

December 2, 1998

EQUAL OPPORTUNITY DIRECTIVE 1999-03

TO: Bureau/Office Equal Opportunity Officers
FROM: E. Melodee Stith, Director /signed/
Office for Equal Opportunity
SUBJECT: Procedures for Processing Complaints of Discrimination Based
on Sexual Orientation

The Department has a zero tolerance of discrimination policy, with an emphasis on prohibiting harassment based on race, color, national origin, sex, religion, disability, age, or sexual orientation. The Assistant Secretary for Policy, Management and Budget signed on December 1, 1998, the attached Departmental Manual establishing procedures for processing complaints of discrimination based on sexual orientation.

Please ensure that the procedures receive maximum distribution within your Bureau, particularly among EO staffs and EEO Counselors. If you have any questions regarding this process, do not hesitate to call me on 202-208-5693.

Attachment

Department of the Interior

Departmental Manual

Effective Date: 12/1/98

Series: Personnel Management

Part 373: Equal Opportunity

Chapter 7: Procedures for Processing Complaints of Discrimination Based on Sexual Orientation

Originating Office: Office for Equal Opportunity

373 DM 7

7.1 Authority. Executive Order 11478, as amended by Executive Order 12106, and as further amended by Executive Order 13087 (collectively, the Executive Order), prohibits discrimination and ensures equal opportunity for all persons, without regard to race, color, religion, sex, national origin, age, disability or sexual orientation, employed in, or seeking employment with the Federal government. These procedures covering complaints of discrimination based on sexual orientation are issued pursuant to the Executive Order and the Secretary of the Interior's authority to plan, direct, and control Departmental affairs. Nothing contained in this chapter of the Manual shall be construed as (i) abrogating in any manner the preference of American Indians, including Alaska Natives, for positions related to the administration and conduct of Indian affairs which has been granted by statutes of the United States or (ii) creating any new substantive rights beyond those already in effect.

7.2 Policy. It is the policy of the Department to provide all employees a workplace free from unlawful discrimination and to value the differences each employee brings from his or her culture including sexual orientation. It is further the Department's policy that no employee or applicant for employment be subjected to unlawful discrimination because of his or her sexual orientation.

7.3 Scope. This chapter describes the procedures for processing complaints where allegation(s) of discrimination are based solely on sexual orientation. Complaints of discrimination that contain allegations based on race, color, religion, national origin, sex, age or disability will be processed pursuant to Title 29, Code of Federal Regulations (CFR), Part 1614. When complaints of discrimination contain allegations based on sexual orientation and allegations based on race, color, religion, national origin, sex, age or disability, dual processing may occur at appropriate stages; e.g., at the hearing stage. The process described in this chapter applies to all Departmental employees except those who are in bargaining units represented by unions and have contractual grievance procedures which cover complaints alleging discrimination based on sexual orientation. Bargaining unit employees may make an election between the negotiated grievance procedure and this chapter unless the governing collective bargaining agreement provides that either is the exclusive procedure. Once an election is made, it is binding on the employee who made the election.

7.4 Definition. Sexual orientation is defined as homosexuality (Gay or Lesbian), bisexuality, heterosexuality, or transsexuality, whether such orientation is real or perceived.

7.5 Responsibility. It is the responsibility of all managers and supervisors to ensure that all personnel actions, policies, practices, and the work environment are free from discrimination and harassment on the basis of sexual orientation. No employee or applicant for employment shall be subjected to reprisal, intimidation, or coercion for raising an allegation of discrimination based on sexual orientation, or for participating in procedures addressing sexual orientation issues. Appropriate action, including disciplinary action, shall be taken when conduct and behavior occur that result in discrimination or harassment of employees because of their sexual orientation. The Bureau and/or Office (hereafter collectively referred to as the Bureau) Directors shall be responsible for enforcing and publicizing this policy and the complaints processing procedures to all employees.

7.6 Pre-complaint Processing.

A. Aggrieved persons who believe they have been discriminated against on the basis of sexual orientation must consult an Equal Employment Opportunity Counselor (EEO Counselor) prior to filing a complaint in order to try to resolve the matter informally.

(1) An aggrieved person must contact an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

(2) The Bureau Equal Opportunity Officer (EO Officer) or Department Director (Director), Office for Equal Opportunity (OEO) may extend the 45-day time limit in paragraph 7.6A(1) of this section when the aggrieved person shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably would not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting an EEO Counselor within the time limits, or for other reasons considered sufficient by the EO Officer or the Director, OEO.

B. At the initial counseling session, EEO Counselors must advise the aggrieved person in writing of his or her rights and responsibilities (including the right to

request a hearing with the Office of Hearings and Appeals (OHA) after an investigation by the Bureau), the duty to mitigate damages, and that only the matter (s) raised in pre-complaint counseling (or matters like or related to matters raised in pre-complaint counseling) may be alleged in a subsequent formal complaint filed with the Bureau or Department as specified in 373 DM 7.7. EEO Counselors must also advise an aggrieved person of his or her duty to keep the Bureau or Department informed of his or her current address.

During the pre-complaint counseling stage, employees will be advised of other forums for raising employment issues that may or may not address discrimination based on sexual orientation. Some of these forums include the Office of Special Counsel which investigates prohibited personnel practices, the Merit Systems Protection Board which hears appeals of certain agency actions, the Federal Sector EEO Complaint Process, the Department's administrative grievance procedures which address unfair employment practices (outside of EEO discrimination issues), and, for those employees in a bargaining unit, the negotiated grievance procedures, as applicable. Generally, the choice of forum is the exclusive right of the employee.

C. EEO Counselors shall conduct counseling activities in accordance with Department and Bureau policies and procedures. When advised that a formal complaint has been filed by an aggrieved person, the EEO Counselor shall submit a written report within 15 days to the EO Officer who has been designated to accept complaints and to the aggrieved person concerning the issues discussed and actions taken during counseling.

D. The EEO Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the EEO Counselor's attention, unless the counseling period is extended for an additional 60 days by the Bureau EEO Officer to facilitate resolution. If the matter has not been resolved and the counseling period has not been extended, the aggrieved person shall be notified in writing by the EEO Counselor, not later than the thirtieth day after contacting the EEO Counselor, of the right to file a discrimination complaint. The written notice shall inform the aggrieved person of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint, and of the aggrieved person's duty to notify the Bureau immediately, in writing, if the aggrieved person retains counsel or a representative. The notice will also advise the aggrieved person that a complaint that is not filed within the 15-day period may be dismissed as untimely. The EEO Counselor must obtain the signature of the aggrieved person on the notice with the date of receipt unless the notice was otherwise sent by certified mail, return receipt

requested.

E. Where the Bureau has an established alternative dispute resolution (ADR) procedure and the aggrieved person agrees to participate in the ADR procedure, the pre-complaint processing shall be completed within 90 days. If the matter has not been resolved within such 90-day period, the notice described in paragraph 7.6D shall be issued.

F. The EEO Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The EEO Counselor shall not reveal the identity of an aggrieved person who consulted the EEO Counselor, except when authorized to do so by the aggrieved person, or until the Bureau or Department has received a formal discrimination complaint prepared in accordance with 373 DM 7.7 from the aggrieved person involving that same matter.

7.7 Formal Complaints.

A. A complaint may be filed with the Secretary of the Interior; the Assistant Secretary - Policy, Management and Budget (PMB); the Deputy Assistant Secretary - Workforce Diversity; the Director, OEO; the Bureau Director; or the EO Officer. To expedite processing, the complaint should be filed with the EO Officer of the Bureau where the alleged discrimination arose.

B. A complaint must be in writing and must be filed within 15 days of receipt of the notice of right to file a complaint required by 373 DM 7.6D or E.

C. A complaint must contain a signed statement from the person claiming to be aggrieved (complainant) or the complainant's representative. This statement must be sufficiently precise to identify the complainant, the Bureau where the complaint arose, and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

D. The EO Officer shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed and of the specific accepted allegations. Such acknowledgment shall also advise the complainant that the Bureau is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint. The time limits may be extended to ensure the complete development of the investigative record.

7.8 Dismissal of Complaints. The Director, OEO, shall dismiss a complaint or a portion of a complaint:

A. That fails to state a claim covered under this chapter or states a claim by the same complainant that is pending before or has been decided by the Department, except for those allegations being processed under 29 CFR Part 1614;

B. That fails to comply with the applicable time limits contained in 373 DM 7.6 and 7.7, unless the EO Officer or Director, OEO, extends the time limits in accordance with 373 DM 7.6A(2), or that raises a matter that has not been brought to the attention of an EEO Counselor or is not like or related to a matter that was raised in pre-complaint counseling;

C. Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination based on sexual orientation or where the complainant indicates that he or she has elected to pursue the non-EEO process;

D. That is moot or alleges that a proposal to take a personnel action or other preliminary step to taking a personnel action is discriminatory;

E. Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

F. Where the EO Officer or Director, OEO, has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of receipt, or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated, if sufficient information for that purpose is available; or

G. If, prior to the issuance of the final agency decision, the complainant refuses to accept, within 30 days of receipt, an offer of settlement by the Bureau which constitutes an offer of full relief and contains a certification from the Director, OEO, or the Solicitor, or a designee, that the offer constitutes full relief, provided that the offer gave notice that failure to accept within the period designated would result in dismissal of the complaint.

7.9 Investigation of Complaints.

A. The investigation of complaints shall be managed by the EO Officer either directly or through contractual services.

B. Any investigation will be conducted by a contract or government investigator(s) (investigator) with appropriate security clearance(s). The EO Officer may use an exchange of letters or memoranda, interrogatories, fact-finding conferences, or any other fact-finding methods that efficiently and thoroughly address the matters at issue.

C. The following procedures apply to the investigation of complaints:

(1) The complainant, Bureau officials, and any employee of the Department shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the Bureau against which a complaint is filed, or its employees fail without good cause shown to respond fully and in a timely fashion to requests for documents, records, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decision-maker should, in appropriate circumstances:

(a) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(b) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(c) Exclude other evidence offered by the party failing to produce the requested information or witness;

(d) Issue a decision fully or partially in favor of the opposing party; or

(e) Take such other actions as are deemed appropriate.

D. The EO Officer shall develop a complete and impartial factual record sufficient to make findings on the matters raised by the written complaint.

E. The EO Officer is responsible for completion of the investigation within 180 days of the date of filing of the formal complaint; however, the EO Officer may extend the time period for up to an additional 90 days to ensure complete development of the investigative record.

F. Within 180 days from the filing of the complaint or within the period of extension provided in paragraph 7.9E above, the EO Officer shall notify the complainant, in writing, that the investigation has been completed and provide the complainant with a copy of the investigative file. The notice shall advise the complainant of the right to elect, within 30 days, a hearing by a hearing examiner appointed by the Director, OHA or a final agency decision by the Director, OEO.

G. Bureaus are encouraged to incorporate ADR procedures into their investigative efforts in order to promote early resolution of complaints.

7.10 Hearings.

A. Procedures. When a complainant requests a hearing, the EO Officer shall forward a copy of the completed investigative record to OHA and request that the Director, OHA, appoint a hearing examiner to conduct a hearing in accordance with this section. The hearing process shall be completed within 180 days from receipt of the request, unless extended because of extenuating circumstances or for uncontrollable delays. Where the hearing examiner determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, which the Bureau has not had an opportunity to address, the hearing examiner shall remand any such issue for counseling in accordance with 373 DM 7.6, or for such other processing as ordered by the hearing examiner. Any issues raised at the hearing alleging discrimination on the basis of race, color, national origin, sex, age, religion, or disability must be referred to the EO Officer for proper processing without the hearing examiner deciding the issues.

B. Conduct of Hearing. Bureau Directors shall provide for the attendance at the hearing of all Department employees approved as witnesses by the hearing examiner as described in paragraph 7.10B(3)(c) below. All approved Department witnesses will be on official time and all costs, including video teleconferencing and travel, associated with attendance at the hearing will be paid by the Bureau.

(1) If a hearing is held, attendance is limited to persons determined by the hearing examiner to have an appropriate connection to the complaint. The hearing examiner may exclude from the hearing any person, including representatives of the complainant, whose presence obstructs the orderly process of the hearing.

(2) The hearing should be conducted so that it will bring out pertinent facts and produce pertinent evidence (documents, testimony, or other appropriate evidence such as photographs, tapes, etc). The rules of evidence need not be strictly followed, although reasonable bounds should be maintained on the relevance of the evidence submitted, and unduly repetitious testimony should be excluded. The hearing examiner shall have the authority to make decisions on the admissibility of evidence or testimony.

(3) Criteria for evidence provided through testimony of witnesses are as follows:

(a) Testimony will be under oath or by affirmation and both the complainant (or representative) and management (or representative) will be given the opportunity to produce witnesses and to question all witnesses who appear and testify.

(b) The parties may not use affidavits to exempt persons from cross-examination. The hearing examiner may not accept an affidavit in lieu of personal testimony from a Department witness who should have been produced at the hearing. The fact that a Department employee has already executed an affidavit is not a sufficient reason for failing to produce that employee as a witness at the hearing. If both parties stipulate to the use of affidavits in lieu of personal testimony from specific witnesses, then those witnesses will not be required to appear at the hearing, and the affidavit may be accepted as evidence. The affidavit of a deceased person or of a person otherwise unavailable for legitimate reasons, as determined by the hearing examiner, may be accepted as evidence.

(c) The Bureau will make its employees available as witnesses when requested by the hearing examiner after consideration of a request by the complainant or management. The complainant shall be responsible for producing witnesses he or she calls who are not current Department employees. If the Bureau determines that it is not administratively practical to comply with the request of the hearing examiner to produce its employees, it will notify the hearing examiner in writing of the reasons for that determination. If, in the hearing examiner's judgement, compliance with the request is essential to a full and fair hearing, the hearing may be postponed until such time as management complies with the request. If management finds it is not feasible to comply or fails to comply within 15 days of

the hearing examiner's decision on compliance with the request, the issue will be referred by the hearing examiner to the Director, OEO, who will render a decision on the postponement within 15 days.

(d) Both the complainant and the Bureau are required to submit a list of potential witnesses to the hearing examiner prior to the hearing as directed by the hearing examiner. Potential witnesses approved by the hearing examiner will be notified in advance of the possibility of being called to appear as witnesses. For good cause shown, the complainant or the Bureau may later request the hearing examiner to approve witnesses in addition to those previously approved by the hearing examiner. However, the hearing examiner has the authority and responsibility to exclude unduly repetitious, immaterial, or irrelevant testimony and may therefore, exclude witnesses who have no new or relevant testimony to offer, or for other reasons within the hearing examiner's discretion.

(e) Witnesses will be assured freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony. Department employees will be on official duty in connection with being made available as witnesses, including preparation time, travel time, and time spent at the hearing.

(4) The hearing examiner may request further documentation at any stage of a proceeding. Within the time frame for submission, the complainant or Bureau official from whom the documentation was requested must comply or submit an objection on the ground that the documentation requested is unavailable or the matters described therein are privileged, irrelevant, or otherwise improper. The hearing examiner shall issue a decision on all such objections if the parties are unable to resolve the matter. The hearing examiner may require the Bureau or the complainant receiving sensitive documents to maintain them in confidence.

(5) For the purposes of expediting the proceedings, the hearing examiner may modify the procedures set forth in 7.10B(3)(b) through (e) and 7.10B(4) as he/she deems advisable with the approval of the Director, OHA, and the Director, OEO. If it is not approved by either the Director, OHA, or the Director, OEO, the hearing examiner's modification will not be effective.

C. Record of Hearing. The hearing shall be recorded and the Bureau shall arrange and pay for verbatim transcripts. A copy of the hearing transcript will be provided to the Bureau and the complainant without charge. All documents or other evidence submitted to, and accepted by, the hearing examiner at the hearing shall be made part of the record of the hearing. Each party shall provide copies of its proposed

exhibits to the other party as directed by the hearing examiner.

D. Findings and Conclusions. The hearing examiner shall issue recommended findings of fact and conclusions of law on the merits of the complaint, and recommend appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint. The hearing examiner shall send the record of hearing including the transcript and the recommended findings and conclusions to the parties and the Director, OEO, by certified mail, return receipt requested, or other appropriate means. Within 60 days of receipt of the recommended findings and conclusions, the Director, OEO, may accept, reject, or modify the recommended findings and conclusions or the relief ordered by the hearing examiner and issue a final agency decision in accordance with 373 DM 7.11. If the Director, OEO, does not, within 60 days of receipt, accept, reject, or modify the findings and conclusions of the hearing examiner, the recommended findings and conclusions of the hearing examiner and the relief ordered shall become the final agency decision and the Director, OEO, shall notify the parties of the final agency decision in accordance with 373 DM 7.11. The Director, OEO, in his or her sole discretion, may extend the 60-day period for an additional 30 days. When the decision of the Director, OEO, rejects or modifies the recommended findings and conclusions or the relief ordered by the hearing examiner, the complainant may, within 30 days of receipt of the decision, request a review of the decision by the Assistant Secretary, PMB. The Assistant Secretary, PMB, will, within 45 days of receipt of the request, affirm or modify the decision of the Director, OEO. The decision of the Assistant Secretary, PMB, shall then be the final agency decision of the Department.

7.11 Final Decisions. Within 60 days of receiving notification that a complainant has requested an immediate decision from the Director, OEO, or within 60 days of the end of the 30-day period for the complainant to request a hearing, and where the complainant has not requested either a hearing or a decision, or within 60 days of receiving recommended findings and conclusions from a hearing examiner, the Director, OEO, shall issue a final agency decision. The final agency decision shall consist of findings on the merits of each matter in the complaint and, when discrimination is found, appropriate remedies and relief shall be ordered in accordance with 373 DM 7.12 of this chapter.

The legal standards for proving discrimination on the basis of sexual orientation will be the same standards used for assessing the merits of discrimination complaints based on race, color, sex, national origin, religion, age or disability. In McDonnell Douglas v. Green, 411 U.S. 792 (1973), the United States Supreme Court delineated a tripartite burden of proof under which discrimination complaints are to be

examined. To establish liability, a complainant must first establish, through the preponderance of the evidence, a prima facie case; i.e., present facts which, if unexplained, reasonably give rise to an inference of discrimination by the agency. The prima facie case creates a presumption of unlawful discrimination. If the complainant carries this initial burden, the burden then shifts to the agency to provide one or more legitimate, nondiscriminatory reasons for the agency's action. Finally, should the agency provide such a reason(s) to rebut the complainant's prima facie case, the burden returns to the complainant to demonstrate, through the preponderance of the evidence, that the agency's stated reason(s) for its actions is a pretext for unlawful discrimination. The complainant ultimately must show that it is more likely than not that discrimination based on sexual orientation was the real motivation for the agency's action(s).

A. To establish a prima facie case of discrimination in a non-selection case, the complainant must demonstrate:

- (1) that he or she belongs to a protected group (i.e., is homosexual, heterosexual, bisexual or transsexual, or is perceived as such);
- (2) that he or she applied for a position for which the agency was seeking applicants;
- (3) that he or she was qualified for the position; and
- (4) that he or she was not selected under circumstances giving rise to an inference of discrimination based on his or her sexual orientation.

B. To establish a prima facie case of discrimination in other than non-selection cases, the complainant must demonstrate:

- (1) that he or she belongs to a protected group (i.e., homosexual, heterosexual, bisexual, or transsexual or is perceived as such);
- (2) that he or she was subjected to an adverse employment action or decision; and
- (3) that he or she was treated less favorably than similarly situated employees outside his or her protected sexual orientation group under circumstances giving rise to an inference of discrimination.

C. To establish a prima facie case of reprisal, the complainant must demonstrate:

- (1) that he or she participated in prior protected activity or opposed activity protected by this chapter;
- (2) that management was aware of his or her activity as described in (1);
- (3) that he or she was subjected to an adverse employment action or decision; and
- (4) that there is a causal connection between the protected activity and the adverse employment action.

7.12 Remedies and Relief. When the Director, OEO, finds that an employee, applicant for employment or former employee was discriminated against or was the subject of reprisal on the basis of sexual orientation, the Director, OEO, shall provide relief to the fullest extent permitted by existing laws and regulations. This may include any or all of the following elements in appropriate circumstances:

A. Notification to all employees of the Bureau at the Bureau's facility in which the reprisal or discrimination took place that the Bureau was found to have engaged in reprisal or discrimination based on sexual orientation, that the employees have a right to be free from such reprisal or discrimination, and that the Bureau is committed to taking corrective or preventive action to ensure that violations similar to those found will not recur.

B. Offer of position remedy, subject to the following:

- (1) If the final agency decision determines that the complainant would have been selected for a position but for discrimination, and the position has not been filled, the Director, OEO, may order that the complainant be extended an offer of employment to that position unless the preponderance of the evidence indicates that the complainant would not have been selected even in the absence of discrimination.
- (2) If the final agency decision determines that the complainant would have been selected for the position but for discrimination and the position has been filled, the Director, OEO, may order that the complainant be extended an offer of employment to a substantially-equivalent position if such a position exists. However, if the record establishes by the preponderance of the evidence that the complainant would not have been selected even in the absence of discrimination, no offer of a substantially-equivalent position shall be made.

(3) If there are no vacant, substantially-equivalent positions within the Bureau

where the discrimination occurred, the Director, OEO, may order that Bureau to grant the complainant priority consideration rights, in the same commuting area in which the complainant applied, for a minimum of one (1) year and a maximum of two (2) years. Priority consideration means that the complainant will receive bona fide consideration by the selecting official for any position for which the complainant is qualified before any other candidate is referred for consideration and that the complainant will not be considered in competition with other candidates and will not be compared with them. While priority consideration does not mean that the complainant must actually be selected, it does mean that once the Bureau determines that the complainant meets the qualifications for the position, it must refer the complainant to the selecting official for consideration. If the Bureau chooses not to select the complainant entitled to priority consideration as set forth herein, it must submit to the Director, OEO, a written statement detailing the reasons for its decision, which the Director, OEO, will keep in the administrative file and make available to the complainant at his or her request. If the Director, OEO, determines that the Bureau's reasons for not selecting the complainant for the position are inadequate, the Director, OEO, may order the Bureau to place the complainant in the position. All requests for priority consideration shall be consistent with legal requirements for the position. There are no further appeals from the priority consideration process if the complainant is not selected.

C. Monetary awards, subject to the following:

- (1) Back pay and benefits computed pursuant to 5 U.S.C. § 5596 (5 CFR 550 Subpart H).
- (2) Reasonable attorney's fees, where back pay is at issue, as authorized by 5 U.S.C. § 5596. In all other situations, attorney's fees are not authorized.
- (3) Back pay and attorney's fees may not be awarded to applicants for employment.
- (4) Compensatory damages are not available to employees or applicants for employment for discrimination based on sexual orientation.

D. Cancellation of an unwarranted personnel action.

E. Expungement from the Bureau's records of any adverse materials pertaining to the complainant that relate to the discriminatory employment practice.

F. Full opportunity to participate in the employment benefit denied (e.g., training,

preferential work assignments, overtime scheduling), if the complainant is still a current employee, subject to the constraints of law.

G. Recommend that the Bureau take appropriate administrative or disciplinary action.

H. Commitment that the Bureau shall cease from engaging in the specific discriminatory employment practice found in the case.

7.13 Request for Reconsideration. If the complainant or Bureau is dissatisfied with the final agency decision, a Request for Reconsideration (RFR) may be filed with the Director, OEO. The RFR must be in writing and must contain arguments or evidence which establish that the final agency decision was erroneous because: (a) new and material evidence is available that was not readily available when the previous decision was issued; or (b) the previous decision involved an erroneous interpretation of material facts, or misapplication of established policy or procedures contained within this chapter and the decision is of such exceptional nature as to have effects beyond the actual case at hand.

The RFR, with supporting arguments or evidence, must be filed within 30 calendar days of the date the final agency decision is received. A complete copy of the RFR must be served on all parties listed in the final agency decision as having been sent a copy of that decision, and to the Director, OEO. Opposition to the RFR must be in writing and must be submitted within 30 calendar days from receipt of the RFR to the same parties who received the RFR. All RFRs and oppositions to RFRs must be accompanied by a certificate of service containing the date and manner in which service was effected and must be submitted to the Director, OEO, 1849 C Street, N. W., Washington, DC 20240. The Director, OEO, will issue the decision on the RFR no later than 60 days from receipt of the RFR and the supporting arguments.

7.14 Settlement Agreements. Each Bureau shall make reasonable efforts to settle complaints of discrimination, voluntarily and as early as possible in and throughout the administrative processing of the complaint, including the pre-complaint counseling stage. Any settlement agreement reached at any time in the process shall be in writing, signed by both parties, and shall identify the allegations resolved. A copy of the settlement agreement shall be given to the complainant, the manager responsible for implementing the settlement agreement, the EO Officer and the Director, OEO. All terms of the settlement agreement must be consistent with the remedies described in 373 DM 7.12 and otherwise shall comply with all Departmental policies, requirements, and legal authorities. Bureaus are strongly

encouraged to use ADR procedures to facilitate early resolution.

7.15 Compliance with Settlement Agreements and Final Agency Decisions.

A. Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, as described in 373 DM 7.14, shall be binding on all parties. The EO Officer shall maintain all documentation and records supporting compliance with the settlement agreement including records associated with expungement of the Bureau's files (see 373 DM 7.12F). If the complainant believes that the Bureau has failed to comply with the terms of a settlement agreement, the complainant shall notify the Director, OEO, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point where processing ceased. The Director, OEO, will issue a final agency decision on the breach claim within 60 days of receipt of the claim. If the Director, OEO, determines that the settlement agreement has not been complied with and the noncompliance is not attributable to acts or conduct of the complainant, the Director, OEO, may order such compliance or order that the complaint be reinstated for further processing from the point processing ceased. There are no further appeals from a final agency decision on a breach claim.

B. A final agency decision shall be binding on both the Bureau and the complainant. The Bureau shall report to the Director, OEO, and submit documentation supporting compliance with the final agency decision. If the complainant believes that the Bureau has failed to comply with the final agency decision, the complainant shall notify the Director, OEO, in writing, of the alleged noncompliance. The Director, OEO, shall respond to the noncompliance consistent with 373 DM 7.15A.

7.16 Relationship to Other Procedures. Nothing in this chapter shall abrogate the rights of any employee to file a complaint of discrimination against the Department within the purview of the Federal Sector Equal Employment Opportunity Complaint Procedures, 29 CFR 1614, or in an appropriate U.S. District Court. If the employee files a civil action in a U.S. District Court on the same matter pending before the agency, the administrative complaint will be held in abeyance until the U.S. District Court rules. When necessary, dual administrative processing may occur for complaints of discrimination filed pursuant 29 CFR 1614. To the extent possible and consistent with existing authorities, relevant Departmental policies and practices generally used in processing complaints of discrimination under 29 CFR

1614 also will be applied to processing complaints of discrimination based on sexual orientation. This may include, but is not limited to: granting employees a reasonable amount of official time; computation and calculation of dates for resolving timeliness issues; confidentiality of records; and the methodology for analyzing allegations of discrimination.

7.17 Management's Rights. Managers and alleged responsible officials shall have the same rights and opportunities to review documents, be made aware of allegations, and provide responses and evidence as are available to managers under 29 CFR 1614 and the implementing EEOC Management Directive, MD-110.

APPENDIX - Processing Chart for Complaints of Discrimination Based on Sexual Orientation