

## PROCEDURES FOR PROCESSING COMPLAINTS OF DISCRIMINATION BASED ON SEXUAL ORIENTATION

1. **PURPOSE:** This chapter adopts, in part, the standard operating procedures established by the preceding IPM chapters for processing complaints of discrimination filed by civilian personnel or civilian applicants against DOT and is patterned, to an extent, after the procedures for processing complaints of discrimination in the Federal sector as contained in 29 CFR Part 1614. This chapter has been created to set forth policy, basic requirements and guidance for processing internal complaints of discrimination based on sexual orientation.
2. **AUTHORITY:** These procedures covering complaints of discrimination based on sexual orientation are issued pursuant to the Secretary's authority to plan, direct, and control departmental affairs. See 49 USC 102 and 49 CFR 1.23(a).
3. **POLICY:** It is the Department of Transportation's (DOT) policy that no civilian employee or applicant for civilian employment be discriminated against on the basis of his/her sexual orientation.
4. **EFFECTIVE DATE:** The procedures detailed in this chapter will become effective 60 days from the date that this chapter is published or at which time the Agency's collective bargaining/partnership obligations have been fulfilled<sup>1</sup>.

---

<sup>1</sup> The specifics of how collective bargaining/partnership obligations are fulfilled are determined by the requirements of the Federal Sector Labor Management Relations Statute and the procedures established by the parties in collective bargaining agreements or partnership charters. Accordingly, when an employee covered by a bargaining unit brings a complaint under these procedures, DOCR should consult with the labor relations officer in the relevant modal

5. SCOPE: Civilian employees of or applicants for civilian employment with DOT may elect to have allegations of discrimination based on sexual orientation addressed under the procedures contained in this chapter.
  
6. INTRODUCTION: DOT developed these procedures to provide an alternative process for implementing the Department's policy prohibiting discrimination based on an individual's actual or perceived sexual orientation. (The term "sexual orientation" means heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived.) These procedures are similar to the Department's Equal Employment Opportunity (EEO) complaint process in that they provide for pre-complaint counseling, an investigation of the formal complaint and the issuance of a final agency decision by the Director, Departmental Office of Civil Rights, or his/her designee. They also provide for an attempt at informal resolution upon the completion of the investigation. However, unlike the EEO complaint process, a complainant has no right to request a hearing before an Administrative Judge, and has no right to be awarded compensatory damages if a finding of discrimination is made. Moreover, complainants who are not current or former DOT employees have limited remedies available. See Section on Remedies and Relief.
  
7. TIME FRAMES: All time periods in this chapter stated in terms of days are calendar days unless otherwise noted. 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 a Federal holiday, in which case the period will be extended to include the next business day.

---

administration to ensure that these procedures have become effective with regard to the relevant union.

8. PRE-COMPLAINT COUNSELING:

- A. Notification of Rights: When a civilian employee or applicant for employment makes either a verbal or written allegation to his/her supervisor or any other management official that he/she has been discriminated on the basis of sexual orientation, he/she must be informed of his/her right to obtain counseling from an EEO Counselor.
- B. Contacting an EEO Counselor: Counseling contacts must be initiated within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.
- C. Duties and Responsibilities of EEO Counselors include:
1. When contacted by a complainant, whether a civilian employee or applicant for civilian employment, EEO Counselors are responsible for providing him/her with appropriate counseling, utilizing traditional methods, including use of alternative dispute resolution (ADR) techniques which when used will extend the pre-complaint counseling period to a maximum of 90 days.
  2. Counselors should inform all civilian employees or applicants for civilian employment who have sought counseling that their rights regarding initiating a complaint of discrimination based on sexual orientation under this chapter derive from internal Departmental policy as reflected in the Secretary of Transportation's Equal Employment Opportunity Policy statement dated May 27, 1993, and not from EEOC regulations which govern the processing of discrimination complaints in the Federal sector (29 CFR Part 1614).
  3. Counselors are responsible for advising civilian employees of relevant distinctions between complaints based on sexual orientation and those processed under 29 CFR Part 1614.
  4. Counselors are also responsible for advising civilian employees of, among other things, their right to anonymity (unless waived) during counseling, their right to representation throughout the

complaint process, including the counseling stage, and their right to elect the administrative forum in which to pursue their complaint.

5. In the event counseling is unsuccessful, Counselors must inform complainants of their right to file a formal complaint with the Departmental Office of Civil Rights, within 15 days from receipt of the EEO Counselor's notice of right to file a formal complaint.
6. On the thirtieth day after he or she has been contacted, unless the complainant has agreed, in writing, to extend the period for no more than 60 days, the Counselor must issue the notice of right to file a formal complaint.

9. ELECTION OF FORUM<sup>2</sup>:

A. General: By electing to pursue a complaint via an applicable negotiated grievance procedure, the Office of Special Counsel (OSC), or the Merit Systems Protection Board (MSPB)<sup>3</sup>, a complainant is deemed to have waived his/her rights to seek redress of the alleged discriminatory actions under these procedures. Also, the existence of this process precludes a complainant from bringing allegations of discrimination based on sexual orientation via the administrative grievance process. See DOT's Administrative Grievance System Handbook, Chapter 10, Paragraph D(20). An election to proceed under this order is indicated only by the timely filing of a formal complaint; use of the pre-complaint process does not constitute an election for purposes of this section. The determination as to which forum a complainant has elected is made based upon whichever written complaint is filed first.

B. Means of making an election:

1. Negotiated grievance procedure: When a person is covered by a

---

<sup>2</sup> Pursuant to Section 347 of the 1996 DOT Appropriations Act, FAA employees may not pursue a claim before the MSPB, but may in accordance with the FAA Appeals Procedures contained in the agency's Personnel Management System have issues of discrimination based on sexual orientation adjudicated by a Tri-Party Panel.

<sup>3</sup> Non-appropriated fund employees, e.g., employees working in the United States Coast Guard store, are not deemed employees for purposes of Title 5 of the United States Code. See 5 USC 2105(c). Therefore, they do not have the option of electing to pursue a claim via the OSC or the MSPB.

collective bargaining agreement that permits allegations of discrimination based on sexual orientation to be raised in the negotiated grievance procedure, a person wishing to file a complaint must elect to raise the matter under either this chapter or the negotiated grievance procedure, but not both. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance.

2. The Office of Special Counsel (OSC)

- a. Functions of OSC: To conduct prohibited personnel practice investigations concerning complaints of improper personnel practices, to seek corrective action based upon the results of its investigation, and to seek corrective action from the MSPB where the agency has failed to take corrective measures.
- b. A complainant may initially file a complaint based on sexual orientation discrimination with DOT pursuant to this chapter or with the OSC pursuant to 5 USC 2302(b)(10), but not both.
- c. If a complainant initially files with OSC within 45 days of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action, and OSC decides it does not have jurisdiction to investigate a complaint containing allegations of sexual orientation discrimination, the complainant may pursue the allegation under this process. However, the complainant must initiate pre-complaint counseling within 15 days of receipt of OSC's denial of jurisdiction. The date on which the complainant filed his/her complaint with OSC shall be the date of initial contact with the Counselor, but the 30 day time period in which counseling must generally be completed will not begin to run until the date on which the complainant actually initiates pre-complaint counseling.

3. Merit Systems Protection Board (MSPB)

- a. A complainant may initially file a complaint based on

sexual orientation discrimination with DOT pursuant to this chapter or an appeal of an adverse personnel action with the MSPB pursuant to 5 USC 7701, but not both.

- b. If a complainant initially files with the MSPB within 45 days of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action, and the MSPB decides it does not have jurisdiction to investigate a complaint containing allegations of sexual orientation discrimination, the complainant may pursue the allegation under this process. However, the complainant must initiate pre-complaint counseling within 15 days of receipt of MSPB's denial of jurisdiction as long as the MSPB's dismissal of the complaint was not based upon the complaint having been untimely filed. The date on which the complainant filed his/her complaint with MSPB shall be the date of initial contact with the Counselor, but the 30 day time period in which counseling must generally be completed will not begin to run until the date on which the complainant actually initiates pre-complaint counseling.

- C. Effect of Election: Where a complainant has elected to pursue a complaint based on sexual orientation discrimination in any of the above-mentioned fora, a complaint filed pursuant to this chapter must be dismissed.

## 10. FORMAL COMPLAINTS OF DISCRIMINATION:

- A. General: Formal complaints of discrimination based on sexual orientation should be filed with the Director, Departmental Office of Civil Rights (DOCR), or filed with the appropriate regional DOCR office. Formal complaints must be filed within 15 days of receipt of the notice of final interview. The complaint will be reviewed, in consultation with the Civil Rights Staff of the Office of the Assistant General Counsel for Environmental, Civil Rights and General Law (C-18), to ensure that it meets the applicable jurisdictional prerequisites

contained in 29 CFR 1614.107(b), (c), (d), (e), (f), (g) and (h)<sup>4</sup>. For purposes of this chapter, among other reasons, a complaint will fail to state a claim where the allegation is not based upon an individual's sexual orientation or states allegations that are pending before, or have been decided by, the Agency.

- B. Acceptance/Dismissal: The complainant will be promptly notified of the acceptance or dismissal of the formal complaint. Accepted complaints will be investigated in the same manner as any other allegation of discrimination accepted by DOT. When a complaint is dismissed the complainant is entitled to request that the Director, DOOCR, reconsider the decision to dismiss the complaint. See Section on Motion for Reconsideration.
- C. Investigation: All investigations are to be completed within 180 days from the date of filing of a formal complaint. In the event a complaint is received which contains allegations of discrimination based on sexual orientation and basis(es) covered by Part 1614, all allegations will be investigated concurrently. However, following the investigation, those allegations not based on sexual orientation will be processed according to existing procedures governing complaints filed under Part 1614 and the allegations based on sexual orientation will be processed in accordance with the procedures in this chapter.
- D. Notification of Completion of the Report of Investigation: When the investigation of an allegation of discrimination based on sexual orientation is completed, the appropriate DOOCR regional office, in conformance with the Privacy Act, will redact all personally identifiable information which is not necessary for the prosecution or defense of the case after consulting with the FOIA Division of the Office of the Assistant General Counsel for Environmental, Civil Rights and General Law (C-12). The DOOCR regional office will then mail a copy of the report of investigation (ROI) by certified mail, return

---

<sup>4</sup> While we recognize that 29 CFR Part 1614 does not apply to complaints of discrimination based on sexual orientation, merely for ease of presentation, we have adopted the provisions cited as being grounds for dismissing a complaint brought pursuant to this chapter.

receipt requested, to the complainant, complainant's representative, and the civil rights office of the Modal Administration/Secretarial Office where the complaint arose.

- E. Informal Resolution: DOCR will allow thirty (30) calendar days from receipt of the investigative report for the parties to the complaint to discuss the report and attempt an informal resolution. If resolution is not achieved the appropriate regional DOCR office will issue a final agency decision (FAD) on the merits regarding each issue in the complaint.
- F. Notification of FAD: DOCR will mail a copy of the FAD by certified mail, return receipt requested, to the complainant, complainant's representative, and the appropriate point of contact in the chief counsel's office and civil rights office of the Modal Administration/Secretarial Office where the complaint arose.

11. MOTION FOR RECONSIDERATION: If the complainant or the Modal Administration/Secretarial Office is dissatisfied with the Final Agency Decision, he/she or the Modal Administration/Secretarial Office may file a Motion for Reconsideration with the Director, DOCR. A Motion for Reconsideration must be in writing and must contain arguments or evidence which tend to establish that:

- A. New and material evidence is available that was not readily available when the previous decision was issued; or
- B. The previous decision involved an erroneous interpretation of material facts, or misapplication of established policy or procedures contained within this chapter; or
- C. The decision is of such exceptional nature as to have effects beyond the actual case at hand.

Motions for reconsideration, with supporting arguments or evidence, must be filed within thirty (30) calendar days of the date the final agency decision is received. A complete copy of the motion for reconsideration must be served on all persons listed in the FAD as having been sent a copy of that document, and to the Director, Departmental Office of Civil Rights. Arguments in opposition to motions for reconsideration must be in



writing and must be submitted within thirty (30) calendar days from receipt of the motion for reconsideration. All motions for reconsideration and arguments in opposition must be accompanied by a certificate of service containing the date and manner in which service was effected and must be submitted to the Director, Departmental Office of Civil Rights, 400 7th St., SW, Washington, D.C. 20590.

## 12. REMEDIES AND RELIEF:

- A. Compensatory damages<sup>5</sup> are not available for acts of discrimination based on sexual orientation.
- B. Relief for current and former civilian employees and applicants for civilian employment: When DOCR finds that an applicant for civilian employment, a current civilian employee or a former civilian employee has been discriminated against, the final agency decision may include any of the following remedies where appropriate:
  - 1. Notification to all employees of the agency in the affected facility of their right to be free of discrimination and assurance that the particular types of discrimination found will not recur.
  - 2. Commitment that corrective or preventive action will be taken, or measures adopted, to ensure that violations similar to those found will not recur.
  - 3. Offer of position:
    - a. If DOCR determines that complainant would have occupied the position applied for but for discrimination, and the position has not been filled, DOCR may order the DOT component in which the discrimination occurred to extend an offer of employment unless clear and convincing evidence indicates that the applicant would not have been selected even in the absence of discrimination. The individual shall have fifteen (15)

---

<sup>5</sup> The term "compensatory damages" is to be defined as that term has been used by the Equal Employment Opportunity Commission's Office of Federal Operations. Thus, an award of back pay is considered an equitable remedy and is not characterized as an award of compensatory damages. See, *McGowan-Butler v. Department of Treasury*, EEOC No. 05940636 (1994). However, it should be noted that former and current FAA employees may not be granted relief under this chapter pursuant to the Back Pay Act.

calendar days from receipt of the written offer of employment within which to accept or decline the offer. Failure to accept the offer within the fifteen (15) day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his/her control prevented a response within the time limit.

- b. If DOOCR determines that complainant would have occupied the position applied for but for discrimination and the position has been filled, DOOCR may order the DOT component in which the discrimination occurred to extend an offer for employment in a substantially equivalent position if such a position exists. However, if the record establishes by clear and convincing evidence that the applicant would not have been selected even in the absence of discrimination, no offer of substantially equivalent employment need be made. The individual shall have 15 calendar days from receipt of the written offer of employment to accept or decline the offer. Failure to accept the offer within the fifteen (15) day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his/her control prevented a response within the time limit.
- c. If a remedy is ordered pursuant to section (b) of this paragraph, but there are no vacant, substantially equivalent positions within the DOT component in which the discrimination occurred, DOOCR may direct that component to grant complainant priority consideration rights, in the same commuting area in which the applicant had applied, for a minimum of 1 year and a maximum of 2 years. Priority consideration means that an employee will receive bona fide consideration by the selecting official for any position for which the employee is qualified before any other candidate is referred for consideration and that the employee will not be considered in competition with other candidates and will not be compared with them.

While priority consideration does not mean that the candidate must actually be selected, it does mean that once the agency determines that the applicant meets the qualifications for the position, it must refer the applicant to the selecting official for consideration. However, it should be noted that the priority consideration required by this chapter must always be applied after the selecting official has fulfilled his/her obligation with regard to the Reemployment Priority List (competitive service) and the Priority Reemployment List (excepted service). When a finding of discrimination has been made, the priority consideration required by this chapter must be applied prior to the selecting official satisfying his/her regulatory obligation to give priority placement to displaced federal workers pursuant to CTAP or ICTAP. If an agency chooses not to select the applicant entitled to priority consideration by this chapter, it must submit to DOCR a written statement detailing the reasons for its decision, which DOCR will keep in the administrative file and make available to the applicant at his/her request.

- d. If an offer of employment is accepted, appointment shall be made as of the date on which the offer is accepted.
4. Commitment that the agency shall cease from engaging in the specific discriminatory employment practice found in the case.
5. Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.
6. Full opportunity to participate in the employee benefit(s) denied, (e.g. training, preferential work assignments, overtime scheduling), subject to the constraints of law.
7. When DOCR finds that an applicant for employment was discriminated against, the final agency decision cannot contain an award of back pay and interest or attorney's fees<sup>6</sup>.

---

<sup>6</sup> Under applicable case law, back pay and attorney's fees may, where deemed appropriate, be awarded to employees or former employees, i.e., an individual who was an employee of DOT at the time that the discriminatory action occurred and may never be awarded to applicants for employment.

- C. Relief for a current or former civilian employee: When DOOCR finds that a current civilian employee, as defined in 5 USC 2105, or a former civilian employee, i.e. an individual who was an employee, as defined in 5 USC 2105, of DOT at the time that the discriminatory action occurred, was discriminated against on the basis of sexual orientation, the final agency decision may contain, in addition to the relief specified above, the following elements where appropriate:
1. Back pay and benefits pursuant to 5 USC 5596.
  2. Reasonable attorney's fees as authorized by 5 USC 5596.
  3. Cancellation of an unwarranted personnel action.
13. REPRESENTATION AND OFFICIAL TIME<sup>7</sup>: At any stage in the processing of a complaint of discrimination on the basis of sexual orientation, including the counseling stage, the complainant is entitled to be accompanied, represented and advised by a representative of the complainant's choice, including a union representative, provided no conflict of interest exists. In cases where the representation of a complainant would conflict with the official or collateral duties of the representative, the agency may, after giving the representative an opportunity to respond, disqualify the representative. Once a representative has been disqualified, the Complainant may make a written request to have no more than 5 business days to find a new representative, during which time all time limitations contained in this chapter will be tolled. If the complainant is an employee of DOT, he/she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to the agency's requests for information.

If the complainant is an employee of DOT and designates another employee of DOT as representative, the representative shall similarly have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to the agency's requests for information.

---

<sup>7</sup> Representation and official time involving any employee who is a member of a union or is part of a bargaining unit must be granted in accordance with the applicable collective bargaining agreement.

DOT is not obligated to change work schedules, incur overtime cost, or pay travel expenses to facilitate the choice of a specific representative to confer.