

Federal Mine Safety and Health Review Commission
Equity Action Plan
January 20, 2022

Background and Executive Summary

The Federal Mine Safety and Health Review Commission (Commission) is an independent adjudicatory agency that provides administrative trial and appellate-level review of legal disputes arising under the Federal Mine Safety and Health Act of 1977 (Mine Act).

The Mine Act establishes mandatory health and safety standards for the operation of coal and other mines. The Department of Labor’s Mine Safety and Health Administration (MSHA) inspects the nation’s mine to determine if the mine is complying with those safety standards. If an MSHA inspector finds that a mine is not in compliance with a mandatory safety standard, the inspector issues a citation alleging a violation. MSHA also proposes an associated civil penalty. The mine operator may challenge the citation and the proposed penalty by filing a case with the independent Commission. After a case is filed, a Commission Administrative Law Judge is assigned to hear the matter. The Judge holds a hearing on the merits of the citation and issues a decision on the allegations contained within the citation. The Judge then independently assesses a civil penalty. The parties may appeal the Judge’s decision to a five-member Review Commission.

In addition to hearing disputes related to alleged violations of mandatory safety standards, the Commission also hears cases involving allegations of discrimination based on a miner’s exercise of protected safety-related activities, or interference with a miner’s right to engage in such activities. A complaint of discrimination or interference may be filed by MSHA on behalf of a miner or a miner may file a complaint with the Commission on their own behalf. The Commission Judges provide the miner and the accused mine operator with a due process hearing regarding the allegations contained within the complaint.

Due to the Commission’s unique role as an independent adjudicatory body that resolves cases between a federal agency (MSHA) and mine operators, our Equity Team found it challenging to respond to Executive Order 13985. The Commission provides hearings, it does not administer programs with “stakeholder” beneficiaries. The “service” provided is due process. Accordingly, the “barriers to access” identified by the Equity Team relate to the ability of a party to bring a complaint or case before the Commission.

Our Action Plan focuses on identified barriers to access to the Commission’s services. Specifically, we considered barriers that a miner may face when attempting to file a discrimination complaint on his/her own behalf and barriers facing parties that are more comfortable speaking Spanish than English.

Furthermore, consistent with the guidance in the Executive Order, the Equity Team contracted with Jefferson Solutions to conduct an Assessment of Procurement at the Commission. The goal of the audit was to assess the status of the agency’s current procurement programs and for Jefferson to recommend revised practices to better incorporate equitable

considerations when conducting future business. However, the auditors uncovered systemic compliance issues with our current practices. Accordingly, the Equity Team referred Jefferson's Report to the Commission's newly hired Chief Operating Officer and the Chair. Unfortunately, due to the identified issues Jefferson was not able to focus its recommendations on furthering equitable considerations.

Action Plan

Our Action Plan addresses: section 105(c) complaints, Spanish language guidance, and the results of our contracting and procurement audit.

A. Section 105(c) Complaints

The Equity Team found that the guides and resources available on the Commission's website (www.fmshrc.gov) are primarily directed toward mine operators. Relatively little of the guidance reviewed was directed toward miners who may be interested in filing a complaint with the Commission on their own behalf.

As stated, our guidance documents are primarily directed toward mine operators filing a contest of a citation for an alleged violation of a safety standard and the associated civil penalty. The website also contains guides for other processes, such as the reopening of a defaulted penalty or requesting information under the Freedom of Information Act.

The Equity Team believes better guidance directed at miner parties is both necessary and appropriate. The Mine Act protects a miners' right to engage in safety-promoting activities. If a miner proves – in a case before a Commission Judge – that they have suffered an adverse employment action as a result of their participation in a safety-related activity, the Judge may order that the mine operator provide appropriate restitution to the miner. This may include reinstatement to a former position, backpay or other appropriate remedies.¹

Miners that file a complaint with the Commission on their own behalf face a number of challenges due to their lack of familiarity with the Commission's practices and procedures. The lack of particularized guidance makes it difficult for miners, who primarily reside in rural areas, to get full access to the adjudicatory processes available at the Commission. Accordingly, the Equity Team has worked with the Commission's Office of the General Counsel to provide some

¹ The miner must first file a complaint with MSHA. An investigator performs the initial investigation into the allegations stated in the complaint. If the investigator finds evidence of unlawful discrimination, an attorney from the Department of Labor may file a complaint with the Commission. On the other hand, if an investigator does not find evidence of unlawful discrimination, the miner may file a complaint directly with the Commission on their own behalf or with the assistance of private counsel. In either case, a hearing on the merits of the allegations contained within the complaint of discrimination is held before a Commission Administrative Law Judge.

basic guidance to miners who may be interested in pursuing a section 105(c) complaint on their own behalf.

B. Action and Intended Impact

1. Complaint Template

To address the deficiency identified in Subsection A, the Commission's Office of the General Counsel created a discrimination complaint template (www.fmshrc.gov/content/section-105c3-complaints). The template contains common legal boilerplate and general guidance regarding the required information and documentation. Additionally, the template contains examples of the types of remedies available and commonly sought by complaining miners. The template is designed to guide a miner through the initial stage of filing a complaint with the Commission.

2. Distribution of Guidance

In addition to the website, the Equity Team will consider other mediums by which to distribute this guidance, which may include mailing hard-copies.

3. Discrimination Decision Filter

Commission Decisions are published on the agency's website and appear by date of issuance. Currently, there is no way for a user to filter discrimination decisions from the more common decisions concerning alleged violations of safety standards. The inability to filter by case categories on our website makes it more difficult to locate the most recent discrimination case-law. This, in turn makes it more difficult for a miner to present a case on his/her own behalf to the Commission.

Accordingly, the Commission's Docket Office is in the process of categorizing our online case archives so that a website user can more easily locate relevant discrimination cases and, as a result, pertinent case law. The Commission expects to implement this improvement in the second quarter of FY 2022.

C. Tracking Progress

We recognize that it will not be possible to entirely measure the success of our efforts through metrics. An increase in the number of filings of section 105(c) cases should not be interpreted as success, nor should a decrease in filings be interpreted as a failure.

The Equity Team recommends that the Commission monitor the trends in filings year-over-year as a baseline measurement. The Equity Team also recommends that the Commission's Docket Office keep track of the number of times a miner files a complaint using the provided template.

D. Accountability

The Commission will need to periodically review our complaint template and other guidance documents to determine if updates are required. Additionally, we will need to ensure that Commission resources are dedicated to posting Commission decisions to the website in a manner that is consistent with the use of our new case categorization filters. We plan to communicate the availability of these new features on our website in a prominent place.

A. Spanish Language Guidance

The Equity Team has identified language as a barrier to access to the Commission's services. This barrier primarily affects *pro se* miners and *pro se* mine operators.

The majority of the guidance published by the Commission is only available in English. The Commission's Docket Office periodically receives inquiries from parties that are more comfortable speaking Spanish. The Docket Office has not received requests for services in any other languages.

B. Action and Intended Impact

The Commission has contracted with an interpreter to expand the agency's Spanish language offerings. Expanded Spanish language offerings will include guidance on how a mine operator can reopen a defaulted penalty. Defaults occur when a mine operator fails to timely and correctly follow procedures for contesting a civil penalty proposed by MSHA. The Equity Team has identified guidance regarding reopening a defaulted penalty as a priority, as it is a common problem with mine operators that have limited experience contesting citations.

Additionally, we also plan to expand Spanish language guidance for miners that may want to file a complaint of interference or discrimination on their own behalf.

The Commission intends for the Spanish language guidance to better assist *pro se* parties that are more comfortable speaking Spanish. The goal is to make the Commission's services accessible to a greater number of interested parties. To further assist a party, the Commission can make translation services available.

C. Tracking Progress

The use of our Spanish language guidance documents can be imprecisely tracked through page view metrics. However, the quantity of page views is unlikely to provide meaningful feedback indicating the success of this program. The Equity Team will ask the Docket Office to track inquiries that are made in Spanish. Additionally, the Equity Team will suggest setting up a Spanish language email address that will take feedback from individuals regarding the Spanish language materials.

D. Accountability

To ensure that the Spanish language guidance program is successful we will need to have a consultant periodically review our guidance documents to determine whether we need to make changes so that guidance is consistent with the English language versions. In the alternative, the Equity Team recommends hiring or identifying an employee at the agency with Spanish language skills that can assist with updating these materials.

A. Barriers to Access in Contracting and Procurement

The Commission contracted with Jefferson Consulting Group to audit our procurement and contracting practices. The Equity Team expected that the audit would result in a baseline measurements of our existing contracts with smaller businesses and those businesses owned by people who have historically faced discrimination. The Equity Team further hoped to receive recommendations as how to incorporate more equitable procurement practices.

Accordingly, Jefferson reviewed FMSHRC's procurement history for FY 2021 with a focus on: (a) categorizing the existing FMSHRC contractor/vendor community in terms of types of supplies and services provided and (b) developing a breakdown of FY 2021 award distribution among the categories of businesses identified in the Federal Acquisition Regulation (FAR) 19.201 i.e., small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

According to Jefferson, their audit of the Commission's practices "demonstrate[d] a lack of adherence to FAR requirements for documenting procurement files, following appropriate competitive processes and producing binding contract agreements that contain SOWs and associated pricing that holds the contractors accountable for their performance." Jefferson concluded that "[u]ntil there is assurance that the data is accurate and complete, it will be impossible to develop a baseline for current performance that will target areas for improvement in equitable access to FMSHRC contracting opportunities."

The Equity Team has determined the structural deficiencies in our procurement program identified in Jefferson's Report cannot be redressed within the Equity Action Plan.

Instead, we have referred Jefferson's report to our agency's newly hired Chief Operating Officer as well as the Chair.