

TRANSMITTAL SHEET
U.S. Department of Commerce
Manual for Processing Discrimination Complaints

NUMBER:

Transmittal Number 2

DATE:

May 8, 2002

AUTHORITY:

This manual is issued pursuant to Department Administrative Order (DAO) 200-0. Per DAO 200-0, Section 2.02, this manual has the purpose and effect of a DAO.

PURPOSE:

This revision reflects changes in the Department's EEO Mediation Program. Changes have been made in Part II, Chapters 2, 3, 4, and 8.

DAOs AFFECTED:

No other DAOs are affected.

DISTRIBUTION:

The revised manual will be distributed via the OCR web site (www.doc.gov/ocr) and by electronic mail. Paper copies and copies in alternate formats may be obtained by request from OCR.

U.S. Department of Commerce



Manual for Processing
Discrimination Complaints

Table of Contents

Introduction

Part I: Program Authority, Responsibility, and Implementation

Part II: Complaints of Employment Discrimination Brought by Department Employees and Applicants for Employment

Section A: EEO Complaint Process

Chapter 1: Laws and Policies Related to the EEO Complaint Process

Chapter 2: Overview of the EEO Complaint Process

Chapter 3: The Informal EEO Complaint Process

Chapter 4: The Formal EEO Complaint Process

Chapter 5: The Appeal Process for EEO Complaints

Chapter 6: Other Issues in the EEO Complaint Process

Chapter 7: Remedies in the EEO Complaint Process

Chapter 8: Alternative Dispute Resolution

Chapter 9: Mixed Case Complaints

Chapter 10: Class Complaints

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Chapter 11: EEO Complaint Processing for the
Decennial Census

Section B: Sexual Orientation Discrimination Complaint Process
[RESERVED]

Section C: Related Processes [RESERVED]

Part III: Complaints of Discrimination by Users of Programs and Services
Operated or Funded by the Department [RESERVED]

Appendix: [RESERVED]

Introduction

This manual governs the Department of Commerce (Department) Equal Employment Opportunity (EEO) and Sexual Orientation Discrimination complaint processes, and the complaint processes for allegations of discrimination by users of programs and services operated or funded by the Department of Commerce. It is primarily intended as a procedural manual for EEO staff. It may also be of interest to others who need to know how the complaint processes work, including management officials, human resources staff, employees, and applicants for employment.

The Complaint Processes

The EEO Complaint Process. The federal EEO complaint process, described in Part II, Section A, is an administrative process designed to redress claims of discrimination and retaliation in federal employment under four federal civil rights laws: Title VII of the Civil Rights Act of 1964, as amended; the Equal Pay Act of 1963; the Rehabilitation Act of 1973, as amended; and the Age Discrimination in Employment Act of 1967, as amended. These laws prohibit discrimination based on race, color, sex, religion, national origin, age (40 and over), and disability; as well as retaliation for filing an EEO complaint, participating in the EEO complaint process, and/or opposing employment practices believed to be unlawful under these laws.

The EEO complaint process includes informal and formal complaint processes and a procedure for appealing Final Agency Decisions to the Equal Employment Opportunity Commission (EEOC). EEOC regulations, management directives, guidance, and EEOC and federal court case law govern the processing of federal sector employment discrimination complaints. The EEOC is an independent federal agency responsible for enforcing federal civil rights laws prohibiting employment discrimination. An Alternative Dispute Resolution process is available in both the informal and formal processes for complaints that are suitable for mediation.

The Sexual Orientation Discrimination Complaint Process. The Department also has a similar complaint process for redressing claims of sexual orientation discrimination and related retaliation. This administrative process was established in accordance with the Department's non-discrimination policy, Department Administrative Order (DAO) 215-11, and Executive Order 11478, as amended. The Sexual Orientation Discrimination complaint process includes informal and formal complaint processes, and a procedure for

U.S. Department of Commerce Manual for Processing Discrimination Complaints

appealing Final Agency Decisions to the Department's Chief Financial Officer and Assistant Secretary for Administration. DAO 215-11 governs the processing of sexual orientation discrimination complaints. The EEOC does not have jurisdiction over complaints of sexual orientation discrimination.

Complaints involving discrimination in programs and services operated or funded by the Department. OCR coordinates the enforcement at the Department of various statutes that prohibit race, color, national origin, age, sex, and disability discrimination in programs that receive Federal financial assistance, and that prohibit discrimination on the basis of disability in programs conducted by the Department.

Structure of this Manual

Part I of the manual describes roles and authority of the officials responsible for implementing the complaint processes.

Part II describes the employment discrimination complaint processes for Commerce employees and applicants for employment.

Section A describes the laws and policies related to the EEO complaint process and the procedures for processing EEO complaints. It includes separate chapters on class complaints and mixed case complaints (complaints which allege discrimination in connection with an action that is otherwise appealable to the Merit Systems Protection Board (MSPB)). It also contains information on the Department's EEO Alternative Dispute Resolution (ADR) program.

Section B is reserved for information about the laws and policies related to the Department's Sexual Orientation Discrimination Complaint Process and the procedures for processing complaints of sexual orientation discrimination.

Section C is reserved for information about related processes including civil actions and other administrative forums in which allegations of employment discrimination or retaliation prohibited by federal civil rights laws or allegations of sexual orientation discrimination may be raised.

Part III of the manual is reserved for information about procedures for raising claims of discrimination not related to employment in programs or activities operated or funded by the Department.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

The **Appendix** is reserved for copies of notices and forms used in the complaint processes and other useful information.

This manual is issued under the authority of DAO 200-0. Pursuant to this DAO, this manual has the status and effect of a DAO. This manual supercedes the Department's Handbook for Processing Discrimination Complaints issued in June 1986.

Program Authority, Responsibility and Implementation

To implement the programs described in this manual and other EEO programs, the Secretary of Commerce has designated the Chief Financial Officer and Assistant Secretary for Administration as Director of EEO. This section contains a summary of the responsibilities and authority of the Director of EEO and other officials with respect to the EEO and Sexual Orientation Discrimination complaint processes covered by this manual. Additional organizational information and information about delegations of authority related to the EEO programs are found in:

- [Department Organization Order \(DOO\) 10-5](#), and
- [DOO 20-10](#).

Director of EEO

The authority of the Director of EEO includes the following:

- providing for the development and implementation of an internal discrimination complaint system consistent with the applicable regulations of the EEOC; and
- designating an EEO Officer for each operating unit, so that the functions described in this manual may be carried out in all Departmental locations.

Director, Office of Civil Rights

The authority of the Director of the OCR includes the following:

- overseeing all Departmental Civil Rights and EEO programs, including the EEO and Sexual Orientation Discrimination complaint programs and the Departmental EEO Alternative Dispute Resolution Program; and

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- issuing the Department's Final Agency Decisions (FADs) on EEO and sexual orientation discrimination complaints.

Chief, Program Implementation Division

The Chief of the Program Implementation Division is responsible for the day-to-day administration of the EEO and Sexual Orientation Discrimination complaint programs, and the complaint processes for allegations of discrimination in programs and services operated or funded by the Department. This includes:

- establishing and maintaining uniform complaint processing systems within the Department;
- providing staff assistance to the Director of EEO, the Director of OCR, and other Departmental offices with respect to the adjudication of complaints;
- arranging for the investigation of complaints;
- developing recommended final decisions on complaints for the Director of OCR;
- developing briefs on appeals to the EEOC from decisions issued by the Director of OCR and preparing other documents as necessary for the processing of EEO complaints;
- developing briefs on appeals to the Chief Financial Officer and Assistant Secretary for Administration from Final Agency Decisions issued by the Director of OCR in sexual orientation discrimination complaints;
- coordinating complaint activities with the Office of the General Counsel (OGC) as appropriate, including review of comments on EEO complaint appeal briefs where OGC has represented the Department at hearings and obtaining OGC review and approval for legal sufficiency of Final Agency Decisions which propose to make a finding of discrimination;
- establishing policies for the administration of the informal and formal EEO and sexual orientation discrimination complaint processes and establishing procedures for the formal complaint process;

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- establishing policies and procedures for the processing of complaints of discrimination in programs and services operated or funded by the Department and coordinating processing with other federal agencies as appropriate; and
- reviewing and monitoring the informal EEO and sexual orientation Discrimination complaint programs of the operating units.

Heads of Operating Units

The head of each operating unit shall :

- provide sufficient resources to administer the complaints processing programs; and
- nominate to the Director of EEO one or more persons to serve as EEO Officer(s) for the operating unit.

EEO Officers

EEO Officers provide guidance and assistance to operating unit officials in EEO matters, and plan and direct their operating unit's EEO and Affirmative Employment Programs consistent with Department guidance and policies, and as delegated by the Director of OCR.

Duties of the EEO Officer, with respect to complaint processing, include:

- administering an EEO counseling program designed to resolve complaints of discrimination, including sexual orientation discrimination, at the informal stage and at the lowest possible level;
- coordinating with OCR to ensure successful and timely processing of individual and class EEO complaints and Sexual Orientation Discrimination complaints;
- managing a program for recruiting, selecting, training and supervising

U.S. Department of Commerce Manual for Processing Discrimination Complaints

collateral-duty and full-time EEO Counselors, and reviewing, editing and forwarding Counselor-s Reports to OCR in a timely manner;

- providing training for managers and supervisors on non-discrimination policies and practices;
- administering the Alternative Dispute Resolution (ADR) program at the informal counseling stage in accordance with guidance established by the Department; and
- developing, implementing and evaluating innovative complaint resolution methods, with a special emphasis on alternative dispute resolution techniques.

EEO Counselors

EEO Counselors have the following duties and shall remain impartial in carrying out all of their responsibilities:

- providing accurate information about the EEO and Sexual Orientation Discrimination complaint processes to complainants and responding management officials;
- promptly furnishing required notices to complainants;
- attempting to assist complainants and management officials in reaching a voluntary resolution to the concerns raised in counseling;
- advising complainants about alternative dispute resolution programs and the procedures for electing to use them;
- advising complainants about other processes in which their claims may be raised, including the MSPB appeal process, the Office of Special Counsel complaint process, and negotiated grievance procedures; and
- submitting complete, accurate and timely counseling reports and other reports as required.

Collateral-duty EEO Counseling. Collateral EEO Counseling is the assignment of an employee outside of the EEO Office to EEO counseling duties, along with his or her regularly assigned duties. Generally, a designation of a collateral-duty EEO Counselor

U.S. Department of Commerce Manual for Processing Discrimination Complaints

shall be for no more than three years. The EEO Officer may extend a designation with the approval of the Director of OCR.

EEO Investigators

EEO investigators have the following duties and shall remain impartial in carrying out these duties:

- collecting testimony and other evidence on the EEO complaint or sexual orientation discrimination complaint as provided in the scope of investigation instructions defined by OCR;
- using investigative techniques selected by OCR to obtain documentary evidence;
- performing other inquiries as directed by OCR;
- preparing a thorough Report of Investigation according to OCR guidelines; and
- performing supplemental investigations as directed by OCR.

– Chapter 1 –

**Laws and Policies Related to the
EEO Complaint Process**

The federal EEO complaint process is a legal process designed to enforce civil rights laws prohibiting discrimination in federal employment.

Laws Enforced Through the EEO Complaint Process

Four federal civil rights laws are enforced through the EEO complaint process: Title VII of the Civil Rights Act of 1964, as amended; the Equal Pay Act of 1963; the Rehabilitation Act of 1973, as amended; and the Age Discrimination in Employment Act of 1967, as amended.

Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e-16, protects employees and applicants for employment from employment discrimination based on race, color, sex, religion, and national origin. Some of these bases of discrimination are self-explanatory; others require some explanation:

- **Sex discrimination** is discrimination based on gender. It also includes discrimination based on pregnancy, childbirth, or related medical conditions.
- **Color discrimination** is distinct from race discrimination. It is treating employees or applicants differently because they have different skin colors even if they are of the same race. For example treating African Americans with darker skin differently than those with lighter skin would be color discrimination.
- **Religion** refers to a person's religious background, religious beliefs or lack of such beliefs, or membership in a religious group. In addition to prohibiting discrimination based on religion, Title VII also requires employers to provide reasonable accommodation for the religious practices of an employee or prospective employee, unless doing so would cause an undue hardship for the employer. For example, a person who is Muslim may ask to take breaks at the required times for prayer. An employer is excused from accommodating religious practices if the accommodation would present an undue hardship. An

U.S. Department of Commerce Manual for Processing Discrimination Complaints

accommodation requiring more than ordinary administrative costs would be an undue hardship in the context of a religious accommodation.

National origin may refer to country of birth, nationality, ancestry, or cultural or ethnic origin. A person may have more than one national origin.

The **Equal Pay Act** of 1963 (EPA), 29 U.S.C. § 206, amended the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., to protect employees from employment discrimination in wages based on sex. A violation of the EPA occurs when a person is paid less than an individual of the opposite sex for equal work on jobs requiring equal skill, effort and responsibility, performed under similar working conditions and within the same establishment. An employer does not have to intend to discriminate to violate the EPA. Violations of the EPA are also violations of Title VII. The EEOC's regulations on the Equal Pay Act are at [29 C.F.R. Part 1620](#).

The **Rehabilitation Act** of 1973, as amended, 29 U.S.C. §§ 791, 793, 794(a), protects qualified employees and applicants for employment from employment discrimination based on disability. It also protects employees from discrimination based on their association with persons with disabilities. The Rehabilitation Act requires federal agencies to provide reasonable accommodation for the known disabilities of qualified employees and job applicants unless such accommodation would impose an undue hardship on the agency's operation of its program.

When bringing a claim under the Rehabilitation Act, a complainant must prove that s/he is a qualified individual with a disability. This generally involves the presentation of medical documentation.

An **individual with a disability** is a person who:

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

A **major life activity** is a function that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, seeing, hearing, walking, breathing, speaking, learning, sitting, standing, lifting, reaching, and working.

An impairment **substantially limits a major life activity** if it prevents a person from performing an activity or significantly restricts their ability to perform the activity. The effects of measures to correct or mitigate an impairment must be taken into account when judging whether a person is “substantially limited” in a major life activity and, has a disability. Thus, whether an individual has a disability is an individualized inquiry.

A **qualified individual with a disability** is a person who:

- has the skills, experience, education, and other requirements of the job the individual holds or is seeking, and
- can perform the essential functions of the position with or without reasonable accommodation.

The standards used to determine violations of the Rehabilitation Act are the standards applied under Title I of the Americans with Disabilities Act (ADA). See 29 U.S.C. § 791(g). However, the ADA itself does not apply to Federal employment. EEOC regulations interpreting the employment provisions of the ADA are at 29 C.F.R. Part 1630.

The Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621-634, protects employees and applicants for employment who are 40 years of age or older from employment discrimination based on age. EEOC regulations on the ADEA are at 29 C.F.R. Part 1625.

Types of Action Prohibited

Title VII, the ADEA, and the Rehabilitation Act prohibit:

- disparate treatment;
- disparate impact; and
- retaliation

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Disparate treatment is intentionally treating employees or applicants differently than others who are similarly situated. With respect to all bases of discrimination except age, this means treating people in a protected group differently than people in similar employment positions who are outside of the protected group. For example, treating an employee differently than coworkers of a different race or sex would be disparate treatment. With respect to age discrimination, disparate treatment means treating an employee differently than similarly situated employees because of the employee's age regardless of whether the similarly situated employees are within the employee's protected age group or are outside of the employee's protected age group. For example, treating a 60-year-old employee differently than employees who are 40 may be age discrimination.

Disparate treatment can occur in any area of employment, including hiring, discipline, performance appraisal, termination, working conditions, and benefits. Sexual harassment is a form of disparate treatment. So is harassment based on any protected category that creates a hostile work environment. Harassment creates a hostile work environment if it is sufficiently patterned or pervasive and is severe enough to alter the conditions of employment and create a hostile or abusive work environment.

Disparate impact is having employer policies or practices that appear neutral but have a significant adverse impact on a group with a common race, color, sex, national origin, religion, or disability status. The effect does not have to be intended. **Note:** Disparate impact based on age is not recognized by all federal circuit courts. The EEOC applies the disparate impact analysis in cases under the ADEA unless the law of the federal circuit court prohibits such application. See EEOC Notice No. 915.002 (9/18/96), Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp., Question & Answer No. 10.

Retaliation can occur in any area of employment. The EEOC regulations protect employees and applicants from retaliation, also called reprisal, for:

- **participating in the EEO complaint process** in any way, including receiving EEO counseling, filing an EEO complaint, being a witness, serving as an EEO Counselor, or acting as another employee's representative; and/or
- **opposing agency actions believed to be unlawful** under Title VII, the EPA, the ADEA, and the Rehabilitation Act.

Harassment due to prior protected EEO activity may also be a form of retaliation.

Proving a claim

This section describes how the most common types of employment discrimination claims are analyzed.

Disparate Treatment. Disparate treatment is, by far, the most common type of allegation in EEO complaints. In some cases, disparate treatment can be proven through direct evidence that management acted because of an unlawful bias. In the vast majority of cases, however, such evidence is not available. The analysis of evidence in most cases alleging disparate treatment is a three-step process:

1. The complainant must first establish that there is some substance to the allegation by proving a ***prima facie* case** of discrimination. To do this, s/he must present evidence that, if not rebutted, would indicate unlawful discrimination. Establishing a *prima facie* case is not a very heavy burden; it generally means that the complainant must show that s/he is protected by the statute and was treated differently than similarly situated people outside the protected group or, in the case of age, that her/his age was the determining factor in the agency's action. In age discrimination cases, it is not necessary for the complainant to show that s/he was accorded treatment different from otherwise similarly situated employees who were not members of her/his protected group or who were considerably younger than s/he.
2. If the complainant establishes a *prima facie* case, the agency must present a **legitimate, non-discriminatory reason** for its challenged action. Again, this is not a heavy burden. The agency must present sufficient evidence to allow a conclusion that the agency's action was not based on unlawful discrimination.
3. Finally, the complainant must prove that the agency's action was based on unlawful discrimination instead of the legitimate reason(s) presented by the Agency. This is **the pretext phase** of the analysis.

Although the burden to produce evidence shifts, the burden of persuasion that the employer intentionally discriminated against him/her remains on the complainant. This burden must be satisfied by a preponderance of the evidence. The preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Hostile Work Environment Harassment. Hostile work environment harassment is a type of disparate treatment claim, but it is analyzed differently than other types of disparate treatment claims. Hostile work environment claims are analyzed in two steps.

1. First, the complainant must demonstrate that s/he was subjected to a hostile work environment-by showing that:
 - s/he belongs to a protected groups or engaged in a protected activity;
 - s/he was subjected to harassment that was sufficiently severe to alter the conditions of employment and create an abusive work environment; and
 - the harassment was based on his/her sex, race, color, religion, national origin, age, or disability, or was in retaliation for prior EEO activity.

The severity of the harassment is determined from the viewpoint of a reasonable person.

2. If the complainant meets this initial burden, the agency has an opportunity to show that it should not be held liable for the harassment. The agency can do this by showing that:
 - it was not aware of the hostile work environment and the situation was not such that it should have been aware of the harassment; or
 - it took appropriate actions to remedy the hostile work environment.

Retaliation. Generally, to prove a *prima facie* case of retaliation, the complainant must show:

- that s/he participated in the EEO process or opposed unlawful discrimination and the alleged retaliator knew of this protected activity;
- an employment action or actions disadvantaged the complainant; and
- the disadvantaging action followed the protected activity within such a period of time that a retaliatory motivation may be inferred.

The next two steps of the analysis are identical to the disparate treatment analysis.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Reasonable Accommodation. In a case alleging that the agency failed to provide reasonable accommodation for a disability, the following analysis is used:

1. The complainant must first prove that:
 - s/he is a person with a disability and is qualified for the position in question;
 - the agency knew or had reason to know of the limitations imposed by the disability;
 - the complainant requested, but did not receive, a reasonable accommodation; and
 - there is plausible reason to believe that the disability can be accommodated.
2. If the complainant meets his/her initial burden, the Agency must then prove that:
 - it accommodated the disability; or
 - it cannot provide reasonable accommodation (because it is not possible or because providing the accommodation would be an undue hardship).
3. If the agency meets its responsibility, the complainant has an opportunity to prove that the Agency's arguments are untrue.

– Chapter 2 –

Overview of the EEO Complaint Process

The federal EEO process is governed by the regulations, management directives, guidance, and EEOC case law, as well as applicable federal court cases. The EEOC regulations governing the federal sector complaint process are at 29 C.F.R. Part 1614. The applicable EEOC management directive is EEOC MD-110.

The EEO administrative complaint process consists of three parts:

- the informal process;
- the formal complaint process; and
- the appeal process.

In most instances, Alternative Dispute Resolution (ADR), through Mediation, is available to aggrieved persons during the informal or formal complaint process.

The **informal complaint process**, also called EEO Counseling and the pre-complaint stage, provides complainants and management officials with an opportunity to define the complainant's concerns, obtain information necessary to address the issues, and attempt to resolve the issues informally. EEO counseling can resolve many workplace conflicts before the parties enter into a formal process, which can be both adversarial and lengthy. It also is a means for employees and applicants with recourse to more than one formal procedure for raising their claims to learn about their options. Alternative Dispute Resolution (ADR) is also available throughout the complaint process.

The **formal EEO complaint process** is a legal procedure for the consideration of claims of employment discrimination based on race, color, sex, national origin, religion, age, and disability. Claims of retaliation for opposing these types of discrimination or for participating in the EEO complaint process can also be raised. If a complaint meets procedural requirements established by regulation, an investigation is conducted. In most cases, complainants may also elect to have a hearing before an EEOC Administrative

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Judge. The formal complaint process ends when a final decision on the merits of the complaint is issued.

Mediation is an alternative to completing the EEO Counseling process during the Informal Complaint or Pre-Complaint stage, or completing the Investigation process during the formal complaint stage. During mediation, the aggrieved person meets with a management official with authority to resolve the complaint and a neutral third party who is trained to facilitate a dialogue between the parties to help achieve resolution. The management official need not be the person whom the aggrieved person alleges discriminated against him or her. In fact, in cases where communication between the aggrieved person and a management official has broken down, the agency may wish to designate another official in the chain of command, keeping in mind that the goal of mediation is to resolve the complaint at the lowest organizational level.

In **the appeal process**, complainants may appeal FADs to the EEOC. Merit decisions in mixed case complaints -- complaints on issues that are appealable to the Merit Systems Protection Board (MSPB) -- are first appealed to the MSPB.

Except for complaints brought solely under the Equal Pay Act (EPA) or the Age Discrimination in Employment Act (ADEA), employees and applicants must use the EEO administrative complaint process before raising their claims in court. However, they need not complete the entire process before going to court.

– Chapter 3 –

The Informal EEO Counseling Process

The informal EEO Complaint process -- also called EEO Counseling or pre-complaint processing -- is governed by EEOC regulations at 29 C.F.R. ' 1614.105, EEOC MD-110 and Department policy. Employees and applicants **must** consult with an EEO Counselor before filing a formal EEO complaint.

Employees or applicants meet with EEO Counselors employed or contracted by the operating unit where the discrimination allegedly occurred to get information on the EEO Complaint and mediation processes, unless a potential conflict of interest exists. Examples of situations in which a conflict of interest may exist are:

- the Complainant works in the EEO office that would normally handle counseling;
- the Complainant is in the EEO Officer-s chain of command;
- the case involves a determination as to whether someone in the EEO Officer-s chain of command took a discriminatory action.

If the EEO Officer determines that the matter involves a conflict of interest, he/she must consult with the Program Implementation Division (PID) to arrange for cross-counseling. Cross-counseling is counseling by a person employed or contracted by another Departmental bureau or another federal agency.

Role of the EEO Counselor.

EEO Counselors are impartial. They are neither employee advocates nor management representatives. Their primary duties are:

1. To identify the issues and basis of discrimination being raised;

U.S. Department of Commerce Manual for Processing Discrimination Complaints

2. To provide information about the EEO complaint process, i.e., EEO Counseling and Mediation, as well as other avenues of redress in which the concerns raised in counseling can be addressed. This includes:
 - advising the complainant and responding agency officials about the complaint process and their respective roles and responsibilities in the process;
 - providing required notices as described below;
3. To inform aggrieved individuals of the need to either elect mediation or elect EEO Counseling, when mediation is appropriate;
4. To advise the EEO Officer or the Bureau ADR Coordinator if mediation is elected.
5. To conduct an inquiry if EEO Counseling is elected or if mediation is not an option. The extent of the inquiry depends on the issue(s) raised, and can include contacting human resource representatives and other agency officials who can provide information necessary to address and resolve the concern(s). The purpose of the inquiry is not to conduct an investigation into the issues; rather, the purpose is to attempt an informal resolution of the issues raised.
6. To advise the aggrieved individual of the right to file a formal complaint of discrimination if resolution efforts are unsuccessful.
7. To prepare a written report of the counseling activities sufficient to determine whether all required counseling actions have been taken and resolve any jurisdictional questions that may arise when a formal complaint is filed.

Anonymity during Counseling. Aggrieved individuals have the right to remain anonymous during the counseling process, but must be advised that this could hinder the Counselor's efforts to achieve resolution. Protecting the anonymity of the complainant while also addressing the issues is possible in many counseling situations. For example, where one action affects many individuals -- such as a selection decision or reduction-in-force actions -- it is often possible to conduct an adequate inquiry without revealing the identity of the complainant. However, where an action affects only the complainant, the request for anonymity makes it difficult for the Counselor to obtain adequate information to attempt to resolve the issues.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Representation during the Informal Complaint Process. An aggrieved person has a right to a representative of his/her choice during the entire informal complaint or pre-complaint process, including informal EEO counseling or mediation. The representative need not be an attorney. Neither the EEO Counselor nor other EEO staff may serve as the aggrieved person's representative. The Counselor should ask the aggrieved person to give notice if s/he appoints a representative, including providing the representative's name and contact information.

Regulatory notices.

During the informal complaint or pre-complaint process, the Counselor will provide the aggrieved person with the following written notices. If the complainant has a representative, copies of these notices will also be provided to the representative.

- At the initial interview contact, the EEO Counselor shall provide the aggrieved person: 1) a written notice of the individual's rights and responsibilities in the informal or pre-complaint process; 2) a copy of the DoC EEO Mediation Guide; and 3) if appropriate, a Pre-Complaint Election Form, which will seek the employee's decision to elect mediation or EEO Counseling .
- At the conclusion of either EEO Counseling or mediation, if a resolution to the dispute has not been reached, the Counselor shall provide the aggrieved person the appropriate Notice of Right to File a Formal Discrimination Complaint.

Delivery of Notices. The Counselor shall deliver these notices to the aggrieved person by such means that receipt can be documented. The most common methods are by certified mail, return receipt requested, and hand-delivery by the Counselor. When the Counselor hand-delivers a notice, the signature of the aggrieved person or representative and the delivery date must be secured.

Stages in the Informal Complaint or Pre-Complaint Process.

Initial Interview. At the initial meeting with the aggrieved person, the EEO Counselor shall:

- determine the bases and issues raised by the complainant;
- explain the aggrieved person's rights and responsibilities in the informal or pre-complaint process and provide the aggrieved person with a written notice of rights and responsibilities;

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- provide the aggrieved person with a written notice of rights and responsibilities;
- explain the requirement to elect EEO Counseling or to elect mediation and when mediation is an option, provide the employee with a copy of the DoC EEO Mediation Guide;
- if the issues can also be raised in another forum, advise the aggrieved person if there is a need to elect one forum and of the time limits for filing claims;
- when appropriate, provide the aggrieved person with a Pre-Complaint Election Form, on which he or she will indicate his or her election of EEO Counseling or mediation. The aggrieved person should be instructed to return the signed election form within 5 days, to ensure adequate time for counseling or mediation.
- inform the aggrieved person of the right to anonymity and representation in the during either EEO Counseling or mediation.

Inquiry. If the employee elects EEO counseling, the EEO Counselor will conduct an inquiry. The primary purpose of the inquiry is to identify management's rationale for the action(s) the aggrieved person believes is (are) discriminatory. This inquiry also serves as an important starting point in efforts to informally resolve the issue(s).

When meeting with any official regarding concerns raised in the informal counseling process, the EEO Counselor should describe the complaint process and the Counselor's role.

Efforts to achieve resolution of the issues. In seeking resolution of the concern(s) of discrimination brought forth by the aggrieved person, the Counselor should begin at the lowest organizational level possible. This approach recognizes that bringing the controversy to a higher level of the organization may serve to entrench parties in their positions. In most instances, informal resolution voluntarily developed by the interested parties is the best outcome of the informal counseling process. If resolution is reached in during EEO Counseling, the Counselor shall prepare a written resolution agreement. The procedures for finalizing resolution agreements are described in Chapter 8.

Mediation. Mediation involves the intervention of a third person, or mediator, into a dispute to assist the parties in negotiating jointly acceptable resolution of issues in conflict. The mediator meets with the parties at a neutral location where they can discuss the dispute and explore a variety of solutions. Each party is encouraged to be open and

U.S. Department of Commerce Manual for Processing Discrimination Complaints

candid about his/her point of view. The mediator, as a neutral third party, can view the dispute objectively and assist the parties in discussing alternatives and options that they might not have considered. Mediation may be a faster, more productive, and more rewarding process for resolving an EEO dispute. Since this ADR procedure is designed to cut the time and cost of traditional administrative and legal procedures, the dispute resolution rate when using mediation is greatly enhanced.

Participation by the parties in the mediation process is voluntary. If the aggrieved person elects mediation, the EEO Counselor will halt counseling and will forward the Pre-Complaint Election Form to the bureau EEO Officer or ADR Coordinator. The EEO Officer or the ADR Coordinator will contact the management official to determine his/her willingness to participate in mediation. If the management official is receptive to mediation, the EEO Officer or ADR Coordinator will make arrangements for the mediation.

If the dispute is resolved during mediation, the parties will develop a settlement agreement in accordance with the procedures set forth in Chapter 8. If the dispute is not resolved during mediation, the case is returned to the EEO Counselor for final processing.

Final Interview. If any issues remain unresolved at the conclusion of counseling or mediation, the Counselor will conduct a final interview with the complainant. At the final interview, the Counselor shall:

- summarize the efforts made to resolve the issue(s) raised in counseling;
- inform the aggrieved person of the right to file a formal complaint on any unresolved issue(s) brought forth in the informal process and the time limit for filing;
- provide the aggrieved person with the appropriate written notice of right to file a formal discrimination complaint within 15 days; and
- If the aggrieved person has a representative, the Counselor should obtain the representative's name and address and inform the aggrieved person that a copy of this notice will be sent to the representative. The Counselor should also inform the aggrieved person that if the representative is an attorney, the applicable time period for filing a formal complaint begins when the attorney receives the notice of right to file.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Counselor-s Report. If a formal complaint is filed, the EEO Officer will inform the Counselor. Within 15 calendar days of receiving this notification, the Counselor shall submit a Counselor-s Report summarizing the allegations raised, persons contacted, and information obtained during counseling.

Time Limits, Duration, and Extension of Time. EEOC regulations specify certain time limits for the informal complaint or pre-complaint stage, which are outlined below.

Initial contact. To preserve the right to file a formal complaint, the aggrieved person must contact an EEO Counselor within **45 days** of the act believed to be discriminatory, the effective date of an alleged discriminatory personnel action, or the date the aggrieved person knew or should have known of the alleged discriminatory action. While no one will be turned away from counseling, observing this time limit will prevent dismissal of a formal complaint for untimely Counselor contact. An aggrieved person is considered to have initiated the informal complaint or pre-complaint process by contacting the EEO Counselor, the bureau EEO Office, or the Department's OCR and indicating a desire to receive counseling. The word "counseling" need not be used. EEO staff should record the date of such contacts.

The reasonable suspicion standard. The "reasonable suspicion" standard is used to determine when the 45 day limitation period is triggered. Under this standard, the limitation period is triggered when an aggrieved person should reasonably suspect discrimination, but before all the facts that would support a charge of discrimination have become apparent.

Duration of the Informal Complaint or Pre-Complaint Process: If the aggrieved person elects EEO Counseling, the Counselor has **30 days** from the initial contact to attempt to reach resolution of the aggrieved individual's concern(s). This period may be extended in the following circumstances:

If the aggrieved person agrees to continue EEO counseling efforts, counseling may be extended up to 30 additional days. The **aggrieved person** must agree to the extension in writing. **If the aggrieved person elects mediation,** the informal complaint or pre-complaint process may be extended for an additional (60) days. In no case, should the informal complaint process be extended beyond 60 days unless the complainant elects mediation. When mediation is elected, the informal complaint period may be extended up to 90 days.

– Chapter 4 –

The Formal EEO Complaint Process

The formal complaint process begins when an individual files a formal EEO complaint with the Department. Processing of EEO complaints is governed by EEOC regulations at 29 C.F.R. Part 1614, EEO MD-110, other applicable guidance, case law of the EEOC and federal courts, and Department policy. This chapter describes the processing of individual complaints that are not mixed cases. See Chapter 9 for information on the processing of mixed case complaints and Chapter 10 for information on the processing of class complaints.

Mandatory EEO Counseling. A complainant must complete informal complaint stage before a formal complaint can be accepted for processing. To preserve the right to file a formal complaint, the informal complaint must be initiated within 45 calendar days of the date of an alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the complainant knew or should have known that the event or action may have been discriminatory.

Content and Format of Complaint. A formal complaint of discrimination must:

be in writing

be signed by the complainant or the complainant's attorney

identify the complainant and the Departmental bureau or office responsible for the action or practice alleged to be discriminatory; and

be sufficiently precise to identify the action or practice(s) alleged to be discriminatory.

In the interest of uniformity and to aid in processing complaints, complainants should be encouraged to submit complaints on *Form CD-498, Complaint of Formal Discrimination*. If a complainant submits a formal complaint that is not on Form CD-498, the OCR or the responsible EEO Officer shall complete a standard form using the information furnished by the complainant or ask the complainant to complete a form.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Filing the Complaint. Complaints may be filed by mail, hand-delivery, or fax. EEO complaints **must** be filed with one of the following officials:

Director, Office of Civil Rights
U.S. Department of Commerce
Mail Stop 6012
Washington, D.C. 20230
Fax: 202/482-5375 or 202/501-2937

The EEO Officer for the bureau in which the alleged discrimination took place.

If a complaint is filed with the Director of OCR, OCR shall send a copy of the complaint to the EEO Officer. If a complaint is filed with the EEO Officer, the original complaint shall be sent to OCR. Any other Department or bureau official who receives an EEO complaint shall immediately forward it to the Director of OCR.

Time Limits and Filing Date. The complaint must be filed **within 15 calendar days** from the date the Notice of Right to File is received by the complainant.

The filing date is:

the date the Director of OCR, or bureau EEO Officer receives the complaint, **if hand-delivered or faxed** to that official;

the postmark date **if mailed** to an appropriate official;

the date of receipt by an appropriate official, **if received by mail with no legible postmark**. Such complaints are considered timely filed if received within five (5) days of the end of the filing period.

Upon receipt of a complaint, OCR or the bureau EEO Office shall enter the filing date in the upper right-hand corner of the *Form CD-498*.

To ensure proper processing of the complaint, the filing date should be included on *all* correspondence relating to the complaint. Complainants should also be advised to include the filing date on correspondence or submissions related to the complaint.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Waiver of Time Limit. The Director of OCR may extend the time limit for filing a complaint if the complainant shows:

that s/he was not informed of the time limits and was not otherwise aware of them;

that circumstances beyond his/her control prevented the complaint from being filed within the time limits; or

other circumstances considered sufficient by the Director.

Counselor-s Report and EEO Officer-s Recommendation. Within 15 days of receipt of the complaint or copy of the complaint, the EEO Officer shall:

review the complaint, EEO Counselor-s report and other relevant documents and may recommend to the Director of OCR, in writing, whether each allegation in the complaint should be accepted for processing;

determine whether the issues covered in the complaint were raised in counseling and that all available information needed to assess the acceptability of the complaint is included in the report. If additional information is needed that is not available to the EEO Officer, the Counselor shall be asked to furnish a supplemental report containing the required information; and

submit to the Director of OCR his/her recommendation, if any; the complaint and any attachments; the counseling report and any exhibits; copies of notices transmitted to the complainant with proofs of receipt; and any supplementary information required by the circumstances of the case.

Intake

Review for Procedural Sufficiency. Upon receipt of the EEO Officer-s recommendation and accompanying documents, OCR shall review the complaint for procedural sufficiency.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

If the file does not contain sufficient information to make this determination, OCR may:

ask the bureau EEO Officer to obtain additional information; or

request additional information from the complainant.

Grounds for dismissal of complaints. EEOC regulations require the Department to dismiss a complaint or portion of a complaint under the circumstances outlined below. Allegations are generally dismissed upon initial review. However, the Department may dismiss allegations at any time up to the complainant's request for a hearing or the issuance of a Final Agency Decision without a hearing.

Failure to state a claim: The allegation fails to state a claim under the laws enforced through the EEO complaint process and the EEOC regulations implementing them. 29 C.F.R. ' 1614.107(a)(1).

Duplication of a claim: The allegation states a claim identical to one that was raised in a pending complaint or in a prior complaint that has been decided. 29 C.F.R. ' 1614.107(a)(1).

Untimely counseling: The complainant did not initiate EEO Counseling on the matter within 45 calendar days of an alleged discriminatory event or the effective date of a personnel action alleged to be discriminatory, or when the complainant knew or should have know that an event or action may have been discriminatory and the Director of OCR did not extend the time limits. 29 C.F.R. ' 1614.107(a)(2).

Untimely filing: The complainant did not file the complaint within 15 days of receiving the Notice of Right to File and the Director of OCR did not extend the time limits. 29 C.F.R. ' 1614.107(a)(2).

Allegation not counseled: The allegation was not brought to the attention of an EEO Counselor and is not like or related to a matter that was brought to the attention of a Counselor. 29 C.F.R. ' 1614.107(a)(2).

Allegation raised in a civil action: The allegation was raised in a civil action in a United States district court in which the complainant is a party and (a) the matter

U.S. Department of Commerce Manual for Processing Discrimination Complaints

has been decided by the court or (b) the matter is pending and 180 days have passed since an EEO complaint raising the allegation was filed. 29 C.F.R. ' 1614.107(a)(3).

Allegation raised in a Negotiated Grievance Procedure (NGP) prior to filing EEO complaint: Prior to filing the formal EEO complaint, the complainant challenged the action or practice alleged to be discriminatory in a NGP that permits allegations of discrimination. The complainant need not have alleged discrimination in the NGP. 29 C.F.R. ' 1614.107(a)(4).

Allegation raised in an MSPB Appeal prior to filing the EEO complaint: Prior to filing the formal EEO complaint, the complainant challenged the action or practice alleged to be discriminatory in an MSPB appeal. The complainant need not have alleged discrimination in the appeal. 29 C.F.R. ' 1614.107(a)(4).

Mootness. There is no reasonable expectation that the action or practice will happen again and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. 29 C.F.R. ' 1614.107(a)(5).

When a complainant has raised a claim for compensatory damages, the Department shall not dismiss a complaint as moot until the complainant has had a reasonable amount of time to produce evidence of entitlement to compensatory damages. Reasonableness shall be determined by the nature of the claim and reference to current case law.

Allegation concerns a proposal or preliminary step: The allegation concerns a proposal to take a personnel action or other preliminary step to taking a personnel action. Note that, where the complainant is alleging hostile work environment harassment, a proposal or preliminary step could be part of a pattern of harassment. 29 C.F.R. ' 1614.107(a)(5).

The complainant cannot be located. The complainant cannot be located after reasonable efforts and has not responded to a notice of proposed dismissal sent to the last known address within 15 calendar days. 29 C.F.R. ' 1614.107(a)(6).

Failure to cooperate. The complainant has failed to respond to a written request to provide relevant information within 15 calendar days of its receipt or otherwise proceed with the complaint, or the complainant's response does not address the

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Department's request, provided that the request included a notice of proposed dismissal. If there is sufficient information in the record, the Department may issue a FAD instead of dismissing the complaint. 29 C.F.R. ' 1614.107(a)(7).

Spin-off complaint. The complaint alleges dissatisfaction with the processing of a previously filed complaint. When such issues are dismissed, complainants will be advised of appropriate procedures to raise these issues. 29 C.F.R. ' 1614.107(a)(8).

Abuse of process. The complaint evidences a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires: (1) evidence of multiple complaint filings; and (2) allegations that are similar or identical, lack specificity or involve matters previously resolved; **or** evidence of circumventing other administrative processes, or intentionally trying to clog the agency's in-house administrative processes or overburdening the EEO complaint system. 29 C.F.R. ' 1614.107(a)(9).

If the entire complaint is accepted for processing, the Chief of the PID shall issue a memo stating the accepted allegations. The complainant must notify the Chief of the PID within 15 calendar days of receiving the acceptance letter if an allegation is not stated correctly.

If part of a complaint is dismissed, the Department will issue a decision containing a full explanation of the reason(s) for dismissing that portion of the complaint, and evidence or documents necessary to support that conclusion, if appropriate. The Department will then investigate the remainder of the complaint, but not the dismissed portion. If the complainant requests a hearing, the EEOC Administrative Judge will evaluate the reasons given by the Department for the partial dismissal. If a FAD is issued without a hearing, the Department will address its rationale for dismissing the allegations. The complainant then has the right to appeal the dismissal to the EEOC, using the procedures outlined in Chapter 5.

Content of Notices. The notice that all or a portion of a complaint has been accepted will include information about the complainant's rights and responsibilities in the formal process, including information about when the investigation must be completed, and when and how to amend the complaint, to requested a hearing (where appropriate), and to request mediation (where appropriate).

If the entire complaint is dismissed, the Director of OCR will issue a FAD

U.S. Department of Commerce Manual for Processing Discrimination Complaints

explaining the reasons for dismissal and stating any accepted allegations. The complainant may appeal the decision to the EEOC. See Chapter 5 for more information on the appeal process.

Mediation

If the case is eligible for mediation through ADR, the complainant may elect ADR by contacting the Department's EEO ADR Program Manager. The DOC EEO ADR Program Manager will issue the Mediation Election Form to the complainant and will contact the management official to determine the official's willingness to participate in mediation. If the management official is receptive to participating in mediation, the DOC EEO ADR Program Manager will notify the complainant and will make arrangements for the mediation session. If the management official is not interested in participating in mediation, the complainant will be notified accordingly. Even if a complaint is referred for mediation, OCR will proceed with the investigation to ensure that a complete, impartial record is compiled within the time frame dictated by 29 C.F.R. § 1614.108. If the complaint is resolved during mediation, the parties will develop a settlement agreement in accordance with the procedure set forth in Chapter 8.

Investigation

Accepted issues are assigned for investigation. Investigations are generally conducted by OCR staff investigators. Testimony and relevant evidence is collected and compiled in the Report of Investigation (ROI).

Time Limits. EEOC regulations require that the ROI be issued to the complainant within 180 days from the date the formal complaint was filed with the Department. The Department may seek from the complainant an extension of up to 90 additional days.

Methods of Investigation. OCR determines the method used to investigate a particular complaint. Generally, the investigator interviews each witness and develops an affidavit for the witness= signature or obtains answers to interrogatories from each witness.

Letter of Authority. The investigator is provided with a Letter of Authority signed

U.S. Department of Commerce Manual for Processing Discrimination Complaints

by either the Chief Investigator or the Chief of the PID empowering the specific investigator by name to investigate the specific complaint. The Letter of Authority officially identifies the Department's authorized investigator to the complainant, representatives, and other witnesses and defines the requirements to provide full cooperation and information as may be requested by the investigator.

Requirement to cooperate with an investigator. Complainants are required to cooperate with the investigation of their complaints and provide information requested by the investigator. Other employees of the Department are also required to cooperate by providing testimony and documents requested by the investigator.

The agency official(s) whose actions are alleged to be discriminatory -- whether identified by the formal complaint or during the course of the investigation -- are expected to cooperate with the investigation, to provide the replies to the information requested by the investigator, and to respond to any and all allegations made against them or against the agency. If requested, the investigator shall furnish to such agency officials the complainant's affidavit and all documents in which the agency official is identified and charged with discrimination or other wrongdoing that will appear in the ROI, in order to allow them full opportunity to respond. These documents include the EEO Counselor's Report and the formal complaint.

Report of Investigation. Each investigation must develop and report sufficient evidence to allow an independent trier of fact to adjudicate the charges of discrimination using the ROI as the sole source of evidence to make a final decision. The ROI must also contain adequate descriptions and explanations to allow a person unfamiliar with the Department of Commerce and its employment practices to understand the results of the investigation using only the ROI as the source of information. ROI's usually contain the following documents:

- the formal complaint.
- the EEO Counselor's report and attachments.
- complaint transmittal, acceptance, and decision letters.
- the Investigator's letter of authority.
- an accurate organizational chart prepared by the investigator identifying and defining the relationships of the organizations, involved parties and testifying witnesses by unit, job title, series, grade, and basis groups.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Comparable employees or applicants shall be identified only by number and/or job title, unless specifically named as part of the complainant's allegations and/or the agency reply.

- the complainant's affidavit or other record of sworn testimony sufficient to explain the allegations and reasons for them, to establish complainant's *prima facie* case and pretext arguments, claims for compensatory damages, and to develop the evidence the complainant has to prove the complaint.
- affidavits or other record of sworn testimony of responding agency witnesses sufficient to fully articulate the agency's reply to all allegations raised by the complainant or developed by the investigation, and to fully report the existing evidence to defend the agency's actions.
- affidavits or other record of sworn testimony of witnesses sufficient to resolve the issues in the complaint, or to otherwise provide evidence of what actions occurred regarding the complainant and similarly situated employees or candidates, and to provide evidence relevant to whether discrimination occurred.
- documentation relevant to the matters at issue sufficient to substantiate the events and claims in the complaint; to provide the existing evidence of what happened to the complainant and similarly situated employees or candidates; to provide the regulations, authorities and/or standing practices of the agency which may have authorized, required or prohibited the actions being investigated; and to provide evidence relevant to whether discrimination occurred.
- a statistical survey of the comparable treatment of similarly situated employees or candidates, identified by base group membership(s), that is directly relevant to the actions at issue in the complaint or decisions covering the most recent two-year period from the effective date of the accepted issue(s) in the complaint. If there are no comparable actions, employees or candidates, the Report of Investigation must provide clear explanation and corroboration of that fact
- any investigator's testimony of record reviews, research, necessary observations, unsigned witness information, evidence of tampering with a document that may not be apparent from the copies to appear in the Report

U.S. Department of Commerce Manual for Processing Discrimination Complaints

of Investigation, and any situation affecting the full coverage of the investigation.

If necessary, as in the case allegations of discrimination based on national origin or religion, the investigator shall obtain information regarding the membership or nonmembership of a person in the complainant's protected group by asking each person concerned to provide the information voluntarily. The investigator shall not require or coerce an employee to provide this information.

ROI-s must be reviewed and approved by the Chief Investigator. If the Chief Investigator determines that the record is not adequate for use by the adjudicator, s/he may assign the case for supplemental investigation. Prior to approval, the contents of the ROI may not be released to anyone outside of OCR. Following approval, complete copies of the ROI are sent to the complainant, and the complainant's representative of record, if any.

Supplemental Investigations. If a need for additional information is discovered after the ROI is issued, the Chief Investigator may order a supplemental investigation. Supplemental investigations use standard investigative methods to obtain additional information to satisfy requests from OCR or directives from the EEOC. Supplemental investigations shall contain only the information specified by the authorized requesting source giving rise to the additional investigation. Additional testimony and documentation gathered during a supplemental investigation is added to the original ROI.

Effects of withdrawal and/or resolution agreements. Any investigation shall be discontinued as soon as one of the following documents is received by the Chief or Deputy Chief Investigator or the Chief of the Program Implementation Division:

a copy of a completed notice of withdrawal dated and signed by the complainant, or

a copy of a completed resolution agreement signed by all required parties.

If the investigation is discontinued for one of these reasons, no ROI will be issued.

Amendment of complaints. A complainant may amend a complaint to add issues or claims that are alike or related to the original complaint any time prior to the conclusion of the investigation. After requesting a hearing, a complainant may also seek leave from the Administrative Judge to amend a complaint to add issues or

U.S. Department of Commerce Manual for Processing Discrimination Complaints

claims that are Alike or related[@] to the original complaint by filing a motion to amend.

A later incident or factual allegation is Alike or related[@] to the original complaint when the later incident or factual allegation adds to or clarifies the original claim and could have reasonably been expected to grow out of the investigation of the original claim.

The Alike or related[@] issues added to the complaint need not be brought to EEO counseling. For purposes of timeliness, these issues relate back to the date of counselor contact for the original complaint.

When a complaint has been amended, the agency shall complete its investigation within the **earlier** of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an Administrative Judge (AJ) on the consolidated complaints any time after 180 days from the filing date of the first complaint.

Adjudication of EEO Complaints

Method of Adjudication. Upon completion of the investigation, a complainant has the right to elect a hearing conducted by the EEOC. The complainant must request a hearing:

within 30 days of his/her receipt of the Notice of Right to Request a Hearing **if the complainant is not represented by an attorney.**

within 30 days of the attorney's receipt of the Notice of Right to Request a Hearing **if the complainant is represented by an attorney.**

The complainant may also choose to have a final decision based solely on the written record. If the complainant does not make a choice within the time limit, the Department will issue a FAD without a hearing.

Requesting a hearing. The Chief of the PID sends the complainant a Notice of Right to Request a Hearing, along with Complainant's copy of the ROI. This notice is sent by certified mail or by other means of delivery that provides proof of the date of receipt.

Complainants must send requests for a hearing directly to the EEOC, and notify the Department at the same time. Upon receipt of this notice, the Department must forward the complaint file to the EEOC within 15 days. If the Department receives a request for a hearing that has not been sent to the EEOC, the Department shall forward both the request and the complaint file, notify the complainant, and advise complainant of the requirement that requests for hearings be sent directly to the EEOC.

Upon receipt of a request for a hearing, OCR will also notify the Department's Office of General Counsel (OGC) and the EEO Officer. The EEO Officer shall make arrangements for a meeting site and a court reporter to prepare a verbatim transcript of the hearing. OGC is responsible for representing the Department at EEOC hearings.

Hearings are conducted by an EEOC AJ in accordance with 29 C.F.R. ' 1614.109 and other rules established by the EEOC.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Authority of the AJ. Upon appointment to the case, the AJ assumes full responsibility for the complaint. AJs will review the complaint file, preside over discovery or other fact-finding, hold a hearing and issue a decision. The AJ also has authority to dismiss all of a complaint for any of the reasons listed earlier in this chapter. At the conclusion of the hearing process, the AJ will issue a decision to both parties, along with a copy of the hearing record. Regulations require that the AJ issue a decision within 180 days after receipt of the complaint file.

Final order on the complaint. Once the AJ issues a decision, the Department has 40 days to issue a final order on the complaint. The final order will notify the complainant whether or not the agency will fully implement the decision of the AJ and will contain notice of the complainant's civil action and appeal rights. If the Department's final order does not fully implement the AJ's decision, the agency must simultaneously file an appeal with the EEOC. The Department may not introduce new evidence or write a new decision in the case when issuing a final order. Any final order that would adopt a finding of discrimination must be reviewed and approved for legal sufficiency by the OGC. If the Department fails to issue a final order within 40 days, the AJ's decision automatically becomes the final action of the Department.

Full implementation of an AJ's decision. The Department fully implements an AJ's decision by adopting the decision. If the decision orders relief, the Department must also provide the ordered relief to the complainant.

Final Agency Decisions without a hearing. FADs on the merits of a complaint are issued by the Department's Director of OCR. If a FAD is requested, the Department must issue a decision within 60 calendar days of the request. If the complainant does not request a FAD or a hearing within the time limit, the Department shall issue a FAD within 90 days of the date the complainant received the Notice of Right to Request a Hearing. FADs must explain the reasons for the Department's findings on the merits of the accepted allegations and the reasons for dismissal of any allegations. Any FAD finding discrimination must be reviewed and approved for legal sufficiency by the Office of General Counsel.

Consolidation of Complaints for Joint Processing

Complaints filed by the same complainant. EEOC regulations require the Department to consolidate two or more complaints filed by the same complainant.

– Chapter 5 –

The Appeal Process for EEO Complaints

This chapter deals with the appeal process in individual EEO complaints that are not mixed cases. For information on appeals of mixed cases, see Chapter 9. For information about appeals in class complaints, see Chapter 10.

The appeal process, which is administered by the EEOC, provides an opportunity for review of Department FADs and final orders by an outside agency. It also allows the Department to appeal decisions issued by AJs. There are two levels of review: the initial appeal to the Office of Federal Operations (OFO) and an opportunity for reconsideration by the EEOC.

Appeals to the Office of Federal Operations

Appeals filed by a complainant

A complainant may appeal a FAD or final order, including a decision dismissing all or part of a complaint, to OFO.

Time frame for appeals. Appeals must be filed:

- within **30 calendar days** of the complainant's receipt of the FAD or final order; or
- if the complainant is represented by an attorney, within **30 calendar days** of the date the attorney received the FAD.

Method of filing an appeal. The complainant should use EEOC Form 573, *Notice of Appeal/Petition*, and should indicate what decision or order s/he is appealing. A copy of this notice is sent out with each FAD issued by the Department, except those issued in mixed case complaints.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

The appeal may be filed by any of the following means:

- **by mail to:**

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P. O. Box 19848
Washington, D.C. 20036

- **by personal delivery to:**

Director, Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, N.W.
Room 5000
Washington, D.C. 20507

- **by facsimile to:**

(202) 663-7022 or
(FTS) 989-7099

A copy of the appeal must be sent to the Department at the following address. In or attached to the appeal, the complainant must certify the date and method by which the copy was sent to the Department.

U. S. Department of Commerce
Office of Civil Rights
Mail Stop 6012
Washington, D.C. 20230

Statement or brief in support of an appeal. Complainants may file a statement or brief in support of the appeal. The statement or brief must be submitted to the Director, OFO, through one of the methods listed above **within 30 calendar days** of filing the appeal. A copy of the statement must also be sent to the Department at the address listed above.

Appeals filed by the Department

The Department must issue a final order within 40 days of receipt of an AJ's decision and, if it does not fully implement the AJ's decision, must file an appeal at the same time.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Brief in support of the Department's appeal. The Department must file a brief in support of its appeal within 20 days of filing the appeal.

Appeal Procedures

Opposition statement or brief. Any statement or brief in opposition to an appeal must be submitted to OFO and served on the opposing party within 30 days of receipt of the statement or brief in support of the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal.

Facsimiles. The OFO will accept statements or briefs by facsimile transmittal, as long as they are no more than 10 pages long.

Complaint file. The Department must submit the complaint file to OFO within 30 days of initial notification that a complainant has appealed, or within 30 days of submission of an appeal by the Department.

Interim Relief. If the Department appeals an AJ's decision which ordered retroactive restoration of a complainant, the Department must temporarily or conditionally restore the complainant to his/her former position pending the outcome of the appeal when:

- The Department issues a final order notifying a complainant that it will not fully implement the AJ's decision finding in favor of the complainant;
- The case involves separation, removal, or suspension continuing beyond the date of the final order; and
- The Department has not determined that the return or presence of the complainant will be unduly disruptive to the work environment.

When interim relief is indicated, the following provisions apply:

- A complainant may decline an offer of interim relief if s/he has obtained a better position.
- A grant of interim relief does not insulate a complainant from subsequent disciplinary or adverse action for another reason.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- Where an agency determines that restoration of a complainant will be unduly disruptive to the work environment, the agency must provide prospective pay and benefits.
- Interim relief does not apply in cases where the complainant alleges that s/he was not retained beyond the period of a temporary appointment which expired prior to the appeal or that the temporary position was not converted to a permanent position (e.g., the interim relief provision will not apply to temporary Census employees when the temporary appointment expired prior to the appeal or the employee was not converted to a permanent position.

Standard of Review for AJ decisions. Factual findings by AJs after a hearing will be subject to a substantial evidence standard of review. EEOC will defer to the AJs factual findings and will not substitute its judgment on appeal unless there is substantial evidence that the findings were incorrect. Legal findings are subject to de novo review. No new evidence will be considered on appeal for cases that went to a hearing unless the evidence was not reasonably available during the hearing process.

Standard of Review for Department FADs without Hearing. The standard of review for FADs without a hearing is de novo review of both factual and legal findings, i.e. a new review rather than an examination of the FAD. OFO reviews the complaint file and all written statements and briefs from both parties and may supplement the record by an exchange of letters or memoranda, investigation, remand to the Department or other procedures. If OFO requests information from a party to supplement the record, the party providing information shall send a copy to the other party.

Decisions on Appeals. OFO, on behalf of the EEOC, issues a written decision setting forth its reasons for its findings and conclusions. Decisions are based on the preponderance of the evidence. OFO's decision is the final decision of the EEOC unless the EEOC reconsiders the decision.

Reconsideration

The EEOC may reconsider an OFO decision on its own motion or if either party files a timely request for reconsideration. The EEOC has the discretion to grant a request for reconsideration, but may do so only if the requester demonstrates that:

- the appellate decision involved a clearly erroneous interpretation of material fact or law, or

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- the appellate decision will have a substantial impact on the policies, practices or operations of the agency.

Time limits for reconsideration:

- **Reconsideration without request.** The EEOC may reconsider an OFO decision on its own motion within a reasonable period of time.
- **Request for reconsideration.** Either the complainant or the Department may request that the EEOC review OFO's decision by filing a Request for Reconsideration. The request must be filed:
 - within 30 days of the party's receipt of OFO's decision; or
 - within 20 days of receipt of another party's timely request for reconsideration.

Filing Procedures. The request, along with any supporting statement or brief, shall be submitted to the OFO and to all parties with proof of such submission.

Statement in Opposition to the Appeal. All other parties shall have 20 days from the date of service in which to submit any statement or brief in opposition to the request. Copies must be provided to other parties, with proof of submission.

Interim Relief. If the Department requests reconsideration of a decision which ordered retroactive restoration of a complainant, and the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, the Department must comply with the decision to the extent of the temporary or conditional restoration of the complainant to duty status in the position specified in the decision, pending the outcome of the Department's request for reconsideration. The Department also must notify the complainant that his/her restoration is temporary or conditional at the same time it seeks reconsideration.

EEOC Decision on Request for Reconsideration. The EEOC issues a decision after considering the written record, including the request and statements in opposition to the request. The decision is final and there is no further right by either party to request reconsideration unless the decision remands the complaint for further agency consideration, in which case the parties retain the rights of appeal and reconsideration with respect to any subsequent decision.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Right to file a civil action. Instead of filing an appeal or request for reconsideration, the complainant may file a civil action in federal district court. The complainant also has an opportunity to file a civil action after the EEOC appeal process.

– Chapter 6 –

Other Issues in the EEO Complaint Process

Representation

At all stages of the EEO complaint process, the complainant has the right to a representative of his/her choice. The representative may accompany and advise the complainant through each stage of the complaint process. The complainant is at all times responsible for proceeding with his/her complaint, regardless of whether or not s/he has designated a representative. A representative may or may not be an attorney.

If the representative is an attorney:

- s/he will be eligible for attorney's fees only for services performed after the formal complaint is filed and only after the complainant has notified the Department that s/he is represented by an attorney, except that reasonable fees may be paid for services performed in reaching a determination to represent the complainant.
- all official correspondence will be sent to the attorney, with copies to the complainant. Timeliness will be calculated from the date the attorney receives the correspondence.

If the representative is not an attorney:

- all official correspondence will be sent to the representative, with copies to the complainant. Timeliness will be calculated from the date the complainant receives the correspondence.

Representatives who are Department employees. If the complainant's representative is an employee of the Department, the following rules apply:

- if the representative's participation in the complainant's case conflicts with his/her official or collateral duties, the Department or EEOC may disqualify the representative. The representative must be given an opportunity to explain why s/he should not be disqualified.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- employees of the Department's OCR and bureau EEO Offices may not serve as representatives.
- the representative will be allowed reasonable official time to represent the complainant, upon request.

Notice of representation. Before disclosing complaint information to a person claiming to be a complainant's representative, the OCR or bureau EEO Office must obtain written notification that the complainant has designated the individual as his/her representative. **If the representative is an attorney**, correspondence from the attorney concerning the complainant's case is adequate notice. **If the representative is not an attorney**, written notification from the complainant must be obtained.

Conflicts of Interest

To maintain the integrity of the EEO complaint process, conflicts of interest, conflicts of positions, and the appearance of such conflicts must be avoided.

Conflict between EEO and personnel functions. Agency officials who are responsible for executing and advising on personnel actions may not be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint process. The EEO process generally challenges the motivation and impact of personnel actions and decisions; therefore, the two functions must remain separate.

Neutrality of EEO staff. EEO Officers, Counselors, and Program Managers are disqualified from serving as representatives for complainants or agencies in connection with the processing of discrimination complaints. The official or collateral duties of EEO staff requires them to gain the confidence of both the agency and the employees by remaining neutral parties throughout the complaint process.

Special processing arrangements to address conflicts of interest involving EEO or high-level officials. Alternate arrangements for processing EEO complaints will be made when:

- officials responsible for EEO programs or high-level bureau or Department officials in their chain-of-command were involved in the matters at issue in a counseling or complaint; or

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- there is some other conflict-of-interest situation making alternate processing arrangements appropriate.

All alternate processing arrangements must be made through the PID. EEO Officers or OCR staff should notify the Chief, Program Implementation Division, immediately when they become aware of a conflict or the appearance of a conflict.

Alternate processing arrangements may include:

- cross-counseling, i.e., counseling by a person employed by another Departmental bureau or another federal agency, or
- investigation and other aspects of formal complaint processing by the EEOC or another federal agency.

Computation of time and waiver of time limits

Computation of time limits. All time periods in this manual are stated in terms of calendar days unless otherwise noted. The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or federal holiday, in which case the period shall be extended to include the next business day.

A document shall be deemed timely if it is delivered or postmarked before the expiration of the applicable filing period. In the absence of a legible postmark, a document is deemed timely if it is received by mail within five days of the expiration of the applicable filing period.

Waiver, estoppel, and equitable tolling. Complaint processing time limits are subject to waiver, estoppel, and equitable tolling. This includes the 45-day time limit for initiating EEO counseling and the 15-day time limit for filing a formal complaint.

The Department will extend time limits when:

- the complainant shows that s/he was not notified of the time limits and was not otherwise aware of them; or

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- the complainant did not know and reasonably should not have known that the matter or personnel action occurred;
- despite due diligence, the complainant was prevented by circumstances beyond his/her control, such as a debilitating illness, from contacting a counselor, filing a complaint, or taking other action on the complaint within the time limits; or
- there are other reasons considered sufficient by the Director of OCR.

The EEOC may also suspend the time limits when considering a complaint on appeal.

Continuing violations. Time limits for EEO counseling are waived as to all but one of the allegations that are part of a continuing violation allegation. A continuing violation is a series of related discriminatory acts, at least one of which falls within the time period for contacting an EEO Counselor. In determining whether a continuing violation is present, it is important to consider whether the complainant had prior knowledge or suspicion of discrimination. The complaint must also demonstrate a nexus between the timely and untimely allegations.

Official Time

Employees may be granted official time for processing EEO complaints. Official time is time granted to an employee when the employee would otherwise be in a duty status without charge to leave or loss of pay. It includes time spent by an employee on EEO activities during regular working hours (including regularly scheduled overtime hours) or during a period of irregular unscheduled overtime work when the employee's presence is required at this time at a meeting or hearing by Department, bureau, or EEOC officials.

A Department employee may be granted official time to:

- pursue the employee's own EEO complaint against the Department,
- represent other Department employees in pursuing their EEO complaints against the Department, and

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- give evidence as a witness in an EEO inquiry or investigation, and/or at a hearing held on an EEO complaint before the EEOC.

Employee requests for annual leave, compensatory time, credit hours or any other type of leave for EEO activities are subject to normal leave granting procedures.

Official time for Complainants and Representatives. Complainants and their representatives, if they are Department employees and otherwise in pay status, shall be:

- granted official time for meetings regarding EEO complaints where their presence is required by Department, bureau, or EEOC officials, regardless of their normal tour of duty, and
- afforded a reasonable amount of official time for preparation and processing of a complaint if they are otherwise in duty status. This includes time spent in the appeal process.

The actual number of hours to which complainants and representatives are entitled will vary, depending on the particular circumstances. All requests for official time should be submitted to the employee's immediate supervisor. Supervisors who have questions concerning the amount of official time requested should contact the applicable bureau EEO Officer or the Office of General Counsel or their servicing Human Resources Officer.

Reasonable Time. The EEOC defines reasonable time 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.

EEO MD-110, Chapter 6, Section VIII.C.1.

In determining the reasonableness of requests from complainants and their representatives, the following factors are considered:

- the nature and complexity of the complaint,

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- the amount of time needed to prepare for, and participate in meetings and hearings related to the pursuit of the complaint, and
- the agency's need to have the employee available to perform his/her normal duties on a regular basis.

Complaints against other federal agencies. Official time will not be granted to Department employees pursuing complaints against other federal agencies, or serving as representatives in such complaints.

Official time for serving as a witness in an EEO complaint. Witnesses shall, if federal employees, be in a duty status while being interviewed by EEO Counselors or investigators, and during the period of their availability at the hearing. Witnesses shall be granted official time whether the complaint is against the Department or another federal agency.

Processing requests for official time from complainants, representatives, and witnesses. Supervisors are responsible for approving or disapproving requests for official time to prepare and present EEO complaints, or to serve as a representative or witness. The servicing human resources office is available to assist supervisors in matters relating to the use of official time. The bureau EEO Officer may provide supervisors with specific information needed to verify the reasonableness of the official time request, such as:

- the length of time spent in meetings with EEO counselors, in interviews with the EEO investigator, or in a hearing before the EEOC; and
- the relative complexity of the issues.

For more information on this topic, see *Leave Handbook*, Section 11, *Excused Absences*, *Equal Employment Opportunity Complaints*.

Privacy Act Considerations in the EEO Process

The Federal government compiles a wide range of information on individuals. The Privacy Act of 1974 (Act) (5 U.S.C. § 552, et seq.) prohibits federal agencies from disclosing personal information without the permission of the individual to whom the record pertains, except under limited circumstances. The Act applies to “any record

U.S. Department of Commerce Manual for Processing Discrimination Complaints

within a system of records,” which means those records retrieved by name, Social Security number or other personal identifier. The Act defines a “record” as:

[A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to his education, financial transactions, medical history, criminal or employment history, and that contains his name or identifying number or symbol, or other identifying particular, such as a finger or voice print, or a photograph.
5 U.S.C. § 552a(a)(4)

The EEO process often requires disclosure of information that would otherwise be kept private. This includes data about race and disabilities compiled for affirmative employment purposes, personnel records, suitability investigations, job-related medical documentation and other records containing information about identifiable individuals.

Exceptions to the Privacy Act that are applicable to the EEO complaint process.

There are four exceptions to the Act’s prohibition of disclosure of private information. Two that are most applicable to the EEO complaint process permit disclosure:

- to officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties (§ 552a(b)(1); and
- for a “routine use,” which is defined as the use of a record for the purpose for which it was collected (§ 552a(b)(3)).

EEO Officials and access to protected information. The EEO process involves fact-finding at both the informal and formal stage. EEO Officers, Counselors, investigators and other EEO personnel involved in processing complaints must obtain and/or view information that would otherwise be private so that actions taken on EEO complaints will be based on complete, impartial factual records. With the right to access private information comes the duty to protect it from unauthorized disclosure.

EEO files and electronic records. To prevent unauthorized disclosure, those responsible for handling and processing EEO files must maintain the files in a secure manner. The Act makes no distinction between paper and electronic records.

EEO investigators must ensure that only relevant evidence is included in their reports. Private information that is not relevant to the issues in the complaint must be sanitized,

U.S. Department of Commerce Manual for Processing Discrimination Complaints

i.e., removed or rendered illegible in accordance with the Chief Investigator's instructions. The investigator has the primary responsibility for sanitizing the ROI, but personnel charged with reviewing and approving the ROI before its release to the complainant must also ensure that only relevant information is disclosed.

The notes taken by EEO Counselors and investigators during interviews with the complainant and witnesses do not become part of the administrative file or ROI. If they are kept in the Counselor or investigator's own files, the notes are considered records subject to the Act's protection to the extent that they contain information about identifiable individuals.

Participants in the EEO process may communicate with OCR and operating unit EEO offices via e-mail, but should be aware that most of the Department's e-mail systems do not guarantee privacy. E-mail messages that contain Privacy Act information, whether printed or stored electronically, must be protected like any other record and are subject to the same disclosure requirements.

Disclosure of information to other entities. Under the "routine use" exception described above, OCR and operating unit EEO offices may disclose information contained in a ROI or other EEO file as follows:

- to disclose pertinent information to the appropriate federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing a statute, rule, regulation or order, where the Department of Commerce becomes aware of an indication of a violation or potential violation of criminal or civil law or regulation.
- to disclose information to another federal agency, to a court, to a party in litigation before a court or in an administrative proceeding being conducted by a federal agency when the government is a party to the judicial or administrative hearing.
- to provide information to a Congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.
- to disclose to an authorized grievance examiner, formal complaints examiner, administrative judge, equal employment opportunity investigator, arbitrator or other duly authorized official engaged in investigation or resolution of a grievance, complaint or appeal filed by an employee.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- to disclose, in response to a request for discovery or for appearance of a witness, information that is relevant to the subject matter involved in a pending judicial or administrative proceeding.

Complainants, witnesses and access to protected information. At the conclusion of an investigation, a copy of the ROI is given to the complainant. The ROI usually contains personal information about people other than the complainant. Each ROI is prefaced by a statement to the complainant and his/her representative that the ROI contains information protected by the Privacy Act and that they are prohibited from disclosing information about third parties to persons not officially involved in the processing of the complaint. A complainant may, of course, disclose protected information about him/herself.

Witnesses are not entitled to view the entire ROI. However, the EEO investigator may disclose any information s/he deems necessary for the witness to make a full and fair response.

Penalties for Unlawful Disclosure. The Act provides that willful unauthorized disclosure by any employee or officer of the agency is a misdemeanor, punishable by a fine of up to \$5,000. Both employees and contractors are subject to the same penalties, except that an employee who discloses or misuses private information may also be subject to discipline.

Offers of Resolution

EEOC regulations allow the agency to make a formal Offer of Resolution. An Offer of Resolution will limit attorney's fees and costs when a complainant rejects an offer and subsequently obtains less relief. This provision is intended to provide an incentive to settle complaints and to conserve resources where settlement of a complaint should reasonably occur.

When an Offer of Resolution may be made. The rules are different for complainants who are represented by an attorney and those who are not.

- **If the complainant is represented by an attorney,** an Offer of Resolution can be made at any time from the filing of the formal complaint until 30 days before a hearing.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- **If the complainant is not represented by an attorney**, an Offer of Resolution cannot be made before AJ is assigned to the case.

What an Offer of Resolution must provide. An Offer of Resolution must be in writing and must contain the following information:

- A notice explaining the possible consequences of failing to accept the offer;
- An offer to pay attorney's fees and costs, to date;
- Any non-monetary relief offered must be specified; and
- Any monetary relief, which may be offered as a lump sum covering all forms of monetary liability or may be itemized in amounts and types.

Time limit for responding to an Offer of Resolution. The complainant has 30 days to consider an Offer of Resolution and accept it. If the complainant does not accept an Offer of Resolution and is awarded relief (by an AJ, Department FAD, or EEOC decision on appeal), that is not more favorable than the offer, the complainant cannot recover attorney's fees or costs incurred after the end of the 30-day acceptance period. The regulation provides an "interest of justice" exception to the withholding of attorney's fees and costs in certain unusual circumstances, where the EEOC finds that equitable considerations make it unjust to apply the provision.

WITHDRAWAL OF EEO COMPLAINTS

A complainant may withdraw an informal or formal complaint of discrimination at any stage of the EEO complaint process. A written statement of withdrawal or a settlement agreement incorporating a provision to withdraw the complaint must be obtained by:

- the EEO Counselor,
- the EEO Officer, or
- the Office of General Counsel representative.

– Chapter 7 –

Remedies in the EEO Complaint Process

When a finding of discrimination is made in an EEO complaint, the complainant is entitled to compensation for any harm caused by the discrimination. Such compensation is called remedies or relief. This section discusses the type of remedies available in different situations. The information in this section applies to remedies for both individual complaints and for individual members of a class. Remedies are determined with reference to EEOC regulations, other applicable statutes and regulations, and EEOC and federal court decisions.

Remedies are awarded based on the circumstances of the complaint. The particular remedies available depend on the type(s) of harm suffered by the complainant. This varies widely depending on the type of discriminatory action and the effect of the action on the particular individual.

When remedies are awarded. In the EEO complaint process, remedies may be awarded to prevailing complainants:

- by the Department in a FAD on the merits of a complaint;
- by an EEOC AJ in a decision; or
- by the EEOC in a decision on an appeal from the Department’s FAD.

Remedies are awarded *only* when the Department or the EEOC finds that discrimination or retaliation has been proven.

Types of remedies. Two types of remedies are available in EEO complaints against federal agencies: equitable relief and compensatory damages.

- **Equitable relief**, also called “make whole” relief, is designed to restore the complainant to the employment situation s/he would have been in if the discrimination had not happened. This may include money for wages already lost (back pay), money

U.S. Department of Commerce Manual for Processing Discrimination Complaints

for wages expected to be lost in the future (front pay), restoration of leave and other benefits, promotion, change in a performance rating and other types of non-monetary actions appropriate to the particular situation.

- **Compensatory damages** provide a prevailing complainant with monetary damages for other types of harm related to the discrimination, including:
 - Financial expenses such as medical expenses, moving expenses, and job search costs. These are called **pecuniary damages**.
 - Non-financial expenses such as emotional pain and suffering, mental anguish, injury to credit standing, injury to reputation, loss of enjoyment of life, and marital strain. These are called **non-pecuniary damages**.

Equitable Relief

When the Department finds that an employee or applicant for employment has been discriminated against, the Department shall provide full relief, which shall include, in the appropriate circumstances:

- commitment that corrective action will be taken or measures adopted to ensure that similar violations will not recur;
- where appropriate, an unconditional offer to each identified victim of discrimination of placement in the position s/he would have occupied but for the discrimination, or a substantially equivalent position;
- payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person suffered as a result of the discrimination; and
- a commitment that the Department shall cease from engaging in the specific unlawful employment practice found in the case.

Equitable Relief for an Applicant for Employment. When the Department finds that an applicant for employment has been discriminated against, the Department, operating unit or segment thereof shall offer the applicant the position s/he would have held absent the discrimination or a substantially equivalent position unless the Department finds that clear and convincing evidence indicates that the applicant would not have been selected

U.S. Department of Commerce Manual for Processing Discrimination Complaints

even absent the discrimination.

The offer of employment shall be made in writing. The offer must notify the applicant that if s/he declines the offer, s/he will still be awarded back pay. The applicant shall have 15 days from receipt of the offer to accept or decline. An applicant who fails to respond within this time period shall be considered to have declined the offer unless the applicant can show that s/he was prevented by circumstances beyond his/her control from making a timely response.

If the offer is accepted, placement shall be retroactive to the date the applicant would have been hired. Back pay shall be awarded from the date the individual would have entered on duty. The retroactive date of entry on duty shall be used for all service computations except completion of a required probationary or trial period.

If the offer is declined, the Department shall award the applicant the sum equal to the amount of back pay s/he would have received from the date s/he would have been appointed to the date the offer was declined, plus interest.

When there is a finding of discrimination, but the Department or EEOC finds clear and convincing evidence that the applicant would not have been selected, the Department shall take all steps necessary to eliminate the discriminatory practice and ensure that it does not recur.

Equitable Relief for an Employee. When the Department or EEOC finds that an employee has been discriminated against, the relief awarded may include the following:

- nondiscriminatory placement with back pay and interest, where appropriate;
- cancellation of an unwarranted personnel action;
- removal from Department or bureau records of any adverse materials relating to the discriminatory employment practice; and
- a full opportunity to participate in an employment benefit denied (i.e. training, overtime, work assignments).

U.S. Department of Commerce Manual for Processing Discrimination Complaints

When there is a finding of discrimination, but the Department finds clear and convincing evidence that the personnel action underlying the complaint would have been taken absent the discrimination, the Department shall take all steps necessary to eliminate the discriminatory practice and ensure that it does not recur.

Back pay. Awards of back pay are computed in accordance with 5 C.F.R. § 550.805. Back pay liability is limited under some statutes:

- Under Title VII and the Rehabilitation Act, it is limited to two years before the date the complaint was filed.
- In Equal Pay Act cases, it is limited to two years before the filing date, or to three years if the violation was willful.

In cases governed by the Back Pay Act or the Civil Rights Act of 1991, interest is included in an award of back pay. Interest on back pay is not available under the ADEA.

Compensatory Damages

A complainant may submit a claim for compensatory damages at any time up to and including the filing of an appeal with the EEOC.

Limitations on compensatory damages. Compensatory damages are *not* available under the following circumstances:

- for allegations of age discrimination or retaliation brought under the ADEA;
- in disparate impact cases, i.e., cases alleging that a policy or practice that appeared neutral had a negative effect on a protected class of people;
- in mixed motive cases, i.e., cases where an employer's action was motivated by both illegal discrimination and legitimate non-discriminatory reasons, where it is shown that the contested agency action would have occurred absent the discrimination;
- in cases alleging failure to provide reasonable accommodation for a disability under the Rehabilitation Act where the bureau demonstrates a good faith effort, in consultation with the complainant, to provide a reasonable accommodation;

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- for breach of a resolution agreement; and
- for acts prior to November 21, 1991.

Cap on compensatory damages. The maximum amount of compensatory damages that may be awarded for proven non-pecuniary losses and future pecuniary losses is \$300,000 per aggrieved individual. This monetary cap does *not* include:

- equitable relief available under Title VII or the Rehabilitation Act, including back pay; or
- past pecuniary losses.

Proving a claim for compensatory damages. A two-part analysis is used in deciding whether a prevailing complainant is entitled to compensatory damages:

- First, the complainant must show by objective evidence that pecuniary or non-pecuniary losses were incurred as a result of the discriminatory actions taken by the Department, operating unit or segment thereof.
- If the complainant meets his/her burden of proof, the burden shifts to the Department to show why all or part of the complainant's claim should be denied.

The amount of any award shall be determined by reference to current case law, including awards in similar cases.

Mitigation of Damages

Complainants must make reasonable efforts to mitigate or minimize their damages. For example, an employee who was fired would mitigate damages by trying to find other work. If the bureau believes that a prevailing complainant failed to make reasonable efforts to mitigate damages, the bureau must prove this by a preponderance of the evidence.

Attorney's Fees and Costs

When a finding of discrimination is made under Title VII or the Rehabilitation Act, the complainant is entitled to reasonable attorney's fees and costs. Attorney's fees are not available under the ADEA or the EPA at the administrative level. Attorney's fees and costs shall be paid by the operating unit or segment thereof against which a finding of discrimination is made.

Fees that may be reimbursed. Attorney's fees shall be allowed only for services rendered by members of the bar and law clerks, paralegals and law students under the supervision of members of the bar. Attorney's fees will not be paid to any employee of the Federal Government.

Normally, the Department is not required to pay attorney's fees for services performed prior to the filing of a formal complaint, except that reasonable fees may be paid for services performed in reaching a determination to represent the complainant. Written submissions to the Department signed by the representative shall be considered notice of representation. However, in the following circumstances, the Department may be required to pay attorney's fees to prevailing complainants for pre-complaint processing:

- a hearing is requested;
- the AJ issues a decision finding discrimination;
- the agency issues a final order disagreeing with the finding and appeals it; and
- the EEOC upholds the AJ's finding on appeal.

Processing claims for attorney's fees awarded by the Department. When the Department awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of attorney's fees and costs (including expert witness fees) to the Director of OCR, within 30 days of receipt of the FAD. When the EEOC awards attorney's fees on appeal, the attorney shall submit the verified statement to the Director of OCR, within 30 days of the appeal decision unless either party has filed a Request for Reconsideration. The statement of attorney's fees must contain an affidavit executed by the attorney of record, itemizing charges for legal services.

The amount of attorney's fees to be paid shall be determined by agreement between the

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Department, the complainant and the complainant's representative. The agreement shall be reduced to writing and signed on behalf of the Department by an authorized official.

If the complainant, complainant's representative and the Department cannot agree on the amount of attorney's fees within 20 days of the Department's receipt of the attorney's verified statement and affidavit, the Director of OCR, shall, within 30 days of receipt of the verified statement and affidavit, issue a FAD determining the amount of attorney's fees. Prior to issuance, the FAD will be reviewed and approved by the Office of General Counsel for legal sufficiency in order to bind the Department. The FAD must contain notice of the right to appeal to the EEOC's OFO and must include the specific reasons for determining the amount of the award. Amounts not in dispute must be paid promptly.

Processing claims of Attorney's Fees awarded at hearing. If an AJ orders the payment of attorney's fees, the complainant's attorney must submit a statement of fees and costs to the AJ, who will determine the amount of fees and costs to be awarded.

Calculating awards of attorney's fees. Awards of attorney's fees are calculated in accordance with existing case law and are based on the number of hours reasonably expended, multiplied by a reasonable hourly rate. This amount may be reduced or increased based on the following factors, although ordinarily many of these factors are subsumed within the calculations set forth above:

- the time and labor required;
- the novelty and difficulty of the questions;
- the skill needed to perform the legal services properly;
- the attorney's preclusion from other employment due to acceptance of the case;
- the customary fee, whether the fee is fixed or contingent;
- time limitations imposed by the client or circumstances;
- the amount involved and results obtained;
- the experience, reputation and ability of the attorney;
- the undesirability of the case;

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- the length of the professional relationship with the client and awards in similar cases.

Only in cases of exceptional success should any of these factors be used to enhance or reduce an award.

The Department must pay costs to a prevailing complainant for reasonable expenses incurred during the prosecution of the complaint. The reasonableness of costs is determined in accordance with EEOC regulations at 29 C.F.R. §§ 1614.501(e)(2)(ii)(C), 1614.501(e)(2)(iii) and existing case law.

Compliance with EEOC Decisions. Except where the Department has filed an appeal or a Request for Reconsideration, the relief ordered in an AJ's decision or an EEOC decision on appeal shall be provided within 60 days after receipt of the decision.

In Departmental appeals and requests for reconsideration of decisions which order retroactive restoration of an employee in a case involving removal, separation or suspension which continues beyond the date of the final order or request for reconsideration, the Department shall comply with the decision by temporarily or conditionally restoring the employee to duty status in the position recommended by the AJ or EEOC, pending the outcome of the appeal or request for reconsideration. At the same time it appeals or requests reconsideration, the Department shall notify the employee and the EEOC that its compliance with the decision is temporary or conditional.

– Chapter 8 –

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is a term, which covers many alternatives to the traditional method of resolving EEO disputes through EEO Counseling (during the Informal Complaint stage) or Investigation (during the Formal Complaint stage). There is a spectrum of dispute resolution techniques, covering such processes as fact-finding, early neutral evaluation, negotiation, settlement conferences, mediation, arbitration, and adjudication, and ranging from informal discussions to formal adjudication. All ADR processes aim to achieve the following desirable results:

to motivate parties to focus their attention on the issues;

to give parties the opportunity to present their perspectives on the situation;

- to provide parties the opportunity, often for the first time, to hear a clear explanation of each other's viewpoint;
- to provide parties with a window of opportunity to identify common interests and points of agreement, and
- to fashion mutually acceptable settlement options to resolve disputed issues.

The Department offers mediation and settlement conferences as the ADR methods in the EEO process.

MEDIATION

Mediation involves the intervention of a third person, or mediator, into a dispute to assist the parties in negotiating jointly acceptable resolution of issues in conflict. The mediator meets with the disputing parties at a neutral location where the two parties can discuss the dispute and explore a variety of solutions. Each party is encouraged to be open and candid about his/her point of view. The mediator, as a neutral third party, can view the dispute objectively and assist the parties in discussing alternatives and options that they might not have considered. Professional mediators are trained not to take sides. Standard practice and the Code of Ethics for Mediators guide mediators to ensure impartial

U.S. Department of Commerce Manual for Processing Discrimination Complaints

behavior. Participation in ADR is voluntary for both the employee and management.

Mediation is an effective ADR technique in many situations, but there are instances in which mediation may not be appropriate or feasible. Examples of when mediation would be inappropriate are in cases involving applicants for employment, former employees, alleged violence, members of a class actions, egregious harassment, when authoritative resolution of a matter is required in precedent-setting cases, when the matter in dispute has significant government policy implications, or when it is important to produce a full public record of the proceedings. (See DoC EEO Mediation Guide)

During the informal stage, the EEO Counselor or Bureau ADR Coordinator will, in most instances, decide whether a dispute is suitable for mediation, in accordance with the Mediation Guide. The Bureau EEO Officer will make determinations regarding cases in question. The Department EEO Manager will make such determinations for cases presented during the formal complaint stage.

Persons participating in mediation do not waive any of their rights by coming to mediation. Complainants' rights to pursue formal complaint processing, including administrative and court action, are not affected if they decide to mediate the issue. Complainants who are unwilling to continue in mediation or who are unable to reach settlement through the mediation process will continue through the EEO complaint process in a timely fashion.

No person participating in mediation is to be penalized in any way because of such participation or by not reaching an agreement, as to do so would be retaliatory and illegal under the EEO laws and regulations. If complainants believe their rights were violated during any mediation or settlement discussions through actions such as threats, coercion, or intimidation, etc., they should contact the Department EEO ADR Program Manager.

Mediation in the EEO Counseling Process

Once the determination has been made at the informal complaint stage that the dispute is appropriate for mediation, the EEO Counselor will explain mediation to the aggrieved person as an alternative to pursuing EEO counseling or, later on, to pursuing a formal complaint. The EEO Counselor will also provide the aggrieved person with the DOC Alternative Dispute Resolution: EEO Mediation Guide and a Pre-Complaint Election Form. The Pre-Complaint Election Form will record the aggrieved person's decision to elect ADR through mediation or EEO counseling.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

If the aggrieved person elects mediation, EEO Counselor will halt counseling for the time being and will notify the Bureau EEO Officer or Bureau ADR Coordinator, as appropriate. The Bureau EEO Officer or Bureau ADR Coordinator will contact the management official to determine interest in participating in mediation. Should management agree to participate in ADR, arrangements will be made for a mediator and the mediation session. Should management not agree to participate in ADR, the EEO Counselor will be notified to advise the employee accordingly and to proceed with counseling.

Mediation in the Formal EEO Complaint Process

When OCR accepts a complaint for investigation, it issues a Notice of Investigation that contains information about the availability of mediation and instructions for requesting mediation or additional information about the mediation program. If the case is appropriate for mediation, and the complainant wishes to elect mediation, he or she must contact the DOC EEO ADR Program Manager. If management agrees to participate, the DOC EEO ADR Program Manager will make arrangements for a mediator and the mediation session. If management does not agree to participate in mediation, the DOC EEO ADR Program Manager will advise the employee accordingly. The investigation will continue throughout the mediation process.

The Mediation Process

Parties to mediation. The employee raising the dispute, a management official with authority to resolve the dispute appointed by the Bureau, and the mediator are the key parties in a mediation. Sometimes the manager involved in the case is an active participant in the mediation. The management official will be responsible for engaging in creative problem solving at the lowest level in the organization. Both parties are entitled to bring with them representatives of their choosing to assist them in the process.

The mediation session. Mediation sessions usually begin with the introduction of the mediator to the two parties. The mediator will provide procedural ground rules, such as making no interruptions when the other party is speaking. S/he will explain the mediation process including clarification of the issue of session confidentiality, securing agreement on time allocation and securing a commitment from the parties to seek resolution in good faith. The mediator will then explain the role of the mediator – to be an impartial facilitator, not an advocate or judge of either party, and to assist the parties in arriving at their own solutions.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

The mediator will end the opening statement by informing the disputants that any settlement agreement developed during the session must be reviewed by the Department's OGC, the Servicing Human Resources Manager, and the Bureau EEO Officer, before the parties sign. After it is signed by the parties, concurrence signatures must be obtained from the servicing Human Resources Manager (or, in some cases, the Department's Director for Human Resources Management), the Department's OGC, and the Bureau EEO Officer before the settlement agreement is enforceable and binding.

After the opening statement from the mediator, the mediator will ask the person initiating the mediation session – usually the aggrieved employee – to explain in his/her own words the nature of the complaint and what type of remedy s/he is seeking. The mediator will then ask the respondent, or management official, to make an opening statement to explain in his/her own words his/her perspective of the complaint.

After all opening statements have been delivered, the mediator will caucus as necessary. A caucus is a private meeting during which the mediator talks with each party separately about the dispute. Information revealed in the caucus that is confidential will not be shared in the other caucus or when the parties reconvene in a joint session, unless the party providing the confidential information permits the mediator to share it. Following the caucuses, the mediator will reconvene the joint session and determine if there is any area of agreement between the parties on any issue. If not, the parties will continue to negotiate and caucus with the mediator, if necessary, until it is clear that a settlement is or is not going to emerge at this session. If there is a need to reconvene the mediation on another day, the decision will be made jointly by both parties and the mediator.

The process ends when a determination is made that a settlement has, or has not, been reached.

Settlement agreements. If a settlement is reached, the parties will draft the terms of the settlement agreement that are acceptable to them. It is suggested that management confer with the servicing Human Resources office to discuss appropriate language relating to personnel actions or benefits before the drafting of the terms of the agreement. The agreement will then be reviewed by the Department's OGC, the Servicing Human Resources Manager, and the Bureau EEO Officer (the concurrences).

Once the settlement agreement is cleared by the concurrences, the parties will sign the settlement agreement. The agreement will then be submitted to the Department's OGC, the servicing Human Resources Manager, and the Bureau EEO Officer for execution.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

After all signatures are obtained, the agreement can be implemented. The Bureau EEO Officer will submit a copy of the fully executed agreement to the Department EEO ADR Manager.

Conclusion of mediation without settlement agreement. If either party believes that a solution cannot be reached and it is useless to continue the mediation, the dispute will return to the stage in the traditional EEO complaint process where it originated for further processing. If the complaint is returned during the informal complaint stage, the EEO Counselor will conduct a final interview and advise the employee of the right to file a formal complaint. If the complaint is returned during the formal complaint stage, the Department EEO ADR Manager advises the Chief, Program Implementation Division. The intake and investigation processes will continue throughout the mediation.

Settlement Conferences

At any point during the EEO complaint process, the parties can voluntarily agree to resolve the issue(s) without a mediator. The parties may negotiate a settlement through informal meetings or conferences. A party may convey an offer of settlement to the EEO Officer, Chief, Program Implementation Division, or the Office of General Counsel at any time before a final decision is issued on the complaint. The terms of the agreement between the parties must be reduced to writing and the agreement must be signed by both parties.

Contents of Settlement Agreements. Where the complainant has made a claim for compensatory damages, a settlement agreement may provide that the bureau shall pay proven compensatory damages as authorized by Section 102(a) of the Civil Rights Act of 1991. If so, the amount of compensatory damages will be determined as specified in Chapter 7.

Departmental Review and Clearance Process. Settlement agreements reached in the EEO complaint process must be reviewed and approved by:

- the bureau's EEO Officer,
- the Office of General Counsel (OGC), and
- the Office of Human Resources Management (OHRM).

Official responsible for obtaining clearances. The responsibility for obtaining the

U.S. Department of Commerce Manual for Processing Discrimination Complaints

necessary clearances shifts at different stages of the EEO complaint process. If resolution is reached during:

- the informal stage, the Bureau EEO Officer will be responsible for transmitting the terms of the settlement for simultaneous review to OGC and OHRM;
- the formal stage through mediation, the DOC EEO ADR Manager will be responsible for transmitting the terms of the settlement agreement for simultaneous review to the Bureau EEO Officer, OGC and OHRM;
- the formal stage without mediation, and when a hearing has not been requested, the Bureau EEO Officer will be responsible for transmitting the terms of the settlement agreement for simultaneous review to OGC and OHRM;

Signatures necessary to finalize agreement. Settlement agreements are not valid until all necessary clearances have been obtained. To finalize a settlement agreement, signatures of the following individuals are necessary:

the aggrieved individual;

the designated management official;

the EEO Officer for reviewing settlement agreements and providing clearance;

the OGC official responsible for reviewing settlement agreements and providing clearance; and

the OHRM official responsible for reviewing settlement agreements and providing clearance.

Once the settlement agreement is signed by all parties, including concurrences, the aggrieved individual and the Department are bound by its terms.

Claims of Breach of Settlement Agreement

A complainant who believes that the Department or bureau has failed to comply with the terms of a settlement agreement, may seek implementation of the settlement agreement by filing a claim of breach of settlement agreement. This process is established by EEOC

U.S. Department of Commerce Manual for Processing Discrimination Complaints

regulations at 29 C.F.R. § 1614.504(a).

Filing a claim of breach of settlement agreement. The claim should indicate whether the complainant wishes to resume processing of the original EEO complaint or have the terms of the settlement agreement implemented. The claims may be filed by sending written notice of the breach allegation to either:

the bureau EEO Officer; or

the Director, Office of Civil Rights
U.S. Department of Commerce
Mail Stop 6012
Washington, D.C. 20230

If a claim is filed with the Director of OCR, s/he will forward it to the bureau EEO Officer.

Time Limit for filing a claim. The notice must be received by the bureau EEO Officer or the Director of OCR within thirty (30) calendar days of the date the complainant knew or should have known of the alleged noncompliance.

Allegations of subsequent acts of discrimination. Allegations regarding subsequent acts of discrimination are processed as EEO complaints and *not* breach of settlement agreement claims. 29 C.F.R. § 1614.504(c).

Processing of Breach of Settlement Agreement Claims. Upon receiving a claim, the EEO Officer shall:

conduct an inquiry sufficient to determine whether there has been a breach of the settlement agreement; and

provide the Director of OCR with a recommendation as to whether there has been a material breach in the term(s) of the settlement agreement and suggest appropriate remedies.

Upon receiving the EEO Officer's recommendations, the Director of OCR shall:

- issue a decision on the claim of breach of settlement agreement within thirty (30) days of receiving the allegation of noncompliance;

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- order appropriate remedies if the decision includes a finding of breach of the agreement; and
- advise the complainant of the right to appeal the decision to EEOC.

Remedies. If the bureau has failed to carry out its promises under the settlement agreement for any reason other than noncompliance or waiver of the settlement agreement by the complainant, the following remedies may be ordered:

- reinstatement of the original EEO complaint for further processing; or
- an order to implement the terms of the settlement agreement.

Appeal of Breach of Settlement Agreement Claim. The complainant may file an appeal on the alleged breach of settlement agreement directly to the EEOC:

- any time after 35 calendar days from filing a claim with the EEO Officer or Director of OCR if there has been no decision, or
- within 30 days of the complainant's receipt of the agency's decision on the breach of settlement agreement claim.

– Chapter 9 –

Mixed Case Complaints

This chapter concerns complaints involving mixed cases. A mixed case alleges discrimination or retaliation in connection with an adverse action or other issue that may be appealed to the MSPB. The procedures used to process mixed case complaints are the same as those used in other complaints with some exceptions, as explained in this chapter. EEOC regulations concerning processing of mixed case complaints are at 29 C.F.R. §1614.302.

Issues that may be appealed to the MSPB. The MSPB is an independent federal agency created to ensure that federal agencies make employment decisions in accordance with merit system principles. The MSPB adjudicates employee appeals of agency actions. To hear an appeal, the MSPB must have jurisdiction over **both** the action and the individual filing the appeal.

Employees and others who are entitled to appeal specific actions vary depending on the laws and regulations covering the specific action. Generally, those who may appeal agency actions to the MSPB are:

- employees in the competitive service who have completed a probationary period; and
- employees in the excepted service with at least two years of continuous service.

Probationary employees have very limited appeal rights, including the right to appeal a termination based on marital status or political affiliation.

Most federal employees may appeal certain personnel actions to the MSPB. These include:

- adverse actions;
- removals;
- suspensions of more than 14 days;

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- reductions in grade or pay; and
- furloughs of 30 days or less;
- performance-based removals or reductions in grade;
- denials of within-grade increases;
- certain reduction-in-force actions;
- denials of restoration to duty or reemployment rights;
- removals from the Senior Executive Service; and
- Office of Personnel Management determinations in employment suitability and retirement matters.

See 5 C.F.R. §§1201.2, 1201.3 for a complete list of actions that may be appealed to the MSPB.

Constructive discharge. Constructive discharge -- an allegation that an employee was forced to resign or retire because of working conditions that would be intolerable to a reasonable person -- is considered a type of removal and is appealable to the MSPB.

Election of Procedures. Complainants must choose between filing *either* an EEO complaint (mixed case complaint) or an MSPB appeal (mixed case appeal). They cannot do both. A person makes an election of procedures by filing a *formal* EEO complaint or an MSPB appeal. The action that is filed first is considered the complainant's choice and subsequent claims filed concerning the same allegations in other proceedings will be dismissed. Initiating EEO counseling is not considered an election of procedures.

Remedies. Remedies available for discrimination allegations are identical in both procedures and claims for compensatory damages can be raised in both forums.

EEO Counseling

EEO counseling on mixed case issues is identical to counseling any other issues, except that Counselors must advise complainants that they have to choose whether to raise their allegations before the MSPB or in the EEO complaint process.

Complainants raising mixed case allegations should be given the option to use mediation. If they choose to have their dispute mediated, they should be advised that this does not affect the time limit for filing MSPB appeals. Mediation will continue if a complainant files an MSPB appeal unless the complainant chooses to withdraw from the mediation process.

Formal EEO Complaint Process

A complainant's decision to file a formal EEO complaint in a mixed case is considered an election to proceed in the EEO forum rather than in the MSPB forum.

Formal complaint processing procedures for mixed case complaints differ from regular procedures in the following ways:

- Complainants filing mixed case complaints do not have the right to a hearing before an EEOC AJ. They receive FADs by the Department based on the written record in the complaint, including the ROI. Complainants must be notified that the Department will issue a FAD within 45 days of issuing the ROI.
- EEOC regulations require OCR to issue a FAD on a mixed case complaint in a shorter time frame: within 120 days from the date the complaint is filed. If 120 days have passed and the Department has not issued a FAD, the complainant may appeal the claim to the MSPB or may file a civil action without completing the administrative process, but may not file both an appeal and a civil action.

Appeal Process

The appeal process for mixed case complaints differs from the appeal process for other EEO complaints. Initial appeals of agency merit decisions in mixed case complaints are

U.S. Department of Commerce Manual for Processing Discrimination Complaints

made to the MSPB instead of the EEOC. The appeal process works as follows:

- A complainant may file an appeal with the MSPB (a) within 30 days from the date the FAD is issued or (b) any time after 120 days if the FAD has not been issued.
- The MSPB's decision may be appealed to the EEOC within 30 days of the complainant's receipt of the decision. If the EEOC disagrees with the MSPB, the MSPB is given an opportunity to adopt the EEOC's decision.
- If the MSPB does not adopt the EEOC's decision, the appeal is referred to a Special Panel made up of representatives from both the MSPB and the EEOC. The Special Panel issues a final decision on the appeal.
- The Special Panel's decision may be appealed to the appropriate United States district court.

Right to File a Civil Action

Instead of completing this administrative appeal process, a complainant may file a civil action in court. The complainant also has an opportunity to file a civil action after the conclusion of the appeal process.

– Chapter 10 –

Class Complaints

This chapter covers the processing of class complaints. EEOC regulations on processing of class complaints are at 29 C.F.R. § 1614.204. With the exception of Equal Pay Act (EPA) and Age Discrimination in Employment Act (ADEA) issues, allegations of class-wide discrimination **must** be raised in the administrative process before filing a civil action.

A **class** is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age or disability.

A **class complaint** is a written complaint filed by the agent for the class. An **agent** or **class agent** is a member of the class who acts for the class during the processing of the class complaint. A class may have a **representative** who may or may not be an attorney.

Requirements for a class complaint

To be accepted for processing, the complaint must meet four criteria:

1. The class must be so numerous that consolidation of members' complaints would be impractical.
2. There must be questions of fact common to the class.
3. The agent's claim must be typical of the claims of the class.
4. The agent or class representative must show that s/he is able to fairly and adequately protect the interests of the class.

EEO Counseling

Class agents must complete EEO counseling. Agents are subject to the same time frames and other procedural requirements as persons seeking counseling on an individual EEO complaint. However, if a complainant is not aware of the class implications of his/her claim during counseling, s/he may request class certification at any reasonable point in the EEO process without going through EEO counseling again. A “reasonable point in the process” means when a complainant knows or suspects that the complaint has class implications, that is, it potentially involves questions of law or fact common to a class and is typical of the claims of a class. Normally this point will be no later than the end of discovery at the hearing stage.

The EEO Counselor must advise the agent of his/her rights and responsibilities, and should explain the differences between class and individual complaints processing. If the complaint is not resolved through EEO Counseling, the Counselor must issue the agent a notice of right to file a formal complaint within 15 days. If a complainant moves for class certification after completing counseling, it will be the responsibility of the Department, or the EEOC AJ assigned to the case, to ensure that the class agent is advised of his/her obligations.

Formal Complaint Process

Filing a class complaint. The formal class complaint must be in writing and must be signed by the agent or the representative. The formal complaint must identify the policy or practice adversely affecting the class and the specific matter affecting the agent. The complaint must be filed within 15 calendar days of the agent’s receipt of the notice of right to file. The complaint may be filed with the same officials who receive individual complaints of discrimination and timeliness is determined in the same manner as with individual complaints.

Intake. Within 30 days of receipt of a formal class complaint, the Department designates an agency representative and forwards the complaint file, including the Counselor’s Report and all other relevant information, to the EEOC. The EEOC then assigns an AJ.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

The AJ will perform the following functions:

- determine whether the class meets the four criteria listed earlier. This is called **certification of the class**.
- give the agent an opportunity to address matters raised by the class that are not in the Counselor's Report.
- issue a decision on whether the complaint meets the procedural requirements for further processing.

Allegations that are not sufficiently specific or detailed to be processed. EEOC regulations require that an AJ allow a class agent 15 days in which to provide specific and detailed information when an allegations lacks specificity or detail. 29 C.F.R. § 1614.20(d)(4).

Dismissal of class complaints. The AJ may dismiss class complaints for any of the grounds applicable to individual complaints, or because the class does not meet all of the four criteria listed earlier, or because of the agent's failure to respond to the AJ's requests for further information.

Department's Final Order. Within forty days from receipt of the AJ's decision on class certification, the Director of OCR shall issue a final order. If the final order does not fully implement the AJ's decision on class certification, the Department will simultaneously appeal the decision to the EEOC.

Disposition of the class agent's complaint upon dismissal of the class complaint. A FAD dismissing a class complaint must notify the agent either that the class complaint is being filed on that date as an individual complaint and accepted for further processing or that the complaint is also dismissed as an individual complaint. The FAD must also include a notice of the agent's appeal rights and right to file a civil action.

Individual complaints filed by class members. If a class agent or other class member raises issues identical to those raised in the class complaint, the individual complaints will be held in abeyance pending an AJ's decision on certification of the class. If the class is certified, the individual complaints will be subsumed into the class complaint. If the class is not certified, the Department will resume processing the individual complaints.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Notification of the Class

Within 15 days of receipt of an AJ's decision certifying a class complaint, the Department shall notify all members of the class of the acceptance. Notification shall be made by means reasonably calculated to reach all members of the class. The notice must contain:

- the name of the Department, the name and location of the operating unit and the date of acceptance;
- a definition of the class and a statement of the accepted issue(s);
- an explanation of the binding nature of the final decision or resolution on the class members; and
- the name, address and telephone number of the class representative.

Obtaining Evidence About the Complaint. Once a case is accepted, the AJ will notify the parties that they will be allowed at least 60 days to prepare their cases. Evidence may be developed through interrogatories, depositions, requests for admissions, stipulations or production of documents. If mutual cooperation fails, either party may ask the AJ to rule on a request to develop evidence. During the period for development of evidence, the AJ may direct that an investigation of the facts be conducted by an agency certified by the EEOC.

Failure to respond to a request to develop evidence. If a party fails, without showing good cause, to respond to an AJ's ruling on a request for information, documents, or admissions, the AJ may:

- draw an adverse inference against the noncompliant party, i.e., consider the matter to be established in favor of the opposing party;
- exclude other evidence offered by the noncompliant party;
- recommend that a decision be rendered in favor of the opposing party; or
- take such other action as s/he deems appropriate.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Hearing. After the period allowed for developing evidence, the AJ will set a date for the hearing. Hearings on class complaints are conducted in accordance with EEOC regulations at 29 C.F.R. § 1614.109.

The EEO Officer shall arrange for a court reporting service to prepare a verbatim transcript of the hearing.

Following the hearing, the AJ shall transmit to the Department the transcript of the hearing and a report of findings of fact and recommendations, including systemic relief for the class and individual relief where appropriate.

Final Agency Decision. Within 60 days of receipt of the AJ's report of findings and recommendations, the Department shall issue a FAD. The FAD is binding on all members of the class. The Department may adopt or modify the AJ's findings and recommendations or reject them and issue a decision with its own findings and conclusions. The FAD shall be in writing and shall be transmitted to the agent by certified mail, return receipt requested, along with a copy of the AJ's report of findings and recommendations. A FAD rejecting or modifying an AJ's finding and recommendations must contain specific reasons for the Department's action.

If the Department does not issue a FAD within 60 days, the AJ's findings and recommendations become the Department's final decision. The Department shall transmit the FAD to the agent within 5 days of the expiration of the 60-day period. The FAD must contain a notice of the right to appeal or file a civil action.

FADs finding discrimination. A FAD finding discrimination shall include the date of the agent's initial contact with the EEO Counselor and the date the Department eliminated the policy or practice giving rise to the complaint.

When discrimination is found, the Department shall eliminate the discriminatory policy or practice. Where appropriate, individual relief, including costs and attorney's fees if appropriate, shall be provided to the agent. The FAD shall order the bureau to provide any relief authorized by law and determined to be necessary or desirable to resolve the discrimination and promote the policy of equal opportunity. Awards of attorney's fees for prevailing class complainants will be processed in accordance with 29 C.F.R. § 1614.501(e)(1) and (2).

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Notification of FAD. Within 10 days of its transmittal of the FAD to the agent, the Department shall notify class members of the decision and relief awarded, if any, through the same method used to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class member to seek individual relief and the procedures to be followed.

Relief for individual class members. When discrimination is found, there is a presumption of discrimination as to every individual who can show that s/he is a member of the class and was affected by the discrimination during the relevant period of time. The agency must prove by clear and convincing evidence that a class member is not entitled to relief.

A class member who believes that s/he is entitled to individual relief must file a claim with the Director of OCR, within 30 days of notification of the FAD. The claim must:

- be specific; and
- show that the claimant is a class member who was affected by the discriminatory policy or practice during the period of time for which class-wide discrimination was found.

The Department shall issue a FAD on each claim for individual relief within 90 days of the date the claim was filed. The FAD must include a notice of right to appeal or to file a civil action.

If the Department intends to dispute an individual claim, it must notify the AJ, in writing, within sixty days of receipt of the claim. The AJ will toll the 90-day period for issuing a FAD and may hold a hearing on the claim or may otherwise supplement the record. At the conclusion of any fact-finding, the AJ will issue a decision on the individual claim and forward it to the Department and to the individual.

Upon receipt of the AJ's decision, the 90-day period for issuing a FAD will resume. The Department must issue a FAD regarding the individual claim within the resumed 90-day period. The FAD must include a notice of right to appeal or to file a civil action. If the Department does not issue a FAD, the AJ's decision will become the final decision of the Department.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

When class-wide discrimination is not found, but it is found that the agent or any other class member is the victim of discrimination, the agent or other class member shall be awarded individual relief under 29 C.F.R. § 1614.501.

Resolution of Class Complainants. The complaint may be resolved by agreement of the agency and the class agent at any time. Notice of the resolution must be provided to the AJ. Class members must also be notified using the same manner as notification of the acceptance of the class complaint. The notice must state the relief, if any, to be granted by the agency and the name and address of the AJ assigned to the case. The notice must also state that within 30 days of the date of the notice of resolution, any member of the class may petition the AJ to vacate the resolution because it benefits only the class agent, or is otherwise not fair, adequate and reasonable to the class as a whole.

The AJ will review the resolution and consider any petitions to vacate it that are filed. The AJ will evaluate the agreement in relation to the strength of the class agent's case, and should not reject a settlement merely because individual class members contend they would have received more had they prevailed at trial. If the AJ finds that the proposed resolution is not fair, adequate and reasonable to the class as a whole, the AJ will issue a decision vacating the agreement. If the AJ finds that the resolution is fair, adequate and reasonable to the class as a whole, the resolution will be binding on all members of the class.

Appeals and Requests for Reconsideration

An agent may appeal:

- an AJ's decision accepting or dismissing all or part of a class complaint;
- a FAD addressing the resolution of a complaint on the merits of a complaint;
- and an AJ's decision to vacate a proposed resolution of a complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

A class member other than the agent may appeal:

- an AJ's decision that a proposed resolution is not fair, adequate, and reasonable to the class as a whole;
- an AJ'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;
- an AJ's finding that the petitioner is not a member of the class and did not have standing to challenge the resolution; and
- a FAD on a claim for individual relief under a class complaint.

Appeals and requests for reconsideration must be filed with the EEOC's OFO and must be processed in accordance with 29 C.F.R. §§ 1614.402 through 1614.407. See Chapter 5 for more information on the appeal process.

Civil Actions

An agent who has filed a class complaint or a class member who has filed a claim for individual relief may file a civil action under Title VII, the ADEA or the Rehabilitation Act in an appropriate United States district court:

- within 90 days of a FAD, if no appeal has been filed;
- after 180 days from the date the class complaint was filed, if no FAD has been issued and no appeal filed;
- within 90 days of receipt of the EEOC's decision on appeal; or
- after 180 days from the date of filing an appeal, if the EEOC has not issued a decision on the appeal.

Filing a civil action within the applicable time frame terminates administrative processing of the complaint.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

As an alternative to filing an administrative complaint, an agent bringing a class complaint under the ADEA may file a civil action in a United States district court after giving the EEOC not less than 30 days notice of the intent to file such an action. Such notice must be filed with the EEOC's Federal Sector Program Office within 180 days of the occurrence of the alleged unlawful practice.

Where violation of the EPA is alleged, an agent may file a civil action with a court of competent jurisdiction within two years, or if the violation is willful, within three years, of the date of the alleged violation, regardless of whether an administrative complaint has been filed. Filing an administrative complaint does not toll the time for filing a civil action.

Freedom from Retaliation

Agents, class members, representatives, witnesses and Department officials shall be free from reprisal, restraint, coercion and interference at all stages in the presentation and processing of a class complaint. They shall have the right to pursue individual complaints based on reprisal for their role in the class complaint.

– Chapter 11 –

EEO Complaint Processing for the Decennial Census

Every ten years, the Census Bureau, a component of the Department of Commerce, conducts the Decennial Census, an enumeration of the entire U.S. population. This is the largest peacetime operation undertaken by the federal government.

The Census Bureau hires several hundred thousand temporary employees to conduct and support Decennial Census operations. For the 1990 and 2000 Decennials, the Department's OCR, in partnership with the Census Bureau EEO Office and Field Division, and the Department's OGC, designed EEO complaint processing programs to meet the unique needs of the Decennial workforce.

The Census Bureau modifies its procedures with each Decennial Census. Therefore, the approach to processing Decennial EEO complaints must be tailored to the specific operations of each Decennial. However, some basic components of prior Decennial programs can be incorporated into future Decennial programs.

Planning for the decennial

Planning for the Decennial Complaint Processing Program should begin at least three fiscal years before the Decennial year e.g., planning for the 2010 Decennial should begin no later than the start of Fiscal Year 2007.

Key participants. The key participants in the Decennial Census Complaint Processing Program are OCR, the Department's OGC, the Census Bureau EEO Office, the Census Bureau Field Division and the Census Bureau Human Resources Division. It is critical that these participants reach consensus on their respective roles and responsibilities early in the process.

The Decennial Program Manager and complaints processing staff. A Decennial Program Manager, reporting to the Director of OCR, should be appointed to provide leadership and to serve as a central point of contact for the key participants. The Decennial Program Manager and his/her staff serve on temporary appointments. The

U.S. Department of Commerce Manual for Processing Discrimination Complaints

Decennial Program Manager and staff have traditionally been stationed at Census Bureau Headquarters for the duration of the Decennial operation.

Initial planning meetings. Initial planning meetings should include:

- a briefing on the nature of Decennial operations;
- a briefing on the structure of the prior Decennial Complaint Processing Program;
- an analysis by key participants on the strengths and weaknesses of the previous program;
- recommendations for improvement;
- an analysis of the impact of any changes in law, regulation or policy; and
- an analysis of the impact of any changes to the manner in which the Decennial Census will be conducted.

Follow-up meetings. At follow-up meetings, participants should define their roles and responsibilities, review the schedule of census operations, and establish projected staffing and funding levels. Once the basic infrastructure of the program is established, the parties can begin developing specific program initiatives.

Record-keeping. At the conclusion of each Decennial, all planning materials and administrative records should be archived to serve as source materials for planning the next Decennial.

Processing Decennial Complaints

Duration of program. The Decennial Complaint Processing Program typically runs for four fiscal years, e.g., 2007 to 2011. The Decennial Complaint Processing Program should be in place and ready to process complaints before the Census Bureau launches its Dress Rehearsal Operation. Dress Rehearsal and other early operations are prime opportunities to test procedures and make adjustments to the program.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

When the workload no longer justifies the need for the program, the Decennial Complaint Processing Program Office will be closed, temporary staff will be released, and all records will be turned over to OCR. OCR will complete the processing of the remaining Decennial complaints.

Expedited processing. Due to the fast pace and temporary nature of Decennial operations, witnesses and documents are often dispersed by the time a complaint reaches hearing. The dialogue with the EEOC should be opened as soon as the Decennial Program Manager is on board. Historically, so few Decennial employees have come within the jurisdiction of the MSPB that a similar discussion with the MSPB has not been necessary. However, planners should consider the types of appointments the Census Bureau will use and any other proposed personnel procedures that might create a significant number of mixed case complaints and/or MSPB appeals.

Employees and applicants who can use the Decennial complaint process. The Decennial Complaint Processing Program should be limited to temporary employees hired for Decennial operations and applicants who apply for these positions. EEO complaints filed by permanent Census Bureau employees should be processed through OCR's regular complaint process.

Minimal disruptions to Census operations. To be successful, a Decennial Complaint Processing Program must minimize disruptions to Census operations. It is strongly recommended that the Decennial Complaint Processing Program provide a mechanism for customer feedback, especially from the Census Bureau's Field Division and its Regional Directors.

Streamlined process. Because of the temporary nature of the operation, the entire Decennial EEO complaint process should be streamlined so that the key participants should complete each step of the complaint process in less time than permitted by the EEOC regulations. Compressing the processing time increases the likelihood that witnesses and documents will be available at the time of investigation.

Other features of the program. Other features of the Decennial Complaint Processing Program may include:

- Placement of EEO Specialists in each Regional Census Center to conduct investigations and, possibly, counseling. Regional EEO Specialists should report to the Decennial Program Manager.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- Additional staffing in OCR and Census EEO Office, dedicated to the Decennial Complaints Program.
- Standard operating procedures to make EEO investigations quicker and ensure that all relevant evidence is gathered.
- Structured resolution authority, so that Regional Directors can resolve low-cost cases without approval from Headquarters.
- Use of templates and standard form documents.
- Specialized complaint tracking and record keeping procedures to obtain accurate measures of Decennial complaint activity levels and program effectiveness.

Some Special Considerations for Processing Decennial Complaints

- **Impracticality of Alternative Dispute Resolution (ADR).** Traditional ADR techniques, such as mediation, are not practical in the Decennial because of its decentralized structure. For example, an enumerator who works from home may be hundreds of miles away from the Regional Census Center, where management officials with authority to sign a resolution agreement are located.
- **Unique features of the work environment.** A thorough understanding of the work environment is critical in establishing procedures, especially for investigations. Many of the facilities established for Decennial operations (e.g., Regional Census Centers and local or district offices) do not have the amenities found in permanent government offices. For example:
 - Although most offices will have fax machines, some may not have electronic mail, voice mail or conference calling capability.
 - The majority of Decennial employees work from their homes.
 - Many Decennial employees work outside traditional business hours.
 - Decennial employees often work in the field, making it difficult to locate them.

U.S. Department of Commerce Manual for Processing Discrimination Complaints

- Those who do work in offices are often in large, open rooms, which makes private telephone conversations difficult.

Because of the unique features of the work environment:

- Decennial investigations will rely more heavily on the use of the telephone, U.S. mail and overnight delivery services than non-Decennial investigations.
- Regional Specialists or other investigators may be responsible for investigating complaints in several states simultaneously.
- In all but the most serious cases, constraints on time and funds will preclude the face-to-face interviews generally required in EEO investigations.
- **Document storage.** As the local or district census offices and Regional Census Centers begin to close, the Decennial Program Manager should note where the documents from each office will be stored.

This list is by no means exhaustive, but it includes areas most often overlooked in approaching Decennial Census complaints processing.

For more information

For more information on complaints processing procedures for a particular Decennial Census, contact OCR, the Census Bureau's EEO Office or the Decennial Complaints Manager.