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Program Statement

OPI: OGC/DCE
NUMBER: P3713.23
DATE: 5/12/2005
SUBJECT: Discrimination and
Retaliation Complaints
Processing

1. **PURPOSE AND SCOPE.** To establish procedures in the Federal Bureau of Prisons (Bureau) for processing complaints of discrimination based on race, color, religion, sex, national origin, physical or mental disability, age, retaliation, sexual orientation, or parental status; violations of the Equal Pay Act; compliance procedures within the Bureau for complaints filed under Section 504 of the Rehabilitation Act of 1973 (§ 504); implementation of the Bureau's Sexual Harassment Prevention Plan, in accordance with the Attorney General's directive issued on April 25, 1994; and the Department of Justice Statement of Policy With Respect to Non-Discrimination in Employment, including sexual orientation, which was issued on May 24, 1994.

All employees are responsible for treating fellow employees with dignity and respect. In addition, they should neither practice discriminatory behavior nor condone it in others.

It is the policy of the Federal Bureau of Prisons to provide, ensure, and promote equal opportunity in employment for all persons on the basis of merit. Management at all levels will take effective actions to eliminate any internal policy, practice, or procedure which results in discrimination on the basis of race, color, sex, religion, national origin, age, physical or mental disability, sexual orientation, or status as a parent.

The Bureau of Prisons is committed to assuring that questions or complaints of discrimination and sexual harassment are promptly and thoroughly investigated and resolved without reprisal or threat of reprisal.

2. **PROGRAM OBJECTIVES.** The expected results of this program are:

- a. Employees alleging discrimination based on race, color, religion, sex, national origin, physical or mental disability, age, or retaliation will have access to the government's complaint resolution process. Contract employees may not file complaints using the procedures outlined in this Program Statement. However, employees may file complaints under this Program Statement against contract employees.
- b. Employees alleging discrimination based on sexual orientation or parental status will have access to the complaint resolution process of the U.S. Department of Justice, including counseling, alternative dispute resolution, investigation, and a final agency decision from the Complaint Adjudication Officer, U.S. Department of Justice. In certain cases, employees may also direct complaints to the Office of Special Counsel, as prohibited personnel practices, and the Merit Systems Protection Board.
- c. Time frames established for each step in the complaint resolution process will be met.
- d. CEOs will promote culturally diverse work environments free of discrimination, including sexual harassment, and ensure the local program's operation.
- e. Notification of this policy will be given to each employee through bulletin board postings and distribution of written information about the policy.

4. **DIRECTIVES REFERENCED**

a. **Directive Rescinded**

P3713.17 Discrimination and Retaliation Complaints Processing (3/6/98)

b. **Directives Referenced**

P1210.24 Internal Affairs, Office of (5/20/03)
P1330.13 Administrative Remedy Program (12/22/95)
P1601.04 Worker's Compensation Program (9/11/02)
P3000.02 Human Resource Management Manual (11/1/93)
P3420.09 Standards of Employee Conduct (2/5/99)
P3713.21 Affirmative Action and Diversity Management Program (5/16/01)
P3730.05 Workplace Violence Prevention, Staff (3/23/04)
P3792.06 Employee Assistance Program (EAP) (11/4/93)

5 U.S.C. § 552a(b) (1)

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et seq.)

The Age Discrimination in Employment Act of 1967, as amended
(29 U.S.C. § 621 et seq.)
The Rehabilitation Act of 1973, as amended (29 U.S.C. § 791
et seq.)
Fair Labor Standards Amendments of 1974 and 1978
Civil Service Reform Act of 1978
Executive Order 11478, as amended
Executive Order 12731, as amended
Executive Order 13087, as amended
Executive Order 12067, as amended
Executive Order 12106, as amended
Executive Order 13152, as amended
EEOC Management Directive 110
EEOC Management Directive 715
Notification and Federal Employee Antidiscrimination and
Retaliation Act of 2002 (No Fear Act), Pub. L. 107-174
Office of Personnel Management Handbook: Addressing Sexual
Orientation Discrimination in the Federal Government
Title 5 CFR Part 720; and Part 1201, Subpart D
Title 28 CFR Part 39
Title 28 CFR Part 42, Subpart A
Title 29 CFR Part 33
Title 29 CFR Parts 1604, 1605, 1606, 1614, 1625 and 1626
Master Agreement between the Federal Bureau of Prisons and
the Council of Prison Locals (March 9, 1998 - March 8, 2001)
Department of Justice Manual and Procedures for Providing
Reasonable Accommodation
www.eeoc.gov

5. STANDARDS REFERENCED

- a. American Correctional Association 2nd Edition Standards for
the Administration of Correctional Agencies: 2-CO-1C-11
- b. American Correctional Association 4th Edition Standards for
Adult Correctional Institutions: 4-4056
- c. American Correctional Association 3rd Edition Standards for
Adult Local Detention Facilities: 3-ALDF-1C-07-1

6. ACTION REQUIRED

- a. Each Chief Executive Officer (CEO) (Regional Director,
Assistant Director, Warden, Staff Training Center Director)
will ensure a culturally diverse work environment free of
discrimination, including sexual harassment. Additionally,
he/she will ensure that the operation of the local Equal
Employment Opportunity (EEO) Program is consistent with the
procedures outlined in this Program Statement.

Each CEO is responsible for maintaining official bulletin boards in locations easily accessible to all Bureau of Prisons staff including staff who work in offices separate from the parent facility, such as CCM offices, contract facilities (where there are Bureau of Prisons staff), etc., notifying them of the following information:

- (1) The names, titles, telephone numbers and locations of the EEO Counselors;
 - (2) Procedures for filing an individual or class complaint of employment discrimination, which includes posting on bulletin boards time frames relevant to both the agency and the employee as outlined in Attachment A; and
 - (3) Procedures for filing a complaint of discrimination on the basis of disability in programs or activities conducted by the Department of Justice.
- b. Each CEO will provide sufficient resources and support to implement the EEO complaints program as specified in this Program Statement, including:
- (1) Making reasonable accommodations for the known disabilities and religious needs of applicants and employees; and
 - (2) Ensuring that no person is retaliated against or harassed because of participation in the EEO complaints process or because of opposition to a policy or practice which the person believes is discriminatory.
 - (3) Ensuring that discrimination based on sexual orientation or parental status is prohibited.
- c. Each CEO will implement the Bureau's Sexual Harassment Prevention Plan by:
- (1) Ensuring that no person is subjected to sexual harassment in the workplace, either by a request for sexual favors or by a sexually harassing work environment.
 - (2) Notifying all employees and posting permanently on official bulletin boards the names, titles, telephone numbers, and addresses of the contact persons designated by the Sexual Harassment Prevention Program.
 - (3) Notifying all employees by posting on official bulletin boards the procedures for contacting a contact person who conducts an inquiry into allegation(s) of sexual harassment and the time limits for the inquiry.

- (4) Notifying all employees by posting on official bulletin boards that EEO complaints on sexual harassment must be filed within 45 days of the incident, no matter to whom the affected employee has reported the matter, if the employee wishes to proceed through EEO procedures.
- (5) Ensuring the appropriate provisions in EEOC Management Directive, and applicable laws and statutes are followed.

- d. Management and supervisory staff will work toward an environment which is fair and free of discrimination and retaliation by neither practicing discrimination nor tolerating discriminatory behavior or practices.
- e. The Bureau will ensure that the EEO process is covered during Annual Training.

6. **DISTRIBUTION.** All Bureau CEOs will ensure that each current employee and new employee in their organizational units will have access to this Program Statement.

/s/
Harley G. Lappin
Director

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CHAPTER 1

EEO COUNSELING PROGRAM

1. NUMBER OF EEO COUNSELORS

Staff at each institution (including each institution at a complex), Regional Office, and the Central Office will have access to at least two trained, collateral duty EEO Counselors or one full-time counselor. Staff at a complex may use counselors at any institution within the complex. These Counselors will make efforts to resolve discrimination complaints during the informal, pre-complaint stage. With the CEO's recommendation, the EEO Officer maintains sole responsibility to determine the number of collateral duty EEO Counselors located at a particular location.

2. RESPONSIBILITIES

- a. The **Equal Employment Opportunity Officer** for the Bureau is responsible for:
 - (1) selecting, appointing and removing EEO Counselors;
 - (2) informing EEO Counselors of policy changes;
 - (3) providing technical assistance to EEO Counselors; and
 - (4) ensuring that all EEO Counselors receive the mandatory training set forth in EEOC Management Directive 110.
- b. **Management** is responsible for:
 - (1) Providing opportunities and resources for EEO Counselors to perform their duties, including training as set forth in EEO Management Directive 110, official time, private space for persons who do not have personal offices, adequate access to computers with passwords that preclude other employees from accessing EEO data, printers, telephones, etc.
 - (2) Maintaining official bulletin boards in locations easily accessible to all staff, including staff who work in offices, contract facilities, etc., notifying them of the following information: names, titles, telephone numbers, and locations of EEO counselors and procedures for filing an individual or class complaint of employment discrimination.

- (3) Ensuring that EEO Counselors are free from restraint, coercion, discrimination, and reprisal during, or because of, their counseling activities; and
- (4) Making available to the EEO Counselor all documents and information necessary for informal resolution of the complaint. These documents include official personnel files, promotion board packages, all performance records, lieutenants' logs, and any other material relevant to the complaint. In their official positions as EEO Counselors, they will have routine access to these records and thereafter, pursuant to 5 U.S.C. § 552a (b) (1), such access does not constitute an unwarranted invasion of privacy.

c. **EEO Counselors** are responsible for:

- (1) serving as a liaison between management and employees to attempt to resolve problems informally;
- (2) submitting monthly reports, that describe their monthly activities, by the 10th day of the following month;
- (3) submitting their pre-complaint counseling reports to the EEO Officer, via email, and aggrieved person(s) within 5 days of the conclusion of counseling;
- (4) issuing the Notice of Right to File a Discrimination Form to the complainant at the conclusion of counseling unless the matter has been informally resolved. When counseling is performed telephonically, the Counselor will send the Notice of Right to File a Discrimination Form, and all other appropriate notices and forms, to the complainant via certified mail, return receipt requested. Although the counselor will, if requested by the complainant, also send this information via fax and/or e-mail, the 15 days for filing a complaint will only commence on the date such notice is received by the complainant via certified mail.
- (5) interviewing aggrieved persons who come to the EEO Counselor with problems, as well as others who are involved in the inquiry, and maintaining an impartial and objective attitude toward the matters under discussion;
- (6) making every possible effort to resolve complaints informally by conducting a thorough inquiry into the matters brought to them and trying to resolve issues in the complaint with the aggrieved person and management;

- (7) maintaining the confidentiality of privileged information from personnel or other employees' records. If the individual wants to remain anonymous during the counseling stage, the Counselor will not release the name of the person seeking assistance nor any information that will disclose that person's identity. The Counselor may be under obligation, however, to report staff activities that are considered a serious, and imminent threat to life or may result in bodily harm, or are in violation of the law. Allegations of sexual harassment may be required to be reported depending on the severity of the allegations. The Counselor should consult with the EEO Officer if in doubt as to what needs to be reported.
- (8) ensuring that the complainant understands his/her rights and responsibilities in the EEO process, as outlined in the *Notice of Rights and Responsibilities* (Attachment B), including the option to elect Alternative Dispute Resolution (ADR). The EEO Counselor must perform several tasks in all cases as outlined in the *EEO Counselor Checklist* (Attachment C);
- (9) explaining to the aggrieved person, the Bureau's ADR program and the differences between ADR and traditional counseling;
- (10) determining the claim(s) and basis(es) raised by the potential complaint and assisting the complainant in articulating the claim so as to avoid fragmenting the claim;
- (11) conducting an inquiry during the initial interview with the aggrieved person for the purpose of determining jurisdictional questions if a formal complaint is filed;
- (12) seeking a resolution of the dispute at the lowest possible level, unless the aggrieved person elects to participate in the Bureau's ADR program; and
- (13) advising the complainant of the entitlement to official time under

3. **SELECTION OF COLLATERAL DUTY COUNSELORS**

(This section only applies to collateral duty counselors; If full time counselors are used, the positions will be filled under the merit systems promotion procedures.)

a. **Vacancies**

A collateral duty EEO Counselor is expected to spend no more than 20 percent of his or her on-duty time counseling. When there is an EEO Counselor vacancy or when a new Counselor position is established, a local employment vacancy announcement will be made available to all Bureau of Prisons staff including staff who work in offices separate from the parent facility, such as CCM offices and contract facilities (where there are Bureau staff).

The announcement should emphasize that this position is a collateral-duty and has no known promotion potential. However, the job will provide the applicant with the opportunity to increase skills such as problem-solving, listening skills, and mediation. The employee's duties as an EEO Counselor will be attached in his or her position description. Experience gained can be credited when applying for other positions.

b. **Qualifications**

Applicants must have a minimum of one year of service with the Federal Bureau of Prisons and should submit a resume stating their qualifications and reasons for applying. Applicants should understand that, if selected, they will be expected to serve as an EEO Counselor for two years. EEO officials must have the confidence of the agency and its employees. It is inconsistent with their neutral roles for EEO counselors to serve as representatives for agencies or complainants.

Therefore, persons in these positions cannot serve as representatives for complainants or for agencies in connection with the processing of discrimination complaints. Also, any person who serves as an EEO Counselor should not serve as a representative for any employee at any stage of the discrimination complaint process. Additionally, he or she should not serve as a management representative or advisor in the complaint process.

c. **Selection Panel**

The CEO will appoint a selection panel consisting of an Affirmative Action Committee Chairperson, a Special Emphasis Program Manager, and the Human Resource Manager. The local union president will be contacted to appoint a union representative who will also serve on the panel. The selection panel will review the applications and submit a list of no more than five names to the CEO.

d. **Selection**

The CEO will forward the nominations and the supporting documentation to the EEO Officer in the Central Office, indicating his or her recommendation for selection. The EEO Officer will select the EEO Counselor and notify the CEO of the selection.

e. **Training**

No one will serve as an EEO Counselor until he or she has received formal training as required by MD-110. The local Employee Development Manager or the EEO Office in the Central Office can verify if a Counselor has received training.

4. **REMOVAL, RESIGNATION, AND TRANSFER OF COLLATERAL DUTY EEO COUNSELORS**

a. **Removal**

Only the EEO Officer may remove a counselor from his or her duties. If the agency removes a collateral duty EEO Counselor, he/she will be afforded due process in accordance with all applicable government-wide laws, rules, and regulations, and the Master Agreement. The EEO Officer may remove a counselor from his or her duties for any of the following reasons:

- (1) Abusing his or her access to privileged information, such as that in personnel records;
- (2) Refusing to counsel an employee for reasons other than: a clear conflict of interest, having an unusually heavy counseling load, or having not received training as an EEO Counselor;

If the EEO Counselor is unable to counsel the employee for any of the above reasons, he or she should consult with another EEO Counselor at the facility and refer the employee to that Counselor. When there are no other Counselors available, the Counselor will consult with the EEO Officer concerning the appointment of another Counselor.

- (3) Engaging in an activity which is contrary to the EEOC's regulations and directives or engaging in conduct which would affect his or her neutrality as an EEO Counselor;
or

- (4) Failing to perform the duties of a EEO Counselor such as failing to submit the Counselor's Report within the established time frames or failing to attempt informal resolution.

b. Resignation

If an employee cannot continue to serve as a Counselor, he or she will submit his or her resignation in writing to the EEO Officer, with a copy to the CEO.

The EEO Counselor serves in this capacity as collateral-duty, and is expected to spend no more than 20 percent of his or her on-duty time counseling complainants. If the Counselor's time spent counseling interferes with the Counselor's accomplishing the objectives of his or her full-time position, the Counselor or the CEO should contact the EEO Officer in the Central Office regarding this conflict. The Counselor may be placed in an inactive status until the conflict is resolved.

c. Transfer

If a Counselor is transferred to another facility, he or she will inform the EEO Officer so that a determination can be made as to whether the Counselor may continue to serve as a Counselor at the receiving facility, provided the CEO of the facility recommends the counselor for the job and the EEO officer approves.

5. SUPERVISION OF COLLATERAL DUTY EEO COUNSELORS

- a. An EEO Specialist in the Central Office under the direction of the EEO Officer, will provide direct supervision to all collateral duty EEO Counselors. The Specialist provides technical guidance to the Counselors on an as-needed basis, and keeps the EEO Officer apprised of all EEO counseling activity.
- b. In addition to providing technical counseling advice to the EEO Counselors, the EEO Specialist is responsible for monitoring the monthly counselor's reports, which each Counselor submits, and for providing training to the EEO Counselors.
- c. EEO Counselors may attend open meetings of the Affirmative Action Committee at their location; however, they are not required to attend.

CHAPTER 2

ALTERNATIVE DISPUTE RESOLUTION

1. GENERAL INFORMATION ABOUT ALTERNATIVE DISPUTE RESOLUTION (ADR)

EEOC's revised regulations at 29 CFR 1614.102(b)(2) require agencies to establish or make available an ADR program. The ADR program is available during both the pre-complaint and formal complaint processes. The ADR program does not diminish an individual's right to pursue his or her claim under the 1614 process should ADR not resolve the dispute.

2. TRAINING AND EVALUATION

The Bureau must provide appropriate training and education on ADR to its employees, managers and supervisors, neutrals, and other persons protected under the applicable laws.

The EEO Officer will continuously evaluate the ADR program to ensure the core principles of fairness, flexibility, training, and evaluation, as outlined in MD-110, are being utilized. The EEO Officer should continuously evaluate the ADR program and make changes. Changes in working conditions which impact the bargaining unit will require notice and opportunity to bargain with the Union prior to implementation in accordance with the Master Agreement.

3. THE BUREAU OF PRISONS ADR PROGRAM

The Bureau of Prisons has elected to use mediation as its method of ADR in the EEO process.

Mediation is the intervention in a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision-making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of the issues in dispute.

The mediator has no authority to render decisions. S/he is a facilitator who is skilled at working with the parties to resolve their dispute. The mediator is not an arbitrator or judge. A mediator primarily makes procedural suggestions regarding how parties can reach an agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore

acceptable resolution options or to develop proposals that might move the parties closer to resolution.

Mediators differ in their degree of directiveness or control in their assistance in disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution. Regardless of how directive the mediator is, the mediator performs the role of a catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute. The parties dictate the outcome of the mediation, not the mediator. The mediator will draft any agreements reached by the parties.

The format of the mediation session is as follows. Typically, the mediator meets with both parties first together in a joint session. At the joint session, the mediator will initially ask the aggrieved party to briefly describe the complaint, then will ask the aggrieved party's representative the same question. The mediator will then ask the manager involved his or her side of the situation. The mediator may ask each party what they are seeking to accomplish in the mediation, i.e. what it will take to resolve the dispute. At the conclusion of the joint session, the mediator will typically meet with each party separately in what is called a private session. These sessions will allow the mediator to ask more direct questions of the parties without putting the other person on the spot. At the conclusion of the separate sessions, it is up to the mediator whether s/he will convene additional separate sessions or whether s/he will bring the parties back together for another joint session.

Mediation sessions are confidential. At the beginning of the mediation, all parties in the room will be required to sign an "Agreement to Mediate" which states that everything discussed in the room is confidential. At the conclusion of each separate session, the mediator will also ask each party what they do not want him/her to share with the other party. The mediator is bound by these requests of confidentiality. The Agreement to Mediate also states that neither party can subpoena or depose the mediator in the event of future litigation.

The parties should come fully prepared to discuss the facts that led to the dispute. Documentation is not necessary. Parties will have the opportunity during breaks to obtain whatever documentation they feel that the other side should read. The parties should also be

able to discuss what they believe will resolve the issue. Typically, the mediator will have no knowledge of the facts prior to the mediation.

A typical mediation session lasts four to six hours. Unless otherwise agreed to by all parties, the mediation will be conducted in a secure location within the facility or complex where the aggrieved party works. The mediator will contact all parties prior to the session to coordinate a time convenient to all parties. Mediations will be conducted during normal business hours.

If settlement is reached as a result of the mediation, the mediator will draft the settlement agreement. Should the representative of the aggrieved party not be at the mediation session, the aggrieved party will have adequate access to the representative via telephone, facsimile, and/or electronic mail throughout the mediation session and prior to signing any settlement agreement. The EEO Officer will ensure that a person with settlement authority, who is not a responsible management official or BOP official who is directly involved in the case, is accessible throughout the mediation session, at least by telephone, if not in person. The person with settlement authority will ensure that the settlement agreement is enforceable.

The settlement agreement will be signed by the person with settlement authority and by the aggrieved party and his or her representative, if the representative attends the mediation session, prior to the end of the mediation session. The mediator will incorporate notice in all EEO settlement agreements that the settlement will be implemented in accordance with law (see c. below for more information about settlement agreements).

4. **REPRESENTATION OF THE PARTIES**

Aggrieved individuals have the right to in person representation during any ADR process. If the aggrieved individual plans to bring a legal representative to the mediation session, s/he should notify the EEO Officer of such intention within five days of the EEO Officer's notification that their request for ADR has been approved. Notification after that time frame may require rescheduling the mediation. The Bureau will typically not bring legal representation unless the aggrieved party plans to bring such representation.

a. **Mediators (NEUTRALS)**

The Bureau may use mediators, subject to the qualifications as outlined in the EEOC's MD 110, from the following sources: other federal agencies (through a federal neutral sharing program or other arrangement); private organizations; private contractors; bar associations; or individual volunteers.

In an ADR proceeding conducted under this Program Statement, the neutral's duty to the parties is to be "neutral, honest, and to act in good faith." The neutral must also act consistently with the ADR and:

- (1) Ensure that ADR proceedings are conducted consistent with EEO law and Part 1614 regulations, including time frames;
- (2) Ensure that proceedings are fair, particularly providing the parties the opportunity to be represented by any person of his/her choosing throughout the proceeding;
- (3) Ensure that an agency representative participating in the ADR proceeding has the authority and responsibility to negotiate in good faith and that a person with authority to approve or enter into a settlement agreement is accessible to the agency's representative;
- (4) Ensure enforceability of any agreement between the parties, including preparation of the written settlement agreement if the parties reach resolution and ensuring that the agreement includes the signatures of the appropriate agency representative and aggrieved person;
- (5) Ensure confidentiality, including destroying all written notes taken during the ADR proceeding or in preparation for the proceeding; and
- (6) Ensure neutrality, including having no conflict of interest with respect to the proceeding (e.g., material or financial interest in the outcome, personal friend or co-worker of a party, supervisory official over a party) unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

The Bureau does not use its own employees as mediators in the EEO ADR program. Should the mediator selected not be suitable for one of the parties, said party should contact the EEO Officer for the selection of another mediator.

b. Resolutions Must be in Writing

If the Bureau and the aggrieved party agree to a resolution of the matter, the terms of the resolution must be reduced to writing and signed by both parties in order that the Bureau and the aggrieved party have the same understanding of the terms of the resolution. The written agreement must state clearly the terms of the resolution and contain the procedures available under 1614.504 in the event that the Bureau fails to comply with the terms of the resolution.

Written agreements must comply with EEOC's Enforcement Guidance on non-waivable employee rights under EEOC enforced statutes. Additionally, any written agreement settling a claim under the Age Discrimination in Employment Act (ADEA), must also, where applicable, comply with the requirements of the Older Workers Benefit Protection Act of 1990 (OWBPA) Pub. L. 101-433 (1990), the ADEA, subsection (f), 29 U.S.C. § 626(f) and EEOC's regulations regarding Waiver of Rights and Claims under the ADEA at 29 CFR Part 1625. Neither party has to agree that a settlement must be confidential.

Once all of the parties sign the agreement, the signed and dated copy of the resolution must be transmitted to the EEO Officer. The EEO Officer will retain the copy for one year or until s/he is certain that the agreement has been fully implemented, whichever is later.

c. Mediation In Lieu of Counseling

The EEO Counselor will advise the aggrieved party that they may request ADR in lieu of EEO counseling. The EEO Counselor will explain what ADR is and that the Bureau's form of ADR in the EEO process is mediation using mediators from outside the Bureau. If the individual is interested in ADR, he or she must submit an *ADR Election Form* (Attachment D) to the EEO Counselor.

After the aggrieved party has elected to participate in ADR and within one working day of the election, the EEO Counselor must notify the EEO Officer by faxing a copy of the signed document indicating the election. The EEO Officer's fax number is (202) 616-2080. The EEO Counselor will also submit a memorandum to the EEO Officer containing the following information:

- (1) Aggrieved person's name, address, and phone number;
- (2) Aggrieved person's title and grade;
- (3) Basis for alleging discrimination;
- (4) A summary of the alleged discriminatory event(s);
and
- (5) Request for relief, if known.

The EEO Officer will determine whether the issue(s) is appropriate for mediation. Mediation will typically not be appropriate if there is an open Office of Internal Affairs' or criminal investigation, the dispute involves an issue that the Bureau has no authority to decide (such as retirement questions which are up to OPM), the issue is part of a class action matter, the staff member has abused the mediation process, or for other reasons as the EEO Officer may determine in accordance with the MD-110.

If the EEO Officer accepts the request for ADR, s/he will notify the aggrieved person with a copy to the EEO Counselor within five days of her/his decision. The EEO Officer will also notify the CEO of the need to appoint management representatives to participate in the mediation. The EEO Officer will then provide all parties with background information as to what to expect in the mediation process (see Attachment E).

If mediation is not approved, the EEO Officer will notify the aggrieved party, with a copy to the EEO Counselor, and instruct them to contact the EEO Counselor within 15 days of receiving such notification to resume the counseling process.

If mediation is conducted in the informal stage of the EEO process, traditional counseling will be terminated and the counseling process will be extended automatically from 30 to 90 days.

The EEO Officer will assign a mediator who will contact all parties to arrange a mutually acceptable date. The mediation will take place at the institution/complex at which the aggrieved person is located unless an alternate location is agreed upon by all parties.

If mediation is successful in resolving the issue, the agreement will be reduced to writing and become a valid contract signed by all parties. The EEO process will then be concluded. If mediation is unsuccessful, the EEO Officer will notify the aggrieved party, with a copy to the EEO Counselor, that they must contact the EEO counselor within 15 days of the mediation if they wish to continue with the EEO process.

At that point, the EEO Counselor will conduct a final interview, issue the Notice of Right to File a Formal Complaint of Discrimination, and prepare a counseling report that describes the initial counseling session, frames the issues and reports only that ADR was unsuccessful.

d. Mediation In The Formal Stage

If mediation is desired in the formal stage, the complainant will submit the Request for ADR form (Attachment D) to the EEO Officer for review. If ADR is approved, the EEO Investigation will be suspended until conclusion of the mediation process.

Mediation will not affect the complainant's EEO rights and s/he will have the ability to continue with the EEO process if the mediation is unsuccessful in reaching a settlement.

e. The EEO Officer's Role

- (1) The EEO Officer will select a mediator for the parties to use, as soon as possible, but no later than 15 calendar days from accepting the request for ADR.
- (2) The EEO Officer will provide the mediator with the names of all of the parties that will participate in the mediation session so that the mediator can contact the parties. The mediator will contact all parties and select a mutually acceptable date for the mediation. The mediation date should be as soon as possible, but, ordinarily, no later than 45 calendar days of notification of the mediator. The mediator will notify the EEO Officer of the mediation date.
- (3) The EEO Officer will notify the facility CEO of the date and will ensure that adequate space (at least two secure rooms) is reserved for the mediation and will ensure that entrance into the facility of the mediation is arranged.
- (4) The EEO Officer will ensure that the management representatives have settlement authority for the issue or have immediate access to such individual during the mediation session, whether by phone or in person. The EEO Officer will ensure that the person who has settlement authority is not a responsible management official or BOP official who is directly involved in the case.

- (5) The EEO Officer is responsible for maintaining a list of qualified neutrals who will serve as mediators. The EEO Officer will ensure that the neutrals meet the qualification as set forth in the EEOC's Management Directive 110. The EEO Officer may select neutrals from private contractors, the Federal Mediation and Conciliation Service, or from another federal agency. Bureau staff will not be employed as neutrals in the EEO ADR program.

CHAPTER 3

INDIVIDUAL COMPLAINTS PROCESSING

1. FILING AND PRESENTATION OF AN INDIVIDUAL COMPLAINT

a. Notification

An applicant or current or former employee (this does not include contract workers) who wishes to file a complaint of discrimination must contact an EEO Counselor within 45 calendar days of the alleged discriminatory event or personnel action, or the time when he or she knew or should have known of the discriminatory event or personnel action. The first day counted will be the day after the event from which the time period begins to run and the last day of the period will be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period will be extended to include the next business day. The aggrieved party may utilize e-mail to establish the initial contact.

If an EEO Counselor is not available, the aggrieved individual should contact either the local Human Resource Manager, the local CEO, or the EEO Officer in the Central Office at (202) 514-6165. The EEO Officer will assign an EEO Counselor.

Employees or EEO Counselors may request an alternate EEO Counselor where a conflict of interest exists. A conflict of interest may include, but is not limited to, situations in which the complaint concerns the existing EEO Counselor's immediate supervisor or where the employee seeking counseling is a high-ranking management employee and the existing counselor is of significantly lower rank.

Such requests must be made to the Bureau's EEO Office in Washington, DC at (202) 514-6165, which retains the right to approve or deny any such request. Denials will be in writing, to include e-mail. Denial of an alternate counselor does not prohibit the employee from pursuing the claim through the existing counselor.

b. Counseling/Informal Resolution

The EEO Counselor has 30 calendar days from the date of initial contact to counsel the applicant or employee and attempt informal resolution of a complaint of discrimination or retaliation. (The EEO Officer may grant an extension of up to 60 additional days (total of 90 days), with the agreement, in writing, of the aggrieved individual.)

The EEO Counselor will also advise the aggrieved person that they may request Alternative Dispute Resolution (ADR). See Chapter 2 for further guidance.

c. Filing of Formal Complaint

It is the complainant's responsibility, not the counselor's, to file a formal complaint with the appropriate official(s). The EEO Counselor may offer his or her assistance to the complainant in completing the complaint form. The complainant or his or her representative must submit the formal complaint in writing, signed by the complainant. A complaint must be filed with the agency that allegedly discriminated against the complainant. To expedite the processing, the complainant should file with:

EEO Officer
Federal Bureau of Prisons
320 First Street NW
Room 936
Washington DC 20534

This does not negate the complainant's rights to file with the Attorney General, the Director of EEO for the Department of Justice, or the Director of the Federal Bureau of Prisons.

A document will be deemed timely if it is received by facsimile, (202) 616-2080, or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail or facsimile within five days of the expiration of the applicable filing period. The time limits in this part are subject to waiver, estoppel, and equitable tolling.

d. Amendment of Complaint

A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. However, once a hearing is requested, a complainant must file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

e. Acknowledgment of Complaint

Immediately upon receipt of a formal complaint of discrimination, or an amendment to a complaint, the EEO Officer or his/her designee will acknowledge receipt of the complaint in writing. The acknowledgment letter will inform

the complainant of the date on which the complaint was filed and the EEOC Office and the address where a request for a hearing will be sent. Such acknowledgment will also advise the complainant of his or her rights in the administrative processing of the complaint. For complainants alleging discrimination because of race, color, religion, sex, national origin, age or disability, the acknowledgment letter will advise the complainant of the right to file a civil action, including the time limits imposed on the exercise of these rights.

Within a reasonable amount of time after receipt of the EEO Counselor's written report, the EEO Officer or designee will send the complainant a second letter (commonly referred to as an "acceptance" letter), stating the claim(s) asserted and to be investigated. If the claims are not accepted, the complainant will receive a dismissal letter (see chapter 4, **Dismissal of a Complaint**).

If the acceptance letter's statement of the claim(s) asserted and claim(s) to be investigated differs, the letter further will explain the reasons for the difference, including whether the agency is dismissing a portion of the complaint. The agency will advise the complainant that s/he may submit a statement to the agency concerning the agency's articulation of the claim, which will become a part of the complaint file. The EEO Officer will inform the complainant of the Bureau's obligation to investigate in a timely manner.

f. **Time Extensions**

The EEO Officer may extend the time limits for filing a formal complaint for good cause shown. Examples of good cause shown includes: the complainant can show that he or she was not notified or otherwise aware of the time limits; was prevented by circumstances beyond his or her control from submitting the matter within the time limits; or for other reasons the EEO Officer considers sufficient.

g. **Fragmentation of Complaints**

The fragmentation, or breaking up, of a complainant's EEO claim during processing must be prevented at all levels of the complaint process, including pre-complaint counseling. Fragmentation often occurs at the point where the agency identifies and defines the complainant's claim, most commonly during the counseling and investigative stages. A claim refers to an assertion of an unlawful employment practice or policy for which, if proven, there is a remedy under the federal equal employment statutes. Fragmentation often results from a failure to distinguish between the

claim the complainant is raising and the evidence (factual information) s/he is offering in support of that claim. Fragmentation rarely occurs when the complainant presents a legal claim based on a single incident (such as a particular selection decision or a termination decision) rather than a series of events.

One of the reasons the distinction between legal claims and supporting evidence is important is because complainants frequently raise factual incidents that occur outside of the 45-day time period for contacting an EEO Counselor. In general, for a legal claim to be timely raised, at least one of the incidents the complainant cites as evidence in support of his/her claim must have occurred within the 45-day time period for contacting an EEO Counselor.

If the claim itself is timely raised, the agency must consider, at least as background, all relevant evidence offered in support of a timely raised legal claim, even if the evidence involves incidents that occurred outside the 45-day time limit. This is true of supporting evidence that the complainant offered during EEO counseling as well as later in the investigative stage. During the investigation, the degree to which a certain piece of proffered evidence is relevant to the legal claim will determine what sort of investigation is necessary of that particular piece of evidence.

Investigators should not simply disregard relevant information the complainant provided in support of his/her claim as untimely raised; nor should they send the complainant back to counseling as if the supporting evidence was a new claim to be processed as a separate complaint.

h. Consolidation of Complaints

A new claim that is not like or related to a previously filed complaint provides the basis for a new, and separate, complaint. The complainant must present the new, unrelated claim to an EEO Counselor and the new claim is subject to all of the regulatory case processing requirements and those set forth in this Program Statement. In order to address a different fragmentation concern, the Bureau is required to consolidate for joint processing two or more complaints of discrimination filed by the same complainant, after appropriate notification is provided to the parties.

While it is anticipated that most consolidated complaints will be investigated together, in certain circumstances, such as significant geographic distance between the sites of two complaints, consolidation does not preclude an agency from investigating each

complaint separately. In all instances, however, where an individual requests a hearing, the consolidated complaints should be heard by a single Administrative Judge; or where the complainant requests a final agency decision, the Agency should issue a single decision. The Bureau must consolidate complaints filed by the same complainant before the Bureau issues the notice required at the conclusion of the investigation.

When a complaint has been consolidated with an earlier filed complaint, the Bureau must complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint. A complainant has the right to request a hearing, even in the case of consolidated complaints, after 180 days have passed since the filing of the original complaint, even if the Bureau's investigation has not been completed. If not already consolidated, an Administrative Judge or the EEOC may, in their discretion, consolidate two or more complaints of discrimination filed by the same complainant.

i. **"Spin-off" Complaints**

Complaints about the processing of existing complaints should be referred to the EEO Officer, and/or processed as part of the original complaint.

j. **Representation**

A complainant is entitled to a representative of his or her choice at **all** stages of the processing of a complaint of discrimination, including the counseling stage. In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

2. **SETTLEMENT OF COMPLAINTS**

- a. Settlement of complaints of discrimination can occur at any stage of the process. The complainant(s) proposal for settling his or her complaint will be presented to the appropriate management official. After the completion of the investigation, the complainant may be provided with an opportunity to discuss the investigative file and possible settlement of the complaint with an appropriate staff member in the EEO Complaints Section, if settlement is attempted.

- b. If settlement is reached, the terms of the settlement will be in writing. The complainant and his or her representative, and the appropriate management official(s) will sign the settlement agreement and it will be made part of the complaint file.
- c. Any settlement agreement agreed to after the filing of the formal complaint, including an offer of resolution, must be made in writing, signed by the complainant and his or her representative and the appropriate management(s) official(s).
- d. The settlement agreement will be binding on both the complainant and the Bureau. If the complainant believes that the Bureau has failed to comply with the terms of the settlement agreement, the complainant must notify, in writing, the:

Director of EEO
U.S. Department of Justice
1100 Vermont Ave. NW, Suite 630
Washington DC 20530 and

EEO Officer
Federal Bureau of Prisons
320 First Street NW
Washington DC 20534

of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

The agency will resolve the matter and respond to the complainant in writing. If the agency has not responded to the complainant in writing, or if the complainant is not satisfied with the EEO Officer's attempts to resolve the matter, the complainant may appeal to the:

U.S. Equal Employment Opportunity Commission
1801 L Street NW
Washington DC 20507

for a determination as to whether the Bureau of Prisons has complied with the terms of the settlement agreement or decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of receipt of the Bureau of Prison's determination. The complainant must serve a copy of the appeal on the agency to

the Director of EEO for the Department of Justice at the address above. See 29 CFR 1614.504, 29 CFR 1614.402, 29 CFR 1614.403, 29 CFR 1614.404, and EEOC Management Directive 110 for further information on this process.

3. OFFER OF RESOLUTION

An offer of resolution made pursuant to 1614.109(c) can be made to a complainant who is represented by an attorney at any time after the filing of a formal complaint until 30 days before a hearing. If, however, the complainant is not represented by an attorney, an offer of resolution cannot be made before the case is assigned to an Administrative Judge for a hearing. (These time and representation provisions apply only to offers of resolution and do not restrict the parties from discussing settlement or engaging in the alternate dispute resolution process in an effort to resolve an EEO complaint.)

Complainants have 30 days from receipt of an offer of resolution to consider the offer and decide whether to accept it. Offers of resolution must be in writing and must explain to the complainant the possible consequences of failing to accept the offer. The agency's offer, to be acceptable, must include attorney's fees and costs, and must specify any non-monetary relief. The agency may offer a lump sum payment that includes all forms of monetary liability, including attorney's fees and costs, or the payment may itemize the amounts and types of monetary relief being offered. Complainant's acceptance of the offer must also be in writing. Upon acceptance, the complaint is settled in full and processing ceases.

If a complainant decides not to accept the offer, the agency takes no immediate action, and the complaint continues to be processed normally.

After the hearing is completed, if the Administrative Judge (or the Commission on appeal) concludes that discrimination has occurred, but provides for less relief than the amount offered by the agency earlier in its offer of resolution, then the agency may use complainant's decision not to accept its offer of resolution to argue for a reduction in its obligation to pay complainant's attorney's fees. In general, if a complainant fails to accept a properly made offer, and the relief ordered on the complaint is not more favorable than the offer, then the complainant will not receive payment from the agency for attorney's fees or costs incurred after the expiration of the 30-day acceptance period.

It should be noted, however, that an exception to this general rule exists where the interests of justice would not be served. An example of an appropriate use of the interest of justice exception is where the complainant received an offer of resolution, but was informed by a responsible agency official that the agency would not comply in good faith with the offer (e.g., would unreasonably delay implementation of the relief offered). If the complainant did not accept the offer for that reason, and then obtained less relief than was obtained in the offer, it would be unjust to deny attorney's fees and costs.

A complainant's failure to accept an offer of resolution does not preclude the agency from making other offers of resolution or either party from seeking to negotiate a settlement of the complaint at any time.

4. UNION ROLE IN THE EEO PROCESS

- a. The Alternative Dispute Resolution Program applicable to the EEO process is negotiable at the National level. Other dispute resolution programs dealing with EEO will be negotiable and may be negotiated at level(s) below the National level in accordance with applicable laws, rules, regulations, and the Master Agreement.
- b. Should the settlement of an EEO complaint change conditions of employment of any bargaining unit employees, negotiations over the change will comply with law and the Master Agreement.
- c. Should a designated union representative serve as an EEO representative of an EEO complainant, he/she is entitled to official time as governed by Chapter 29, Code of Federal Regulations.
- d. The union's role in the EEO process will be recognized in accordance with applicable laws, rules, regulations, relevant case law, and the Master Agreement.
- e. Bargaining unit member's rights to union representation under statute and the Master Agreement will be adhered to during the EEO investigation process.
- f. Union members may not be arbitrarily disqualified from performing collateral duties as EEO counselors. However, if they ordinarily represent employees and are disqualified because of said representational role, the specific reasons for the disqualifications will be provided in writing.

- g. The union's role in the EEO process will be recognized in accordance with applicable laws, rules, regulations, relevant case law, and the Master Agreement. Should it be definitively determined that these rights include the right to be present at and participate in formal discussions during the EEO process, these rights will be recognized.

5. **PHS COMMISSIONED OFFICERS**

PHS Commissioned Officers assigned or detailed to the Bureau of Prisons must pursue the EEO process of the Department of Health and Human Services (DHHS) when the subject of the complaint is a matter under the control of DHHS. For all other matters, PHS officers may use the Bureau's EEO process. PHS commissioned officers, however, are neither entitled to a hearing before an administrative judge of the EEOC, nor, are they entitled to seek administrative relief beyond the final decision issued by the Department of Justice.

6. **INJURIES THAT MAY BE ATTRIBUTED TO ALLEGATIONS OF DISCRIMINATION**

Any staff member who suffers injuries (i.e., stress, physical problems, etc.) that may be attributed to allegations of discrimination may be eligible for benefits under the Program Statement on the Workers Compensation Program. Staff may also be eligible for services provided by the Program Statement on Employee Assistance Program (EAP).

CHAPTER 4

DISMISSAL OF COMPLAINTS

The EEO Officer will recommend to the Director of the EEO staff for the Department of Justice the dismissal of a complaint of discrimination when it meets the standards set forth below. The Department of Justice's authority to dismiss a complaint ends when a complainant requests a hearing. The Bureau will process dismissals expeditiously.

1. BASES FOR DISMISSALS THAT MAY EXIST AS OF THE FILING OF THE COMPLAINT OR DEVELOP THEREAFTER

a. Untimely Counseling Contact

- (1) A claim that has not been brought to the attention of an EEO Counselor in a timely manner.
- (2) The complainant did not contact an EEO Counselor within 45 days of the discriminatory event or within 45 days of the effective date of the personnel action, and the complainant did not show that the 45-day contact period should be extended pursuant to 1614.105(a)(2).

b. Untimely Filing of the Formal Complaint

The complainant failed to file a formal complaint within 15 days of his/her receipt of the Counselor's notice of right to file a formal complaint ("Notice of Final Interview") in an individual complaint, or in a class complaint. The Bureau has the burden of proving that the complainant received the notice and that the notice clearly informed the aggrieved person of the 15-day filing time frame. This time limit is also subject to waiver, estoppel and equitable tolling under 1614.604(c).

c. Failure to State a Claim

The complainant failed to state a claim under 1614.103. This may include a claim that does not allege discrimination on a basis encompassed in one of the statutes applicable to federal sector employees. In determining whether a complaint states a claim, the proper inquiry is whether the conduct if true would constitute an unlawful employment practice under the EEO statutes.

The Bureau will accept a complaint from any aggrieved employee or applicant for employment who believes that s/he has been discriminated against by the Bureau because of race, color, religion, sex, national origin, age or disabling condition. The EEOC has long defined an

"aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. The Bureau is required to address EEO complaints only when filed by an individual who has suffered direct, personal deprivation at the hands of the employer; the agency's act must have caused some concrete effect on the aggrieved person's employment status.

d. Abuse of Process

Section 1614.107(a)(9) is the appropriate provision under which an agency may dismiss a complaint on the extraordinary grounds of abuse of process.

- (1) Abuse of process is defined as a clear pattern of misuse of the process for ends other than that which it was designed to accomplish. The EEOC has a strong policy in favor of preserving a complainant's EEO rights whenever possible. The occasions in which application of the standards are appropriate must be rare, because of the strong policy in favor of preserving a complainant's EEO rights whenever possible. Therefore, such dismissals must be taken only in cases where there is a clear misuse or abuse of the administrative process.
- (2) In order to determine whether a complaint, or a number of consolidated complaints, should be dismissed for this reason under 1614.107(a)(9), the agency or Administrative Judge must strictly apply the criteria established by the EEOC on this issue. This requires an analysis of whether the complainant evidences an ulterior purpose to abuse or misuse the EEO process. Agencies are cautioned that numerous complaint filings alone is not a sufficient basis for determining that there has been an abuse of the process.

However, multiple filings on the same issues, lack of specificity in the allegations, and the filing of complaints on allegations previously raised, may be considered in deciding whether a complainant has engaged in a pattern of abuse of the EEO process. All pending complaints from a complainant which satisfy these criteria should be consolidated for dismissal under this section.

- (3) Cases in which the EEOC has found an abuse of the EEO process include those where, upon review of the complainant's record, including the number and types of complaints filed, the EEOC has concluded that the complainant has pursued a scheme involving the misuse

and misapplication of the EEO process for an end other than that which it was designed to accomplish.

- (4) The EEOC has stressed in such cases that a party cannot be permitted to utilize the EEO process to circumvent other administrative processes; nor can individuals be permitted to overburden the EEO system, which is designed to protect individuals from discriminatory practices. Evidence of numerous complaint filings, in and of itself, is not a sufficient basis for determining that there has been an abuse of the process.

e. States the Same Claim

The complaint states the same claim that is pending before or had been decided by the agency or EEOC except in those cases where a class action complaint is pending. The EEOC has interpreted this regulation to require that the complaint must set forth the "identical matters" raised in a previous complaint filed by the same complainant, in order for the subsequent complaint to be rejected.

f. Complainant Files a Civil Action

The complainant files a civil action concerning the same allegation, at least 180 days after s/he filed his/her administrative complaint. The requirement in 1614.410 that the civil action will be dismissed only if it was filed pursuant to 1614.408 evidences the intent of the EEOC to restrict the dismissals of EEO complaints for filing a civil action to those civil actions which were brought under the statutes enforced by the EEOC. Where a complainant has not filed a civil action pursuant to the specific statutes listed in 1614.408, the complaint may not be dismissed pursuant to 1614.107(a) (3).

g. Issue Has Been Decided

The same issue has been decided by a court of competent jurisdiction and the complainant was a party to the lawsuit. EEOC regulations mandate dismissal of the EEO complaint under these circumstances so as to prevent a complainant from simultaneously pursuing both administrative and judicial remedies on the same matters, wasting resources, and creating the potential for inconsistent or conflicting decisions. The proper inquiry to determine whether dismissal is warranted is whether the issues in the EEO complaint and the civil action are the same, that is, whether the acts of alleged discrimination are identical. The factual allegations and not the bases or the precise relief requested should be the crux of the legal analysis.

h. Allegation Raised in Negotiated Grievance Proceeding

The complainant has raised the allegation in a negotiated grievance procedure that permits allegations of discrimination, indicating an election to pursue a non-EEO process. This also provides that an election to proceed under 1614 is indicated by the "filing of a written complaint," while an election to proceed under a negotiated grievance procedure is indicated by the "filing of a timely written grievance." The withdrawal of a grievance does not abrogate its effect for purposes of an election.

i. Appeal Made to Merit Systems Protection Board (MSPB)

The complainant has elected to appeal the claim to the Merit Systems Protection Board, rather than file a mixed case complaint under 1614.302.

j. Complaint Alleges a Preliminary Step

The complaint alleges that a proposal to take or a preliminary step in taking a personnel action is discriminatory. This provision requires the dismissal of complaints that allege discrimination "in any preliminary steps that do not, without further action, affect the person: for example, progress reviews or improvement periods that are not a part of any official file on the employee." If the individual alleges, however, that the preliminary step was part of a pattern of harassing the individual for a prohibited reason, the complaint cannot be dismissed under this section because the preliminary step has already affected the employee.

k. Complaint is Moot

A complaint may be dismissed as moot where there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When such circumstances exist, no relief is available, and there is no need for a determination of the rights of the parties. The EEOC has also held, however, that where a complainant has made a timely request for compensatory damages, an agency must address the issue of compensatory damages before it can dismiss a complaint for mootness.

l. Dissatisfaction with the Processing of a Complaint

The complaint alleges dissatisfaction with the processing of a previously filed complaint.

2. **DISMISSALS THAT GENERALLY OCCUR AFTER THE AGENCY ACCEPTS THE COMPLAINT BASED ON COMPLAINANT'S ACTIONS OR INACTIONS**

a. **The Complainant Cannot Be Located**

EEOC regulations permit dismissal where the complainant cannot be located. The provision requires that the agency make reasonable efforts to locate the complainant and inform the complainant that s/he must respond to the agency's notice of proposed dismissal within 15 days sent to his/her last known address. A matter may not be "dismissed" under this section until after the complaint has been filed.

b. **The Complainant Failed to Respond or Proceed in a Timely Fashion**

EEOC regulations permit dismissal where the complainant has failed to respond to a written "request to provide relevant information or to otherwise proceed" within 15 days of receipt, provided that the request contained notice of the proposed dismissal and further provided that there is otherwise insufficient available information to adjudicate the claim. The regulation further states that an agency may not dismiss on this basis where the record includes sufficient information to issue a decision. The EEOC also has held that the regulation is applicable only in cases where there is a clear record of delay or contumacious conduct by the complainant.

3. **PROCESSING OF PARTIALLY DISMISSED COMPLAINTS**

The EEO Officer will notify the complainant of a partial dismissal by letter and further inform the complainant that there is no immediate right to appeal the partial dismissal. The EEO Officer should advise the complainant that the partial dismissal will be reviewed either by an EEOC Administrative Judge, if the complainant requests a hearing before an Administrative Judge, or by the EEOC if the complainant files an appeal of a final agency action or final agency decision.

There is no immediate right to appeal a partial dismissal of a complaint. Where an agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in 1614.107(a), the agency must notify the complainant in writing of its determination, set forth its rationale for that determination, and notify the complainant that the allegations will not be investigated. The agency must place a copy of the notice in the investigative file.

The agency should advise the complainant that an Administrative Judge will review its dismissal determination if s/he requests a hearing on the remainder of the complaint, but the complainant may not appeal the dismissal until a final action is taken by the agency on the remainder of the complaint.

a. Where a Hearing is Requested

If the complainant requests a hearing from an Administrative Judge, the Administrative Judge will evaluate the agency's reasons for believing that a portion of the complaint met the standards for dismissal before holding the hearing. If the Administrative Judge believes that all or a part of the agency's reasons are not well taken, the entire complaint or all of the portions not meeting the standards for dismissal will continue in the hearing process. The parties may conduct discovery to develop the record for all portions of the complaint continuing in the hearing process. The Administrative Judge's decision on the partial dismissal will become part of the Administrative Judge's final decision on the complaint and may be appealed by either party after final action is taken on the complaint.

b. Where a Final Decision By the Agency Is Requested

Where a complainant requests a final decision by the agency without a hearing, the agency will issue a decision addressing all claims in the complaint, including its rationale for dismissing claims, if any, and its findings on the merits of the remainder of the complaint. The complainant may appeal the agency's decision, including any partial dismissals, to the EEOC.

4. ALLEGATIONS OF DISSATISFACTION REGARDING PROCESSING OF PENDING COMPLAINTS

- a. If a complainant is dissatisfied with the processing of his/her pending complaint, whether or not it alleges prohibited discrimination as a basis for dissatisfaction, s/he should be referred to the EEO Officer. Agency officials should earnestly attempt to resolve dissatisfaction with the complaints process as early and expeditiously as possible.
- b. The EEO Officer must add a record of the complainant's concerns and any actions the agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the agency's reason(s) for not taking any action.

- c. A complainant must always raise his/her concerns first with the agency, in the above manner. However, in cases where the complainant's concerns have not been resolved informally with the agency, the complainant may present those concerns to the EEOC at either of the following stages of processing:
- (1) Where the complainant has requested a hearing, to the EEOC Administrative Judge when the complaint is under the jurisdiction of the Administrative Judge; or
 - (2) Where the complainant has not requested a hearing, to the EEOC Office of Federal Operations (OFO) on appeal.

A complainant must raise any dissatisfaction with the processing of his/her complaint before the Administrative Judge issues a decision on that complaint, the agency takes final action on the complaint, or either the Administrative Judge or the agency dismiss the complaint. The complainant has the burden of showing improper processing. No concerns regarding improper processing raised after a decision will be accepted by the agency, the Administrative Judge, or OFO.

CHAPTER 5

INVESTIGATION OF COMPLAINTS

An investigation of a formal complaint of discrimination is an official review or inquiry, by persons authorized to conduct such review or inquiry, into claims raised in an EEO complaint. The investigative process is non-adversarial. That means that the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence. A copy of the complaint will be provided to the investigator prior to the commencement of the investigation.

1. ROLE OF THE EEO OFFICE IN INVESTIGATIONS

The EEO Officer will ensure that:

- a. all new investigators receive at least 32 hours of introductory investigator training before conducting investigations and that all investigators receive at least eight hours of continuing investigator training every year, as outlined in Chapter 6 of the MD-110.
- b. all employees of the agency cooperate with the EEO investigator in the conduct of the investigation,
- c. witness testimony is given under oath or affirmation and without a promise that the agency will keep the testimony or information provided confidential, and all witnesses providing affidavits are given the opportunity to review the typed version of the affidavit and make corrections as necessary, prior to swearing to the truth of the affidavit,
- d. individual complaints are properly and thoroughly investigated in a timely manner in accordance with 29 CFR 1614.108, and
- e. there is no conflict or appearance of conflict of interest in the investigation of complaints.

2. EEO INVESTIGATOR

The EEO Investigator is a person officially designated and authorized to conduct inquiries into claims raised in EEO complaints. The authorization includes the authority to administer oaths and to require employees to furnish testimony under oath or affirmation without a promise of confidentiality. The investigator does not make or recommend a finding of discrimination.

3. **COMPLAINANT**

The complainant must cooperate in the investigation and keep the agency informed of his/her current address. If an agency is unable to locate the complainant, the agency may dismiss the complaint, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days of the notice of proposed dismissal.

Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, coupled with a 15-day notice of proposed dismissal, a failure to respond could result in dismissal of the complaint.

4. **INVESTIGATION**

In accordance with instructions contained in Commission Management Directives, the agency will develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

A complainant and his or her representative will be informed in writing of the issue(s) that have been accepted for processing and the assignment of an EEO Investigator. The CEO will also be informed in writing of the complaint and the name of the EEO Investigator assigned, with a request that all relevant documents be retained for the EEO Investigator. The CEO will also be advised to retain the necessary records regarding the circumstances surrounding the complaint. These records will be retained locally unless the EEO Officer directs otherwise.

In cases of an appearance of a conflict of interest, such as complaints against a local or national Executive Staff member, the complaint may be assigned by the EEO Officer to a contract investigator or may be sent to the Director of the EEO Staff, U.S. Department of Justice, for assignment to the EEO Officer of another Agency component for processing.

The Bureau uses both contract and in-house investigators. The Bureau EEO Investigators are full-time positions in the Office of General Counsel, and they report to an Attorney who is directly responsible to the EEO Officer. The EEO Officer maintains sole discretion to determine whether to assign a case to a Bureau or contract EEO Investigator.

The EEO Investigator will contact the complainant or representative to obtain a list of the recommended witnesses. This list will be made part of the investigative file. The EEO Investigator will advise the local facility CEO of the date of the investigation and any clerical support and space needs. The CEO will designate a point of contact and provide space for conducting the investigation.

There may be circumstances where it may be advantageous to conduct the investigation at an alternate site. The alternate site will be mutually agreed upon among the parties. The investigator, working with the point of contact will locate alternate space as necessary. When possible, the EEO Investigator will provide the contact person, in advance, with a list of persons to be interviewed. The point of contact will make arrangements for all of the staff to be available by notifying their supervisors. Employees the EEO Investigator needs to interview will be on official time during the interview.

Bargaining unit employees, including probationary employees, have the right to a union representative during any examination by, or prior to submission of any written report to a representative of the employer in connection with an investigation if:

- a. the employee reasonably believes that the examination may result in disciplinary action against the employee and
- b. the employee requests representation.

The union, not the employee, has the right to appoint and designate the union representative of its choice.

The EEO Investigator will advise the CEO of the required documents to be provided. Other than receiving guidance from the EEO Complaints Section, EEO Investigators will exercise independent judgment in gathering information and determining whom to interview. Investigations of complaints of discrimination are official investigations; therefore, the elements of the Program Statement on Standards of Employee Conduct and Responsibility apply.

The EEO Investigator is authorized to conduct fact finding/mediation at any time while conducting the investigation if it appears during the investigation that the complaint can be informally resolved. The EEO Investigator will document their attempts at settlement with the settlement authority for inclusion in the investigative file and note the name and title of the settlement authority with whom settlement was attempted. If the complaint is resolved, the terms of the settlement will be put in writing and submitted to the EEO officer for review prior to

signing. Once approved by the EEO Officer, the settlement agreement will be signed by the complainant and the CEO or his/her designee. This settlement is binding on the parties. Prior to signing any settlement agreement, the chapter on Union Rights in this Program Statement must be reviewed and followed.

Investigative inquiries may be made using a variety of fact-finding models, such as the interview or the fact-finding conference, and a variety of devices, such as requests for information, position statements, exchange of letters or memoranda, interrogatories, and affidavits. If the EEO Investigator uses a recording device to conduct an interview, the employee's statement will be reduced to the form of an affidavit. The complainant will have the option to utilize a recording device to record his/her interview; however, the investigator's recording will be the official recording of record. The employee will have the opportunity to review the affidavit and make corrections as necessary. The employee will not be required to sign an affidavit that is incorrect.

The inquiry/review process may also incorporate some of the features of a dispute resolution plan. The purpose of the investigation is:

- (1) to gather facts upon which a reasonable fact finder may draw conclusions as to whether an agency subject to coverage under the statutes that the EEOC enforces in the federal sector has violated a provision of any of those statutes and
- (2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.

The investigation will include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, if any; and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.

The EEO Investigator prepares the investigative summary, which is a narrative document that succinctly states the issues and delineates the evidence addressing both sides of each issue in the case. The summary should state facts (supported in the complaint file) sufficient to sustain a conclusion(s). The summary should cite to evidence and the exhibits collected.

5. **COMPLAINANTS' OPPORTUNITY TO REVIEW THE INVESTIGATIVE FILE**

Within the appropriate time frame for finishing an investigation under 1614.108(e), and prior to issuance of the notice required by 1614.108(f), the EEO Investigator is encouraged to allow the complainant and his or her designated representative an opportunity to examine the investigative file and to notify the EEO Officer, in writing, of any perceived deficiencies in the investigation prior to transferring the case to the EEOC for a hearing or prior to issuing a final decision without a hearing. A copy of the complainant's notification to the agency of perceived deficiencies must be included in the investigative file together with a written description by the EEO Officer of the corrective action taken.

If the EEO Officer agrees with alleged deficiencies in the investigation as identified by the complainant, the agency must correct them immediately. If the investigation period has ended or is about to end, the EEO Officer should request agreement from the complainant to extend the investigation period pursuant to 1614.108(e). If the EEO Officer does not agree with the complainant's claimed deficiencies in the investigative file, the EEO Officer will prepare a statement explaining the rationale for the disagreement and include it in the investigative file along with the complainant's notice of claimed deficiencies.

After completing the investigation with review process, the EEO Investigator will forward the entire completed investigative file to the EEO Office. A copy of the investigative file will be sent by the EEO Officer to the complainant within 180 days of the date the complaint is filed. This time period may be extended up to 90 days with the complainant's approval. Copies of the entire investigative file will be forwarded to the complainant and his/her representative or attorney.

Within 180 days from the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for, the agency will provide the complainant with a copy of the investigative file, and will notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and decision from an administrative judge or may request an immediate final decision pursuant to 29 CFR 1614.110 from the agency with which the complaint was filed.

Where the complainant has received the notice discussed above or at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing by submitting a written request for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The complainant will send a copy of the request for a hearing to the agency EEO office. Within 15 days of receipt of the request for a hearing, the agency will provide a copy of the complaint file to EEOC and, if not previously provided, to the complainant.

CHAPTER 6

RIGHT TO HEARING OR FINAL AGENCY DECISION

1. RIGHT TO HEARING

If settlement is not reached, within 30 days of completion of the investigation the EEO Officer will provide the complainant with a notice of his/her right to a hearing conducted by an Administrative Judge from the EEOC, if it is not a mixed case, or his/her right to request a final agency decision (FAD) by the Complaint Adjudication Officer (CAO), U.S. Department of Justice, or his right to file a civil action in the appropriate U.S. District Court. (An investigation is deemed completed when the report of the investigation is served on the complainant in conjunction with the notice of the right to elect either a hearing before an EEOC Administrative Judge or a final decision from the agency.)

This notice will include the EEOC field office and address where a hearing request is to be sent as well as the agency office to which the copy of the hearing request should be sent. A copy of the Request for a Hearing Form will also be included with the notice. Included with this notice will be a copy of the complaint file, prepared in accordance with EEOC Management Directive 110, which includes the investigative file and investigative summary. If the complainant has a representative, the representative will be entitled to a copy of the complaint file as well.

See section 4.c. below for rights adhering to claims of sexual orientation and parental status discrimination pursued through the BOP EEO process.

2. NO HEARING REQUESTED; FINAL AGENCY DECISION (FAD)

If the complainant does not request a hearing within 30 days after receiving the complaint file and the issuance of the notice of rights, or if the complainant requests a final agency decision, the complaint file will be forwarded to the Complaint Adjudication Officer for final agency decision on behalf of the Attorney General.

3. SEXUAL ORIENTATION OR PARENTAL STATUS COMPLAINTS HEARINGS

In complaints alleging discrimination because of sexual orientation or parental status, after the complainant and his/her representative is given a copy of the complaint file, an attempt will be made to settle the complaint. The complaint file will be sent to Complaint Adjudication

Officer for final agency decision on behalf of the Attorney General. Time frames applicable to the final agency decision for appealable complaints will be followed.

4. **HEARING**

A hearing before the EEOC provides the parties with a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses. Hearings are governed by 29 CFR 1614.109. An Administrative Judge from the EEOC adjudicates claims of discrimination and issues decisions. Administrative Judge decisions, in non-class action cases, become the final action of the agency if the agency does not issue a final order within 40 days of receipt of the Administrative Judge's decision in accordance with 1614.110(a).

Section 1614.108(f) generally provides, among other things, that within 180 days from the complainant's filing of his/her complaint, an agency will provide the complainant with a copy of the complaint file and will notify the complainant that within 30 days of the complainant's receipt of the complaint file that the complainant has the right to request a hearing and decision from an Administrative Judge or a final agency decision from the agency. The agency's duty to send this notice and the complainant's right to receive it are not dependant on the agency's completion of the investigation.

- a. To request a hearing, the complainant must submit the hearing request directly and in writing to the EEOC district or field office having jurisdiction, as indicated in the notice letter referenced above, within 30 days of receipt of the notice letter and the complaint file. An agency's authority to dismiss a complaint ends when a complainant requests a hearing. An agency should process dismissals expeditiously. The Notice of Hearing Form, EEOC MD 110 Appendix N, is recommended for use in this regard. A copy of the request for hearing must be mailed to the agency at the office indicated in the notice letter.
- b. Upon receipt of the request for a hearing, the EEOC district or field office will send a docketing letter to the complainant and the agency, in which it will provide the parties with an EEOC Hearings Unit No., and will request that the agency forward a copy of the complaint file, including the investigative file, within the earlier of 15 days of its receipt of the complainant's request for a hearing or receipt of the docketing letter.

The EEOC will assign an Administrative Judge to conduct a hearing. Once appointed, the Administrative Judge has full responsibility for adjudication of the case. The Agency cannot dismiss a case that has been referred to the EEOC for a hearing. The Administrative Judge will determine the date and location of the hearing.

- c. The Labor Law Branch, Office of General Counsel, will designate the attorney who will represent the Bureau at the hearing. The EEO Complaints Section will provide the Labor Law Branch with the files in the complaint of discrimination.
- d. The Bureau will bear the expenses for travel of the Bureau's witnesses, as well as those of all witnesses who are federal government employees, and the complainant, if he or she is a federal government employee; and the expense of a court reporter.
- e. The Administrative Judge has the authority to call the appropriate witnesses after reviewing the complaint file and consulting with the complainant and the agency representative. The Administrative Judge sends a Recommended Decision, along with the hearing transcript and the complaint file, to the CAO for a final agency decision.

Generally, an Administrative Judge will conduct a hearing on the merits of a complaint unless:

- (1) the parties mutually resolve the complaint and the hearing request is withdrawn;
- (2) the hearing request is otherwise voluntarily withdrawn;
- (3) the Administrative Judge dismisses the complaint; or
- (4) the Administrative Judge determines that material facts are not in genuine dispute and issues an order limiting the scope of the hearing or issues a decision without a hearing pursuant to 29 CFR 1614.109(g).

The Administrative Judge will issue a decision on a complaint and will order appropriate remedies and relief when discrimination has been found within 180 days of his/her receipt of the complaint file from the agency, unless the Administrative Judge makes a written determination that, in his/her discretion, good cause exists for extending the time for issuing a decision.

- f. Within 15 days of its receipt of a copy of the complainant's request for a hearing sent to an EEOC district or field office or the docketing letter from the district or field office, whichever is earlier, the EEO Officer will send a

copy of the complaint file, including the investigative file, to the district or field office. The agency also will send a copy of the complaint and investigative file(s) to the complainant and his or her representative, if it has not previously done so.

- g. The Bureau is responsible for arranging for an appropriate sized room in which to hold the hearing and must ensure that all approved witnesses who are federal employees are notified of the date and time of the hearing and the approximate time that their presence will be required. The Bureau is responsible for ensuring the appearance and travel arrangements to the hearing site of approved witnesses who are federal employees.
- h. Further information about the hearing and the role of the Administrative Judge can be found at 29 CFR and in EEOC Management Directive 110.

5. **FINAL ACTION BY AGENCY**

- a. The complaint file will be forwarded by the EEO Officer to the CAO for final agency decision (FAD), on behalf of the Attorney General, within 30 days after the complainant's receipt of the investigative file, if the complainant does not request an EEOC hearing, or in cases alleging discrimination because of parental status or sexual orientation.
- b. Final action by the Department of Justice following a decision by an administrative judge. When an administrative judge has issued a decision under 29 CFR 1614.109(b), (g) or (i), the Department of Justice's CAO will take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. (If the CAO does not issue a final order within 40 days of receipt of the administrative judge's decision in accordance with 29 CFR 1614.110, then the decision of the administrative judge will become the final action of the Department of Justice.)

The final order will notify the complainant whether or not the agency will fully implement the decision of the administrative judge and will contain notice of the complainant's right to appeal to the EEOC, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the Bureau will simultaneously file an appeal in accordance with 29 CFR 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 will be attached to the final order.

- c. Final action by the Department of Justice in all other circumstances. When the Department of Justice dismisses an entire complaint under 29 CFR 1614.107, receives a request for an immediate final decision or does not receive a reply to the notice issued under 29 CFR 1614.108(f), the Department of Justice will take final action by issuing a final decision. The final decision will consist of findings by the Department of Justice on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief.

The Department of Justice will issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision.

The final action will contain notice of the right to appeal the final action to the EEOC, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 will be attached to the final action.

- d. When discrimination is found, the EEO Officer will take the necessary steps to assist the institution's staff to implement the remedial relief ordered. The EEO Officer is required to report to the CAO within 90 days of receipt of the final agency decision the status of any action taken to implement the remedial relief. The EEO Officer will also further advise the CAO of steps taken until full implementation of the relief is accomplished.

CHAPTER 7

APPEALS TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Section 1614.401(a)-(e) identifies those entitled to file appeals to the Commission. All such appeals must be filed with the Commission at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
PO Box 19848
Washington DC 20036

As an alternative to mailing, appeals may be hand-delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
1801 L Street NW
Washington DC 20507

As a further alternative, appeals may be sent by fax to (202) 663-7022.

The appellant will furnish a copy of the appeal to the opposing party at the same time it is filed with the EEOC. In or attached to the appeal to the EEOC, the appellant must certify the date and method by which service was made on the opposing party. The individual appellant should use EEOC Form 573, Notice of Appeal/Petition. The agency will attach a copy of EEOC Form 573 to all decisions, actions, and dismissals of equal employment complaints.

1. PERSONS WHO MAY APPEAL

The EEOC's regulations governing appeals to the Commission are located at subpart D of Part 1614. Section 1614.401 sets out who may appeal to the Commission when an issue of employment discrimination is raised either alone or in connection with a grievance, settlement, or a Merit Systems Protection Board (MSPB) claim.

a. A Complainant May Appeal

- (1) An agency's dismissal of or final action on a complaint. An agency's final action on a complaint may include either:
 - (a) a final order from the agency stating whether it will fully implement the decision of the Administrative Judge or

- (b) a final agency decision on the merits of the complaint where the complainant requested an immediate final decision pursuant to 1614.108(f).

The regulations further provide that the agency must file an appeal with the Commission at the same time it serves the final order on the complainant following receipt of a decision from an Administrative Judge where it does not intend to fully implement the decision. The agency's filing of an appeal of an Administrative Judge's decision that it does not intend to fully implement will result in the Commission's review of the agency's decision not to fully implement the Administrative Judge's decision.

The complainant need not file a separate appeal to have the Commission review the agency's actions. Where, however, the complainant contends that the Administrative Judge erred either in any rulings made during the pendency of the action or in the decision, the complainant would need to file an appeal from the agency's final order to challenge such errors. If an agency fails to take any action during the 40-day period, the Administrative Judge's decision would be deemed ratified and the complainant would be entitled to file an appeal of the Administrative Judge's decision as ratified after the expiration of the 40-day period. The agency would not be permitted to cross-appeal or challenge any aspect of the Administrative Judge's decision in this situation.

- (2) An agency's alleged noncompliance with a settlement agreement in accordance with 1614.504.

b. An Agency Must Appeal

- (1) If it determines not to fully implement an Administrative Judge's decision to dismiss or on the merits of a complaint, in an appeal filed simultaneously with the final order served on the complainant. If the agency issues a final order to the complainant stating that it does not intend to fully implement the decision of the Administrative Judge but fails to file an appeal, the agency's final order has no effect on the Administrative Judge's decision.

If the agency fails properly to issue a final order and file an appeal simultaneously with the issuance of the order, the Administrative Judge's decision will be deemed ratified by the agency upon the expiration of the agency's 40-day period for accepting or not accepting the Administrative Judge's decision.

- (2) If it determines, in a class complaint, not to fully implement an Administrative Judge's certification decision, in an appeal filed simultaneously with the final order served on the agent. An agency's final action on a complaint may include either:
 - (a) a final order from the agency stating whether it will fully implement the decision of the Administrative Judge or
 - (b) a final agency decision on the merits of the complaint where the complainant requested an immediate final decision pursuant to 1614.108(f).

The regulations further provide that the agency must file an appeal with the Commission at the same time it serves the final order on the complainant following receipt of a decision from an Administrative Judge where it does not intend to fully implement the decision. The agency's filing of an appeal of an Administrative Judge's decision that it does not intend to fully implement will result in the Commission's review of the agency's decision not to fully implement the Administrative Judge's decision. The complainant need not file a separate appeal to have the Commission review the agency's actions. Where, however, the complainant contends that the Administrative Judge erred either in any rulings made during the pendency of the action or in the decision, the complainant would need to file an appeal from the agency's final order to challenge such errors.

If an agency fails to take any action during the 40-day period, the Administrative Judge's decision would be deemed ratified and the complainant would be entitled to file an appeal of the Administrative Judge's decision as ratified after the expiration of the 40-day period. The agency would not be permitted to cross-appeal or challenge any aspect of the Administrative Judge's decision in this situation.

c. An Agency May Appeal

An Administrative Judge's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole.

d. A Class Agent May Appeal

- (1) An Administrative Judge's decision accepting or dismissing all or part of a class complaint. Included is a dismissal of a complaint that does not meet the prerequisites of a class complaint as enumerated in

1614.204(a)(2) where the decision to dismiss informs the class agent that the complaint is being filed as an individual complaint. The Office of Federal Operations, Appellate Review Programs, will provide expedited consideration of class complaints that are dismissed for failure to meet the prerequisites of a class complaint.

- (2) A final agency decision on the merits of the complaint.
- (3) An Administrative Judge's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole. A petition to vacate a resolution may be filed with the Administrative Judge asserting that the resolution favors only the class agent or is not fair, adequate, and reasonable to the class as a whole. The petitioner may file an appeal with the Commission if the Administrative Judge finds the resolution fair, adequate, and reasonable to the class as a whole. If the Administrative Judge finds the agreement not fair, adequate, and reasonable, the class agent, class members, and the agency may file an appeal.
- (4) An agency's alleged noncompliance with a settlement agreement in accordance with 1614.504.

e. A Class Member or Petitioner May Appeal

- (1) An Administrative Judge's decision finding a proposed resolution fair, adequate, and reasonable to the class as a whole if the class member filed a petition to vacate the resolution; or finding that the petitioner is not a member of the class and did not have standing to challenge the resolution.
- (2) An Administrative Judge's decision that a proposed resolution is not fair, adequate, and reasonable to the class as a whole. As noted above, where the Administrative Judge finds the agreement not fair, adequate, and reasonable, the class agent, class members, and the agency may file an appeal. If the Administrative Judge finds that the agreement is fair, adequate, and reasonable, only the petitioner may file an appeal.
- (3) An agency's final decision on a claim for individual relief under a class complaint.
- (4) An agency's alleged noncompliance with a resolution in accordance with 1614.504.

f. A Grievant May Appeal

- (1) A final decision of the agency.
- (2) A final decision of the arbitrator.
- (3) A final decision of the Federal Labor Relations Authority (FLRA) on the grievance.

Exception: A grievant may not appeal under subpart D of Part 1614, when the dispute initially raised in the negotiated grievance procedure is: still ongoing in that process, in arbitration, before the FLRA, appealable to the Merit Systems Protection Board (MSPB), or if 5 U.S.C. § 7121(d) is inapplicable to the involved agency.

2. TIME LIMITS FOR APPEALS TO THE COMMISSION - 29 CFR 1614.402

Aggrieved persons must be made aware of administrative and civil action time limitations which potentially may bar an aggrieved person's ability to file appeals and civil actions. The time limits specified are stated in calendar days.

The following time limits apply for filing an appeal to the Commission:

- a. **Appeals limits for complainant's appeal of an agency's final action on or dismissal of individual complaints of discrimination:** Within 30 days of receipt of the dismissal or final action.
- b. **Appeals limits for decisions on class complaints of discrimination under 1614.402(a):**
 - (1) a class agent or an agency may appeal an Administrative Judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint and
 - (2) a class member, a class agent or an agency may appeal a final decision on a petition pursuant to 1614.204(g) (4).

See 1614.401(c). Appeals described in 1614.401(c) must be filed within 30 days of receipt of the dismissal or final decision.

c. Appeals limits for allegations of noncompliance with a settlement agreement or an Administrative Judge's decision that has not been appealed to the Commission or been the subject of a civil action under 1614.504.

- (1) Within 30 days of the complainant's receipt of an agency's determination on an allegation of noncompliance.
- (2) Thirty-five days after the complainant serves the agency with an allegation of noncompliance, if the agency has not issued a determination.

Notice to the EEO Director, Department of Justice, (include address) of noncompliance is a prerequisite to the filing of an appeal alleging breach of a settlement agreement.

d. Appeals limits on final grievance decisions in employment discrimination claims where 5 U.S.C. § 7121(d) applies to the agency:

Within 30 days of receipt of the final decision of an agency, an arbitrator, or the Federal Labor Relations Authority when employment discrimination was raised.

e. Limits on petitions for consideration of final decisions of the MSPB on mixed case appeals and mixed case complaints (5 CFR 1201.151 et seq. and 5 U.S.C. § 7702(2)).

- (1) Within 30 days of receipt of the final MSPB decision.
- (2) Within 30 days after the decision of a MSPB field office becomes final.

f. Appeals limits for an agency's appeal if the agency's final order following a decision by an Administrative Judge does not fully implement the decision of the Administrative Judge:

- (1) Within 40 days of receipt of the Administrative Judge's decision.
- (2) Under 29 CFR 1614.401(b), an agency is required to file an appeal to the Commission if the agency's final order does not fully implement the Administrative Judge's decision. The Commission's use of the word "may" in 1614.401(b) is not inconsistent with this requirement. The agency has the option to appeal if it is not satisfied with the Administrative Judge's decision.

If the agency chooses not to appeal, however, it must fully implement the Administrative Judge's decision. In other words, when the agency decides whether it will fully implement the Administrative Judges's decision, it is also deciding whether to appeal; a decision to fully implement means that it is not appealing while a decision not to fully implement means that it is appealing.

g. Time Limits on Appeals to the Commission - 1614.504(a)

In addition to providing for appeals to the Commission by complainants alleging breach of a settlement agreement, 1614.504(a) provides that a complainant may file an appeal alleging agency noncompliance with a final action through which the agency has accepted the decision of an Administrative Judge. The complainant first must present his/her allegations of noncompliance to the:

EEO Director
Department of Justice
1100 Vermont Ave. NW, Suite 630
Washington DC 20530.

The complainant thereafter may appeal:

- (1) Within 30 days of the complainant's receipt of an agency's determination on the allegation of noncompliance.
- (2) Thirty-five days after the complainant serves the agency with the allegation of noncompliance, if the agency has not issued a determination.

h. Petitions to Consider MSPB Decisions

A petition to EEOC to consider a final MSPB decision on a mixed case appeal or on the appeal of a final decision on a mixed case complaint, under 1614.303 and 1614.304, must be in writing and must include:

- (1) The name and address of the petitioner and of petitioner's representative (if any);
- (2) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, only with regard to the issues of discrimination based on race, color, religion, sex, national origin, age, or disability;
- (3) A copy of the decision issued by the MSPB; and
- (4) The signature of the petitioner or representative, if any.

i. Appeal to MSPB on Mixed Case Complaint

At the time the agency issues its final decision on a mixed case complaint the agency will advise the complainant of the right to appeal the decision to the MSPB (not the EEOC) within 30 days of receipt of the agency's final decision provided at 1614.302(d)(3).

CHAPTER 8

RIGHT TO FILE CIVIL ACTION

1. A complainant who has filed a non-mixed individual complaint, an agent who has filed a class complaint, or a claimant who has filed a claim for individual relief in a class action complaint may file a civil action in an appropriate United States District Court:
 - a. Within 90 days of receipt of an agency's final action on an individual complaint, or final decision on a class complaint, if no appeal has been filed.
 - b. After 180 days from the date of filing an individual or class complaint if no appeal has been filed and no final action on an individual complaint or no final decision on a class complaint has been issued.
 - c. Within 90 days after receipt of the Commission's final decision on appeal.
 - d. After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

2. **THE EQUAL PAY ACT - 1614.408**

Regardless of whether the individual complainant pursued any administrative complaint processing, a complainant may file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, within three years of the date of the alleged violation of the Equal Pay Act. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is willful; liquidated damages in an amount equal to lost back wages may also be awarded. The filing of an administrative complaint does not toll the time for filing a civil action.

3. **TERMINATION OF EEOC PROCESSING**

Filing a timely civil action under any of these statutes terminates Commission processing of an appeal. If a civil action is filed after an appeal has also been filed, the parties are requested to notify the Commission of this event in writing.

4. **MIXED CASE COMPLAINTS**

The Civil Rights Act of 1991 did not extend the time limit for filing a civil action in mixed case complaints. See 1614.310, which sets forth the statutory rights to file a civil action in mixed case complaints.

5. **NOTICE OF COMPLAINANT'S RIGHT TO REQUEST COURT APPOINTMENT OF COUNSEL AND STATEMENT OF RIGHT TO APPEAL**

In every final action or final decision on complaints which allege discrimination on the bases of race, color, religion, sex, national origin, and/or disability, complainants unsuccessful in the administrative process, in the event they file a civil action, are informed that the court has discretionary authority to appoint counsel for them. If the complainant decides to file a civil action, under Title VII or under the Rehabilitation Act, and if the complainant does not have or cannot afford the services of an attorney, the complainant may request that the Court appoint an attorney to represent him/her and that the Court permit him/her to file the action without payment of fees, costs, or other security. The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend the time in which to file a civil action.

CHAPTER 9

PROCEDURES FOR RELATED PROCESSES

1. Different procedures apply to certain related processes. The relationship between 29 CFR Part 1614 EEO complaints, Merit Systems Protection Board (MSPB) actions, grievances filed pursuant to negotiated grievance procedures, notices of intent to sue in Age Discrimination in Employment Act (ADEA) complaints and the alternative available in Equal Pay Act (EPA) complaints are set out more specifically here. All time frames in this chapter are expressed in calendar days.

2. **MIXED CASE COMPLAINTS AND APPEALS - 29 CFR 1614.302**

- a. **Definitions**

A "**mixed case complaint**" is a complaint of employment discrimination filed, through the EEO process, with a federal agency based on race, color, religion, sex, national origin, age, disability, or reprisal related to or stemming from an action that may be appealed to the MSPB. The complaint may contain only a claim of employment discrimination or it may contain additional non-discrimination claims that the MSPB has jurisdiction to address.

A "**mixed case appeal**" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or reprisal. There is no right to a hearing before an EEOC Administrative Judge on a mixed-case complaint.

- b. **Procedures**

EEOC regulations provide for processing discrimination complaints on claims that are otherwise appealable to the MSPB. Two determinations must be made to decide if the mixed case regulations apply. First, the employee must have standing to file such an appeal with the MSPB. Second, the claim that forms the basis of the discrimination complaint must be appealable to the MSPB.

- (1) **Standing**

- (a) The following employees generally have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal (These are not all-inclusive lists of employees who have or lack standing to appeal to the MSPB and these lists may change over time. Questions concerning whether an

employee may appeal an action to the MSPB should be referred to the EEO Officer or to the MSPB.):

- i. competitive service employees not serving a probationary or trial period under an initial appointment;
 - ii. career appointees to the Senior Executive Service;
 - iii. non-competitive service veterans preference eligible employees with one or more years of current continuous service; and
 - iv. non-preference eligible excepted service employees who have completed their probationary period or with two or more years of current continuous service.
- (b) The following employees generally do not have a right to appeal to the MSPB:
- i. probationary employees (but see 5 CFR 315.806, allowing appeals alleging discrimination based on party affiliation, marital status, procedural deficiencies) and
 - ii. employees serving under a temporary appointment limited to one year or less.

(2) **Appealable Actions**

- (a) Denial of restoration after recovery from compensable injury of an excepted service employee;
- (b) Termination during probation (under limited circumstances);
- (c) Certain involuntary reassignments or demotions connected with conversions to Senior Executive Service;
- (d) Improper application of re-employment priority rights;
- (e) Reduction-in-force;
- (f) Denial of re-employment rights under various circumstances;

- (g) Denial of restoration following military duty; recovery of competitive service employees from certain injuries;
- (h) Reduction-in-grade and removal based on unacceptable performance;
- (i) Denial of within-grade increases;
- (j) Adverse suitability determinations;
- (k) Adverse actions by agencies:
 - (i) Removal,
 - (ii) Suspensions for more than 14 days,
 - (iii) Reduction-in-grade (demotion), or
 - (iv) Furloughs for 30 days or less;
- (l) All adverse retirement decisions of OPM except termination of annuity payments; and
- (m) Adverse actions involving administrative law judges.

c. Election to Proceed is Required

- (1) The regulations provide that a covered individual may raise claims of discrimination in a mixed case either as a direct appeal to the MSPB or as a mixed-case EEO complaint with the agency, **but not both**.
- (2) Whatever action the individual files first is considered an election to proceed in that forum. Filing a formal EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO Counselor or receiving EEO counseling does not constitute an election.
- (3) Where an aggrieved person files an MSPB appeal and timely seeks counseling, counseling may continue pursuant to 1614.105, at the option of the parties. In any case, counseling must be terminated with notice of rights pursuant to 1614.105(d), (e), or (f).

d. Procedures for Handling Dual Filing

- (1) Where the agency does not dispute MSPB jurisdiction:
 - (a) If an individual files a mixed case appeal with the MSPB before filing a mixed case complaint with the agency, and the agency does not dispute MSPB jurisdiction, the agency must thereafter dismiss any complaint on the same claim, regardless of

whether the claims of discrimination are raised in the appeal to the MSPB.

- (b) The agency or the EEOC Administrative Judge must advise the complainant that s/he must bring the claims of discrimination contained in the dismissed complaint to the attention of the MSPB, pursuant to 5 CFR 1201.151, et seq.
 - (c) Where an agency has not accepted a complaint for processing, i.e., has disposed of the complaint on procedural grounds, the resulting final agency decision is appealable to the Commission.
- (2) Where the agency or the MSPB Administrative Judge questions MSPB jurisdiction:

The agency will hold the mixed case complaint in abeyance until the MSPB Administrative Judge rules on the jurisdictional issue, notifies the complainant that it is doing so, and instructs him/her to bring the discrimination claim to the attention of MSPB. During this period, all time limitations for processing or filing the complaint will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to the EEOC. If the MSPB Administrative Judge finds that MSPB has jurisdiction over the claim, the agency will dismiss the mixed case complaint and advise the complainant of the right to petition EEOC to review MSPB's final decision on the discrimination issue. If the MSPB administrative judge finds that MSPB does not have jurisdiction over the claim, the agency will recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

- (3) Where a complainant files with the agency first:

If an employee first files a mixed case complaint at the agency and then files a mixed case appeal with the MSPB, the agency should advise MSPB of the prior agency filing and request that the MSPB dismiss the appeal without prejudice.

- (4) Where a complainant has pending a non-mixed case complaint or a series of non-mixed case complaints and the claims raised in those complaints are inextricably intertwined with an appeal on a claim that is appealable to the MSPB (This provision is specifically meant to address those situations where a series of events, connected in time or type, culminate in an appealable action against a person with standing to

appeal to the MSPB. For example: minor discipline, warnings or other claims may form the basis for a non-mixed case, but ultimately lead to suspension in excess of 14 days or termination; similarly, an allegedly discriminatory performance evaluation and subsequent placement on a performance improvement plan are non-mixed claims that may culminate in denial of a within-grade promotion, or even in removal, both of which are appealable to the MSPB.)

The agency should file with the MSPB a motion to consolidate the non-mixed case claim with the mixed case appeal. Upon filing the motion, the non-mixed case complaints will be held in abeyance pending a decision by the MSPB administrative judge on the agency's motion. If the MSPB administrative judge should fail to consolidate the non-mixed case complaints, they will be processed pursuant to 1614.106, et seq. Time for processing will commence to run without notice, 15 days following the decision denying jurisdiction. The time periods are to run from the time processing ceased. This means that if processing of the non-mixed claim ceased on the 70th day, the count of days will begin with day 71. If the MSPB Administrative Judge consolidates, the mixed case complaint should be dismissed.

e. Processing Where MSPB Dismisses a Mixed Case Appeal Because it Finds No Jurisdiction (That Is, the Case Is Not Mixed)

- (1) If an individual files a mixed case appeal with MSPB instead of a mixed case complaint, and the MSPB subsequently dismisses the appeal as non-jurisdictional, the agency must inform the individual that s/he may contact a Counselor within 45 days to raise the discrimination claim(s) and that the filing date of the mixed case appeal will be deemed to be the date the individual initially contacted the Counselor.
- (2) If the individual filed the appeal after the agency issued an agency final decision on the mixed case complaint or after the agency failed to issue a final decision on the mixed case complaint within 120 days, the agency must provide the complainant with a 30 day notice of right to a hearing and decision from an EEOC Administrative Judge or an immediate final decision by the agency pursuant to 1614.108(f) and thereafter proceed as in a non-mixed case.

f. Processing Mixed Case Complaints Filed at the Agency

If an employee elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint, except:

- (1) Within 45 days following completion of the investigation, the agency must issue a final decision without a hearing before an EEOC Administrative Judge.
- (2) Upon the filing of a complaint, the agency must advise the complainant that if a final decision is not issued within 120 days of the date of filing the mixed case complaint, the complainant may appeal the claim to the MSPB at any time thereafter, as specified in 5 CFR 1201.154(a), or may file a civil action as specified in 1614.310(g), but not both.
- (3) Also upon the filing of a complaint, the agency must notify the complainant that if s/he is dissatisfied with the agency's final decision on the mixed case complaint, s/he may appeal the claim to the MSPB (not the EEOC) within 30 days of receipt of the agency's final decision.
- (4) Upon completion of the investigation, the agency must notify the complainant that a final decision will be issued within 45 days without a hearing before an EEOC Administrative Judge.
- (5) Upon issuance of the agency's final decision on a mixed case complaint, the agency must advise the complainant of the right to appeal the claim to the MSPB (not EEOC) within 30 days of receipt of the notice and of the right to file a civil action as provided in 1614.310(a).
- (6) With regard to mixed case complaints, if a final decision is not issued on a mixed case complaint within 120 days of the date of filing, the complainant may appeal to the MSPB at any time thereafter pursuant to 5 CFR 1201.154(a) or may file a civil action as provided in 29 CFR 1614.310(g), but not both. The complainant is not entitled to a hearing before the EEOC on a mixed case.

The EEO Officer will ensure that all rights and responsibilities enumerated in EEOC Management Directive 110, Chapters 2,3, and 4 are provided to every complainant in writing. This includes:

- (a) The Right to Hearing,

- (b) The Right to Appeal, and
- (c) The Right to File a civil action.

3. **AGE DISCRIMINATION COMPLAINTS**

It is incumbent upon federal agency personnel responsible for processing discrimination complaints to inform complainants or potential complainants of the following procedures available to them in pursuing an age discrimination complaint.

a. **Election of Administrative Process**

An aggrieved person may file an administrative age discrimination complaint with the agency pursuant to 29 CFR Part 1614. If the aggrieved person elects to file an administrative complaint, s/he must exhaust administrative remedies before s/he may file a civil action in U.S. District Court. Exhaustion of administrative remedies occurs when the agency takes final action or 180 days after filing the complaint if no final action is taken.

It should be noted that **attorney's fees are not available during the administrative process of complaints brought under the Age Discrimination in Employment Act.**

b. **Aggrieved May Bypass Administrative Process**

An aggrieved person may bypass the administrative complaint process and file a civil action directly in U.S. District Court provided that the aggrieved person first provides the EEOC with a written notice of intent to sue under the ADEA. The notice to the EEOC must be filed within 180 days of the date of the alleged discriminatory action. Once a timely notice of intent to sue is filed with the EEOC, the aggrieved person must wait at least 30 days before filing a civil action.

c. **Responsibilities Regarding Notices of Intent to Sue**

The following is a statement of the procedures and a delineation of the responsibilities on the part of the aggrieved person, the EEOC, and the Bureau of Prisons with respect to the filing and processing of notices of intent to sue under the ADEA.

(1) **The Aggrieved Person**

It is the aggrieved person's responsibility to provide the EEOC with a written notice of intent to sue within 180 days of the date of the alleged discriminatory action.

- (a) Notices of intent to sue must be delivered to the Commission at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
1801 L Street NW
Washington DC 20507

or mailed to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
PO Box 19848
Washington DC 20036

or faxed (if no more than 10 pages) to:

(202) 663-7022.

- (b) The notice of intent to sue should be dated and must contain the following information:

- i. statement of intent to file a civil action under Section 15(d) of the Age Discrimination in Employment Act of 1967, as amended;
- ii. name, address, and telephone number of the employee or applicant;
- iii. name, address, and telephone number of the complainant's designated representative, if any;
- iv. name and location of the federal agency or installation where the alleged discriminatory action occurred;
- v. date on which the alleged discriminatory action occurred;
- vi. statement of the nature of the alleged discriminatory action(s); and
- vii. signature of the complainant or the complainant's representative.

(2) **The Equal Employment Opportunity Commission (EEOC)**

- (a) Upon receipt of a notice of intent to sue, the Commission will promptly notify the concerned agency (and all persons named in the notice as

prospective defendants in the action, if any), in writing, of its receipt of the notice of intent to sue and will provide the agency with a copy of the notice. A copy of the Commission's notification will be provided to the aggrieved person and/or his/her representative, if any. Additionally, the Commission will take any appropriate action to ensure the elimination of any unlawful practice.

- (b) Where an aggrieved person files a civil action before the agency has completed its inquiry, or before the Commission has reviewed the agency's disposition, the Commission will terminate the inquiry and will take no further action on the notice of intent to sue.

(3) **The Agency**

Upon receipt of a notice of intent to sue, an agency must review the claim(s) of age discrimination and conduct an inquiry sufficient to determine whether there is evidence that unlawful age discrimination has occurred. Agencies may determine their method of review/inquiry and the method may vary depending on the scope and complexity of the claims. Agencies are encouraged to make good faith efforts to resolve disputes.

4. **EQUAL PAY ACT COMPLAINTS**

An aggrieved individual does not have to file an administrative complaint before filing a lawsuit under the Equal Pay Act (EPA). If an aggrieved individual nonetheless wants to file an administrative complaint, it will be processed like Title VII complaints under Part 1614. Complainants in EPA cases should be notified of the statute of limitations (two years or, if a willful violation is alleged, three years), which applies even if the individual files an administrative complaint, and of the right to file directly in a court of competent jurisdiction without first providing notice to the Commission or exhausting administrative remedies.

It should be noted that **attorney's fees are not available during the administrative process of complaints brought under the Equal Pay Act.**

5. **NEGOTIATED GRIEVANCE PROCEDURES**

- a. When a person who is employed by an agency, such as the Federal Bureau of Prisons, which is subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement which permits allegations of discrimination to be

raised in a negotiated grievance procedure, that person wishing to file a complaint **or** a grievance on a matter of alleged employment discrimination **must elect** to raise the matter under **either** the EEO complaint procedures or the negotiated grievance procedure, **but not both**.

- b. An election to proceed under the EEO complaint procedures is indicated **only** by filing a formal, written complaint with the EEO Officer; use of the pre-complaint counseling process does not constitute an election to proceed under the complaint procedures. A person who files a formal EEO complaint may not thereafter file a grievance on the same matter.
- c. An election to proceed under the negotiated grievance procedure is indicated by the filing of a timely, written grievance.
- d. According to 29 CFR 1614.301, an aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances alleging discrimination **may not** thereafter file a complaint on the same matter under these complaint procedures, **irrespective of whether the Bureau has informed the individual of the need to elect, or of whether the grievance has raised the issue of discrimination, or what the disposition of the grievance is.**

Any such complaint filed after a grievance has been filed on the same matter will be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure, including the right to appeal any issue of discrimination in a final decision on the grievance to EEOC. The dismissal of such a complaint will advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

CHAPTER 10

COMPLAINTS OF CLASS DISCRIMINATION

1. INTRODUCTION

Section 1614.204 of Title 29 CFR provides for processing class complaints of discrimination. A class is defined as a group of employees, former employees, or applicants who are alleged to have been adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or disability.

A class complaint is a written complaint of discrimination filed on behalf of the class by the agent of the class, alleging that the class is so numerous that a consolidated complaint by the members of the class is impractical, that there are questions of fact common to the class, that the claims of the agent of the class are typical of the claims of the class, and that the agent of the class and, if represented, the representative, will fairly and adequately protect the interests of the class.

The regulatory requirements for class complaints at 1614.204 provide a structure different from that for individual complaints. For class complaints, there is a four-stage process. The first stage is the establishment of a class complaint. At this stage, the class agent is required to seek counseling from an agency EEO Counselor. The second stage is a determination from a Commission Administrative Judge, subject to agency final action, as to whether to certify the complaint as a class action. The third stage, assuming that the complaint has been certified as a class action, involves a recommended decision from an Administrative Judge on the merits of the class complaint, subject to final agency action in the form of a final decision. The fourth stage, where there has been a finding of class-based discrimination, is the determination of the claims for relief of the individual class members.

2. PRE-CERTIFICATION PROCEDURES

a. Pre-Complaint Processing

Section 1614.204(b) provides that, as with an individual complainant, an employee who seeks to represent a class of employees must seek counseling and undergo pre-complaint processing in accordance with 1614.105, with one exception, discussed below. Section 1614.105 requires that an employee must seek counseling within 45 days of the discriminatory event.

The agency will extend the 45-day time limit when the individual shows that s/he was not notified of the time limits and was not aware of them, that s/he did not know and reasonably should not have known that the discriminatory practice or personnel action occurred, that despite due diligence s/he was prevented by circumstances beyond his/her control from contacting the EEO Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. See 1614.105(a)(2). The time period may be waived by the agency and is subject to estoppel and equitable tolling. See 1614.604(c).

If the complaint is not resolved on the 30th day following initial EEO counseling, the EEO Counselor must give the agent written notice that s/he has 15 days from receipt of the notice to file a formal complaint. 1614.204(c)(2).

The counseling period may be extended up to an additional 60 days if, prior to the expiration of the 30-day period, the aggrieved person agrees with the agency in writing to postpone the final interview.

The one exception to the mandatory counseling prerequisite allows a complainant to move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. 1614.204(b). (The term "move" in this context means that the complainant must make his/her intention to process the complaint as a class action clear to the investigator if the complaint is still in the investigation phase of the process, to the Administrative Judge if the complaint is at the hearing phase of the process, or to the agency if the investigation has been completed and the complainant has not elected to proceed to a hearing.)

A complainant may make his/her intention clear through a letter, a formal motion, or any means that effectively informs the agency, investigator (if the matter is within the investigation phase of the process), or Administrative Judge of the complainant's intent to pursue a class action. The Commission intends that "reasonable point in the process" be interpreted to allow a complainant to seek class certification when s/he knows or suspects that the complaint has class implications, i.e., the complaint potentially involves questions of law or fact common to a class and the complainant's claim is typical of that of the class. Undue delay will lead to dismissal of the class complaint.

If a complainant moves for class certification after completing the pre-complaint process contained in 1614.105, no additional counseling is required. Instead, the agency or the Administrative Judge, as appropriate, must advise the

complainant of his/her rights and responsibilities as the class agent.

b. Filing and Presentation of the Class Complaint

As with an individual complaint, a class complaint must be filed with the agency that allegedly discriminated against the putative class (see 1614.106). A class complaint must be signed by the class agent (the complainant) or a class representative and must identify the policy or practice adversely affecting the class as well as the specific action or policy affecting the class agent (see 1614.204(c)(1)).

Within 30 days of an agency's receipt of a class complaint, including the agency's receipt of the class complaint during its investigation of the aggrieved person's individual complaint, an agency must designate an agency representative and forward the complaint, along with a copy of the EEO Counselor's report and any other relevant information about the complaint, to the Commission (see 1614.204(d)(1)).

When any complaint is filed, an agency must take care to preserve any and all evidence with potential relevance to the class complaint. This is a continuing obligation that begins as soon as the complaint is filed, even before the class has been certified, and continues throughout the processing of the complaint.

The agency must forward the class complaint to the EEOC district office having jurisdiction of the agency facility where the complaint arose.

Should the agency's organizational component where the complaint arose not fall within one of the geographical jurisdictions shown, the agency should contact the following office for guidance:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
Complaint Adjudication Division
PO Box 19848
Washington DC 20036
Telephone: (202) 663-4519
TDD: (202) 663-4593

3. CERTIFICATION OR DISMISSAL - 1614.204(d)

The Commission will assign an Administrative Judge (or in some limited circumstances involving national security, a complaints examiner from another agency) to issue a decision on certification of the complaint (see 1614.204(d)).

a. Class Complaint Criteria

A class complaint will be dismissed if:

- (1) The complaint does not meet all of the prerequisites of a class complaint under 1614.204(a)(2) (i.e., numerosity, commonality, typicality, and adequacy of representation);
- (2) The claims lack specificity and detail pursuant to 1614.204(d)(4);
- (3) The complaint meets any of the criteria for dismissal pursuant to 1614.107(a) "Dismissals of Complaints"; or
- (4) The complainant unduly delayed in moving for class certification. See 1614.204(b).

b. Developing the Evidence for Purpose of Certification Determination

The Administrative Judge may direct the complainant or agency to submit additional information relevant to the issue of certification (see 1614.204(d)(1)).

c. Individual Complaints Filed on Bases and Issues Identical to Class Complaints

An individual complaint that is filed before or after the class complaint is filed and that comes within the definition of the class claim(s), will not be dismissed but will be subsumed within the class complaint. If the class complaint is dismissed at the certification stage, the individual complaint may still proceed, unless the same or another basis for dismissal applies. If the class proceeds to a hearing, the individual claim may be presented by the class representative at the liability stage of the process, or it may be presented at the remedy stage by the complainant. If the class complaint is dismissed at the certification stage, the class members may not proceed unless they have timely filed individual complaints.

The agency will, within 30 days of receipt of a decision dismissing a class complaint for failure to meet the criteria of a class complaint, issue the acknowledgment of receipt of an individual complaint as required by 1614.106(d) and process in accordance with subpart A, each individual complaint that was subsumed into the class complaint.

4. **CERTIFICATION DECISION - 1614.204(d) (7)**

a. **Administrative Judge Issues Decision on Certification**

The Administrative Judge will issue a decision on whether to certify or dismiss a class complaint. When appropriate, the Administrative Judge may decide to certify a class conditionally, for a reasonable period of time, until a complainant finds representation. For example, if the record on a class complaint satisfies the numerosity, typicality, and commonality requirements for class certification, the Administrative Judge may "conditionally" certify the class for a reasonable period of time so that the class agent may secure adequate representation.

Administrative Judges should refer complainants to any attorney referral systems that may be operating in EEOC district offices or other attorney referral services for assistance in obtaining adequate legal representation.

Even after a class is certified, the Administrative Judge remains free to modify the certification order or dismiss the class complaint in light of subsequent developments. The Administrative Judge has the authority, in response to a party's motion or on his/her own motion, to redefine a class, subdivide it, or dismiss it if the Administrative Judge determines that there is no longer a basis for the complaint to proceed as a class complaint.

b. **Transmittal of Decision**

The Administrative Judge will transmit his/her decision to accept or dismiss a class complaint to the agency and the agent. The agency will take final action by issuing a final order within 40 days of receipt of the Administrative Judge's decision. The final order will notify the agent whether the agency will implement the decision of the Administrative Judge. If the final order does not fully implement the decision of the Administrative Judge, the agency will simultaneously appeal the Administrative Judge's decision in accordance with 1614.403 and append a copy of the appeal to the final order.

If the decision is to accept (certify) the class complaint, Commission regulations require the agency to notify all class members. The agency must use all reasonable means to notify all class members of the acceptance of the complaint within 15 days of receipt of the Administrative Judge's decision or within a reasonable time frame specified by the Administrative Judge.

An Administrative Judge's decision to dismiss the class complaint at the certification stage will inform the agent that the complaint is being filed on that date as an individual complaint and will be processed under subpart A, that the complaint is also dismissed as an individual complaint in accordance with 1614.107(a), or, in the case of a complaint forwarded to the Administrative Judge during the agency's investigation of the complaint, that the complaint is being returned to the agency and will continue from the point that the agency's investigation ended with the referral of the complaint to the Administrative Judge.

c. Right to Appeal the Administrative Judge's Decision

The Administrative Judge's decision whether to accept or dismiss the class complaint is subject to final agency action. The Administrative Judge will transmit his/her decision to the agency, with a copy to the complainant and the complainant's representative, if any. The agency has 40 days from receipt of the Administrative Judge's decision to take final action by issuing a final order informing the complainant as to whether the agency will fully implement the decision.

If the agency informs the complainant that it does not intend to fully implement the decision, the agency must simultaneously file an appeal with the Commission and append a copy of the appeal to the final order served on the complainant. The complainant will have 30 days from receipt of the final order to file an appeal and the agency will provide the complainant with a copy of the Notice of Appeal/Petition (EEOC Form 573).

5. NOTIFICATION - 1614.204(e)

a. Timing and Method of the Notice

Within 15 calendar days of the agency's receipt of the Administrative Judge's decision certifying a class complaint or such time frame specified by the Administrative Judge, the agency will use reasonable means, such as hand delivery, mailing to the last known address, or distribution (such as through inter-office mail or e-mail) to notify all class members of the certification of the class complaint.

An agency may file a motion with the Administrative Judge seeking a stay in the distribution of the notice for the purpose of determining whether it will file an appeal of the Administrative Judge's order.

The "reasonable means" used by agencies for notification should be those most likely to provide an opportunity for class members to know about the complaint. Conspicuous

posting on bulletin boards to which all potential class members have easy access may constitute adequate notice in some situations.

b. Content of the Notice

The notice must contain:

- (1) the name of the agency or organizational segment, its location, and the date of acceptance of the complaint;
- (2) the definition of the class and a description of the issues accepted;
- (3) an explanation of the binding nature of the decision or resolution of the complaint on class members;
- (4) the name, address, and telephone number of the class representative; and
- (5) a copy of the Administrative Judge's decision certifying the class.

c. Individuals May Not Opt Out

The class members may not "opt out" of the defined class; however, they do not have to participate in the class or file a claim for individual relief. All class members will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found.

d. Settlement Notice

All class members must receive notice of any settlement or decision on the class complaint whether or not they participated in the action.

6. DEVELOPING THE EVIDENCE - 1614.204(f)

a. The Process of Developing the Evidence

The Administrative Judge will advise both parties that they will have at least 60 days to develop evidence (see 1614.204(f)(1)). They can do this in the same manner as in individual cases, i.e., through interrogatories, depositions, requests for admissions, stipulations, or production of documents. The parties may object to production on the grounds that the information sought is irrelevant, overly burdensome, repetitious, or privileged. The Administrative Judge has the authority to impose sanctions on a party if that party fails to comply without good cause with rulings on requests for information,

documents, or admissions. An adverse inference may be appropriate where the information is solely in the control of that party.

Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request, the Administrative Judge may impose sanctions. Adverse inferences are appropriate when the information is solely in the control of that party. These sanctions include, but are not limited to, the authority to:

- (1) draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
- (2) consider the issues to which the requested information pertains to be established in favor of the opposing party;
- (3) exclude other evidence offered by the party failing to produce the requested information, and/or;
- (4) recommend that a decision be entered in favor of the opposing party.

b. Use of Agency Facilities by Class Agent

The class agent and his/her non-attorney representative should be permitted reasonable access to and/or use of agency facilities (copiers, telephones, word processors, facsimile, private room) for preparation of the case as long as there is no undue disruption of agency operations. The class agent and/or non-attorney representative may not use agency resources and facilities in the preparation of the class case without obtaining the prior approval of the designated agency official.

7. RESOLUTION - 1614.204(g)

a. Resolution by the Parties

The complaint may be resolved by agreement of the agency and the agent at any time pursuant to the notice and approval procedure contained in 1614.204(g)(4).

b. Notice of Proposed Resolution

If a resolution is proposed, notice must be given to all class members in the same manner as the notification of certification of the class was given. The notice must include a copy of the proposed resolution, set out the relief, if any, that the agency will grant, and inform the class members that the resolution will bind all members of

the class. The notice must also inform class members of the right to submit objections to the settlement. The notice further must inform the parties of the name and address of the Administrative Judge assigned to the complaint.

The agency will provide the Administrative Judge with a copy of the proposed resolution and the notice sent to the parties.

c. Administrative Judge Will Review Resolution

- (1) The Administrative Judge will review and issue a decision concerning the fairness, adequacy, and reasonableness of the proposed resolution. Within 30 days of the date of a class member's receipt of the notice of proposed resolution, the class member may file a petition with the Administrative Judge noting objections to the settlement if the petitioner (class member) believes that the settlement benefits only the class agent or is otherwise not fair, adequate, and reasonable to the class as a whole.

The Administrative Judge will review the proposed resolution after the expiration of the 30-day period allowed for petitions and consider any petitions received. If the judge determines that the resolution is not fair, adequate, and reasonable, s/he will vacate the proposed resolution and may replace the class agent with the petitioner or other class member who is eligible to serve as class agent.

- (2) An Administrative Judge's decision that a resolution is not fair, adequate, and reasonable vacates the agreement between the class agent and the agency. The decision must inform the class agent, the petitioner, class members, and the agency, of the right to appeal the decision to the Commission. The decision must include a copy of the Notice of Appeal/Petition (EEOC Form 573).
- (3) An Administrative Judge's decision that a resolution is fair, adequate, and reasonable binds all members of the class. The decision must inform the petitioner of the right to appeal the decision to the Commission. The decision must include a copy of the Notice of Appeal/Petition (EEOC Form 573).

8. **HEARING - 1614.204(h) and (i)**

a. **Hearing Procedures**

Hearing procedures in class complaints are the same as those applied to hearings in individual complaints of discrimination and are set out at 1614.109.

b. **Site of the Class Hearing**

The Administrative Judge assigned to hear the complaint will, upon expiration of the period allowed for preparation of the class case, set a date for a hearing and determine the site of the hearing. Within his/her discretion, the Administrative Judge is authorized to conduct the hearing in the EEOC district office, in an EEOC area or local office, at the agency's organizational component where the complaint arose, or at such other location as s/he may determine appropriate.

In determining the hearing site, the Administrative Judge may consider factors such as the location of the parties; the location of EEOC district, area, and local offices; the number and location of witnesses; the location of records; travel distances for the Administrative Judge, the parties, and witnesses; travel costs; the availability of sources of transportation; and other factors as may be appropriate.

Should an agency desire that a hearing be held at a location within the jurisdictional area of another EEOC district office, it must submit a request, in writing, to the EEOC office that determined the class certification issue. In its request, the agency must identify the location of the desired place of hearing and must set out, in detail, its reasons and justification for the requested change. The Administrative Judge will rule on the request only after the directors of the concerned EEOC district offices have conferred on the matter.

c. **Travel Expenses**

If the Administrative Judge sets a hearing site that is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel and per diem expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the Administrative Judge, except that an agency does not have the authority to pay the travel expenses of complainant's witnesses who are not federal employees.

The agency's obligation is limited to those costs which are legally payable in advance by the agency.

d. Official Time for Agency Employees

Any employee testifying at a hearing is entitled to official time for the time s/he spends testifying as well as a reasonable amount of time for travel to and from the hearing. The class agent and agent's representative, if employees of the agency where the complaint arose and was filed, are entitled to official time for actual time spent at the hearing and for a reasonable amount of time spent preparing for the hearing.

An agency may permit its employees to use official time in preparing and presenting a class complaint which arose in another agency.

9. ADMINISTRATIVE JUDGE'S RECOMMENDED DECISION

The Administrative Judge will transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class, and any individual relief, where appropriate, with regard to the personnel action or policy that gave rise to the complaint. The report of findings and recommendations will be sent to the agency together with the entire record, including the transcript. The Administrative Judge will also notify the class agent, in a separate communication, of the date on which the report of findings and recommendations was forwarded to the agency (see 1614.204(i)(1)).

If the Administrative Judge finds no class relief appropriate, s/he will determine if any finding of individual discrimination is warranted and, if so, will recommend appropriate relief (see 1614.204(i)(2)).

10. AGENCY DECISION - 1614.204(j) and (k)

a. Action on Administrative Judge's Report of Findings and Recommendations

Within 60 days of receipt of the report of findings and recommendations issued by the Administrative Judge, the agency must issue a decision to accept, reject, or modify those findings and recommendations. If the agency does not issue the final decision within 60 days, the Administrative Judge's findings and recommendations will become the final decision of the agency.

The agency must transmit its final decision to the agent within five days of the expiration of the 60-day period.

b. Required Features of the Agency Final Decision

- (1) The agency's final decision on a class complaint must be in writing; must be transmitted to the agent by certified mail, return receipt requested, and must include a copy of the report of findings and recommendations of the Administrative Judge (see 1614.204(j)(2)).
- (2) Where the Administrative Judge addresses the merits of the complaint, the agency final decision also must address the merits. It must include a finding on the issue of discrimination, address the merits of the class agent's personal claim, and include the corrective action, if any, awarded to the class agent. (Section 1614.204(j)(5) provides: "The final decision of the agency will require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.")
- (3) A decision finding discrimination should include the dates of the agent's initial contact with the EEO Counselor and the date the agency eliminated the policy or practice on which there has been a finding of discrimination.
- (4) The final agency decision will inform the agent of the right to appeal or to file a civil action and of the applicable time limits.

c. Binding Nature of Agency Decision

The final agency decision finding of discrimination will be binding on all members of the class and on the agency. A finding of no discrimination is not binding on a class member's individual complaint. Class members may not "opt out" of the class action while it is pending.

d. Notification of Agency Final Decision

The agency will notify class members and the class representative of the decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, will include information concerning the rights of class members to seek individual relief and of the procedures to be followed. Notice will be given by the agency within 10 days of the transmittal of its decision to the agent. The notice will include the period for which the relief will be available and stating it in terms of precise calendar days, e.g., between 6/30/90 and 9/1/97.

11. **RELIEF FOR INDIVIDUAL CLASS MEMBERS - 1614.204(1)**

a. **Claims for Individual Relief by Class Members Where Discrimination is Found**

Where a finding of discrimination against a class has been made, there is a presumption of discrimination as to each member of the class. The agency has the burden of proving by clear and convincing evidence that a class member is not entitled to relief. See 1614.204(1)(3).

Within 30 days of receipt of notification of the final agency decision, a class member who believes that s/he is entitled to individual relief must file a written claim with the head of the agency, or with the agency's EEO Director (Department of Justice).

The claim must include a specific, detailed showing that:

- (1) The claimant is a class member who was affected by the discriminatory policy or practice and
- (2) The discriminatory action occurred within the period of time for which the agency found class-wide discrimination in its decision.

Where a finding of discrimination against a class has been made, there will be a presumption of discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief.

b. **Timing of Agency Decision on Individual Claims for Relief**

Within 90 calendar days of receiving an individual claim, the agency must issue a final decision on that claim. The agency's final decision must include a notice of the right to file an appeal or a civil action within the applicable time limits. The decision must include a copy of the Notice of Appeal/Petition (EEOC Form 573).

c. **Oversight of Individual Claims for Relief**

- (1) Where an Administrative Judge finds that the agency discriminated against the class, the Administrative Judge should include in his/her order a provision that establishes a mechanism for review of individual claims pursuant to 1614.204(1)(3). Under that section, a class member must file a claim with the agency within 30 days of his/her receipt of notification from the agency of its final decision and the agency must issue a decision within 90 days of its receipt of the claim. That section further provides that Administrative

Judges retain jurisdiction over the complaint in order to resolve any disputed claims of class members and may hold hearings or otherwise supplement the record on a claim filed by a class member.

- (2) To implement this section, an Administrative Judge's order should advise the agency to inform him/her in writing within 60 days of the agency's receipt of a claim from a class member that it intends to dispute the class member's claim and provide a copy of such notice to the class member. Once the agency informs the Administrative Judge and the class member of its intent to dispute the class member's claim, the Administrative Judge will issue an order tolling the 90-day period within which the agency is required to issue a decision on the class member's claim.
- (3) The Administrative Judge's order will advise the agency to provide a statement in support of its decision to dispute the class member's claim and any supporting evidence within 15 days of the agency's receipt of the Administrative Judge's order, providing a copy of any such submission to the class member.

The class member will have 15 days from the date of service of the agency's submission to respond to the agency's submission and may file a statement and documents in support of his/her claim, providing a copy of any such submission to the agency. If service of the submission was by mail, the class member may add three days to the date that the response is due.

The Administrative Judge has the discretion to enlarge the 15-day period at the written request of either party or on his/her own motion. If a party seeks an enlargement of the 15-day period, that party must provide a copy of its written request to the other party.

- (4) The Administrative Judge thereafter may determine whether s/he needs additional information or should hold a hearing in order to further develop the record regarding the class member's claim. At the conclusion of fact finding, the Administrative Judge will issue a decision concerning the class member's claim and forward the decision to the class member and the agency.

The decision will advise the agency that the 90-day period for issuing a final decision on the claim will resume upon its receipt of the Administrative Judge's decision. The agency must issue a final decision regarding the class member's claim within the 90-day

period. If the agency does not issue the final decision within the 90-day period, the Administrative Judge's decision will become the final decision of the agency.

- (5) A decision on a class member's claim must inform the class member of the right to appeal the decision to the Office of Federal Operations or to file a civil action and it must include a Notice of Appeal/Petition (EEOC Form 573).

d. Limits on the Duration of a Finding of Class-Wide Discrimination

The agency or the Commission may find class-wide discrimination and order remedial action for any policy or practice in existence within 45 days of the class agent's initial contact with the EEO Counselor. Relief may be ordered for the time the policy or practice was in effect.

Under the continuing violation theory, incidents occurring earlier than 45 days before contact with the EEO Counselor must also be remedied provided the initial contact with the EEO Counselor was timely and the earlier incidents were part of the same continuing policy or practice found to have been discriminatory. Where contact with the EEO Counselor is timely as to one of the events comprising the continuing violation, then the counseling contact is timely as to the entire violation (see 1614.204(1)(3)). This 45-day time period does not limit the two-year time period for which back pay can be recovered by a class member.

e. Where Class-Wide Discrimination is Not Found

The agency will, within 60 calendar days of issuance of the final decision, acknowledge receipt of an individual complaint as required in 1614.106(d) and process in accordance with the provisions of subpart A, each individual complaint that was subsumed into the class complaint. If it is found that the class agent or any other member of the class is a victim of discrimination, the relief provisions of 1614.501 will apply.

12. REPRISAL

Federal employees who are agents, claimants, representatives of agents or claimants, witnesses, or agency officials having responsibility for processing class complaints may file individual discrimination complaints if they believe they have been subjected to restraint, interference, coercion or reprisal because of their involvement in the presentation and/or processing of a class complaint. EEO counseling must precede the filing of such complaints.

CHAPTER 11

WITNESSES AND REPRESENTATIVES

The procedures outlined here relate specifically to the processing of individual complaints of discrimination. The principles reflected in these procedures, however, should also guide the processing of class complaints of discrimination.

1. DISCLOSURE OF INVESTIGATIVE MATERIAL TO WITNESSES

a. To the Complainant

The complainant must receive a copy of the complaint file and a transcript of the hearing, if a hearing is held.

b. To Other Witnesses

Agencies may disclose information and documents to a witness who is a federal employee where the investigator determines that the disclosure of the information or documents is necessary to obtain information from the witness, e.g., to explain the claims in a complaint or to explain a manager's articulated reason for an action in order to develop evidence bearing on that reason.

2. TRAVEL EXPENSES

a. Witness Employed by the Federal Government

Section 1614.605(f) requires that a witness be in an official duty status when his/her presence is required or authorized by agency or EEOC officials in connection with a complaint. A witness is entitled to travel expenses. If a witness is employed at an agency other than the one against which the complaint is brought and must travel to provide the attestation or testimony, the witness is entitled to reimbursement for travel expenses.

The current employing agency of a federal employee must initially authorize and pay the employee's travel expenses and is entitled to reimbursement from the responding agency, which is ultimately responsible for the cost of the employee's travel. An agency would not be responsible for paying the travel expenses of non-federal witnesses.

b. Outside Complainant or Applicant Not Employed by Federal Government

The agency is not responsible, however, for paying the travel expenses of an "outside" complainant or applicant. Although the complainant who, for purposes of his/her complaint is a witness, may once have been employed by the

agency against whom s/he complains, the termination of the employment status with the federal government also terminates any federal obligation to pay travel expenses associated with prosecution of the complaint.

3. **OFFICIAL TIME FOR WITNESSES AND REPRESENTATIVES**

Section 1614.605 provides that complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to agency requests for information, if otherwise on duty.

Former employees of an agency who initiate the EEO process concerning an adverse action relating to their prior employment with the agency are employees within the meaning of 1614.605, and their representatives, if they are current employees of the agency, are entitled to official time.

Witnesses who are federal employees, regardless of whether they are employed by the respondent agency or some other federal agency, will be in a duty status when their presence is authorized or required by EEOC or agency officials in connection with the complaint.

If appropriate under the circumstances, this official time may be authorized to be used off the site of the facility.

4. **REASONABLE AMOUNT OF OFFICIAL TIME**

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which the complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis.

The complainant and/or representative and the requestor's supervisor should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant's use of such time.

5. **MEETING AND HEARING TIME**

Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with EEOC Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable. Both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off day, that complainant or representative is entitled to official time, which may require that the agency pay overtime.

6. **PREPARATION TIME**

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings, conferences, and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the EEOC, even though no meetings or hearings are involved.

However, because investigations are conducted by agency or EEOC personnel, the regulation does not envision large amounts of official time for preparation purposes. Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings) is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint.

The EEOC does not require agencies to provide official time to employee representatives who are representing complainants in cases against other federal agencies. However, the EEOC encourages agencies to provide such official time.

7. **AGGREGATE TIME SPENT ON EEO MATTERS**

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on

the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative's absence from his/her normal duties. The amount of official time to be afforded to an employee for representational activities will vary with the circumstances.'

Moreover, section 1614.605(c) provides that in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether s/he has designated representative.

The Commission does not require agencies to provide official time to employee representatives who are representing complainants in cases against other federal agencies. However, the Commission encourages agencies to provide such official time.

8. **REQUESTING OFFICIAL TIME**

The complainant, representative and others who may need official time (such as witnesses), if a Bureau employee, must request official time. This request will be directed to the requestor's supervisor and will be followed up in writing as soon as practicable. The response will be provided as soon as practicable.

9. **DENIAL OF OFFICIAL TIME**

A written explanation of all denials of requests must be provided to the requestor as soon as practicable. If the agency denies a request for official time, either in whole or in part, the agency must include a written statement in the complaint file noting the reasons for the denial. If the agency's denial of official time is made before the complaint is filed, the agency will provide the complainant with a written explanation for the denial, which it will include in the complaint filed if the complainant subsequently files a complaint.

10. **DUTY STATUS/TOUR OF DUTY**

For purposes of these regulations, "**duty status**" means the complainant's or representative's normal hours of work. It is expected that the agency will, to the extent practical, schedule meetings during the complainant's normal working

hours and that agency officials will provide official time for complainants and representatives to attend such meetings and hearings.

If meetings, conferences, and hearings are scheduled outside of the complainant's or the representative's normal work hours, the agency should adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance will be within the discretion of the CEO.

Witnesses who are federal employees, regardless of their tour of duty and whether they are employed by the respondent agency or another federal agency, must be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

11. **USE OF GOVERNMENT PROPERTY**

The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors, or facsimiles) must be authorized by the agency and must not cause undue disruption of agency operations. This will include providing a private place to meet and work on the complaint, using the equipment referenced above, if neither the complainant nor the representative, if he or she is an employee of the facility, has a private office.

CHAPTER 12

DISABILITY DISCRIMINATION

1. COMPLAINTS INVOLVING PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF JUSTICE

a. Coverage

- (1) Section 504 of the Rehabilitation Act of 1973, as amended, prohibits discrimination on the basis of a physical or mental disability in **all** programs or activities conducted by Executive Branch agencies, including the Federal Bureau of Prisons and the U.S. Postal Service. Thus, no qualified disabled person will, on the basis of his or her disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity the Bureau conducts.
- (2) The Bureau will make available to employees, applicants, inmates, visitors, other participants in or beneficiaries of the Bureau's programs, and other interested persons information regarding the provisions of 28 CFR Part 39, which prohibit discrimination because of disability in programs or activities the Bureau conducts.
- (3) No qualified disabled individual will be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity the Bureau conducts, because the Bureau's facilities are inaccessible to or unusable by disabled persons. Furthermore, the Bureau will operate each program or activity at existing facilities, when viewed in their entirety, so that the programs or activities are readily accessible to and usable by disabled individuals.

b. Compliance Procedures

- (1) Any person who believes that he or she has been subjected to discrimination covered by this section may, by him or herself or by his or her representative, file a complaint with the Bureau's EEO Officer. However, inmates who allege disability discrimination by the Bureau must first exhaust the Bureau's Administrative Remedy Procedure as set forth in 28 CFR 39.170(d)(1)(ii).

- (2) Complaints from employees and applicants will be processed under the procedures in Chapters 2, 3, and 4 of this Manual.
- (3) All complaints filed under the procedures in this Chapter must be filed within 180 days of the alleged act of discrimination, except for complaints which are filed by inmates, and those must be filed within 180 days of the Bureau's final administrative decision under the administrative remedy procedure.
- (4) Complaints should be submitted to the:

EEO Officer
Federal Bureau of Prisons, Central Office
320 1st St. NW
Washington DC 20534.
- (5) The EEO Officer will accept a complete complaint which is filed in accordance with these procedures, and inform the complainant and management of receipt of the complaint. If the EEO Officer receives a complaint which is not complete, he or she will notify the complainant, within 30 days of the receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the complaint will be dismissed without prejudice.
- (6) Within 180 days of receipt of the complaint, the EEO Officer will assign an investigator to investigate the complaint, complete the investigation, and attempt informal resolution. If no informal resolution is achieved, the investigator will issue a report of investigation. Bureau employees are required to cooperate in the investigation and in any attempted resolution of complaints. Employees who participate in the investigation will do so as part of their official duties and during the course of regular duty hours.
- (7) The EEO Officer will furnish the complainant with a copy of the investigative report promptly after receiving it from the investigator and provide the complainant with an opportunity to informally resolve the complaint informally. If a complaint is resolved informally, the terms of the agreement will be put in writing and made a part of the complaint file. A copy of the agreement will be provided to the complainant and the respondent. The written agreement may include a finding on the issue of discrimination and should describe any corrective action to which the complainant and respondent have agreed.

- (a) A notice of the right of the complainant to receive a Final Agency Decision from the Complaint Adjudication Officer and
 - (b) A notice of the right of both the complainant and respondent to request a hearing before an Administrative Law Judge from the Department of Justice.
- (8) The complainant or Bureau management officials may file a Notice of Appeal to the EEOC Office of Federal Operations (OFO), with or without a request for hearing, within 30 days of receiving the letter of findings.
- (9) If one party files a timely appeal, but does not request a hearing, the other party may file a written appeal for a hearing within 30 days of receiving the letter of findings or within 10 days of receiving notice of the other party's appeal, whichever is later. If neither party requests a hearing, the EEO Officer will promptly transmit the notice of appeal and the investigative report to the OFO.
- (10) If neither party files a written appeal, with or without a hearing, within 30 days of receipt of the letter of findings, the Director of EEO for the Department of Justice, or his or her designee, will certify that the letter of findings is the final agency decision on the complaint at the expiration of the 30 days.
- (11) Procedures for appeals for a hearing or to the OFO may be found at 28 CFR 39.170(j)-(l).

c. Requests for Reasonable Accommodation

The Bureau adopts the Department of Justice's "Manual and Procedures for Providing Reasonable Accommodations" issued on October 17, 2002. It is understood that the Bureau of Prisons may have its own internal procedures which must be adhered to with regard to providing reasonable accommodation.

CHAPTER 13

DISCRIMINATION BASED ON SEXUAL ORIENTATION OR DISCRIMINATION BASED ON STATUS AS A PARENT

Executive Order 13087, amending Executive Order 11478, was signed on May 28, 1998, to provide a uniform policy for the federal government to prohibit discrimination based on sexual orientation. Executive Order 13152, also amending Executive Order 11478, was signed on May 2, 2000, to provide for a uniform policy for the federal government to prohibit discrimination based on an individual's status as a parent.

Although Executive Order 13087 did not create any new rights, Executive Order 13152 did change in that it now defines "status as a parent." Both orders set the stage for positive and constructive action by all units of the federal government to make certain that the workplace is one free from harassment and discrimination.

Sexual orientation refers to an individual's sexual preferences meaning homosexuality, bisexuality, or heterosexuality. "Status as a parent" refers to the status of an individual who, with respect to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- ◆ a biological parent;
- ◆ an adoptive parent;
- ◆ foster parent;
- ◆ a stepparent;
- ◆ a custodian of a legal ward; or
- ◆ in loco parentis over such an individual; or actively seeking legal custody or adoption of such an individual.

With regard to the processing of complaints on the basis of sexual orientation or parental status, complainants are entitled to a Department of Justice Final Agency Decision. Individual entitlement in this regard is derived from Department of Justice policy and practice and the above referenced Executive orders and not from EEOC regulations which govern other types of discrimination complaints in the Federal Sector.

Although complaints based on sexual orientation and parental status are processed under the same administrative time frames, they cannot be the subject of a hearing before an EEOC Administrative Judge or an appeal to the EEOC. Information on other avenues of redress (e.g., Merit Systems Protection Board, Office of Special Counsel, Negotiated Grievance Procedure, and Agency Grievance Procedure) regarding sexual orientation may be found in the *Office of Personnel Management Handbook: Addressing Sexual Orientation Discrimination in the Federal Government*.

CHAPTER 14

SEXUAL HARASSMENT

1. POLICY

It is the policy of the Federal Bureau of Prisons to prohibit sexual harassment at any Bureau facility. Bureau employees will work in an environment free from sexually harassing conduct and intimidation from all employees and inmates, regardless of their position.

Section 703 of Title VII of the Civil Rights Act of 1964, as amended, considers harassment on the basis of sex as a violation of that law. Agency responsibility regarding the management of sexual harassment, when it occurs, is also referred to in 29 CFR Part 1604.

On June 30, 1993, EEOC issued Management Directive Number 560.005 to all federal agencies, transmitting guidelines on the Prevention and Elimination of Sexual Harassment in the Workplace. Issuance of this Program Statement is consistent with guidance from EEOC.

2. PURPOSE AND SCOPE

To reaffirm the Bureau's position prohibiting sexual harassment and to inform all Federal Bureau of Prisons employees (including Federal Prison Industries and the National Institute of Corrections) that not only is sexual harassment a violation of Federal Bureau of Prisons policy, but it is also a violation of Title VII of the Civil Rights Act. This chapter of the Program Statement defines sexual harassment, summarizes the Bureau's policy, and explains the avenues of relief for victims. This policy pertains to all organizational levels and units under the responsibility of the Director of the Federal Bureau of Prisons.

3. DEFINITIONS

Harassment on the basis of sex is a violation of Title VII of the Civil Rights Act of 1964, as amended. The Equal Employment Opportunity Commission defines sexual harassment in 29 CFR § 1604.11, as:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- a. Submission to such conduct is made either explicitly or implicitly, a term or condition of an individual's employment;

- b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

4. **RESPONSIBILITIES**

- a. The Bureau of Prisons will not condone acts of sexual harassment or inappropriate behavior by staff or inmates. All employees will be informed that sexual harassment is prohibited conduct which will not be condoned, and appropriate corrective action will be taken against persons who engage in sexual harassment.
- b. Staff must take seriously all reported statements from their fellow staff alleging claims of inappropriate sexual behavior or claims of sexual harassment. The responsibility to report under the Program Statement on Standards of Employee Conduct will apply. At no time will an attitude of "that's what you have to put up with in a correctional environment" be condoned.
- c. All supervisors will discuss this Program Statement with all current employees and each new employee under their supervision, and inform employees of their responsibilities. Managers/supervisors will encourage employees to report conduct which they believe to be sexual harassment to ensure that there is no sexually harassing conduct in their areas of responsibility.
- d. All Federal Women's Program Managers, Hispanic Employment Program Managers, Black Affairs Program Managers, Selective Placement Program Managers, EEO Counselors, or other EEO Officials contacted will notify their CEO upon receiving any written allegations/complaints of sexual harassment.
- e. Management officials will notify the EEO Officer whenever they receive official notification of a complaint of sexual harassment.
- f. The agency will not condone retaliation against the victim or any employee who provided information related to the allegations. Management should scrutinize employment

decisions affecting the victim and witnesses during and after the investigation to ensure such decisions are not based on retaliatory motives.

5. **COMPLAINTS**

a. **Notification**

Employees who feel they are victims of sexual harassment by another employee have the option of first notifying the harasser that the behavior is unwelcome. If the conduct continues, or when the victim feels uncomfortable confronting the harasser, the employee/victim may notify any management official, EEO Counselor, Office of Internal Affairs (OIA), any special emphasis program manager, or Ombudsman.

b. **Relief**

The employee may seek relief by notifying the any of the individuals referenced above, pursuing the EEO Complaint process, or using the Negotiated Grievance process (if covered by that agreement) or the Agency Grievance procedure. Employees should be informed that if they choose to use the EEO Complaint process, they must do so within 45 days of the action(s) of which they are complaining (See Chapter 3).

If the employee is the subject of an adverse action appealable to the MSPB, he or she may raise the allegation of sexual harassment in any appeal to the MSPB. CEOs may, at their discretion, notify the Office of Internal Affairs and request that an investigation be conducted.

In cases where management is considering separating the alleged victim and alleged harasser, consideration will be given to the concerns of the victim.

c. **Complaints**

Complaints of discrimination alleging sexual harassment may be made by memoranda to the CEO or after completing EEO counseling. A complaint form will be issued to the employee on the 30th day of counseling by the EEO Counselor. The Complaint of Discrimination form may be submitted to the Director of the Federal Bureau of Prisons at 320 First Street NW, Suite 654, Washington DC 20534, the CEO, the Equal Employment Opportunity Officer at 320 First Street, NW, Suite 936, Washington DC 20534 or via fax to (202) 616-2080, or your local Federal Women's Program Manager.

All allegations of sexual harassment will be forwarded to the EEO Officer and investigated promptly by the EEO Office, in accordance with 29 CFR Part 1614.

All persons found to have engaged in sexually harassing behavior will be subject to corrective action, including disciplinary or adverse action.

6. **SEXUAL HARASSMENT TRAINING**

All new employees should receive sexual harassment prevention training before completing their probationary year. In an effort to prevent sexual harassment, **all** Federal Bureau of Prisons employees will receive sexual harassment prevention training each year. All CEOs will ensure that they and all employees under their supervision receive sexual harassment prevention training.

CHAPTER 15

SELF-ASSESSMENTS

- a. The Bureau of Prisons and its employees have an ongoing obligation to prevent discrimination on the bases of race, color, national origin, religion, sex, age, reprisal, and disability, and eliminate barriers that impede free and open competition in the workplace. As part of this on-going obligation, the Bureau will conduct self-assessments as outlined in MD715.
- b. To ensure the efficiency of its EEO program, the Bureau will use a complaint tracking and monitoring system that permits the agency to identify the location, status, and length of time elapsed at each stage of the agency's complaint resolution process, the issues and the bases of the complaints, the aggrieved individuals/complainants, and other information necessary to analyze complaint activity and identify trends. The Bureau will identify, monitor, and report trends reflected in complaint processing activity.
- c. The agency will conduct a review of each finding of discrimination to determine the appropriateness of disciplinary action against the officials involved in the matter. The agency will track these decisions, and report trends, issues, and problems to agency leadership for appropriate action.
- d. The Bureau will benchmark its alternative dispute resolution process against EEOC regulation at 29 CFR Part 1614 and other federal agencies of similar size highly ranked in EEOC's Annual Report on the federal sector complaint's processing.



U.S. Department of Justice
Federal Bureau of Prisons

Notice of EEO Time Lines

When an employee believes that he/she has been discriminated against, the employee may file a complaint through the EEO process or the negotiated grievance procedure. Time lines for the negotiated grievance process are referenced in the Master Agreement.

Counseling/ADR:

The aggrieved person must contact an EEO counselor within 45 calendar days after:

- the alleged discriminatory action.
- the effective date of an alleged discriminatory personnel action.
- becoming aware of the alleged discriminatory practice.

The aggrieved person must be given a Notice of Right to File a Formal Complaint no later than:

- 30 calendar days after the first contact with the counselor. The period may be extended if the aggrieved person and the agency agrees to an extension of no more than an additional 60 calendar days.
- 90 calendar days after the first contact with the counselor if the aggrieved person agrees to use the agency's alternate dispute resolution procedures.

Formal Complaint:

The aggrieved person may file a formal complaint:

- At any time after the 30th calendar day when the aggrieved person and the agency agree to an extension and resolution efforts continue.
- Within 15 calendar days after receiving a Notice of Right to File a Formal Complaint.

Dismissal of Issues:

If the agency dismisses a formal complaint, the complainant may file an appeal to the EEOC, Office of Federal Operations (OFO), within 30 calendar days. If OFO determines that:

- Dismissal was not proper, OFO will order the agency to accept the complaint.
- Dismissal of the complaint was proper, the complainant may file a civil action in U.S. District Court within 90 calendar days after receiving the OFO decision.

If an OFO decision is not issued within 180 calendar days after the appeal was filed, the complainant may file a civil action in U.S. District Court.

Investigation of Complaints:

If the agency accepts the formal complaint, the agency must complete the investigation and furnish a copy of the investigative file to the complainant within 180 calendar days after the formal complaint is filed. The complainant may agree in writing to an extension of not more than 90 calendar days.

The complainant, after receiving the investigative file, has 30 calendar days to request a:

- Hearing before an EEOC administrative judge, or
- Final agency decision without a hearing.

Decisions:

A hearing, if requested, must be held and the administrative judge's findings and conclusions must be sent to the agency and the complainant within 180 calendar days.

The agency must issue a final decision within 60 calendar days of the end of the 30 calendar day period in which the complainant can request a hearing or an immediate final agency decision and the agency does not receive a request for either a hearing or an immediate final agency decision.

Appeals:

An appeal may be filed with OFO within 30 calendar days of the final agency decision.

- A request for reconsideration of the OFO decision may be filed within 30 calendar days. It must be filed with EEOC, Office of Federal Operations OFO.
- A civil action in U.S. District Court may be filed:
 - After 180 calendar days of filing the formal complaint if a final agency decision has not been issued.
 - Within 90 calendar days of receiving the agency decision if the agency decision is not appealed to EEOC, OFO.
 - After 180 calendar days of filing an appeal with OFO if no decision is issued.
 - Within 90 calendar days after receiving the OFO decision.

I RECEIVED A COPY OF THIS NOTICE.

(Aggrieved Person) Date: _____

(Aggrieved Person's Representative) Date: _____

(EEO Counselor) Date: _____



U.S. Department of Justice
Federal Bureau of Prisons
EEO Program

Notice of Rights and Responsibilities

You have the right to be informed of the time frames in the EEO complaint process. This form will provide you with the Rights and Responsibilities in relation to the EEO process. The EEO Counselor will explain each of these rights and, where noted, provide additional information in written form.

You must initial each section of this form on the line to the left. This is your acknowledgment that you have been informed of these rights. If, after having these rights explained to you, you wish to proceed with the Counseling stage of the EEO process, you must sign and date the bottom of this form.

_____ You have the right to anonymity during the counseling stage. You should be aware that the EEO Counselor will not share your name, but that in some circumstances the specific facts might reveal your identity.

_____ I want to remain anonymous during counseling. If however, I report activities that are considered a serious and imminent threat to life, or may result in bodily harm, or are in violation of the law, the counselor may be under obligation to report such activities.

_____ I do NOT want to remain anonymous during counseling.

_____ The EEO Counselor is not your representative. The EEO Counselor must act as a neutral and can not act as an advocate for either you or the agency. You have a right to representation throughout the complaint process.

_____ I choose not to have a representative at this time, I understand I may choose one later.

_____ I have a Representative

Name of Representative:

Phone Number:

Is your representative an attorney? _____

_____ You have the right to choose between the Alternative Dispute Resolution (ADR) process or EEO Counseling. You must make this election within five days of receiving this notice. Your decision to choose ADR or Counseling is final. The counselor will provide you with information about the ADR process. Your signature on the information sheet indicates your election.

_____ There are responsibilities in relation to time limits both for you and the agency. You have been provided a copy of the Notice of EEO Time Lines. Your initials indicate your receipt of this information.

_____ You have the right to an immediate final decision after an investigation by the agency in accordance with § 1614.108(f).

_____ You have the duty to mitigate damages such as interim earnings or amounts that you could earn with reasonable diligence generally must be deducted from an award of back pay.

_____ You have the duty to keep the agency and EEOC informed of your current mailing address and to serve copies of appeal papers on the agency. _____ Only those claims raised at the counseling stage or claims that are like or related to those that were raised may be the subject of a formal complaint. You may amend a complaint after it has been filed.

_____ If you are bringing this complaint as a class agent, you have been provided a copy of the Notice of Rights and Responsibilities in a class action. If you are not bringing this complaint as a class agent, please write

N/A in the line at left.

_____ Rejection of an agency's offer of resolution made pursuant to § 1614.109(c) may result in the limitation of the agency's payment of attorneys' fees or costs.

_____ The agency is required to consolidate two or more complaints filed by the same complainant after appropriate notice to the complainant. § 1614.606. When a complaint has been consolidated with one or more earlier complaints, the agency will complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days of the filing of the first complaint. However, you may request a hearing before an EEOC Administrative Judge at any time after 180 days of the filing of the first complaint.

_____ If you are employed in a federal agency subject to the provisions of § 7121(d); and you are covered by a collective bargaining agreement you must choose EITHER to have your allegations of discrimination addressed in the negotiated grievance procedure with a caution that the opportunity to raise allegations of discrimination will be lost if not raised in the grievance process; OR, to have your allegations of discrimination addressed under the EEO process. If you are covered by the collective bargaining agreement, you have been provided a copy of the Negotiated Grievance Procedures Notice. Your initials acknowledge this receipt. If you are not covered by the collective bargaining agreement, please write N/A on the initial line.

_____ A mixed case is one which alleges discrimination in connection with a claim which is also appealable to the MSPB. If you have standing to file an appeal to the MSPB and the allegations which form the basis of the discrimination complaint can be appealed to the MSPB, you must choose the forum in which you wish to proceed. If your complaint qualifies as a mixed complaint, you have received a copy of the Notice of Mixed Complaint. Your initials acknowledge this receipt. If your complaint is not a mixed case complaint, please write N/A in the initial line.

_____ If your complaint is of age discrimination, you may choose to file a formal EEO Complaint OR you may bypass the administrative complaint process and file a civil action directly in an appropriate U.S. District Court after first giving the EEOC not less than thirty (30) days notice of intent to file such action. Such notice must be filed within 180 days after the date of the alleged discrimination. If you have an age-based claim, you have been given an Age Discrimination in Employment Act Notice. Your initials acknowledge this receipt. If you do not have an age-based claim, simply write N/A on the initial line.

_____ If your complaint is of wage-based sex discrimination, you may file a civil action in federal district court within two years, or three years if the violation is willful, of the date of the alleged violation, regardless of whether she or he has pursued an administrative action against the agency. Filing of an EEO complaint alleging a violation of the EPA does not tone the time for filing a civil action. If you have a wage-based sex discrimination claim, you have been provided an Equal Pay Act Notice. Your initials acknowledge this receipt. If you do not have a wage-based sex discrimination claim, please write N/A in the initial line.

=====
I explained the above rights to the complainant on this day.

_____ Date _____

EEO Counselor

I understand the above listed rights as they have been explained by the EEO Counselor. After careful review of my options:

I choose to proceed with EEO Counseling

_____ Complainant Date _____
_____ EEO Counselor Date _____

I choose to elect ADR

_____ Complainant Date _____
_____ EEO Counselor Date _____

I choose to pursue my complaint through MSPB, the Negotiated Grievance Procedure, or another forum

_____ Complainant Date _____
_____ EEO Counselor Date _____

I choose not to pursue my complaint at this time.

_____ Complainant Date _____
_____ EEO Counselor Date _____

EEO COUNSELORS CHECKLIST

1. First Contact:

_____ Provide staff member with a Request for EEO Counseling Form.

_____ Set up a date for the Initial Interview.

2. Initial Meeting:

_____ Explain the role of the EEO Counselor.

_____ Explain Rights and Responsibilities.

_____ Have complainant initial and sign Rights and Responsibility Form.

_____ Have complainant sign any other relevant forms.

_____ Review Request for EEO Counseling form with the staff member, explain about any untimely issues, issues that are not EEO issues, or previous filings through the Negotiated Grievance Procedure or MSPB. Determine the basis(es) the staff member is alleging. Determine the staff member's issues.

_____ What occurred?

_____ When did it happen?

_____ Where did it take place?

_____ Why does the aggrieved believe it happened?

_____ Are there any witnesses or anyone who may have first hand knowledge of the situation or incident?

_____ Who is the management official responsible for the incident or who can remedy the situation?

_____ Are there any related documents available?

_____ What remedy does the individual seek?

_____ How do they want to resolve the situation?

• Develop a Counseling Plan:

_____ Contact the EEO Office/EEO Specialist.

_____ Draw up the witness list; other persons to interview.

- _____ Determine what documents need to be reviewed
(directly related to the aggrieved and incident)
- _____ Other documents related to aggrieved and incident.

- Interview Responsible Management Official (RMO) or other Staff Involved
 - _____ Present the matters complained about.
 - _____ Present RMO information found in fact finding.
 - _____ Inform RMO what aggrieved seeks as relief.
 - _____ Determine what RMO will give to informally resolve.
- Suggest informal resolutions that may be acceptable to both sides.
- Conclude counseling with final interview and issue Notice of Right to File and Complaint form.
- Prepare Counselor's Report and submit within 15 days of issuing the Notice of Right to File.

MEDIATION

1. What is Mediation?

Mediation is a form of alternative dispute resolution in which a third party neutral, a mediator, meets with the parties (complaining staff member and management representative(s)) to assist them in resolving their dispute. Mediation is an informal, voluntary process that is unbinding unless agreement is reached by both parties. Mediation is not a legal process based on documentation; it is based on open communication.

2. What is the role of the Mediator?

The mediator has no authority or power to render decisions. He (or she) is merely a facilitator who is skilled at working with the parties to resolve their dispute. The mediator is not an arbitrator or judge. The parties dictate the outcome of the mediation, not the mediator. The mediator will draft any agreements reached by the parties.

3. Who will be the Mediator?

The mediator will be an individual trained and experienced in mediation skills. The individual may be employed by a private contractor, the Federal Mediation and Conciliation Service, or another federal agency. Bureau staff will only be used upon permission of the staff member. These staff will not be from the same institution as the staff member.

4. Who will pay for the Mediator?

The Bureau of Prisons will pay for any costs associated with hiring a mediator.

5. What is the format of a Mediation session?

Typically, the mediator meets with both parties first together in what is called a joint session. At the joint session, the mediator will initially ask the staff member to briefly describe the facts leading up to the dispute. Then the mediator will ask the management representative the same question. The mediator may also ask each party what they are seeking to accomplish in the mediation (i.e. what will it take to resolve the dispute). At the conclusion of the joint session, the mediator will typically meet with each party separately in what is called a private session. These sessions allow the mediator to ask more direct questions of the parties without putting the person on the spot. At the conclusion of the separate sessions, it is up to the mediator whether he will convene additional separate sessions or whether he will bring the parties back together for another joint session.

6. Are the Mediation sessions confidential?

Yes. At the beginning of the mediation, all parties in the room will be required to sign an "Agreement to Mediate" which states that everything discussed in the room is confidential. At the conclusion of each separate session, the mediator will also ask each party what they do not want him to share with the other party. The mediator is bound by these requests of confidentiality. The Agreement to Mediate also states that neither party can subpoena or depose the mediator in the event of future litigation.

7. Are representatives permitted to attend the Mediation? Will legal staff be present?

The staff member is permitted to bring whomever he or she likes to the mediation. He or she can bring a friend, a relative, a union representative or a legal representative. Typically, Management will not be represented by legal staff unless the staff member will be represented. If the staff member plans to bring a legal representative, he or she must inform the EEO Officer at least five days prior to the mediation.

8. Who will represent management at the Mediation?

Typically, the manager involved in the dispute will attend the mediation. In addition, one additional manager, not directly involved in the dispute, will attend. Names of these individuals will be provided to the staff member prior to the session.

9. What preparation should the parties do prior to attending the Mediation session?

The parties should come fully prepared to discuss the facts that led up to the dispute. Documentation is not necessary and often interferes with the process. (Parties will have the opportunity during breaks to obtain whatever documentation they feel that the other side should read.) The parties should also be able to discuss what they believe will resolve the issue. Typically, the mediator will have no knowledge of the facts prior to the mediation.

10. What is the duration of an average Mediation session? When and where are these sessions conducted?

A typical mediation session lasts from 4-6 hours. The mediation will be conducted in a secure location within the institution. The mediator will contact all parties prior to the session to coordinate a time convenient to all parties. Mediations will be conducted during normal business hours.

11. Who will determine if Mediation is appropriate to resolve my dispute? How soon will the Mediation session be conducted?

If you elect Mediation on the Mediation Election Form, the EEO Officer will determine whether your issue is appropriate for mediation. Mediation will not be appropriate if there is a criminal investigation ongoing, the disputes involve an issue that the Bureau has no authority to decide (such as retirement questions which are up to OPM), the issue is part of a class action matter, the staff member has abused the mediation process, or for any other reason that the EEO Officer determines. If mediation is appropriate, the goal of the program is to conduct the mediation within three weeks of when the staff member elects mediation. This will depend, however, on the schedules of the parties.

12. What happens to the EEO process if the staff member elects Mediation? What if the session does not resolve the dispute?

If mediation is elected in the informal complaint stage of the EEO process, attempts through traditional counseling will be terminated. The pre-complaint processing period will be automatically extended from 30 days to 90 days. A mediator will contact both parties to schedule the mediation session. If the mediation is unsuccessful in resolving the dispute, the EEO counselor will write the counseling report. That report will describe the initial counseling session, frame the issues, and report only that ADR was unsuccessful.

If mediation is elected in the formal complaint stage of the EEO process, the EEO Investigation will be suspended until conclusion of the mediation session.

Mediation will not affect the staff member's EEO rights and he or she will have the ability to continue with the EEO process. If the mediation is successful, however, the EEO process will be concluded.

THE BUREAU OF PRISONS PLAN FOR THE
PREVENTION OF SEXUAL HARASSMENT
IN THE WORKPLACE

The purpose of this plan is to reaffirm the Federal Bureau of Prisons' policy on the prohibition of sexual harassment. Sexual harassment is considered to be a form of misconduct which interferes with work productivity and wrongfully deprives employees of the opportunity to work in an environment independent from unsolicited and unwelcome sexual overtones.

POLICY

It is the policy of the Federal Bureau of Prisons (Bureau) to prohibit sexual harassment at all Federal Bureau of Prisons facilities. Bureau employees will work in an environment independent from sexually harassing behavior and/or conduct and intimidation from any employee regardless of their position.

BACKGROUND

Sexual harassment is a prohibited personnel practice and it is a violation of Title VII of the Civil Rights Act. The Equal Employment Opportunity Commission describes sexual harassment as:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:

- a. Submission to such conduct is made either explicitly or implicitly a term or condition of employment;
- b. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual's work, or;
- c. The conduct substantially interferes with an individual's work performance; or
- d. The conduct creates an intimidating, hostile, or offensive working environment."

TRAINING PROGRAM FOR SUPERVISORS AND EMPLOYEES

Training will be provided to all Bureau employees on a regular basis. This training will be provided to all new employees during Institution Familiarization as well as in two modules of the Introduction to Correctional Techniques course at the Federal Law Enforcement Training Center, Glynco, Georgia. Training will

also be provided to all new supervisors during supervisory training and to all new employees at all offices and facilities during new employee orientation. Annual Refresher Training at each office and facility will also include a segment regarding sexual harassment. All Chief Executive Officers will ensure that employees under their supervision receive sexual harassment training.

EMPLOYEE AWARENESS

The Bureau's EEO Office developed a poster, which is included, that should be placed in a location that is visually accessible to all employees. The Department of Justice issued a pamphlet entitled "Sexual Harassment in the Workplace It's Against the Law." Copies of the pamphlet can be obtained from the Department of Justice, EEO Staff.

The EEO Office maintains copies of recent court decisions regarding sexual harassment cases. The Management and Specialty Training Center has a wide variety of videos that may be ordered for purposes of training employees.

The Introductory to Correctional Techniques training has a presentation on sexual harassment during the personnel orientation segment. Sections pertaining to sexual harassment can also be found in the Bureau's Employee Handbook and the Standards of Employee Conduct and Responsibility (Standards of Conduct).

MANAGEMENT COMMITMENT

In an effort to eliminate incidents of sexual harassment, Management officials will be held accountable for the actions of its employees. Therefore, managers are expected to set the tone for their employees by providing examples of non-offensive behavior.

Management officials will inform all employees that sexual harassment is prohibited conduct that will not be tolerated. Managers are responsible for taking corrective action in instances where allegations of sexual harassment are sustained.

The Federal Bureau of Prisons will not tolerate any acts of Sexual harassment against its employees.

In accordance with the Standards of Conduct, disciplinary action will be taken against any employee found to have sexually harassed another employee or applicant, including sexual harassment.

PROCEDURES TO DISSEMINATE AGENCY STANDARDS OF CONDUCT
OR OTHER POLICY DIRECTIVES/MATERIALS
DESIGNED TO CURTAIL INAPPROPRIATE CONDUCT

- a. Each new employee, contractor and volunteer receives the Standards of Conduct from the local Human Resource Manager and must sign a form acknowledging receipt.
- b. A form indicating that an employee has received the Standards of Conduct is filed on the left side of the Official Personnel Folder of the employee.
- c. Employee Development Managers are responsible for ensuring that employees and supervisors are trained annually in the Standards of Conduct. This training can be tracked by the code number given to each class. Training in this area includes:
 - (1) Institution Familiarization and New Employee Orientation. This training includes at least a one-half hour segment on the Standards of Conduct and is presented to all new employees early in their employment with the Bureau.
 - (2) Annual Refresher Training is mandatory for all employees and the Standards of Conduct is a core subject.
 - (3) Introduction to Correctional Techniques includes a segment on the Standards of Conduct. This training is mandatory for all employees who are assigned to correctional facilities.
- d. All employees receive the Federal Bureau of Prisons' Employee Handbook. This handbook includes the Bureau's position on sexual harassment. Information on sexual harassment is found in the Equal Employment Opportunity and the Standards of Conduct section of this publication.

METHODS TO ENSURE ACCOUNTABILITY WITHIN
THE COMPONENT FOR MAINTAINING A WORKPLACE FREE
OF SEXUAL HARASSMENT

- a. The Bureau's Standards of Conduct includes a section describing penalties that can be assessed for misconduct including discrimination. Sexual harassment is discrimination because of sex.
- b. The performance evaluation standards for all supervisors and managers include elements for assessing the performance in the area of equal employment opportunity, including sexual harassment.



FEDERAL BUREAU OF PRISONS
SEXUAL HARASSMENT PREVENTION PLAN

BUREAU OR PRISONS COMMITMENT REGARDING SEXUAL HARASSMENT

THE BUREAU TAKES ALL ALLEGATIONS OF SEXUAL HARASSMENT SERIOUSLY. SEXUAL HARASSMENT WILL NOT BE TOLERATED IN THE BUREAU OF PRISONS.

IF YOU FEEL THAT YOU HAVE BEEN SUBJECTED TO ANY FORM OF SEXUAL HARASSMENT YOU HAVE THE RIGHT TO NOTIFY:

Any management official;
An EEO Counselor;
The Office of Internal Affairs;
Any Special Emphasis Program Manager; or,
The Ombudsman.

YOUR CONTACT WITH ANY OF THE INDIVIDUALS LISTED ABOVE MAY BE IN PERSON, TELEPHONICALLY OR BY WRITTEN COMMUNICATION.

DISCIPLINARY ACTION WILL BE TAKEN AGAINST ANY EMPLOYEE FOUND TO HAVE SEXUALLY HARASSED ANOTHER EMPLOYEE.