRC has been assessed and recertified as a Fair Housing Assistance Program after every Performance Assessment that it has undergone. Specifically, in FY 2009 and FY 2010 THRC satisfactorily met eight out of the nine, assessment standards set by HUD. THRC did not meet standard number nine, which requires the closing of 50% of cases within 100 days or less and the closing of 95% of aged cases by the end of the contract year. During the last HUD Performance Assessment, THRC closed 26% of its cases within 100 days and 93% of its aged cases by the end of the contract year. At the center of THRC's ability to meet performance standard nine is significant turnover in the housing division between August 2009 and July 2010.

THRC began the 2009 review period with two housing investigator vacancies which were filled in August of 2009. Shortly thereafter two additional, experienced housing investigators and one housing support staff person also left the agency's employment, and those positions were filled in December 2009 and January 2010. The cumulative effect of these transitions was that the entire Housing investigative staff was turned over in the course of five months. In March and June 2010, the agency again lost two more housing investigators. Whenever an investigator leaves, their existing cases have to be distributed among investigators who already have their own case loads. This slows down productivity and results in the accumulation of aged cases. Once a new investigator is hired, there will generally be anywhere from six months to one year before the investigator is sufficiently trained and experienced enough to handle a full case load and meet production goals. This dynamic has significantly affected THRC's ability to close 50% of cases within 100 days and 95% of aged cases by the end of the contract year.

To address these performance standard shortfalls, THRC has taken several steps. First, as of July 2010, the housing division now reports to the Deputy Director, which has allowed for more day-to-day oversight, technical assistance with investigations, and communication with the housing division staff. Second, THRC has implemented two new standard operating procedures to reduce the amount of time it takes to receive a case assigned to THRC from HUD and to prepare a complaint for assignment to investigation. Lastly, the Housing Coordinator reviews each open case with investigators on a weekly basis to determine the progress on each case and assist the investigator with planning future actions in a timely manner so that by day seventy of a case, the investigation is ready for review.

Since October 2010, THRC's housing division has been fully staffed with four housing investigators and one housing coordinator. This combined with the steps as described above has allowed THRC to vastly improve its performance as it relates to standard number 9. As of February 28, 2011, THRC is closing 52% of its housing cases within 100 days or less for the current HUD contract year which runs from July 1, 2010 – June 30, 2011. This is a significant improvement from the 26% that THRC was at as of June 30, 2010. Also, as of January 31, 2011, THRC has closed 84% of the aged cases open as of October 1, 2010.

We fully anticipate that being fully staffed combined with the steps put in place to monitor and increase efficiency that THRC will meet if not exceed HUD's performance standards.

We do not concur with the auditors' assessment of THRC's failure to "maximize" funding from HUD. The auditors' calculations contained in this finding assume that THRC would complete 100% of investigations within 100 days or less. However, HUD Performance Standard number nine requires that THRC complete 50% of investigations within 100 days or less. THRC believes that the correct way to calculate the unrealized funding is to use the 50% guideline required by HUD, not 100%.

It is important to note that THRC's contract with HUD is not a fixed contract but is based on whatever amount of cases THRC is able to close. In HUD contract year 2010, THRC closed 144 cases. Of those, 38, or 26% of cases, were closed within 100 days (29 were no-cause, or

conciliations, and 9 were administrative closures). THRC was reimbursed \$94,120, which was the maximum amount allowable for these 38 cases. Assuming this same proportion (31% of closures being administrative) and taking into consideration the 50% HUD guideline which would have required 72 cases to be closed within 100 days, THRC should have closed 50 cases as no-cause and 22 cases as administrative closures. Based on these numbers, THRC could have received \$175,760 in revenue. Therefore, the total amount of lost revenue would equal \$81,640 and not \$140,706 as stated on page 22 of the audit findings.

**Actual Closures and Reimbursement Amounts**

THRC Fiscal Year 2010	Total Cases Closed w/in 100 days	HUD Reimbursement
No Cause & Conciliations \$2600/ case	29	\$75,400
Administrative Closures \$2080/case	9	\$18,720
<b>Total</b>	<b>38</b>	<b>\$94,120</b>

**Potential Closures and Reimbursement Amounts Based On 50% Standard**

THRC Fiscal Year 2010	Total Cases Closed w/in 100 days	HUD Reimbursement
No Cause & Conciliations \$2600/ case	50	\$130,000
Administrative Closures \$2080/case	22	\$45,760
<b>Total</b>	<b>72</b>	<b>\$175,760</b>

**Actual Loss**

Potential Reimbursement	\$175,760
Actual Reimbursement	\$ 94,120
<b>Difference</b>	<b>\$ 81,640</b>

Stating that THRC should have closed 100% of all cases within 100 days holds THRC to a standard that even HUD does not expect or require. A more accurate picture of the lost revenue should be calculated as described above. Notwithstanding, THRC is aware of the potential revenue that could have been realized during contract year 2010. As stated above, THRC has put procedures in place to assist in meeting HUD's performance standard of closing 50% of cases within 100 days and closing 95% of aged cases by the end of the contract year.

THRC is always working towards increasing federal funding from HUD by closing as many cases as it can within a 100-day time frame; however, with the current level of staffing at THRC, it would not be possible to close *all* cases within 100 days. To meet the increased standard suggested in Finding #5 would necessitate additional resources in the form of hiring additional investigative and legal staffing to achieve such a level of "maximum reimbursement."

### **Auditor Comment**

We repeat and reiterate our finding. We did not state that the commission should close 100% of its cases within 100 days. Rather, the figures presented were only an example of the amount of federal funding that the commission could have received if it had received maximum reimbursement from the Department of Housing and Urban Development.

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### **OBSERVATION AND COMMENT**

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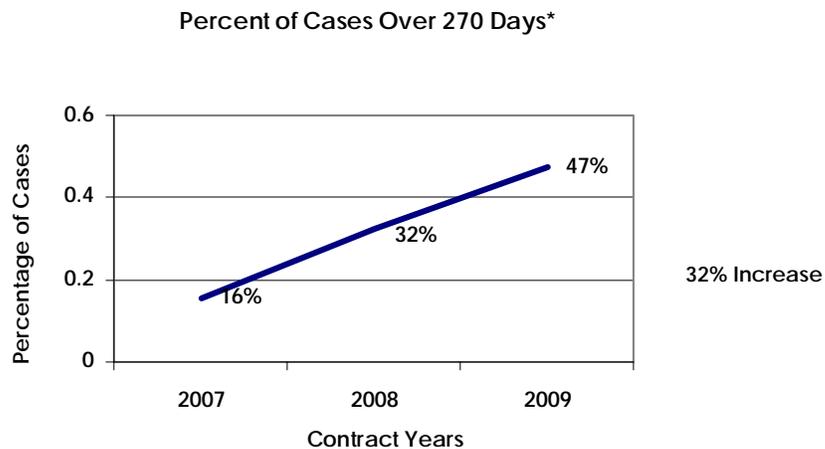
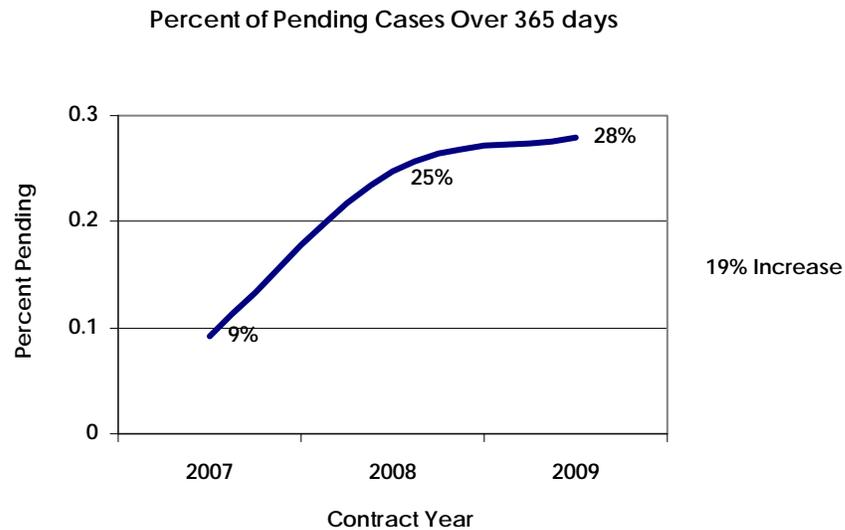
The topic discussed below did not warrant a finding but is included in this report because of its effect on the operations of the Tennessee Human Rights Commission.

**The agency's employment case processing efficiency appears to be within contract guidelines; however, analysis of report data shows trends of activities that are moving toward noncompliance with guidelines, which could mean the agency's efficiency is decreasing**

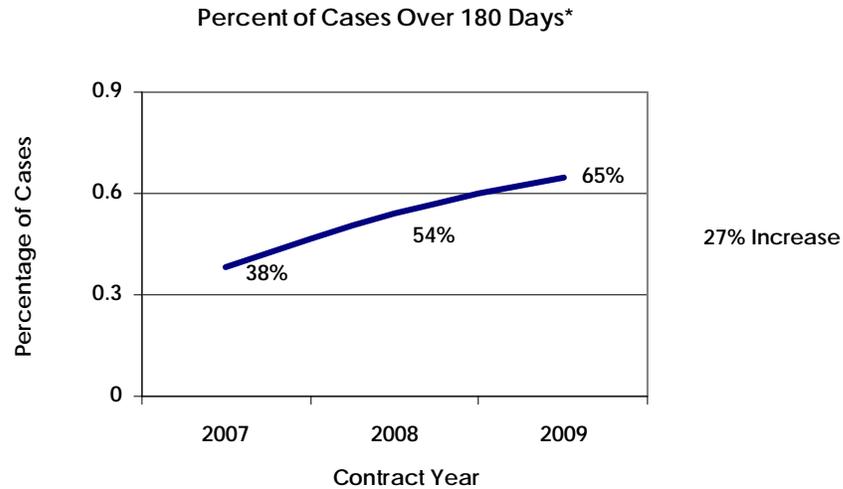
In order to evaluate processing efficiency, we collected the Equal Employment Opportunity Commission's (EEOC) Pending and Resolution reports for contract years 2006-2007, 2007-2008, and 2008-2009. In order to focus on those under control of THRC, we eliminated cases originating with EEOC from our review. The result of the analysis is mixed. Although some EEOC guidelines are being met (Pending Case Limits and Percentage of Administrative Closures), the average case age is increasing. However, these levels are below levels reported in the 2007 performance audit report.

## Contract Compliance

According to the current contract between the EEOC and the Tennessee Human Rights Commission, procedures and processes should be in place to ensure dual charge inventories do not exceed an age of 365 days. The EEOC Contracting Principles state that cases should be resolved within 9 months (270 days). To meet this, the commission has set a goal to resolve cases within 180 days. Estimates show that even though the average case age is below 365 and 270 days, respectively (260 days as of September 2009), an increasing number of cases are exceeding these benchmarks.



\*Represents combined pending and resolution report data.

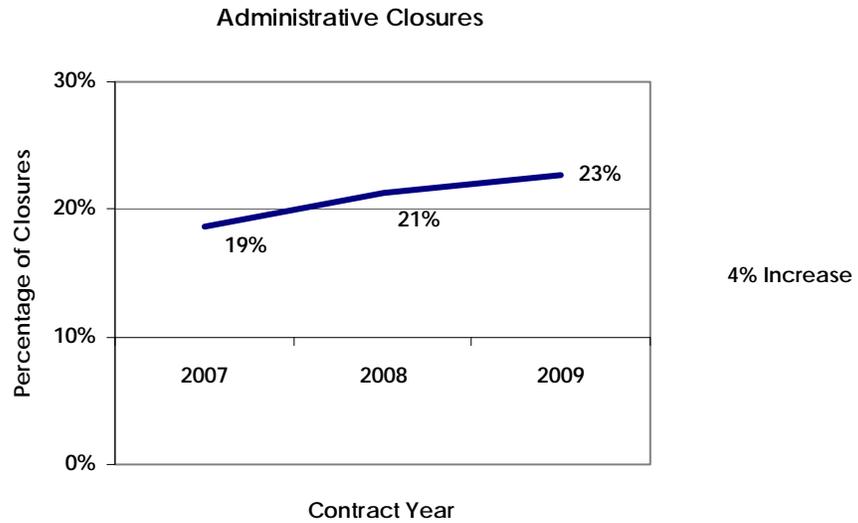


\*Represents combined pending and resolution report data.

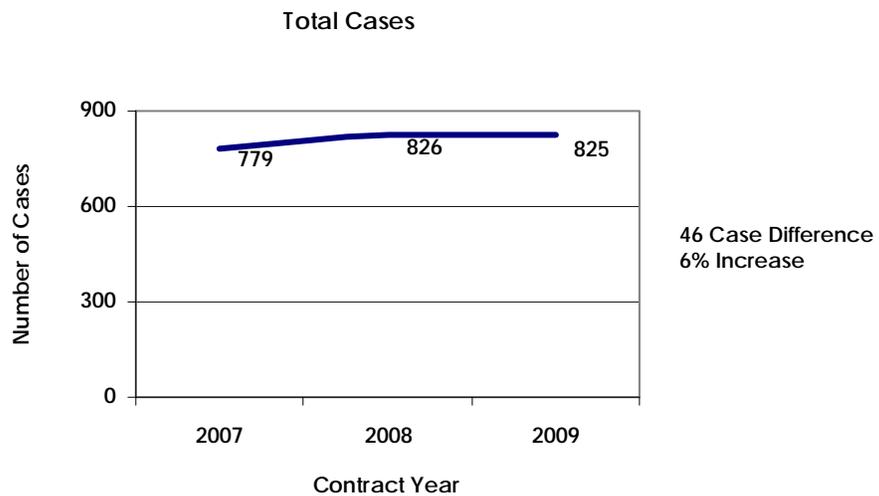
As mentioned previously, despite the increasing trends the data are showing, the levels have not returned to those in previous reports. The 2007 performance audit reported the percentage of pending cases over 270 days old to be as high as 68% as of September 1998 and 51% as of May 2002.

<b>Month of Contract Year</b>	<b>Percent over 270 Days</b>
September 1998	68%
May 2002	51%

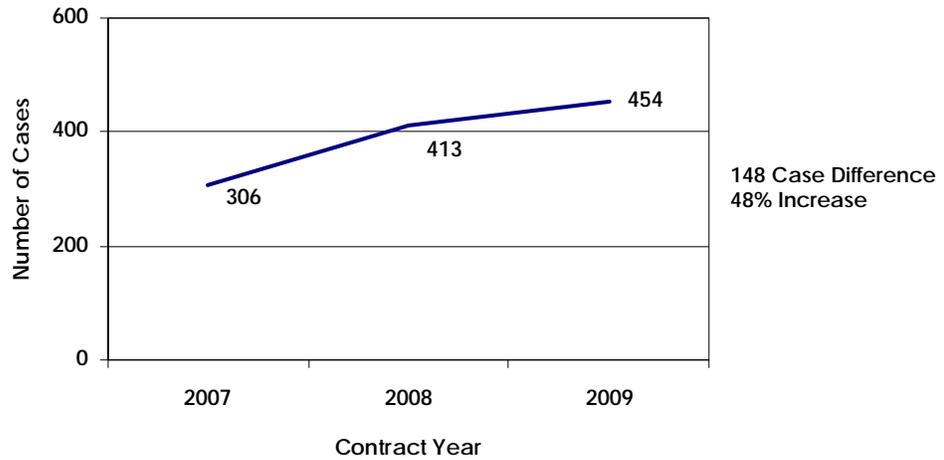
The EEOC Contracting Principles require the number of Administrative Closures to not exceed 35% of the total resolutions. Administrative closures are cases closed by administrative decision, which includes withdrawal without benefits; unable/failure to locate charging party; failure to cooperate; and lack of jurisdiction. Although estimates from Resolution Reports for the past three contract years are below the required limit, the percentages are gradually increasing.



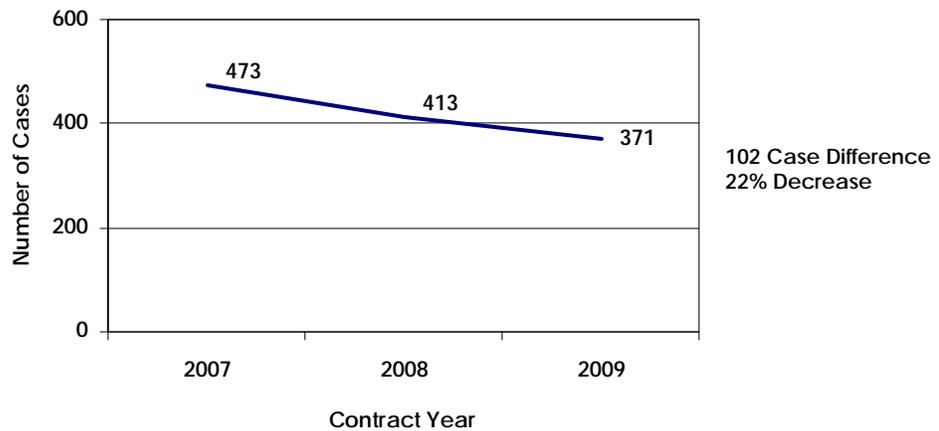
Our review found that although the total number of cases for contract years 2008 and 2009 have remained approximately the same, the commission's total number of cases (combined total of pending and resolved cases) has increased slightly. Our review also found that the number of pending cases is increasing and the number of resolved cases is decreasing.



Number of Pending Cases



Number of Resolved Cases



Human Rights Commission comment:

Case processing efficiency is always a top concern for THRC. As such, two of THRC's strategic goals over the past four years have centered on ensuring that employment investigators conduct timely investigations. THRC has set the following strategic goals:

- 1) By fiscal year 2014, reduce the percentage of employment cases over 180 days old to 25% of the total case inventory.
- 2) By 2014, resolve 50% of employment cases in 180 days or fewer.

The specific goal for fiscal year 2011 is to have only 40% of pending cases over 180 days old. As the end of January 2011, THRC has 412 open cases, 215, or 52%, of which are over 180 days. Agency management is working with supervisors and investigators to manage cases more efficiently and anticipates making significant progress towards meeting the strategic goal for fiscal year 2011 by the end of the fiscal year.

THRC has also set a goal for fiscal year 2011 of resolving 35% of charges in 180 days or fewer. As of the end of January 2011, THRC had resolved 347 cases, 119, or 34%, of which were closed within 180 days. THRC has exceeded this goal for fiscal year 2011 and continues to work hard in order to maintain and improve upon this progress.

Lastly, THRC would like to note that during EEOC contract year 2010, THRC investigated and closed more cases than it has over the last five years, and often this was accomplished without being fully staffed. The agency is dedicated to conducting thorough, accurate, and timely investigations and consistently works to achieve those goals through training of staff and implementation of case monitoring procedures.

## **RESULTS OF ADDITIONAL AUDIT WORK**

We also performed work in the following areas.

### **Commission disaster relief plan – unforeseen problems encountered**

As a result of the May 2010 flood in Nashville, we sought to determine whether the Human Rights Commission had an established disaster relief plan and, if so, how well it functioned in response to the flood. Based upon our work, we found that while the commission had a disaster relief plan in place, it did not take into account the possibility that both the commission's central office and alternate work site would be unavailable for operation in the event of a disaster. As a result, commission officials were forced to seek a solution to unforeseen problems associated with the flood.

#### Human Rights Commission comment:

Prior to the flooding of May 2010, THRC's disaster relief plan called for the agency to resume normal operations with the EEOC and/or HUD in the event that the agency's physical location was unavailable. What THRC staff discovered in May 2010 was that EEOC and HUD locations were also unavailable due to flooding in their locations as well. As a result, an alternative to the alternative had to be found.

THRC was able to coordinate with Shared Services Solutions, the Tennessee Department of Human Resources, Tennessee Department of General Services, and Tennessee Department of Finance and Administration Office for Information Resources in order to find an alternative work location in the Tennessee Tower. During the three weeks that THRC was displaced, some staff members worked out of the Tower while those staff members that could work from home did so.

Despite these difficulties, i.e., not having immediate access to necessary documents and equipment and not being in one location with co-workers, the THRC employment division was still able to meet and exceed critical production goals.

In November 2010 THRC staff attended the statewide Emergency Workforce Planning Meeting and is in the process of preparing a plan to address workforce planning and preparedness issues in accordance with the guidance provided at the meeting.

### **Improved adherence to the state Records Disposition Authorization policy for discarding investigated and closed cases since the prior audit**

The destruction of all State of Tennessee government records must be covered by an approved Records Disposition Authorization (RDA) developed by each agency, approved by the Public Records Commission, and filed with the Department of General Services. The RDA for the Human Rights Commission states that files for investigated and closed cases should be destroyed after two years and after an audit is conducted.

However, in the prior performance audit released in February 2007, we found that the agency did not comply with the RDA for discarding investigated and closed cases. To determine whether the commission was adhering to its RDA, we reviewed a sample of 5% of the HUD and EEOC investigations closed in 2006. We selected this year for our review since it was the furthest year back in which closed investigations were not yet eligible for destruction because an audit had not been conducted up to the current audit. In 2006, the commission closed 106 HUD and 570 EEOC investigations. A sample of 5% for each category equates to 5 HUD and 29 EEOC investigations. Our review found that the commission maintained these files as required by its RDA.

### **Improved commission adherence to its Title VI Plan since the prior audit**

The 2007 performance audit found that the commission did not provide Title VI training to its employees as stated in its Title VI plan. Nor did the commission provide information on Title VI to complainants. To determine if the commission had adequately addressed this finding, we requested and reviewed information that demonstrated that agency staff received Title VI training in 2007, 2008, and 2009. Further, we reviewed the commission's website, which is available to the general public, and found that it contained information about Title VI and the protections that it provides to individuals. We found that the commission had adequately provided information Title VI training to its staff as well as notified the public.

## **Commission in compliance with notice of vacancy and appointment requirements**

Per Section 10-7-605, *Tennessee Code Annotated*, the chair of an existing agency or appointing authority is required to notify the Secretary of State's office within 15 days of an unscheduled vacancy and within 45 days for the expiration of scheduled commission membership terms. This statute also stipulates that the department is to notify the Secretary of State's office within 15 days of making an appointment to the commission. While the 2007 performance audit found that the commission was not in compliance, a review of commission vacancies and appointments in Fiscal Years 2008 and 2009 found that the department was in compliance with these requirements.

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## **RECOMMENDATIONS**

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### **ADMINISTRATIVE**

The Human Rights Commission should address the following areas to improve the efficiency and effectiveness of its operations.

1. The Tennessee Human Rights Commission should process case files in accordance with the terms of its contract with EEOC. The commission should not submit cases for EEOC credit until all possible appeal rights are expired or are resolved. Contract compliance will help ensure that complainants' rights are preserved.
2. The Tennessee Human Rights Commission should communicate to employment complainants during the pre-determination period in the investigative process exactly what their rights are and what conclusion the investigator has reached, i.e., cause or no cause. Agency staff should not communicate any statement or suggestion to complainants that would instruct or influence them to act or not act in any manner. The wording of the post pre-determination interview letters "At this time you are to do nothing" should be immediately removed since it is instructive and may prevent complainants from seeking additional remedies when it is their right to do so. Staff should receive additional training to ensure that they clearly advise all complainants of their rights and avoid suggesting any particular course of action.
3. The Tennessee Human Rights Commission must take care to ensure that each complainant is treated fairly and that all of its actions have the appearance of fairness. The commission should develop a written policy that clearly sets guidelines for accurately identifying dates and should apply the standard to all situations. The agency should also keep logs sufficient enough to independently verify the timeliness

of each request without requiring the oral statements of any one employee to determine compliance with the written guidance.

4. It appears that instituting periodic random follow-up contacts with case witnesses would help minimize the threat of abuse. Implementation of this process could be incorporated as part of the commission's annual internal audit conducted by the housing director. Tennessee Human Rights Commission management should conduct periodic random follow-up contacts with case witnesses.
5. The Tennessee Human Rights Commission should formally identify and measure specific factors causing noncompliance with the timely closure of complaint cases and institute timely measures to improve its performance and thereby expand opportunities to receive more federal reimbursement funding. The assessment of factors and the identification of measures should be documented. There should be frequent reviews of the measures and their effectiveness so that progress can be ascertained on a regular basis and any additional steps to improve compliance can be initiated and evaluated.

## **Appendix 1**

### **Title VI and Gender and Ethnicity Information**

#### **Title VI Information**

All programs or activities receiving federal financial assistance are prohibited by Title VI of the Civil Rights Act of 1964 from discriminating against participants or clients on the basis of race, color, or national origin. In response to a request from members of the Government Operations Committee, we compiled information concerning federal financial assistance received by the Human Rights Commission, and the commission's efforts to comply with Title VI requirements. The results of the information gathered are summarized below.

The Human Rights Commission receives federal funds as a result of work sharing agreements with the U.S. Equal Employment Opportunity Commission and the U.S. Department of Housing and Urban Development. The Human Rights Commission is required to annually generate a report on its Title VI efforts which it submits to the statewide Title VI coordinator. Effective July 1, 2009, the Human Rights Commission was assigned the responsibility of being the statewide coordinator for Title VI.

The commission has appointed a Title VI Coordinator, who is located in the Nashville office. The Title VI Coordinator is responsible for monitoring the Title VI plan and disseminating information to all commission employees through their respective supervisors. The Title VI Plan states that the Title VI Coordinator identifies and recommends training or job enrichment activities for employees and responds to career development requests made by individual employees. Under Section 4-21-203, *Tennessee Code Annotated*, effective June 30, 2009, the commission is also required to investigate alleged violations of Title VI and prepare all required reports including the yearly Title VI plan update.

The commission did not receive any Title VI complaints during the past two years. Should any be received, the commission would investigate them in a fashion similar to an employment or housing complaint.

## Gender and Ethnicity Information

### Human Rights Commission Staff Gender and Ethnicity by Job Position January 2011

Title	Gender		Ethnicity			
	Male	Female	Asian	Black	Hispanic	White
Executive Director	0	1	0	1	0	0
Deputy Director	0	1	0	1	0	0
Housing Coordinator	1	0	0	1	0	0
General Counsel	0	1	1	0	0	0
Title VI Compliance Coordinator	1	0	0	1	0	0
Communications Specialist	0	1	0	1	0	0
Secretary	0	2	0	1	0	1
Investigator	3	9	0	7	0	5
Administrative Service Assistant 3	2	1	0	1	1	1
Compliance Officer	1	0	0	1	0	0
Intake Specialist	0	1	0	0	0	1
Intake Officer	0	1	0	0	0	1
Associate Counsel	1	0	1	0	0	0
<b>Total</b>	<b>9</b>	<b>18</b>	<b>2</b>	<b>15</b>	<b>1</b>	<b>9</b>

### Human Rights Commission Commissioner Ethnicity and Gender July 2010

Region	Gender		Ethnicity	
	Male	Female	Black	White
East	3	2	4	1
Middle	3	2	4	1
West	4	1	3	2
<b>Total</b>	<b>10</b>	<b>5</b>	<b>11</b>	<b>4</b>

## Appendix 2 Performance Measures Information

As stated in the Tennessee Governmental Accountability Act of 2002, “accountability in program performance is vital to effective and efficient delivery of governmental services, and to maintain public confidence and trust in government.” In accordance with this act, all executive branch agencies are required to submit annually to the Department of Finance and Administration a strategic plan and program performance measures. The department publishes the resulting information in two volumes of *Agency Strategic Plans: Volume 1 - Five-Year Strategic Plans* and *Volume 2 - Program Performance Measures*. Agencies were required to begin submitting performance-based budget requests according to a schedule developed by the department, beginning with three agencies in fiscal year 2005, with all executive-branch agencies included no later than fiscal year 2012. The Tennessee Human Rights Commission began submitting performance-based budget requests effective for fiscal year 2010.

Detailed below are the Tennessee Human Rights Commission’s performance standards and performance measures, as reported in the September 2010 *Volume 2 - Program Performance Measures*. Also reported below is a description of the agency’s processes for (1) identifying/developing the standards and measures; (2) collecting the data used in the measures; and (3) ensuring that the standards and measures reported are appropriate and that the data are accurate.

### Performance Standards and Measures

#### Performance Standard 1

1. Increase annual employment case closures per THRC’s worksharing agreement with EEOC.

Performance Measure 1 – Average annual employment case closures per EEOC worksharing agreement

Actual (FY 2009-2010)	Estimate (FY 2010-2011)	Target (FY 2011-2012)
426	500	500

#### Performance Standard 2

2. Increase annual housing employment case closures per THRC’s worksharing agreement with HUD.

Performance Measure 2 – Average annual housing case closures per HUD worksharing agreement

Actual (FY 2009-2010)	Estimate (FY 2010-2011)	Target (FY 2011-2012)
141	105	115

The commission’s performance measures are based upon the number of HUD and EEOC cases it closes. For HUD cases, the amount of federal funding that the agency receives is directly

tied to the number of cases that THRC closes. The more cases that THRC closes the more federal funding that it receives. For EEOC cases the situation is slightly different. The amount of federal funding that THRC can receive is subject to the maximum amount specified in the contract. However, if there is additional funding available, THRC maybe able to get more federal funding if it closes more cases than specified in its contract. Both HUD and Employment case information are maintained in web based database systems. Information pertaining to HUD cases is maintained in a database system called TEAPOTS while information about employment cases is maintained in the Integrated Mission System (IMS) database. Each system maintains case information pertaining to its respective issue. The director and deputy director are involved in determining appropriate performance measures for the commission.