

# 2020 Annual Report

OFCCP OMBUDS SERVICE



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## Message from the Ombudsman

It is with great pleasure that I present the inaugural Ombuds Service Annual Report. With the close of each fiscal year we are given the opportunity to reflect, improve, and strategize with an eye on what the future holds. This reflection is a special one for the OFCCP Ombuds Service, with the program being established in the fall of 2019, and my first year as the agency's Ombudsman now in review.

The Ombuds Service was initially announced in September 2018 through Directive 2018-09, *OFCCP Ombuds Service* (Sept.19, 2018)(DIR 2018-09),<sup>1</sup> which declared the agency's plan to hire an ombuds tasked with facilitating the fair and equitable resolution of concerns raised by external stakeholders. Hired in August 2019, my first undertaking was the development of a program that could address the needs of all OFCCP stakeholders, internal and external. In May 2020, the Ombuds Service was officially launched in accordance with Directive 2020-04, *Ombuds Service Supplement* (April 17, 2020)(DIR 2020-04),<sup>2</sup> serving to clarify the role of the OFCCP Ombudsman as well as the mission, principles, and operations of the Ombuds Service. Available to all who have questions about or seek guidance relevant to the program, the Ombuds Service Protocol ("the Protocol")<sup>3</sup> is an attachment to DIR 2020-04 and also available on the OFCCP Ombuds Service landing page.<sup>4</sup>

As explained in further detail in the Protocol, OFCCP's vision to establish an ombuds program was initiated through feedback received from outside the agency; enhance contractor compliance assistance, increase transparency, and engage in more effective communication. The Ombuds Service is just that, a conflict resolution mechanism through which stakeholders can share their concerns about open OFCCP matters or identify issues with agency policies, procedures, and general administration. By encouraging discourse, the introduction of the Ombuds Service provides contractors, contractor representatives, complainants, worker rights groups, and anyone else connected to the work of OFCCP with an independent, confidential, neutral, and informal outlet to raise these issues. By the same token, the invitation to request ombuds services is extended equally and, as such, the program is available to OFCCP employees who have identified the need for conflict resolution assistance in their coordination with external stakeholders.

Similarly, this and each subsequent Annual Report will be made public. In an effort to model the type of transparency and communication that I was brought onboard to facilitate, it is a priority of mine that all who work for, coordinate with, and have an interest in OFCCP can take part in the process of reviewing my work and delivering change, wherever change might be necessary. That begins with problem identification, however small or large the conflict, and meaningful collaboration between myself, the agency, and all of its stakeholders about the most effective paths forward.

I truly hope that the analysis that follows is valuable, and I encourage people to view this as part of an ongoing dialogue about my services and how they might assist the OFCCP constituency at large.

Sincerely,



Marcus Stergio  
Ombudsman

## Executive Summary

Conflict occurs in all aspects of life, a fact that is recognized by every organization that employs an ombuds. Regardless of the organization's mission, or the way it functions, or which sector of the workforce it operates in, staffing an ombuds proactively demonstrates a desire for the resolution of individual issues, awareness about those which present themselves most regularly, and the ability to implement changes best suited to address areas of concern. It is a sign of strength that the organization admits that it is not perfect, an acknowledgement which compels an ombuds to share what they have seen. For this purpose, annual reports are commonplace in the ombuds field, never intended to criticize or assign blame, but an opportunity to shed light on and initiate conversation about issues that exist and might benefit from consideration.

In addition to reviewing the work of the Ombuds Service over the previous fiscal year, this report, as outlined by the Protocol, proposes recommendations based on a combination of quantitative and qualitative data as well as the experiences and observations of the Ombudsman. Recommendations may relate to topics such as training, outreach to contractors, contractor representatives, and worker advocacy groups, general procedures of the agency such as compliance evaluations or investigation strategies, and methods for those procedures to be conducted as efficiently as possible. The Ombudsman does not have the authority to enact amendments to agency policies or procedures, however, and applicable recommendations are therefore delivered from a neutral perspective. The Ombudsman takes this reporting obligation seriously, and welcomes all who are involved with the work of OFCCP into the act of reflection. The 2020 Annual Report highlights the referrals received and handled, issues raised, actions taken by the Ombuds Service, initiatives embarked upon, lessons learned, accomplishments realized, observations witnessed, recommendations provided, and next steps envisioned. In this report you will find:

- An overview of the role of the Ombudsman and the Standards of Practice that were adopted in accordance with the International Ombudsman Association (IOA),<sup>5</sup> the United States Ombudsman Association (USOA),<sup>6</sup> and the Coalition of Federal Ombudsman (COFO).<sup>7</sup>
- Advice regarding when and how to engage the Ombudsman, along with tips for preparing to do so. The process of contacting the Ombudsman is informal and, therefore, preparation is not required, but guidance is offered for those who are interested in but wondering how to gather their thoughts before placing a referral.
- Common practices of the Ombudsman once a referral is received, including but not limited to the initial steps that might be taken, who will be consulted, the processes employed once the root causes of conflict have been diagnosed, and how the Ombudsman discerns which processes might be most appropriate to effectively address the totality of issues presented.
- Presentation of quantitative data, including the quarterly distribution of referrals received and the sources of those referrals. The Ombudsman handled 128 referrals and closed all but 9 of them during fiscal year 2020. A majority were received during quarters three and four, and most of which OFCCP retained jurisdiction over came from contractor representatives, or the attorneys and consultants representing external stakeholders.
- Distinction between primary issues raised, or the reasons for contacting the Ombudsman, and secondary issues, or those that were identified through the course of further dissecting any and all concerns expressed by the parties involved. A majority of primary issues were related to negotiation impasses, communication problems, the length of an investigation, personnel and/or conduct concerns, and jurisdiction disputes. Meanwhile, the most widely identified secondary issues were, again, communication difficulties and inconsistent application of policies and procedures from one OFCCP office to the next.

- A systemic review of all issues raised with the Ombuds Service, as well as applicable correlations between primary issues and secondary issues, those correlations that might suggest trends that both OFCCP and external stakeholders can build awareness around. Prescriptive guidance is offered from the lens of the Ombudsman based exclusively on the trends analysis conducted. Each recommendation could be considered a suggested area of focus for OFCCP, external stakeholders, and for the Ombuds Service as well, areas that the Ombudsman will monitor and provide updates on in future Annual Reports.
- Mechanisms which have thus far been utilized to resolve issues, the number of people involved with dispute resolution processes, and the kinds of outcomes which might have been achieved, generally speaking. Over the past year, 274 individuals have taken part in ombuds referrals, and 64% of the services provided by the Ombudsman were individual consultations. Shuttle diplomacy, or negotiations during which the Ombudsman serves as a neutral intermediary, was the next most frequently utilized conflict resolution tool, followed by facilitated dialogue and mediation.
- A review of the intended messaging and the platforms implemented by the Ombuds Service for delivering those messages. In total, 42 presentations and trainings were delivered by the Ombudsman during fiscal year 2020, with just under 60% of those being provided to various segments of the external stakeholder community.
- The reception to the Ombuds Service during its inaugural campaign, observed primarily through testimonials from those who have already taken advantage of the program's offerings, and an ongoing invitation for feedback to be submitted by those who have come in contact and/or worked with the Ombudsman. Evaluations of the Ombuds Service are instrumental to the continued development and enhancement of the program.
- A preview of fiscal year 2021 along with the Ombudsman's plans for the future of the program, including but not limited to outreach, engagement, education, and training.

The report that follows will elaborate upon each of these topics. It is delivered in the spirit of both transparency and confidentiality, a delicate balance between sharing as much information as possible while protecting the integrity of the ombuds process, without breaching pledges of discretion to those who have confided in the Ombudsman.

## Ombuds Service in Practice

The section that follows will offer additional insight about the operations of the Ombuds Service. While actual communications and the individuals involved are privileged in nature, the practice itself is not. To further establish what that practice entails, below you will find a review of the Standards of Practice around which the Ombudsman functions, the suggested process for engaging the Ombuds Service, and common practices of the Ombudsman.

### **STANDARDS OF PRACTICE**

The OFCCP Ombuds Service operates in accordance with four Standards of Practice. They are widely accepted principles within the organizational ombuds community and, while each carries its own weight, are not mutually exclusive. Rather, they are intertwined such that a devotion to them enables the Ombudsman to advocate for fair processes.

#### ***Confidentiality***

During and after the course of handling an ombuds referral, the Ombudsman will not share identifying information outside of the program unless specifically requested to do so by the person who brought forward the referral. Confidentiality is ensured to the extent permitted by law, and any applicable exceptions to the Ombudsman's confidentiality are identified by the Ombuds Service itself, at times in consultation with the Office of the Solicitor or OFCCP's FOIA representative and, if necessary, will be discussed with the original source(s) of the information as soon as possible. Whether it be certain aspects of or an entire conversation, requests for confidentiality are taken seriously to encourage candid dialogue and the exploration of options for resolution, while fostering security for those external stakeholders who contact the Ombuds Service.

#### ***Neutrality***

Ombuds do not advocate for any one individual, organization, or outcome. To promote self-determination, achieve necessary commitments from the parties, and impact the successful resolution of conflict, the Ombudsman listens, speaks, and operates without judgment or prejudice, and advocates only for fair processes and mutually agreeable solutions.

#### ***Independence***

When looking at an organizational chart of OFCCP, it may be difficult to pinpoint where the Ombuds Service is located. This is intentional, as the program does not share a space with any division or work team within the agency. A firewall of this nature enables the Ombudsman to preserve neutrality and confidentiality, while operating as a catalyst for change who assists both internal and external constituents.

#### ***Informality***

Use of the Ombuds Service is voluntary and is not a mandatory step in OFCCP procedures, nor do conversations with the Ombudsman require any particular procedures. The Ombudsman might recommend the commencement of certain conflict resolution processes, but does not impose them on anyone involved with an ombuds referral. Those in need of an attorney, consultant, or representative of any kind will not find one in the Ombudsman, but are welcome to introduce to a referral any individual or representative who would be of assistance as part of the resolution process.

These Standards of Practice inform how the Ombudsman operates, and a wide array of approaches are taken when implementing them. Flexibility is key to ensuring that the Ombuds Service is an effective outlet for resolution and, as such, requires that work processes be

adapted based on unique circumstances and the interests of individuals. Doing so enables the Ombudsman to provide the type of assistance needed by those who are involved with a conflict. With that said, there are recommendations for how best to engage the Ombudsman, as well as general tactics, methods, and practices that have been consistently relied upon over the past year.

## **ENGAGING THE OMBUDSMAN**

A common question posed to the Ombudsman is about timing. *“When might be a good time to contact the Ombuds Service?”* The answer is not as simple as the question itself, primarily because of the variety of OFCCP related matters handled by the Ombudsman, including but not limited to referrals that come about through the course of compliance evaluations, complaint investigations, and conciliation discussions, as well as policy and operational concerns about the agency.

Still, a universal rule might be that parties engage the Ombudsman when they have first attempted to address their issue(s) through the normal chain of command, those avenues within OFCCP that would allow for the most direct and traditional resolution process. For instance, requests for extensions, status updates, or some kind of dialogue aimed at advancing coordination with a District Office employee should first be posed to that District Office employee. If a response from the District Office is for some reason problematic, or if there is no response at all, the Ombudsman might be introduced to assist not only the external stakeholder but also that District Office employee. In short, when following typical channels does not address an issue, the Ombuds Service might then be contacted as an alternative resolution mechanism, and ideally as soon thereafter as possible.

Occasionally, however, individuals may wish to highlight a concern in confidence and can bypass those channels in favor of doing so. The Ombudsman treats confidential, individual consultations as opportunities to empower people who would like to resolve issues on their own by sharing conflict resolution tools necessary to do so. It is important to keep in mind though that, through these one-on-one discussions, the Ombudsman does not become someone’s representative, whether it be a complainant, contractor, contractor representative, or an OFCCP employee. The Ombudsman maintains the neutrality and informality that would be necessary to assist those who have placed a referral and, were the matter to escalate, could facilitate resolution by involving other parties to the dispute while remaining impartial and continuing to advocate only for fair processes.

Similarly, individuals from within or outside of OFCCP may also contact the Ombuds Service to confidentially notify the agency of a concern that is more procedural in nature. If, for example, an external stakeholder has noticed inconsistency in the approaches taken by different OFCCP field offices, it could be helpful to bring this to the Ombudsman’s attention. That concern would then be examined, tracked, and if identified as being a systemic issue, relayed to OFCCP Senior Leadership such that policy, performance, or operational measures can be taken as necessary. OFCCP has learned a great deal through the Town Halls it has hosted over the previous several years, and that education is a direct result of the feedback that willing individuals from the external stakeholder community have chosen to share with the agency. In addition to facilitating resolution of individual disputes, think of the Ombuds Service as an endless Town Hall. There is no need to wait until the next scheduled event to provide an evaluation of OFCCP’s policies and procedures. The Ombudsman is available to receive suggestions and better understand stakeholder experiences such that problem areas are identified, and solutions designed which can increase internal efficiency and ensure fair processes for all.

Given the informality with which the program functions, people may contact the Ombudsman however they prefer. In addition to phone and email, an Ombuds Service Referral Form<sup>8</sup> can be

completed online and is generally utilized when someone would like to make an anonymous complaint about issues with OFCCP policies or practices, as opposed to an ongoing dispute with OFCCP personnel that would require active conflict resolution work with the Ombudsman. Regardless of how people choose to initiate contact, the following are some questions that might help to gather and focus thoughts in advance of placing a referral:

- What would you like to improve or address?
- How have you dealt with it thus far?
- Which barriers are preventing resolution?
- Who else is involved?
- What is the ideal outcome?

The above list is intended only as guidance for those who might be contemplating a referral to the Ombuds Service. The Ombudsman will not require anyone to answer these or other questions during preliminary conversations. The objective, especially early on, is to allow and encourage people to speak openly about any and all concerns such that the Ombudsman can diagnose the root cause of conflict and help design a suitable resolution process. However, preparation is key to any successful conversation or negotiation, and answering these questions is usually an effective way to frame your thoughts in advance of engaging.

## **COMMON PRACTICES OF THE OMBUDSMAN**

Once someone has contacted the Ombuds Service, the next step is typically to schedule a direct conversation between the Ombudsman and the referral source, or the individual who initiated contact. Before prescribing a particular course of action, the Ombudsman will need to gather information about the issue(s) or concern(s) identified and may ask a series of follow-up questions to guarantee a sufficient understanding and, as needed, relay to others involved. The Ombudsman will explore with the referral source what it is that they might wish to keep confidential, if anything, and will respect those confidentiality requests to the extent permissible by law. If there are no requests for confidentiality, the Ombudsman will discern how the totality of information, or a portion thereof, can be presented in a manner that will deliver the most effective and expeditious resolution possible, and will then seek to have a similar intake and information gathering discussion with others involved.

When a request for facilitation is received from an external stakeholder, it is a common practice of the Ombudsman to copy the applicable Regional Director on initial outgoing email communication to OFCCP. The objective is to provide that Regional Director with, at the very least, notification that an ombuds referral has been received which pertains to the work of a field office in their region, and to further allow them the opportunity, if they haven't already, to review and address a particular issue. In some instances, the Regional Director will take action that satisfies the interests of the external stakeholder. On other occasions, there is no immediate action to be taken, but the Regional Director will become and remain involved with future ombuds referral coordination. A third possibility is that the Regional Director defers to the applicable District Director, Assistant District Director, Compliance Officer, or others closely aligned and familiar with an external stakeholder's issue. In the spirit of transparency, this practice is explained each time the Ombudsman receives a new referral, but is mentioned here to proactively set expectations about the process employed and those involved with it.

Depending on the content of initial intake and information gathering conversations, and what is learned while having them, the Ombudsman may conduct research by reviewing the regulations, policies, and applicable laws for appropriate context, but does not engage



in independent legal analysis, which is handled exclusively by the Office of the Solicitor. The Ombudsman might also consult OFCCP Senior Leadership, a specific and relevant division or work team within the agency, and/or the Office of the Solicitor. If consultation is necessary, the identity of individuals would not be disclosed, and only the most applicable information would be shared outside of the Ombuds Service such that proper counsel can be received.

After conducting the necessary degree of research and/or consultation, the Ombudsman would assess and then discuss with the parties which approach would best assist and deliver upon their needs, drawing from a toolkit of conflict resolution methodologies and resources. This may include procedures inclusive of all parties to a dispute, such as facilitated dialogue, shuttle diplomacy, informal mediation, and/or the Ombudsman's neutral participation in conciliation discussions. It may also include one-on-one procedures such as conflict coaching, which often times assists individuals with brainstorming options, considering alternatives, and strategizing ways to most efficiently prepare for an upcoming negotiation or difficult conversation. No matter which of these resolution mechanisms are drawn upon throughout the course of an ombuds referral, the Standards of Practice are closely adhered to, and the Ombudsman stays squarely within the lane of advocating for fair processes and amicable resolution, rather than for an individual or organization's preferred outcome.

While there are aspects of the ombuds practice which are typical, such as some of those explained above, the process is fluid. The Ombudsman must remain flexible, continually adapting and reforming the process to fit the needs and constraints of the situation in hand, and to fulfill the goals of the applicable actors. When engaging the Ombuds Service, people will likely find that some or most of these common practices are applied. Individuals are welcome to request a specific procedure themselves, but are also encouraged to employ similar flexibility and be open to multiple possibilities. Each conflict is unique, but those who achieve desired outcomes are most often the same individuals who trust in the process and allow resolution to run its course.

The remainder of this report will review and analyze what has been presented to, worked on, and observed by the Ombudsman over the past year.

## Referrals by the Numbers

In an effort to evaluate the extent to which the program is utilized, by whom it is utilized, and on what kinds of issues it is most frequently contacted, the Ombuds Service maintains records that are kept confidential to the extent permitted by law, including, but not limited to, the date upon which an ombuds referral was received, the source of that referral, the type of issue(s) presented, the resolution mechanisms utilized to approach those issues, how many people were involved with the dispute resolution process, and the kinds of outcomes which might have been achieved, generally speaking. As an external ombuds, it is important to the Ombudsman that this quantitative data be shared within and outside of OFCCP. The figures below indeed tell a story, one which will be further developed through the Trend Analysis offered later in this report.

### QUARTERLY BREAKDOWN

How long it takes for an ombuds referral to be “resolved,” or how long the life of an ombuds referral might typically be, is more complicated than simply providing an average number of days open. While the Ombuds Service tracks the date upon which a referral is received, it does not track the length of time spent on its resolution. Referrals are often closed and later reopened as essentially the same referral despite the time elapsed. Resolution is therefore achieved only when the parties involved feel they have accomplished all that is possible through coordinating with the Ombudsman, and it is also for this reason that the Ombuds Service tracks referrals that have been “closed” as opposed to “resolved.” It is the parties involved who resolve either the entirety or a portion of their disputes through the Ombudsman’s neutral assistance.

There is also the possibility that length of time spent on a referral insinuates how “simple” or “complex” that referral might be when, in actuality, the duration of time and complexity of a referral are not so directly correlated. It is true that a legitimately difficult situation may take longer to resolve. Meanwhile, a difficult situation with individuals who are invested in and actively pursuing resolution may in fact be addressed rather expeditiously. Further, and perhaps most telling, is the idea that ombuds involvement is not intended to be “a quick fix.” There are times when it might be, but speed does not always equate to efficiency. The Ombudsman’s goal is to be approachable and accessible whenever assistance is necessary but, due to these and other factors, does not measure its own success, or the success of the parties, upon the duration of time for which a referral remains open.

The purpose for tracking the referral date is specifically to organize those inquiries by the quarter or the month during which they were received so that the Ombudsman might draw parallels between those dates and other relevant events. At least two such associations can be made (see Fig. 1).

**FIGURE 1.**

Quarter Received	Total Received	Open	Closed
Quarter 1 (10/1/2019 - 12/31/2019)	9	0	9
Quarter 2 (1/1/2020 - 3/31/2020)	13	0	13
Quarter 3 (4/1/2020 - 6/30/2020)	55	1	54
Quarter 4 (7/1/2020 - 9/30/2020)	51	8	43
	<b>128</b>	<b>9</b>	<b>119</b>

**Figure 1. Referrals by Quarter.** The columns “Open” and “Closed” display the number of referrals that were open or closed as of the conclusion of fiscal year 2020, in correspondence to the quarter in which those referrals were received.

During the first quarter, only 9 referrals were received, and only 13 during the second quarter. However, it was on May 6, 2020 that the Ombuds Service was publicly announced through a stakeholder email, along with a new landing page providing additional guidance such as the Ombuds Service Protocol. Following publication of the Protocol, the number of referrals increased markedly. May was the most eventful month on record with a total of 34 new referrals received.

Also noteworthy is that the rate of inquiry kept pace in quarter four. It is therefore the Ombudsman’s expectation that quarters one and two are less representative, and quarters three and four more representative of the referral expectancy for fiscal year 2021. The increase in exposure to the Ombuds Service made an immediate impact this year, and the Ombudsman’s plans for 2021 (further explored through the Reach of the Ombuds Service and What the Future Holds sections later in this report) are reasons to believe the referral rate will more closely resemble quarters three and four.

**SOURCE OF REFERRALS**

As previously discussed, the Ombuds Service is available to external stakeholders as well as OFCCP staff when the assistance of a neutral party may benefit current and future coordination between the agency and its stakeholders. It is therefore of interest to the Ombudsman to observe where those referrals are coming from. Given the pledge to confidentiality, Figure 2 provides only general data displaying the source of referrals.

**FIGURE 2.**

Referral Source	Total Received	Closed by 9/30/2020
OFCCP	15	11
Contractor	14	14
Subcontractor	1	1
Contractor Representative	35	33
Complainant	18	16
Other	45	44
	<b>128</b>	<b>119</b>

**Figure 2. Source of Referrals.** The referrals received and closed before the conclusion of FY 2020 are displayed in correspondence to the sources from whom those referrals were received.

What constitutes a referral to the Ombuds Service is rather broad. Any inquiry or request for the Ombudsman’s involvement is a referral. That could include someone seeking clarity about a policy or process engaged in by the agency, an external stakeholder or OFCCP employee’s request for individual consultation, shuttle diplomacy, neutral facilitation, and/or mediation between OFCCP and an external stakeholder. Once initial contact is made and an information gathering discussion held with the referral source, each ensuing conversation is considered to be part of that same referral. It is possible that the Ombudsman works with an individual many times throughout the course of the year. If the separate interactions involve the same general fact patterns, they are considered part of that single referral; only on different issues involving previously unidentified people and unique fact patterns would a new referral be created.

As demonstrated by Figure 2, those referrals received from OFCCP offices accounted for roughly 12% of all referrals, with the majority of those being placed by National Office employees. This stands in comparison to contractors placing approximately 11% of referrals, and

a much larger group of those who initiated contact with the Ombuds Service being contractor representatives, or the consultants and outside counsel representing federal contractors in their coordination with OFCCP. Those contractor representatives placed 27% of all referrals received and handled by the Ombudsman. Complainants also utilized the Ombuds Service at a steady rate during fiscal year 2020, constituting 14% of all referrals. The category listed as “Other” includes those inquiries made by individuals who wished to remain anonymous, or those which fall entirely outside of OFCCP’s jurisdiction.

When an inquiry would be more appropriately addressed by the OFCCP Help Desk,<sup>9</sup> the Ombudsman discusses that with the referral source and, with their permission, forwards the inquiry to the Help Desk accordingly. There were 20 such instances over the course of the past year. When an inquiry falls entirely outside of OFCCP’s jurisdiction, the Ombudsman responds to the referral source, welcomes a conversation with them to clarify the mission and capacity of OFCCP, and provides guidance about other available resources, when applicable. In some circumstances, a resource outside of OFCCP, the Department of Labor (DOL), or the federal government as a whole may be of assistance to the inquirer and the Ombudsman, when aware of an alternative conflict resolution resource, can point them in that direction.

**ISSUE TYPES: PRIMARY**

When people engage the Ombudsman, they are usually focused on their position, the substance someone believes they are owed or, more succinctly, what a negotiator wants. What people generally require is the opportunity to be heard, to voice frustrations about whomever it is they are in conflict with, and to cover as much as would be helpful about their position, while the ombuds listens intently for the interests, or the needs and values underlying that position. The initial iteration of that person’s story typically focuses on the primary issue, or the position, that prompted them to contact the Ombuds Service and, through listening to those stories, the Ombudsman has identified and tracked the frequency of primary issues. Note that the categorization of these referrals reflects the types of issues raised by external stakeholders, not the merit of individual referrals.

**FIGURE 3.**

Primary Issues Raised	Frequency
Transparency	3
Extension Requests	5
Scope of a Review	6
Length of Investigation	12
Jurisdiction Disputes	10
Negotiation Impasse	14
Disputed Determination	7
Communication	12
Conduct/Personnel	11
Policy and/or Procedural Concerns	6
Other	42
<b>Total</b>	<b>128</b>

Primary issues might include wanting more transparency from relevant OFCCP contacts, or the extension of a deadline that the agency has set for submission of data or other requested information, or the fact that an investigation has been open and ongoing for longer than someone deems reasonable. When a determination has been made by OFCCP, and a contractor or complainant disputes that determination, the contractor or complainant’s view of that determination is their position. Similarly, when a contractor believes that OFCCP has taken an action contrary to what the regulations, or

**Figure 3. Primary Issue Types.** The initial concerns and issues presented to the Ombudsman.

the Federal Contract Compliance Manual (FCCM),<sup>10</sup> or the agency's published Frequently Asked Questions (FAQs)<sup>11</sup> call for, that too represents a primary issue type, those issues which were the focus of a referral and have been directly shared with the Ombudsman.

Of those primary issues presented in fiscal year 2020, the overwhelming majority fell into the category "Other." This includes referrals initiated by an external stakeholder in search of guidance about agency policies or procedures, or a person without an OFCCP-related issue unsure of whose authority their inquiry might fall within. In either instance, the Ombudsman welcomes a conversation with that referral source to better understand what they might be in need of, and refers them to available resources within OFCCP (such as the Help Desk, FAQs, Directives, FCCM, etc.) or other government agencies (including the Wage and Hour Division, the Employee Benefits Security Administration, the Veterans' Employment and Training Service, or a resource outside of DOL entirely).

Less frequent but still an example of why someone chose to contact the Ombudsman was communication. These concerns were often in reference to what the referral source viewed as poor, inconsistent, or an overall absence of communication. It was with a similar regularity that the Ombuds Service heard from individuals with complaints about the conduct of an OFCCP employee, or an entire office. Some examples include a contractor's concerns about a field office's handling of a compliance evaluation; a consultant feeling as though the approach taken by a Compliance Officer was outside the scope of the Compliance Officer's role; a field office, after a few years of conducting a compliance review, widening as opposed to narrowing the scope of that review; and a complainant expressing doubts about a field office employee properly investigating their complaint.

Jurisdiction disputes typically involved scheduling issues, such as whether it was appropriate to administratively close an audit when the contractor asserted that the scheduled facility had closed, or a contractor received a scheduling letter when it believed it was still within a scheduling moratorium based on a recently received Notice of Compliance. In such instances it would be necessary for the Ombudsman to involve the Division of Program Operations (DPO) and the National Office's Jurisdiction Team, the OFCCP employees qualified to determine jurisdiction. A third example, one that was discussed by multiple complainants, was OFCCP transferring a complaint to EEOC through the interagency Memorandum of Understanding, as opposed to retaining a complaint that made reference to evidence of systemic discrimination. As for Negotiation Impasse, this category almost exclusively encompassed conciliation discussions that had stalled for any of a variety of reasons, and the Ombudsman was asked to step in for the purposes of providing neutral facilitation of those negotiations.

Some of these primary issues, particularly those which later revealed themselves to be part of a pattern, will be further explored in the next section of this report.

## Trend Analysis

Beyond understanding the needs and values motivating it, addressing a primary issue involves pinpointing others which might be either the cause or effect. In much the same way that a position is stationary without its interests, it is often the case that “the issue is not the issue.” Granted, sometimes the issue is so significant to one or more people that it really is the issue, and a series of others stem from it. Yet part of being an effective problem solver is looking at every layer of the problem. As such, the Ombuds Service strives to uncover that which exists below the primary issue; either what led to it, or the ripple effect that takes place as a result of those initial concerns, fears, frustrations, and driving forces escalating a conflict. In practice, this includes the identification, monitoring, and analysis of trends noticed throughout the year. The goal is to detect them early, observe their frequency and impact, and enable OFCCP to implement preventative action around all emerging issues which may be impactful to the agency and its stakeholders.

### ISSUE TYPES: SECONDARY

If contacted by a contractor frustrated that their request for an extension was denied by an OFCCP office, or about the length of an investigation, for example, the Ombudsman’s initial focus is on the reason why that request for an extension was denied, or why the investigation has been lengthy, and what still needs to be achieved before it may conclude. During either those preliminary interactions or subsequent ones, it is often the case that additional issues emerge. A primary issue type was attributed to each of the 128 referrals received in fiscal year 2020 (see Fig. 3). However, a sufficient analysis of the issues handled by the Ombudsman can only be accomplished when also accounting for secondary issues, or those that were uncovered through further discussion about the primary issue. To distinguish between those which a referral source directly presented to the Ombuds Service and those underlying, secondary issues, the Ombudsman has tracked both.

**FIGURE 4.**

Issue Type	Frequency
Primary Issues	128
Secondary Issues	95
<b>Total</b>	<b>223</b>

**Figure 4. Total Issues.** The number of primary versus secondary issues as well as the overall total.

The mere presence of multiple issues per referral is common not only at OFCCP, but with conflict analysis generally. Most conflict resolution experts acknowledge five stages of conflict (latent, perceived, felt, manifest, aftermath). As the name suggests, conflicts in the *latent* stage exist but have not yet been identified.

Those in the *perceived* stage have been observed, but not yet sufficiently examined. A conflict has reached the *felt* stage when parties experience emotions associated with their involvement. It is either this phase during which most ombuds referrals are placed, or *manifest*, the stage that immediately follows and represents the point at which those involved are engaging, but not yet productively. In order to achieve the fifth stage, *aftermath*, or the outcome of the conflict, all potential contributors to the escalation of that conflict must be identified and addressed. It is for this reason that while handling 128 referrals in fiscal year 2020, the Ombudsman tracked and identified a total of 223 primary and secondary issues (see Fig. 4); these issues either led to or heightened a concern, disagreement, or wider dispute.

More often is the case that a secondary issue type is indirectly alluded to and, upon further work with those parties, the Ombudsman notices it played a contributing role to conflict escalation. Looking at what those secondary issues actually were, the frequency at which they

were observed, and their affiliation to the respective primary issue introduces new levels of meaning. Those which appear to be most prevalent are given separate attention, shared with OFCCP Senior Leadership and, through this report, OFCCP field offices along with the external stakeholder community.

**FIGURE 5.**

Secondary Issues Raised	Frequency
Communication	30
Transparency	12
Consistency Across Offices	24
Reasonable Timeframes	14
Bias	15
<b>Total</b>	<b>95</b>

**Figure 5. Secondary Issue Types.** The secondary issues tracked along with their frequency.

Communication problems were far more likely to be a secondary as opposed to primary issue, as was transparency. This might come as a surprise to those familiar with the original purpose of the Ombuds Service, a program introduced as one of the agency's many answers to external stakeholder feedback about its need to improve communication and enhance transparency. Although, to suggest that they are less significant concerns than originally anticipated would be overlooking the impact of secondary issues. Their

overall rate of occurrence is more telling. Of the 223 total issues witnessed by the Ombuds Service, communication and transparency account for at least 24%. This proportion suggests that these issues remain significant contributors to OFCCP conflict, although it should be understood that they are fundamental to disputes between people generally as opposed to a phenomenon unique to OFCCP. It should also be noted that many contractor representatives shared with the Ombudsman how far the agency has progressed in recent years with addressing transparency, but isolated incidents are expected given the nature of OFCCP's work as an enforcement agency and its relationship to federal contractors whose employment practices are called into question.

The most common correlation between communication and transparency to the respective primary issue was observed on referrals placed due to an impasse reached through OFCCP and stakeholder negotiations. Similarly, complaints about the conduct of an OFCCP employee or office were often followed by complaints of a pattern of ineffective communication and/or a lack of transparency. On almost every occasion, poor communication and/or transparency was the cause rather than the effect of a negotiation impasse, or concerns over the agency's conduct, or a determination that was disputed by either a contractor or complainant.

There were three secondary issue types that did not arise as primary issue types. An external stakeholder's frustrations about perceived inconsistencies from one OFCCP office to the next, or what external stakeholders viewed as unreasonable timeframes offered by OFCCP, were generally referenced through the natural course of discussing the primary issue. Meanwhile, bias was revealed even more indirectly, sometimes after multiple conversations addressing either the reasons an impasse had been reached, why a determination was disputed, or the conduct of an OFCCP employee. Interestingly, it appeared to inform the behaviors of both contractors and OFCCP, as opposed to only one actor steadily showing biases. While the frequency and accumulation of these issues is relevant, the impact will be further explored through the Ombudsman's observations about each.

**SYSTEMIC REVIEW**

Secondary issues are no less significant than primary issues, and particularly when trends suggest they are attached most often to the same primary issue(s). It is therefore the

responsibility of the Ombudsman to conduct a systemic review and examine why they occur. Those that are most often presented are a pattern, and patterns provide opportunities to learn. Classifying, studying, and digesting these trends is essential to an organization's ability to grow. Below are some of the observations of the Ombudsman, along with recommendations about how they might be addressed.

### **Communication**

One of the more common communication concerns expressed by contractors, contractor representatives, and complainants was attached to the "length of investigation" primary issue type. All three of these stakeholder groups reported their perception that investigations were unexpectedly lengthy, and on occasion included long gaps in communication between them and applicable OFCCP staff, sometimes for a period of several months. These groups reported that this occurred despite their attempts to make contact with the agency, and some of them adding that upon hearing back from OFCCP, they were met with additional data and/or information requests. Stakeholder frustrations about those data requests ranged from complainants claiming they had already submitted the requested documentation, to contractors suggesting it was unreasonable to expect that data and/or information be submitted in one or two weeks, and particularly so shortly after a lapse in communication. These concerns were conveyed by multiple individuals about field offices from different regions and pertaining to both compliance evaluations and complaint investigations.

Something else expressed repeatedly came specifically from contractor representatives. On at least 12 occasions, attorneys and/or consultants articulated that, in their view, compliance evaluations could go on for years without OFCCP sharing specific information about the finding(s) and allowing for a rebuttal. On a few of these occasions, OFCCP argued that the rebuttal is offered through conciliation, and it is true that conciliation is designed to be an interactive opportunity for resolution of those findings. In these multiple references to a lack of communication during or near the end of a compliance evaluation, however, contractor representatives have pinpointed stages of the process where increased dialogue would be valued, and potentially even eliminate or benefit the ensuing conciliation procedures. Worth noting is the fact that many provisions of OFCCP's new rule, *Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination*,<sup>12</sup> are intended to address these precise issues.

Concerns about communication came not only from external stakeholders, but from OFCCP as well. The Ombudsman received seven inquiries from OFCCP staff requesting individual consultation about how to effectively engage a highly emotional, skeptical, or seemingly unapproachable complainant or contractor representative. To be clear, agency personnel seeking this assistance is not a problem, in fact it is very encouraging. The issue is that communication is often times challenging; a challenge that is unlikely to be prevented given that OFCCP cannot assist external stakeholders with managing their emotions and becoming effective communicators before they engage with the agency. What OFCCP employees have the ability to do, just as these seven individuals have, is evaluate their own approaches to conflict, suitable communication styles, and talk to the Ombudsman about sufficiently preparing for that upcoming difficult conversation. It cannot be avoided, but it can certainly be managed.

### **Transparency**

The most frequently identified issues relevant to transparency were about OFCCP requests for data, information, and/or additional interviews, as well as status update requests and a perceived lack of clarity regarding potential violations identified in the early stages of compliance evaluations. Contractors and contractor representatives shared with the Ombudsman frustrations about what they viewed to be reviews that did not follow a linear



and predictable process, such as desk audits proceeding to on-site reviews and then seemingly reverting back to a desk audit after further data collection without clear explanation as to why. These groups reported a lack of clarity as to what drove OFCCP to request multiple data submissions or more employee interviews.

In order to effectively evaluate this issue, it must first be acknowledged that OFCCP regulations and guidance establish a contractor's obligation to timely submit affirmative action plans (AAP) and support data at the commencement of a compliance evaluation, and its subsequent need to provide the agency with access to records and establishments. Doing so is the first and most proactive way for contractors to ensure a smooth and efficient compliance evaluation. While OFCCP regulations and guidance set forth an overall process that applies to compliance evaluations, these evaluations necessarily remain somewhat fluid processes based on the specific facts and factors at issue, no two of them exactly alike, and that must be understood by all who coordinate with the agency. Still, as established in Directive 2018-08, *Transparency in OFCCP Compliance Activities* (Sept. 19, 2018)(DIR 2018-08),<sup>13</sup> the agency commits itself to being transparent, consistent, and efficient in compliance evaluations, "ensuring there is open communication, cooperation, and intent to minimize unnecessary burden."

To be sure, some documents and information in OFCCP's possession may be subject to recognized privileges and thus cannot be shared. These circumstances aside, all field offices should follow the principles explained in DIR 2018-08 as it relates to status update requests, the reasoning behind documents and information being requested by OFCCP, and the need for certain actions to be taken during the compliance evaluation process. Weighing the risk and potential value of being transparent is important, and it is conceivable that the impact would extend beyond just simply satisfying what the Directive suggests is necessary. Being consciously and genuinely transparent will allow for trustworthy, amicable relationships to guide collaborative efforts around ensuring contractor compliance and protecting workers from discrimination. That value certainly outweighs the risk.

### **Consistency across Offices**

As of the date of this report, OFCCP has 47 District and Area Offices across the United States and unincorporated territories. Achieving widespread consistency among this number of offices is inherently complicated. Regardless, with efficiency being an objective of the agency, and trends observed by the Ombudsman related to consistency, it is worth exploring as a potential growth area. Parties that engaged the Ombuds Service frequently mentioned that staff from different field offices employ various approaches to conciliation. It should be noted that OFCCP has worked extensively to address this and recently issued internal guidance on conciliation and mediation procedures. It is likely that the increase in consistency is already underway and will be felt over the course of time.

A second area of inconsistency identified by contractors and contractor representatives is how field offices handle the submission of contractor AAPs and support data. During multiple ombuds referrals, it was noted that contractors with establishments in different regions undergoing simultaneous compliance evaluations had received inconsistent messaging pertaining to the current or prior year AAP and support data necessary to submit. It was also mentioned numerous times that there was a lack of clarity about how many months of data was necessary, some field offices suggesting six months, others ten. Similar to the internal guidance produced regarding conciliation and mediation procedures, OFCCP published updated Scheduling Letter and Itemized Listing FAQs<sup>14</sup> which address the appropriate AAP year and amount of support data required. It is possible that this too will take time to permeate, but the hope is that internal uniformity is in progress as a result of these FAQs.

One other area of perceived inconsistency was the handling of employee interview notes. It was mentioned a few times by different contractor representatives that the quality of interview notes or other written communications were unprofessional and/or shared without what stakeholders referred to as care and attention to detail. It does appear to be an intermittent occurrence as opposed to the norm, and it was often times introduced when there were also concerns about conduct of a field office or specific employee. On a few occasions, OFCCP employees shared with the Ombudsman that perhaps they were working too quickly, at the request of the contractor, or the specific document and/or communication had not been reviewed by a supervisor, either because of a lack of resources (such as an Assistant District Director staffed in that field office) or the need for quick action. While it is in the interest of contractors to receive those interview notes and all other OFCCP communications in a timely manner, timeliness should be balanced with efficiency.

A second complaint regarding employee interview notes was the inconsistency in how or whether they are shared with the applicable employee. During coordination between field offices and contractor representatives, the representatives reported that most field office staff proactively send typed interview notes to the employees interviewed for review and signature, yet others do so only when either the contractor or employee interviewed has specifically requested a copy. According to the FCCM, the return of interview notes to employees is a step required of the Compliance Officer and expected by the contractor. Consistency around how that is handled will eliminate confusion and/or concerns about field office staff conducting a thorough and proper investigation.

### **Reasonable Timeframes**

It would be difficult to imagine a scenario where fairness and respect are not mutually shared interests. Humans feel the need to be treated fairly and respectfully. In much the same way, everyone expects what is reasonable, but what defines reasonable is where people might deviate. That was seen by the Ombuds Service on many instances over the past year. On a few occasions the issue of timeliness came about when a contractor was not notified of OFCCP receiving a complaint in the amount of time suggested in the FCCM, which is 10 days from the date that complaint is filed. The complaint perfection process is a complicated one, and it is possible that increased complaint perfection training could benefit those in Regional Offices tasked with that responsibility. For now, the timeframe established by the FCCM should be the objective standard for what is reasonable.

More often than not, though, the concern about unreasonable amounts of time was coupled with the previously discussed issue of lengthy investigations. Earlier this year, OFCCP issued Directive 2020-02, *Efficiency in Compliance Evaluations* (April 17, 2020)(DIR 2020-02),<sup>15</sup> which establishes a framework for keeping the number of aged cases below 15% of the agency's total caseload. DIR 2020-02 defines an aged case as one that does not result "in an administrative closure, conciliation agreement, or referral to the Office of the Solicitor within two years of the date of the scheduling letter." In order to meet that goal, DIR 2020-02 considers many examples of what a reasonable amount of time might be (contacting the contractor within 15 days of sending a scheduling letter, closing the desk audit within 45 days of receiving an acceptable AAP, completing the entire evaluation within 180 days absent preliminary findings of discrimination, issuing a Pre-Determination Notice (PDN) within one year of the issuance of a scheduling letter, etc.). Like the FCCM and its reference to a 10-day notice of complaint receipt, OFCCP employees should adhere to DIR 2020-02 as the criteria for determining what is indeed reasonable. The other end of the bargain is for contractors to fully cooperate with all aspects of the compliance evaluation process and, assuming that is done, completing evaluations more efficiently and within reasonable timelines should be the result.

The other issue related to reasonable timeframes is the amount of time OFCCP provided contractors to submit additional data and/or information requested by the agency. As previously discussed, some contractors reported that OFCCP would set short deadlines for a response to an information request following extended periods of little to no communication from the agency. Creating a shared definition of reasonable lies not only in the important benchmarks published through DIR 2020-02, but in the amount of time it takes OFCCP to respond to contractor, contractor representative, and complainant inquiries, and to expect similar turnaround times from external stakeholders. Both parties should be modeling what they expect in order for that shared definition to come to fruition. If there is not yet measurable progress to display, a simple email notifying a contractor or a complainant of the need for more time, and providing assurance that their case is in movement might go a long way in dispelling the notion that a review is not being handled properly, or that there are other conduct or personnel issues. With it there will be less of a focus on what the other party did not do, and an increased focus on what needs to be done to move things forward.

### ***Bias***

In the context of OFCCP and external stakeholder conflict, what the Ombudsman saw in numerous instances was a tendency to disagree with individuals or their ideas, not because of affiliation to a protected class, but as a learned reaction to a prior dispute. First of all, it should be clarified that this is not exclusive to OFCCP and external stakeholder relationships. It is seen in organizations, public settings, and cultures all over the world. This type of perceived bias was observed as a pattern of behavior that went both ways—by external stakeholders toward OFCCP, and OFCCP toward external stakeholders.

In at least 13 referrals, it was shared with the Ombudsman that either OFCCP staff or a contractor representative was difficult to work with, and those complaints most often arose when a negotiation reached impasse, an external stakeholder alleged a lack of transparency, a determination was disputed, or the conduct of an OFCCP employee called into question. The degree to which perceived bias increases the risk of conflict cannot be overstated. Perceptions are created when people experience learned bias, regardless of how effectively they might actually be communicating, adhering to transparency norms, how consistently they operate in relation to others in similar roles, or how long they take to complete a task. Actions, and perceptions about actions, are shaped by who is on the receiving end and often based on previous working relationships.

Consider too that complainants who do not frequently work with and around the agency may also develop biases. If the primary issue they've raised is a negative experience they had related to communication, or the timeliness of case updates, or the scope of document requests, the complainant's initial impression will be difficult to overturn and may reintroduce itself if the complaint investigation's final determination is one with which they are unsatisfied.

## **RECOMMENDATIONS**

Once systemic issues are identified and analyzed, they must be addressed. The prospect of doing so takes recognition and action, not to mention time and effort. It should be clear that the Ombuds Service does not take a position on how soon or by whom specific action must be taken. It should also be reiterated that the OFCCP Ombudsman is not a classical ombuds, which would typically investigate public complaints and issue findings, or an advocate ombuds, tasked with representing and providing support to a particular angle of its constituency. Those four Standards of Practice to which the OFCCP Ombuds Service adheres do not allow for that type of advocacy or representation, and this is therefore not intended to be a finding, nor is it an endorsement for anything other than fair processes.

Still, it is imperative that the Ombudsman share observations, isolate trends, and guide the conversation thereafter to facilitate sustainable change in areas where change might be necessary. For the purposes of addressing what has been uncovered, the Ombudsman sees the potential for certain policies, concepts, and events being impactful. The following is a collection of actions that the Ombudsman identifies as addressing one or more trends observed through the systemic review.

### ***Setting Expectations***

Consider the degree to which a complaint investigation is uncharted territory for a complainant. Understandably, complainants do not typically begin their coordination with OFCCP having already understood the FCCM, or what the process of investigating their complaint might entail. Setting expectations for a complainant is in line with two of the agency's core principles, certainty and efficiency. While it is inevitable that a procedure that may be foreign to a complainant must sometimes be reiterated, and possibly even several times, it would be difficult to argue against the value of proactively setting expectations. Doing so could eliminate some existing confusion around the agency's role during the investigation, the timeframe of the complaint handling process, the responsibilities of the agency, their own responsibilities as a complainant, and what a Right to Sue entails, as well as when they might be eligible to request one. An external stakeholder should not be left to wonder where they fall on OFCCP's list of priorities when, in fact, they are indeed a priority but participating in a process which takes time. A complainant may become frustrated that they are not receiving the type of representation they anticipated from the agency when, in reality, OFCCP does not become a complainant's representative, even when there are findings of discrimination. Setting these and other expectations takes a concerted effort at the beginning of each new complaint investigation, and may require a certain degree of additional skills training. Still, the value of eliminating those questions would extend not only in the form of certainty for the respective external stakeholder, but efficiency for the OFCCP employee conducting the investigation.

### ***Field Offices can (and should) Utilize the Ombuds Service***

It is true that as an external ombuds, the OFCCP Ombudsman does not accept referrals that relate to internal coordination issues or conflict between agency co-workers. However, any and all obstacles negatively impacting a productive working relationship between OFCCP and external stakeholders are squarely inbounds. While field staff may not have initially realized the Ombuds Service was available to address concerns they had, rather than a service available exclusively to external stakeholders, the hope is that OFCCP employees now understand they can take advantage of this avenue as well.

For example, if a contractor denies access, it has taken a position that stands counter to something OFCCP has asserted or requested. Similarly, if a contractor representative interferes with OFCCP properly investigating, that creates an impasse that may lead to lengthy enforcement actions and an inability to obtain necessary data and ensure compliance. While there are procedures in place to address these occurrences, as set forth in section 8B02 of the FCCM, agency resources could be better utilized by allowing someone not already involved with the review to focus on the reasons access has been denied, or why certain aspects of an investigation are being questioned by a contractor representative. There are interests embedded in the positions contractors and contractor representatives are taking and, when they are identified and addressed, the denial of access and/or counterproductive approach can be worked through, redirected, and the investigation moved back on track. Before it gets to the stage of issuing a Show Cause Notice (SCN), it may be beneficial to involve the Ombuds Service to see if something might be negotiated that satisfies the needs of both OFCCP and the contractor.

The suggestions above are only a few examples of ways that field office employees could consider using the services of the Ombudsman. The list of challenges that Compliance Officers, Assistant District Directors, District Directors, and countless others face could be better developed by those who understand what it takes to perform those jobs on a daily basis. Instead of dealing with them, however, staff should know that they are able to refer those difficult situations in the hopes of removing barriers. The FCCM states that those challenges should be discussed with supervisors, and this report is not intended to supersede the standard advice to share issues with direct lines of OFCCP management. The Ombudsman is another option, however. If there is something needed by an OFCCP employee to more efficiently complete their work, there are now multiple outlets for having that conversation, whether it be with a direct supervisor or confidentially with the Ombudsman. OFCCP's National Office seeks to provide field offices with every resource necessary, and learns of emerging needs from Regional Office leadership. When made aware of needed skills training, the National Office will develop and deliver. When field office employees hear the same objection from numerous contractors and contractor representatives, that likely means there is a problem, and if shared from the perspective of an OFCCP employee, Senior Leadership can issue the internal guidance necessary to make everyone's lives easier. Sharing suggestions that practically address the role of an OFCCP field office employee might benefit the process of conducting a compliance evaluation, or a complaint investigation. Individual consultation with the Ombudsman is not only offered to external stakeholders but to OFCCP employees as well, and the goal remains identifying ways that can guarantee agency processes are efficient and fair to all who participate in them.

### **Ensuring Compliance**

OFCCP takes its mission to provide compliance assistance to contractors very seriously. The advice is for contractors and their representatives to take advantage of that. The agency's website is a library of information, from recent updates to the FCCM, to new and updated FAQs, to the issuance of multiple new Directives per year, and Town Halls held to encourage stakeholder feedback. OFCCP wants to hear from stakeholders, and can only publish as much guidance as it realizes would be helpful. The Ombudsman is one resource through which your information requests and suggestions about new materials can be shared, with an additional option being the OFCCP Help Desk.

The second side of the coin is a different level of compliance, that which is achieved by closely following OFCCP regulations and guidance on what must be provided during a review, and when. If extensions are necessary, there are mechanisms for requesting them from field offices, followed by escalation to the National Office. If DIR 2018-08 on *Transparency in OFCCP Compliance Activities* is not followed, or the timelines proposed in DIR 2020-02 on *Efficiency in Compliance Evaluations* are not met, a contractor can reach out to the applicable Regional Director, the Ombudsman, and the OFCCP Director in that order. If an action or request made by an OFCCP employee seems unreasonable or unwarranted, denying access is the quickest way to create an impasse and might lead to technical violations. Instead of an outright denial of access, or in some other way resisting collaboration, contacting the Ombudsman to discuss the specific concerns may lead to more efficient and mutually agreeable resolutions. Keep in mind that each escalation and each extension request adds to the total amount of time for a review to be completed. The recommendation is therefore to request extensions only when truly needed, to engage along the normal chain of command as closely as possible until it becomes clear that doing so will not be fruitful, and contact the Ombudsman as soon thereafter as possible. OFCCP leadership is intent on ensuring fair and timely reviews, and contractors can ensure the same by committing to deadlines and earnest collaboration.

**Conflict Resolution Training**

An avenue to address many of the above mentioned trends is training. Within the Division of Policy and Program Development (DPPD), OFCCP has a Branch of Training, Education, and Program Development that devotes its time to ensuring that field office personnel are given the tools necessary to understand and apply policies and regulations. Those programs developed by the training team are aimed not only at new developments, but also refresher courses that provide the continuing education necessary for an employee to be a subject matter expert in all aspects of OFCCP's equal employment opportunity authorities. The idea for increased training, however, would target the conflict resolution skills that are not instinctive, regardless of an employee's years of experience with the agency or how well they understand applicable regulations.

The Ombuds Service has worked with DPPD to develop and deliver a "Collaborative Communication" course intended to increase awareness of conflict styles (our own and that of others), how to engage with individuals who employ counterproductive conflict styles, and how to encourage collaboration while communicating with external stakeholders. Similarly, the Ombudsman and DPPD have also developed a "Negotiation Skills" course that will enable OFCCP field staff to approach negotiations with external stakeholders in the most collaborative ways possible, applying an interest based negotiation framework and expanding the capacity for both optimal solutions and improved relationships. A second goal of the "Negotiation Skills" workshop is to address some of the aforementioned inconsistencies in how OFCCP approaches negotiation and conciliation processes from one field office to the next. The course prescribes a collaborative negotiation model and suggests best practices for applying that framework within negotiation, conciliation, and mediation.

While it is anticipated that these programs will benefit both OFCCP and external stakeholders, educational opportunities around conflict resolution are abundant. Other training that could address some of the trends identified through the Ombudsman's systemic review include, but are not limited to, effective listening, difficult conversations, managing biases, and dealing with high conflict personalities. While the Ombudsman is able to develop and provide these trainings in addition to the two scheduled in fiscal year 2021, there are qualified external training providers who can also be contracted to help OFCCP address communication, transparency, and bias issues that could impact its coordination with stakeholders.

**Addressing Bias**

People are generally unaware that their biases even exist, and therefore they maneuver in the backdrop of other, more blatant concerns until someone mentions that a decision made by an OFCCP employee is likely the result of difficulty working with that person in the past, or an OFCCP employee suggests that a contractor representative who has alleged improper conduct or unreasonable data requests is coincidentally a frequent critic of the agency. On the surface, these kinds of opinions may seem like irrelevant side comments, but they are examples of reactive devaluation, a type of bias that presents itself when a proposal or suggestion is diminished because from whom it came. When further unpacked, these incidences are noteworthy, as they often times yield to the communication, transparency, conduct, negotiation impasse, and other issues raised.

To be clear, this does not insinuate that those who reactively devalue or show other forms of bias are inherently bad. Much to the contrary, exhibiting these behaviors is normal. To combat them, separate the people from the problem. The mere fact that two people were in an argument a few years back, or perhaps more frequently take polarizing viewpoints does not mean they cannot still objectively address an issue. Focusing on interests as well as the mutual benefits of collaborating is what leads to optimal gain. This is not accomplished overnight,

however. Just as biases can be learned, the process of overcoming them must be learned, and it all begins with awareness. If a training program is available and it complies with applicable federal laws and orders, the advice is to take it. Until that training is offered, the Ombudsman is available. No one is judged for honestly expressing how they feel and seeking conflict coaching, or informal conversations to address their biases.

The Ombuds Service cannot mandate or unilaterally implement any of the suggestions above. Doing so would be crossing several lines already drawn when establishing confidentiality, neutrality, independence, and informality as the program's Standards of Practice. However, the Ombudsman is not a disinterested bystander. In order to influence change, the Ombudsman strives to assist by presenting the evidence, recommending how to interpret it, proposing potential solutions, and participating in the resolution process. The next section of this report will explain some of the platforms by which the Ombuds Service will attempt to participate in the resolution process, outside of open and future ombuds referrals.

## Reach of the Ombuds Service

Over the past year, a primary focus of the Ombuds Service was to reach as far and wide as possible, within and outside of OFCCP. As with any new program, the size of its impressions is dependent upon the ability to connect with and educate as much of its vast constituency as possible. The Ombudsman was able to do so through a variety of platforms.

### INDIVIDUALS SERVED

The simplest way to evaluate the program’s connectivity is to consider the number of individuals who directly utilized its services. As previously mentioned, a referral placed might

**FIGURE 6.**

Referral Source	Individuals Involved
OFCCP	55
Contractor	30
Subcontractor	2
Contractor Representative	98
Complainant	32
Other	57
	<b>274</b>

**Figure 6. Individuals Served.** The “Individuals Involved” are tracked relative to the referrals they were involved with and, therefore, displayed according to the “Referral Source” which placed the initial inquiry.

not involve anyone other than the source of that referral. When they do, the Ombudsman tracks how many people were also part of the resolution process.

Looking only at the number and types of referrals (see Fig. 2) does not properly account for the total or average number of people involved. Likewise, accounting for the total or average number of people involved does not exactly explain their level of participation. The goal is to measure the reach of the Ombuds Service, and how or through what type of engagement those individuals were involved.

### RESOLUTION MECHANISMS

The need for confidentiality, neutrality, and independence is more commonly accepted than the standard of informality. There are objections to how much confidentiality should be offered, how an OFCCP employee could remain objectively neutral, and/or how possible it might be for safeguards such as independence to be upheld within the framework of the agency’s organizational chart. Based on experience both prior to and during the Ombudsman’s first year with OFCCP, however, the standard that is perhaps most unexpected by those who work with the program is informality. For the Ombuds Service to be a facilitative and impartial resource, a vehicle that promotes self-determination and fair processes, it is crucial that the procedures employed by the Ombudsman work for everyone involved.

It is for this reason that the approaches taken by the Ombudsman differ from one referral to the next. When an issue has been identified by an external stakeholder or an OFCCP employee, it is not a best practice to rush those involved into a mediation, or a facilitated dialogue during which the Ombudsman might support the parties’ abilities to have a small or sometimes larger group conversation via phone or video conference. For some people, that facilitation is not desired, either initially or ever, and the Ombudsman’s relationship with that party will be established and carried out entirely through individual consultation. When people are comfortable with the Ombudsman contacting someone they might be in conflict with, resolution efforts are methodical, and sometimes require that not only the Ombudsman but also the parties themselves accept that direct communication is not yet practical. Therefore, a template or typical process flow does not exist. For instance, an impasse has been reached during contractor and OFCCP interaction, and each respective party presents a host of explanations as to why.



**FIGURE 7.**

Services Provided	Frequency
Individual Consultation	88
Shuttle Diplomacy	38
Mediation/Facilitated Dialogue	11

**Figure 7. Services Provided.** A referral might include multiple resolution mechanisms and, as such, the total number of services provided does not equate to the total number of referrals received and handled by the Ombuds Service.

Those explanations, which many times take the form of blame, accusations, and contradictory fact patterns, must first be explored with each party individually. It may therefore be the case that many rounds of phone, video, or email conversations take place between the Ombudsman and contractor, and likewise the Ombudsman and applicable OFCCP offices. This process of relaying messages back and forth, or shuttle

diplomacy, is a highly effective resolution mechanism absent the parties being prepared for a more intensive facilitated dialogue or mediation.

Of the 274 individuals who worked with the Ombudsman on a referral, 64% of them did so through individual consultation. This could include confidential discussion about a person’s concerns, conflict coaching, assistance preparing for a difficult conversation, or an external stakeholder simply needing guidance about OFCCP policies, procedures, or compliance assistance tools, and the Ombudsman referring them to the appropriate resources. Of the resolution processes that evolved beyond individual consultation, a majority of them included shuttle diplomacy. The number of conversations with each party and how many people were involved in those conversations varied from case to case. Meanwhile, when it appears that shuttle diplomacy has led to progress, and the parties are either hopeful about the prospects for resolution and/or similarly invested in a mutually beneficial outcome, the Ombudsman might recommend engaging with those parties through an informal mediation, or a facilitated dialogue. In those instances, the goal is to help the parties bridge any remaining gaps that exist through an organized concession making process, doing so in a way that models collaboration, effective communication, and a commitment to moving beyond differences. More often than not, the parties conclude mediation or facilitated dialogue with an agreement, or at least an ability to continue working toward resolution directly, with the Ombudsman remaining available on standby should conflict re-escalate and ombuds services again be necessary.

**GROUP ENGAGEMENT**

A tally of the services provided and the number of individuals served only represent a small portion of those who have engaged with the Ombuds Service. For the program to achieve its mission, it was critical that the Ombudsman meet with and deliver presentations to

**FIGURE 8.**

Presentations	Frequency
External	24
Internal	18

**Figure 8. Group Engagement.** The number of presentations and trainings delivered, externally and internally.

constituents, both externally and internally. Unfortunately, it is unrealistic to project the number of federal contractors, subcontractors, their attorneys and consultants, worker groups, contractor employees, OFCCP employees, and other interested third parties who also interacted with the Ombudsman through large group arrangements. However, and especially

in a world that went virtual during 2020, the Ombuds Service does aim to connect with its sizeable audience as often and interactively as possible, and will continue doing so in the future.

The Ombudsman received many requests for public engagement. External presentations were delivered to workers' rights, affirmative action, and compliance groups such as the American Association for Access, Equity and Diversity (AAAED), the Center for Workplace Compliance (CWC), DirectEmployers Association, The Institute for Workplace Equality (IWE), among others. The Ombuds Service also connected with a number of Industry Liaison Groups (ILG), presenting during seven ILG chapter meetings, as well as board meetings and the annual conference of the National Industry Liaison Group (NILG). OFCCP hosted its own external presentation in August, *Updates on Conciliation, Mediation, and the Ombuds Service*,<sup>16</sup> and the Ombuds Service during which the Ombudsman discussed both the Pre-Referral Mediation Program<sup>17</sup> and best practices for working with the Ombuds Service.

An identical emphasis was placed on delivering internal presentations, both within OFCCP and the Department of Labor as a whole. The Ombudsman joined a number of National Office divisional meetings, Regional Office manager meetings, District Office staff meetings, and OFCCP all staff meetings to introduce and discuss the Ombuds Service. In addition to presentations, the Ombudsman piloted a Collaborative Communication training to District Directors and Assistant District Directors, which provided the opportunity to work with about 50 OFCCP employees from around the country. Outside of OFCCP, the Ombuds Service participated in the second annual DOL Office of Compliance Initiatives Summit, *Advancing Compliance Solutions for Today's Workplace, Two Years and Counting*.<sup>18</sup>

Most external ombuds are primarily focused on the priorities of those interested third parties from outside of the organization. The Ombuds Service is indeed committed to arranging any and all potential conversations with external stakeholder groups, and realizes that it has only scratched the surface through year one. After all, there are over 25,000 federal contractors, along with a network of contractor representatives, worker rights groups, and of course the employees of those 25,000 federal contractors, all of whom fall within the OFCCP Ombudsman's potential constituency. Alongside that important connectivity objective, the Ombudsman wants not only external stakeholders but also the OFCCP and larger DOL communities to be comfortable with the Standards of Practice and the operations of the program.

## RECEPTION

The Ombuds Service takes every opportunity to learn from the experiences of those who have already utilized its services. Through its first year, reception to the program has been quite positive. Featured online is an Ombuds Service Evaluation Form,<sup>19</sup> which invites those who have participated in an ombuds referral to share feedback about their participation. Without question, any and all assessments are greatly appreciated, as it is this collection of feedback which allows the Ombudsman to identify aspects of the program which have thus far been successful, and others which might need attention as the Ombuds Service continues to grow.

Through fiscal year 2020, 100% of those who responded suggested that coordination with the Ombuds Service met their needs and expectations, and agreed that they would work with the Ombuds Service again should the need and opportunity present themselves. Certain individuals, whose names will remain confidential, shared testimonials speaking to their experiences.

***"Initially, I was skeptical that an Ombudsman employed within OFCCP could be neutral and objective, but his professionalism has exceeded my expectations. His actual interactions with my clients and me have allayed any prior concerns."***

***— Outside counsel for federal contractor***

*"The Ombuds Service was extremely valuable for me. It helped tremendously to create a best-case scenario for all parties involved. I am very thankful to have had the assistance of the Ombuds Service and the OFCCP."*

— *Complainant, after settlement reached through a complainant/contractor mediation*

*"This referral went well, Marcus. I think (the contractor) was pleased with the outcome. Thanks for your help on this."*

— *OFCCP District Director*

*"The ombuds office was instrumental in gaining resolution of a compliance review that had reached an impasse."*

— *Outside counsel for federal contractor*

*"Using the Ombuds Service was very helpful in this instance and I would not hesitate recommending that our clients use it in the future."*

— *Consultant for federal contractor*

*"What is noteworthy is the priority (applicable OFCCP employee) and Marcus Stergio provided to resolve the matter."*

— *Diversity and Inclusion Director employed by federal contractor*

*"A positive experience like this one truly encourages stronger and more meaningful commitments to compliance and, even more importantly, to the ultimate goal of creating more and better opportunities for women, minorities, veterans, and the disabled. It has really been wonderful to see the changes made by the agency, and your office in particular."*

— *Outside counsel for federal contractor*

*"I appreciate the way you handled this matter and am very pleased with the ombuds program generally. Thanks for making everything so user-friendly. I look forward to working with you again."*

— *Outside counsel for federal contractor*

*"We were happy to get a positive response from (applicable District Office) and do feel that it was driven by your intervention since it had been asked for and denied previously. Thanks again for your help and we will certainly reach out if we encounter any roadblocks."*

— *Outside counsel for federal contractor*

The Ombuds Service is grateful to those who spent a few minutes of their time and completed the evaluation form. For those who were unaware that such an opportunity existed, or intended to complete it and have not yet done so, it is never too late. Constructive criticism, honest feedback, suggestions for improvement, and evaluations of any kind are accepted year round and always appreciated.

## What the Future Holds

Alongside a review of each fiscal year, the Ombuds Service looks ahead to project and set goals for the near future of the program. Regarding future ombuds referrals, it would be complicated to assume how many or from whom they might come over the next several months. With only one year of data, predicting either a steep decline or steady rise would likely be unfounded. A more reliable expectation is that the referral rate will align with quarters three and four of fiscal year 2020 (see Fig. 1), or at least closer to them than the year's first two quarters.

More certain is the plan to continue conducting outreach, engagement, education, and training. Whether limited to virtual formats or taking advantage of in person gatherings, whenever it is those might again be possible, the Ombuds Service has set the goal to match or exceed the number of presentations delivered over the past year. Similarly, as future ombuds referrals and conversations with constituents reveal the need for additional, more specific conflict resolution skills training, they will be developed and delivered accordingly. The Ombudsman is pursuing other avenues that may serve as platforms for broadening the outreach externally and internally. Worker groups, contractor compliance groups, contractors themselves, and employees of those contractors will all be targeted as part of the ongoing outreach campaign, as it the Ombudsman's vision for all who work with OFCCP to understand, have access to, and feel comfortable with this program. Those who have ideas about or a desire to participate in future collaboration with the Ombuds Service are encouraged to be in contact.

And to those still unsure about what that collaboration might look like, or how the Ombuds Service might assist them, that too can be part of the continued discussion. Conflict is inevitable and there are very few people who would suggest they enjoy it. It is more often confronted with apprehension, and the uncertainty over how to manage conflict often leads people to sidestep it. Through the course of individual consultations, the Ombuds Service has heard some of those anxieties. Among some of the programmatic objectives described earlier in this report, it is a sincere desire for all who engage the Ombudsman to collectively agree that there is no risk in doing so. The greater risk lies in avoiding a problem, hoping it might just disappear, when in reality that is unlikely to happen.

Rather than the conclusion of a review, this Annual Report should be seen as the beginning or, to some, the continuation of an ongoing dialogue. Issues cannot be eliminated overnight, nor can the recommendations provided in this report be implemented immediately. The Ombudsman remains available to further discuss those implementations, and the longer term benefits of doing so. In addition to an analysis on the work performed by the Ombuds Service in fiscal year 2020, this report is an invitation to contact the Ombudsman with new referrals, questions about anything discussed herein, or as informal of a conversation as would be helpful.

## Resources and References

The following will serve as resources and references mentioned in the Annual Report and potentially of service to its readers. If a topic of interest is not featured in this report or on the resources and references list below, please contact the Ombudsman, who will refer you to the information or service required.

- <sup>1</sup> [Directive 2018-09, OFCCP Ombuds Service \(Sept.19, 2018\)](#)
- <sup>2</sup> [Directive 2020-04, Ombuds Service Supplement \(April 17, 2020\)](#)
- <sup>3</sup> [Ombuds Service Protocol](#)
- <sup>4</sup> [Ombuds Service Landing Page](#)
- <sup>5</sup> [International Ombudsman Association](#)
- <sup>6</sup> [United States Ombudsman Association](#)
- <sup>7</sup> [Coalition of Federal Ombudsman](#)
- <sup>8</sup> [Ombuds Service Referral Form](#)
- <sup>9</sup> [OFCCP Help Desk](#)
- <sup>10</sup> [Federal Contract Compliance Manual](#)
- <sup>11</sup> [Frequently Asked Questions](#)
- <sup>12</sup> [Resolution Procedures for Employment Discrimination Frequently Asked Questions](#)
- <sup>13</sup> [Directive 2018-08, Transparency in OFCCP Compliance Activities \(Sept. 19, 2018\)](#)
- <sup>14</sup> [Scheduling Letter and Itemized Listing Frequently Asked Questions](#)
- <sup>15</sup> [Directive 2020-02, Efficiency in Compliance Evaluations \(April 17, 2020\)](#)
- <sup>16</sup> [Updates on Conciliation, Mediation, and the Ombuds Service](#)
- <sup>17</sup> [Pre-Referral Mediation Program](#)
- <sup>18</sup> [Advancing Compliance Solutions for Today's Workplace, Two Years and Counting](#)
- <sup>19</sup> [Ombuds Service Evaluation Form](#)

