

# EEO COMPLAINT PROCESSING PROCEDURES

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## CHAPTER I - INTRODUCTION

### 1 PURPOSE AND SCOPE

As part of its commitment to provide a work environment free from employment actions and/or employment decisions based on race, color, religion, sex, national origin, age, disabilities, retaliation for prior equal employment activity, sexual orientation, genetic information, political beliefs, parental status, and marital status, the USDA herein establishes a system to process employment discrimination complaints, including procedures for offering and conducting Alternative Dispute Resolution (ADR) in employment discrimination complaints (Departmental Regulation 4710-1, USDA Alternative Dispute Resolution). It is USDA's objective and policy to resolve complaints, when possible, via informal or formal settlement negotiations with complainants. Agencies are primarily responsible for carrying out this policy. USDA may, at its election, provide assistance to agencies at any stage of the complaint process to facilitate an amicable resolution to all complaints. The resolution strategy of USDA and its use is explained in Sections 11 and 12 below.

### 2 SPECIAL INSTRUCTIONS/CANCELLATIONS

This manual supercedes and replaces DM 4300-1 dated October 18, 2000, which is hereby cancelled. The changes implemented in this manual concern the use of Alternative Dispute Resolution in the EEO complaint process. In addition, a number of minor style and typographic corrections have been made that do not affect the substantive processing of a complaint.

### 3 STATEMENT OF POLICY

Any employee who believes he/she has suffered in the terms and/or conditions of employment, due to an action and/or decision (including a failure to act or decide) by an official or employee of USDA, and believes

that this action and/or decision was motivated by a discriminatory animus based on his/her race, color, sex, religion, age (40 years of age or over), national origin, physical or mental disability, retaliation for prior equal employment activities, sexual orientation, genetic information, political beliefs, parental status, or marital status may file an individual complaint of employment discrimination in accordance with the USDA Equal Employment Opportunity (EEO) Employment Complaint Processing Procedures. Moreover, pursuant to 29 C.F.R. 1614.204, class complaints<sup>1</sup> of discrimination may be filed on the behalf of a group of employees, former employees, or applicants for employment who are alleged to have been adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or disability.

#### 4 AUTHORITIES

There are eleven bases of discrimination which are cognizable under the following statutes and Executive Orders:

##### a Statutory

- (1) Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination against individuals based on race, color, sex, national origin, religion, and reprisal.
- (2) The Age Discrimination in Employment Act (ADEA) of 1967, as amended, prohibits employment discrimination against individuals who are 40 years of age or older.
- (3) The Rehabilitation Act of 1973, as amended, prohibits employment discrimination against qualified individuals with physical or mental disabilities.
- (4) The Equal Pay Act, an amendment to the Fair Labor Standards Act, protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.

##### b Executive Orders

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<sup>1</sup> (**Note:** Further discussion relating to the regulatory requirements for class complaints will be addressed in Chapter XIII - Class Action Complaint.) A class complaint is a written complaint of discrimination filed on behalf of the class by the class agent. A class agent may file a class complaint on the bases of discrimination specifically identified herein, with the exception of sexual orientation, genetic information, marital status, political beliefs, parental status and reprisal. Complaints of marital status discrimination relating to a probationary separation may only be processed as an appeal to the Merit Systems Protection Board and may not be processed as a complaint within the USDA.

- (1) Executive Order 13087 provides that, as a matter of Federal policy, an individual's sexual orientation should not be the basis for the denial of an employment or promotional opportunity.
- (2) Executive Order 13145 (February 8, 2000) prohibits discrimination in Federal employment based on genetic information.
- (3) Executive Order 13152 (May 12, 2000) provides for a uniform policy within the Federal Government to prohibit discrimination based on an individual's status as a parent.

In addition to the above-noted eleven bases of discrimination, the internal policies within the United States Department of Agriculture (hereinafter referred to as the USDA) also prohibit employment discrimination based on marital status and political beliefs.

## CHAPTER II – GLOSSARY OF TERMS

## 1 GENERAL

The following words or acronyms have particular meanings when used in the context of the USDA Equal Employment Opportunity (EEO) Complaint System:

## 2 TERMS

- a Alternative Dispute Resolution (ADR) - Any of a number of conflict resolution techniques listed in DR 4710-1 which use a neutral third party to assist the complainant and agency in resolving EEO complaints, including, but not limited to, mediation, facilitation, and arbitration
- b Administrative Judge (AJ) - An individual assigned by the Equal Employment Opportunity Commission (EEOC) to conduct a hearing on the complaint if requested by the complainant.
- c Agency - One of the primary components (Administration, Office, Service, or Staff) of USDA.
- d Basis - The prohibited factors of discrimination (i.e., race, color, sex, age [over 40], religion, national origin, disability, parental or marital status, political beliefs, sexual orientation, genetics, or reprisal).
- e Complaint - An allegation, formal or informal, that an action or decision in USDA (if an individual complaint) or a policy or practice of USDA (if a class action complaint), which has personally affected an employee was discriminatory on a prohibited basis.
- f Complaint Process or System - The entire set of actions possible on an EEO complaint, including counseling, acceptance, rejection, dismissal, investigation, resolution, hearing, decision, appeal, and civil action.
- g EEO Counselor - An individual assigned to discuss and attempt to resolve informal EEO complaints within USDA.
- h Days – all timeframes referenced in days in this manual are calendar days.
- i Director of Equal Employment Opportunity (DEEO) - The DEEO is the designee of the Secretary of Agriculture responsible for USDA's EEO Complaint Program.
- j Equal Employment Opportunity Officer (EEOO) - The official, usually the agency head, responsible for the EEO program in each agency of USDA.
- k Equal Employment Opportunity Commission (EEOC) - The EEOC is the Federal



agency with the overall responsibility for implementing Title VII (Employment) of the Civil Rights Act of 1964 and other laws prohibiting discrimination in Federal employment.

- l Employee - An individual employed, previously employed, or seeking employment (applicant) in any position within USDA.
- m Formal Complaint - An allegation that was not resolved in counseling and which has been filed with the USDA for investigation and additional processing.
- n Informal Complaint - An allegation concerning any issue that is presented to an EEO counselor.
- o Issues - The action or decision (including a failure to act or decide) or a policy or practice of USDA that has affected an employee which is alleged to have been discriminatory.
- p Mixed Cases - An allegation of discrimination in a matter that is appealable to the Merit Systems Protection Board (MSPB); i.e., an adverse action, reduction in force, denial of a within-grade increase, alleged coerced separation of a non-probationary employee, or performance-based demotions and removals. Mixed cases may be either a mixed case complaint (processed initially within the USDA) or a mixed case appeal (processed initially at MSPB).
- q Resolving Official - The Agency Official designated to represent the agency at an ADR session, and who has been delegated full authority to settle the EEO complaint, including execution of a binding settlement agreement.
- r Responsible Management Official - The person named by the complainant or indicated by the record as responsible, in whole or in part, for taking or recommending (or failing to make or recommend) the action or decision that is the issue of the complaint.
- s United States Department of Agriculture (USDA) - The collection of all the primary components of the USDA and the individual component agencies themselves.

## CHAPTER III – GENERAL PROVISIONS FOR PROCESSING EEO COMPLAINTS

## 1 GENERAL

Any employee who believes he/she has suffered in the terms and/or conditions of employment, due to an action and/or decision, or failure to act or decide, by an official or employee of USDA, and believes that this action and/or decision was motivated by a discriminatory animus based on his/her race, color, sex, religion, age (40 years of age or over), national origin, physical or mental disability, retaliation for prior equal employment activities, sexual orientation, genetic information, political beliefs, parental status, or marital status may file an individual complaint of employment discrimination in accordance with the USDA Equal Employment Opportunity (EEO) Employment Complaint Processing Procedures. Moreover, pursuant to 29 C.F.R. 1614.204, class complaints<sup>2</sup> of discrimination may be filed on the behalf of a group of employees, former employees, or applicants for employment who are alleged to have been adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or disability.

## 2 COMPLAINANT RESPONSIBILITY

A individual who files a complaint must fully cooperate in the processing of the complaint, which includes providing specific responses to offers of resolution and providing requested information in a timely manner, if available. In addition, all individuals must provide his/her current addresses and telephone numbers and pertinent information relating to his/her representative. This includes communicating with the EEO counselor, the investigator, and any agency representative or caseworker. Complainants shall not delegate these responsibilities to a representative.

## 3 PROCESSING

USDA will process all complaints of employment discrimination as expeditiously as possible. All complaints of employment discrimination will be handled in a fair and impartial manner. [Relevant laws, regulations, and precedent decisions will be utilized where reasonable in context of the complaint administrative process.]

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<sup>2</sup> (Note: Further discussion relating to the regulatory requirements for class complaints will be addressed in Chapter XIII - Class Action Complaint.) A class complaint is a written complaint of discrimination filed on behalf of the class by the class agent. A class agent may file a class complaint on the bases of discrimination specifically identified herein, with the exception of sexual orientation, genetic information, marital status, political beliefs, parental status and reprisal. Complaints of marital status discrimination relating to a probationary separation may only be processed as an appeal to the Merit Systems Protection Board and may not be processed as a complaint within the USDA.

USDA will develop an evidence file upon which an individual formal complaint can be fully adjudicated on the merits. When a complaint is filed, all personnel and other records relating to the issues will be maintained in a confidential manner by the agency (irrespective of any other retention or destruction timetable) until the complaint is closed and no further avenue of appeal is available. In the event an agency claims pertinent records are lost or destroyed, an adverse inference may be drawn against the agency, unless the evidence of record clearly demonstrates that such action is unwarranted.

#### 4 ALTERNATIVE DISPUTE RESOLUTION

ADR refers to a variety of dispute resolution techniques that involve the introduction of a neutral third party into a dispute. The "Neutral" can play a variety of roles, including facilitating discussions, fact-finding, providing parties with a "reality check" on the merits and value of their claims, and assisting with creative problem-solving. The ultimate goal of the Neutral is to help the parties reach a resolution of their dispute.

Based on the circumstances of the individual's case, one or more of the following ADR techniques may be made available: mediation, fact finding, facilitation, Early Neutral Evaluation, non-binding arbitration, settlement conferences, ombuds, and med-arb. ADR in the EEO complaint process will adhere to the USDA ADR policy (DR 4710-1).

USDA will provide ADR programs for aggrieved individuals or complainants in both the informal and formal stages of the Equal Employment Opportunity (EEO) complaint process. Each agency that has complied with departmental regulations (DR 4710-1) requiring an ADR program will ensure that employees can raise issues of discrimination in those systems, if they choose to do so, at the informal, formal, or both stages of complaint processing. Agencies may limit the types of issues to be handled in the ADR program at either stage, but Agencies are encouraged to use ADR to resolve as many types of cases as possible. Employees who elect to use any USDA ADR program are not absolved from meeting any time frames of the EEO complaint process, unless an extension of time is granted in writing pursuant to a written request received before expiration of any time frame.

Election of ADR does not require a person to waive his or her right to an investigation or a hearing, or to appeal the final decision to the EEOC. While management must determine whether a given dispute is appropriate for ADR, it may not decline to offer ADR because of the complaint basis (race, color, etc.). The earlier ADR is offered, the more likely it will be successful.

ADR is voluntary for the aggrieved party or complainant. A complainant may request ADR efforts at any time during complaint processing, but the Agency may elect not to participate. If an Agency offers ADR to a complainant in writing and the complainant elects to participate in ADR, management's participation is required.

The Resolving Official designated by the Agency will have full authority to bind the

agency in a written agreement to resolve the complaint. A Responsible Management Official may not be the designated Resolving Official in the ADR session. Responsible Management Officials are encouraged to participate in the ADR session, where appropriate. Each situation should be evaluated on a case-by-case basis. Agencies should assess what outcomes they wish to achieve in ADR, especially in regard to future relationships, when deciding whether or not the Responsible Management Official participates.

## 5 FREEDOM FROM REPRISAL

An individual who files a complaint of employment discrimination or otherwise participates in any manner in the complaint process, including counselors, witnesses, representatives, investigators, and adjudicators, shall be free from restraint, interference, coercion, discrimination, and reprisal at any stage of the processing of the complaint or thereafter. Alleging discrimination to an agency manager, an EEO counselor, or the Office of the Special Counsel; filing a formal complaint or negotiated grievance alleging discrimination; serving as a counselor, witness, representative, neutral or adjudicator on complaints or negotiated grievances involving discrimination allegations, or acting in a capacity that fosters EEO activity, such as an Affirmative/Employment Program Manager are examples of protected EEO activities. Employees or applicants shall be free from any form of reprisal for engaging in protected equal employment activities. Allegations of harassment, restraint, interference, intimidation, coercion, or retaliation for these activities are considered allegations of reprisal. An individual identified in any manner as responsible, in whole or part, for the employment decision and/or employment action that is challenged in the complaint, or who recommended such action, shall not be subject to disciplinary or other action solely because a complaint has been initiated.

## 6 TIME LIMIT

An aggrieved individual must initiate contact with 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.

USDA shall extend the 45-day time limit when:

- a the complainant shows that: (1) he/she was not notified of the time limit, was otherwise unaware of the applicable time limit, and exercised due diligence in pursuing rights to challenge the action; (2) he/she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred and pursued the issue with due diligence upon learning of the action; (3) despite due diligence he/she was prevented by circumstances beyond his/her control from contacting the EEO counselor within the prescribed time limit, or, (4) for other reasons provided by the complainant, the USDA deems explanation sufficient; or.
- b the complainant submits a reasonable request, in writing, prior to the

expiration of the time limit, and to do so will not severely prejudice USDA or the rights of employees.

An aggrieved individual must file a formal complaint with the Office of Civil Rights within 15 calendar days of receipt of the Notice of Right to File. The formal complaint filing period may also be extended for equitable reasons (i.e., where agency officials intentionally mislead the complainant into inaction and untimely filing).

## 7 REPRESENTATION AND OFFICIAL TIME

a The complainant is entitled to be accompanied, represented, and/or advised at any stage of the process by another individual. The complainant is expected to answer personally all questions from the counselors and investigators and is responsible for compliance with the requirements of this part whether or not represented. Where complainant has a representative, all correspondence should be addressed to both the complainant and the designated representative, and documents given to the complainant will also be given to the representative. Oral discussion with a represented complainant may be undertaken without first contacting the representative, but the complainant must be given the opportunity to contact the representative and/or make the representative a party to the discussion before it proceeds. Where the representative is an attorney and the Office Of General Counsel (OGC) is representing the agency, the OGC representative will only contact the complainant through the representative. The complainant is not required to involve the representative in any communication with USDA. Where the representative is an attorney, service on the complainant of any document will be made by service on the representative. Agencies may prohibit a particular employee from acting as a representative on a particular complaint if:

- (1) there is a conflict of interest, or
- (2) the priority requirements of the agency would be harmed.

b The complainant, representative, and any witness or Responsible Management Official in active duty status, shall be granted reasonable official time to prepare and present a complaint or a response to inquiries involved in processing the complaint. The term "reasonable amount of official time" depends on the individual circumstances of each complaint.

Reasonable is defined as whatever is appropriate, under the factual circumstances presented in the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to an agency's request for information. The actual

number of hours to which the complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency, as well as the agency's need to have its employees available to perform their normal duties on a regular basis. The complainant and the agency should arrive at a mutual understanding as to the amount of official time to be used, prior to the complainant's use of such time. Ultimate authority for determining official time rests with the Agency.

The complainant and the representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of the tour of duty, when their presence is authorized or required by the agency or the EEOC during the investigation, informal adjustment, or hearing on the complaint. Whatever time is spent in the (official EEO) meetings or hearings is automatically deemed reasonable. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off duty day, the complainant or representative is entitled to official time, which may require that the agency pay overtime. In the alternative, the supervisor can, in advance and in accordance with Agency leave policy and practices, adjust the tour of duty when appropriate or necessary.

Preparation does not include conducting independent inquiries or gathering data or testimony, but does include activities reasonably related to and anticipated in regard to responding to official requests for information during any complaint processing stage. Since USDA conducts the required investigation, official time is not necessary or reasonable for the purpose of independently obtaining evidence or statements on the complaint issue. Responsible Management Officials, witnesses and their representatives are subject to the same rules on official time as the complainant.

## 8 ACCESS TO RECORDS

EEO counselors, EEO investigators and the Office of Civil Rights are to be allowed access to any agency records requested, and are considered routine users of the Privacy Act information. EEO counselors, EEO investigators and CR are obligated by the Privacy Act not to improperly release protected information. Questions concerning the release of information should be directed to the agency's Freedom of Information Act (FOIA)-Privacy Act Officer or the Office of Civil Rights FOIA-Privacy Act Officer. EEO counselors and investigators experiencing difficulty in obtaining requested information should immediately report the matter to the agency's EEO Manager or the Employment Complaints Division, Office of Civil Rights. Refusal to grant an EEO counselor, EEO investigator, or CR access to requested records will establish a rebuttable presumption of interference in the complaint process. The EEO Director may require appropriate corrective actions in cases of interference in the complaint, including the consideration by authorized individuals of disciplinary action

against the offending individual.

## 9 SHARING INFORMATION

Any request for information from the complainant's file, or request for use of such information, that is not already authorized in this chapter, must be forwarded to the Office of Civil Rights for processing as a FOIA request. However, in complaints that are open and not yet decided, release of documents under FOIA is not deemed appropriate because it would have an adverse impact on the decision process of the complaint. 5 U.S.C. 552(b)(5) further excludes interagency or intra-agency predecisional documents, and section (b)(7) excludes documents that would interfere with law proceedings.

## 10 RESOLUTION STRATEGY

In considering the resolution of complaints, a reasonable analysis is necessary to determine what offer of settlement is appropriate in each individual case. To make this determination, agencies and complainants must use the factors of this resolution strategy and apply them in accordance with the concepts involved. The factors of this resolution strategy are: (1) the underlying interest involved, (2) cost, (3) impact on relationships, and (4) risks. Application concepts are: application of the resolution strategy to each available option, disregard for the merits of the case, no set formula to weigh factors, and justifying adjudication through remaining resolution options.

## 11 FACTORS OF THE RESOLUTION STRATEGY

- a Identification of the underlying interests. The first step in deciding whether and how to resolve a dispute is usually the recognition of the important interest involved in the case. For management, this may be hiring/promoting the best qualified, correcting/preventing inappropriate behavior/performance, achieving program objectives, encouraging/rewarding good performance, or minimizing workflow disruption. For complainants, this may be career advancement, remaining competitive with others, keeping a good reputation, or achieving more job satisfaction. The objective for both management and complainant in resolution becomes retaining as much control over these important interests as possible. Adjudication removes all control from both parties in the dispute and hands it to a third party. Settlement is the method that allows both parties to keep control of their own interests and fate.
- b Cost. USDA managers should strive to minimize costs, especially those that are not directly tied to program objectives, such as complaint processing costs. In situations in which two viable options to resolve the complaint are deemed acceptable to management, the lower cost option is generally preferable. Long-term total average costs should be fully considered. For example, if a complete remedy is estimated to be \$6,000, settlement is possible at \$4,800, and adjudication will cost only \$3,000 it may appear that adjudication is favored.

However, it is only a prudent decision when one prevails on 70 percent of the complaints adjudicated. Thus, settling 10 complaints may cost \$48,000. In contrast, adjudicating 10 complaints (\$30,000) and losing 30 percent of the complaints (\$18,000) would also cost approximately \$48,000. Therefore, the following cost elements should be carefully considered:

- (1) determine the amount at risk;
  - (2) determine the average amount lost (% risk times amount at risk);
  - (3) determine the cost of processing the complaint, and
  - (4) determine the cost of resolution,
- c Impact on relationships. Maximizing positive relationships and minimizing adverse impacts on relationships are important considerations. How management views the complaint, how peers view management or the complainant, the impact of resolution on others in the work site, and the impact of processing on coworkers, friends, and family are all valid considerations.
- d Risk analysis. In balancing the first three factors, the strengths and weaknesses of the case facts, theory of discrimination involved, pattern of actions taken, and level of documentation available must be assessed to determine the risk of loss. Risk may be stated mathematically (30 out of 100, 30 percent, 30/70) or generically (low, moderate, average, high, excessive). High risk may make settlement imperative for either party. Low risk means settlement would be on favorable terms. Settlement is always preferred, on the right terms. There is no guaranteed winner or loser.
- e Application of the strategy factors.
- (1) Applying the strategy to options. In each case, there are many potential resolutions, ranging from no relief (very rare) to full relief (very rare). Each option has a different impact on the underlying interests and relationships, cost a different amount, and affects risk differently. In every case, there is a resolution that is reasonable for both parties. The strategy is used to identify it, determine the bargaining parameters, and justify the resolution.
  - (2) The merits of the claim are not a factor. Whether one is right or wrong is not a factor in managing resolution. If one goes to litigation it is important that one have a high probability of success, maximizing control over interest. Costs, relationships, and risk are what is important in resolution. Every case has strengths and weaknesses on both sides. For those managers who wish to litigate for a moral principle, the overriding principle is what is best for the organization as a whole, not the personal feelings of the individual. If one is absolutely right in the decision being challenged, and one can achieve the interests involved by agreement, it is



generally against principles to risk those interests in the hands of a third party adjudicator solely to be declared right.

- (3) There is no formula to weigh the factors. Normally, the underlying interest is the most important factor in the case. However, sometimes relationships or risks predominate. In no case is the cost to be the only factor or the most important factor. Parties should work to minimize the cost, but not at the expense of risks, interests, or relationships.
- (4) Use the strategy to justify litigation. Once an acceptable resolution is identified and bargaining parameters established, the key is obtaining the agreement of the other party. If this is not possible, the demands of the other side need to be analyzed under the strategy to ascertain their impact on interests, costs, relationships, and risk. Where significant drawbacks exist, the resolution strategy then justifies going forward to adjudication. Where benefits outweigh drawbacks, then resolution on those terms is still preferable to adjudication.

## CHAPTER IV - INFORMAL EEO COMPLAINT PROCESS

### 1 PARTICIPATION IN INFORMAL PROCESS REQUIRED

As a precondition to filing a formal complaint, all complainants **MUST** make contact with a USDA EEO counselor and participate in the informal EEO process, including providing specific details on the issues presented, responding to offers, and identifying relief sought. USDA has established a full-time EEO Counselor Program. EEO counselors may not have any assignments other than counseling or dispute resolution activities. Training assignments concerning the EEO complaint process or dispute resolution activities are acceptable. EEO Counselors may also serve as ADR neutrals on cases other than any case on which they have been an EEO counselor. Only issues raised with an EEO counselor may be filed as a formal complaint.

### 2 A COMPLAINANT MAY AMEND A PENDING COMPLAINT

The complainant may add or bring up additional issues with the EEO counselor once counseling has been initiated.

### 3 AUTHORITY TO RESOLVE

Agencies are authorized to resolve complaints raised with an EEO counselor to the same extent and with the same relief, as appropriate, as in the formal complaint process (Appendix A of 29 C.F.R. Part 1614, EEOC Management directive 110, and Chapters X, Remedial Actions, and IX, Resolution below, apply). Maximum relief at any stage of the process is the relief that could be provided by any adjudicator of a formal complaint, including the maximum possible relief.

### 4 THE INFORMAL EEO COUNSELING PROCESS

- a Initiation of Process. The complainant must contact an EEO counselor within 45 days of the occurrence of an alleged discriminatory event or personnel action to initiate the informal EEO complaint process. In the case of a class action, the class agent must initiate the informal EEO complaint process. In the case of a class action, the class agent must initiate contact with the EEO counselor within 45 days of the date the specific policy or practice affected the proposed agent.
- b Coverage of the informal EEO counseling process. The informal complaint system covers individual and class complaints of discrimination based on race, color, religion, sex, national origin, age, (40 years of age or older), physical or mental disability, sexual orientation, genetic information, marital or parental status, political beliefs and reprisal for previous EEO activity. Only USDA employees but not applicants for USDA employment may initiate a complaint under this manual based on sexual orientation, genetic information, marital or parental status, and/or political beliefs. Claims of discrimination due to political

beliefs are only applicable to competitive service positions, and are not applicable to excepted service or non-career positions.

## 5 ROLE AND RESPONSIBILITY OF THE EEO COUNSELOR

The EEO counselor has six specific defined duties that must be performed for each completed counseling action where an informal resolution is not achieved (see Informal Checklist in the Appendix). The duties are:

- a Advise complainant (**orally and in writing**) about the EEO complaint process under 29 C.F.R. Part 1614, **ADR options pursuant to Chapter V, and the procedures for requesting ADR**, and, where applicable, the various options and/or election requirements for mixed cases, negotiated grievances processes, and ADEA procedures;
- b Assist the complainant in identifying and clarifying the issue(s) and basis(es) of the potential complaint;
- c Conduct a limited inquiry for the purposes of furnishing information for counseling and resolution efforts, and determining jurisdictional questions if a formal complaint is filed;
- d Seek resolution of the complaint at the lowest possible level. If EEO counseling proceeds past the initial contact and record review stage, EEO counselors must contact Responsible Management Officials and orally inform them of the issues of the complaint, the basis of discrimination alleged, the processing steps of a complaint, and their rights at each stage of processing. After this briefing, the EEO counselor is to ascertain any and all reasons for the decision being questioned, and any change to those decisions that the Responsible Management Official will consider. The Responsible Management Officials may offer any additional information they consider appropriate to the EEO counselor. If the complainant does not accept the explanation or record information in resolution of the complainant, the EEO counselor will obtain an offer from the lowest level of management possible, using the resolution strategy, to present to the complainant.
- e Document all closures of the counseling contact in writing, with a copy to the complainant, whether the closure is a resolution by withdrawal or settlement, or a right to file a formal complaint if resolution efforts fail, and,
- f Prepare a report sufficient to determine that required counseling actions have been taken and resolve any jurisdictional questions that may arise if a notice of a right to file a complaint is issued (see EEO Counseling Checklist in the Appendix).

## 6 RIGHTS OF COMPLAINANT

- a At the initial counseling session, the EEO counselor will provide complainant with a written notice of the complainant's rights under the EEO processing system (See Counseling Checklist in the Appendix).
- b The counselor will explain the complainant's right to anonymity and ascertain whether the complainant wishes to remain anonymous.

## 7 APPROACH/ACTIVITIES DURING EEO COUNSELING PERIOD

### a Discussion with Complainant.

- (1) Help the complainant sort out the issues and the exact circumstances surrounding the problem or the alleged discrimination. Gather any information on the relationship and/or history between the complainant and the official or agency alleged to have discriminated.
- (2) Find out what specific relief the complainant desires.
- (3) Identify any mitigating issues, witnesses, or other factors that can allow a thorough understanding of the situation.

### b Discussion with agency officials.

- (1) Explain complainant's allegations and summarize the reasons or facts complainant gave for believing there has been discrimination. (**Note:** The complainant's name can be used only if anonymity has been waved in writing.)
- (2) Explain counselor's role and the complaint process.
- (3) Explain various resolution techniques and options and assist the parties, if they are willing, to select one.
- (4) Obtain articulated reasons for the actions or decisions about which the complainant has raised.
- (5) If counseling proceeds past the exchange of information between the complainant and the agency, obtain an offer from management officials to present to the complainant.
- (6) Present any counter offers to management for consideration.

## 8 ELECTION OF ADR

- a Agencies shall offer ADR, with limited exceptions, as an alternative to traditional counseling in the informal EEO complaint process. There are cases where ADR need not be offered, but decisions not to offer ADR must be fair, equitable, and consistent with Departmental ADR policy. When ADR is offered, the complainant has the option of choosing any available ADR program in USDA that uses neutrals qualified to provide ADR services in EEO complaints. However, if the complainant chooses an ADR program other than the one that normally services employees in the complainant's Agency, the selected program is not required to provide the ADR service. The complainant has 7 days to exercise an option, in writing to the EEO counselor, after the EEO Counselor has offered the option of ADR or traditional counseling. If the complainant does not respond to the EEO counselor within 7 days from the initial notice of the availability of ADR, traditional counseling is automatically elected. The pre-complaint processing period is automatically extended to 90 days (see 29 C.F.R. 1614.105(f)) to accommodate the ADR process if the complainant selects ADR.

The ADR effort will be conducted under the policies and procedures outlined in the USDA ADR policy (DR 4710-1) and any applicable Agency policy or procedure. If the complainant elects ADR and it is provided, the EEO counselor on the case is precluded from serving as the ADR neutral on the case, and may make no further efforts to counsel the complainant.

- b If the ADR session is successful, a written agreement will be prepared. This agreement will be signed by the management official having authority to agree to the terms, and the complainant. The neutral ADR provider will forward the agreement to the ADR Program office for appropriate distribution. The EEO Counselor must be informed of the resolution. The settlement agreement will be forwarded to the Office of Civil Rights (CR), where it will be recorded and monitored.
- c If no agreement is reached within the remaining time frame for EEO counseling, the ADR session is concluded. The ADR Program staff will notify the EEO Counselor of the non-resolution, and the Counselor, in turn, will issue the Notice of Right to File a discrimination complaint required by C.F.R. 1614.105(d). The entire process must be completed within the 90 day extended counseling period.

## 9 PROBLEM RESOLUTION

- a Problem resolution in the informal EEO process means that the complainant and the agency have come to terms with a problem and agree on a solution.

- b Any resolution reached by the parties must be reduced to writing and signed.

## 10 EEO COUNSELOR'S REPORT

If counseling does not resolve the complainant's issues within the 30-day time period, or any extension arranged with the complainant (up to a total of 90 days), the EEO counselor will issue the Notice of Right to File a Formal Complaint (NRF) as described in 29 C.F.R. 1614.105(c). When the complainant files a formal complaint, the Office of Civil Rights will notify the Agency and the EEO counselor must complete and furnish to the Office of Civil Rights and the complainant the counseling report (as described in the Counselor Report Review Checklist in the Appendix) within 15 days of the notice to the Agency of the filing of the complaint. Because the narrative report will become a central document in the complaint file, it is vital for this report to completely, accurately, and clearly describe the complaint and the nature of counseling provided. The narrative report form is divided into sections, each of which describes a specific piece of information about the complaint and the counseling effort. The narrative report should contain only relevant information. As the narrative report is a concrete reflection of the quality of the counseling provided, counselors should take care to ensure that the report submitted is correct, complete, and legible.

The Counselor's Report should include the following:

- a Complainant contact information;
- b Chronology of EEO counseling;
  - (1) Date of alleged discriminatory event;
  - (2) 45<sup>th</sup> day after the event;
  - (3) Date of initial contact;
  - (4) Date of initial interview;
  - (5) Reason for delay contact, if appropriate;
  - (6) Date of NRF, and (if known)
  - (7) Date NRF received.
- c Basis(es) for alleged discrimination;
- d Specific issues alleged to have been discriminatory;
- e Remedy requested;
- f EEO Counselor's Checklist Advising of Rights and Responsibilities (see Forms section);
- g Substance of EEO counselor's inquiry;
  - (1) Information from documents reviewed,

- (2) Explanation and comments from personal interviews and contacts.
- h Summary of informal resolution attempt, including information given to the parties;
- i The EEO counselor's name, date, and signature).

## 11 NOTICE OF RIGHT TO FILE

The EEO counselor must conduct the final interview with the complainant and issue the written notice of a right to file a formal complaint (with the 15 day time limit and the address of ECD) within 30 days of the date the complainant brought the matter to the attention of the EEO counselor, unless the complainant agrees in writing to extend the counseling period for up to an additional 60 days.

## 12 TRAINING

The EEO counselor will receive annual training designed to maintain and improve their knowledge of EEO and Federal personnel laws, regulations, and practices, and their skill in mediation and resolution. The Office of Civil Rights may require particular training for the EEO counselors from time to time.

## 13 REPORTING CONTACTS

Each counseling contact must be immediately reported to the Office of Civil Rights as soon as it is initiated, and be updated when significant events occur, either by the EEO counselor or through the agency Counseling Program Manager. A contact involves any question about a decision or action that has affected the individual raising the question. Multiple questions or decisions may be raised in a single contact. The contact report will identify the issues presented, bases or factors of discrimination alleged, the agency involved, and date of contact. When ADR is offered or approved after the Complainant's request, the contact report will also identify the date of the offer or approval of the request, and the date of any election or request of ADR. The EEO counselor will also report, with a copy of the written closure, all closing actions, including the amounts of any monetary payments made by any agency officials to resolve complaints in the informal stage.

## 14 COOPERATION

Employees of USDA are required to cooperate with the EEO counselor assigned to an EEO complaint. This includes answering all questions asked and providing all documents requested. Employees will deal directly with the EEO counselor when requested, whether or not represented. Failure of complainants to cooperate with the EEO counselor will be documented as a withdrawal from EEO counseling. Failure of any other employee to cooperate with the EEO counselor may be grounds for disciplinary action, up to and

including removal from service. In addition, an adverse inference may be drawn in any adjudication of the matter. All witnesses will be free from any interference, restraint, coercion, or reprisal for their cooperation.



## CHAPTER V - FILING AN INDIVIDUAL COMPLAINT

- a Time limits. A formal complaint must be signed by the complainant and filed in writing within 15 days of receipt of the Notice of Final Interview with the EEO counselor. A complaint is deemed filed on the date postmarked, if addressed to the official designated to receive complaints; or, if not postmarked, on the date received by the office of such a designated official. For purposes of timeliness, in the absence of a returned receipt, the USDA will presume that the Notice of Final Interview was received by the complainant within 5 calendar days of mailing.
- b Location. All formal complaints must be submitted to the Director of the Office of Civil Rights. No other office is authorized to receive formal complaints, and filing with any other office does not toll the necessary time frames. A complaint is filed on the date complete information, as required by regulations, is actually received by the Office of Civil Rights (CR), and all time frames for processing begin from that date.

CR prepares an acknowledgment letter and mails it to the complainant and the representative. A copy of the acknowledgment letter, including the complaint, is also forwarded to the agency's EEO complaint processing office. The letter of acceptance (see d) may serve as the acknowledgment letter if mailed within 30 days from the filing of the complaint.

- c Complaint content. A complaint must include:
- (1) The complainant's name, address, and telephone numbers;
  - (2) The name, address, and telephone number of any representative;
  - (3) A specific description, including the dates, of the decision involved in any individual complaint or the policy or practice and incident of application in any class complaint;
  - (4) The agency that made the decision or applied the policy;
  - (5) The basis on which discrimination is alleged, and

The name of the EEO counselor contacted. The Office of Civil Rights may prescribe a form for use in filing an EEO complaint with USDA.

- d Acceptance. The Director, Office of Civil Rights, or a designee, shall accept complaints that are timely submitted and covered by this chapter (see Acceptance/Dismissal Checklist in the Appendix). The assigned staff member identifies the accepted issues, the appropriate statement of work for the investigation, and any background issues. Complainants will be notified of the acceptance and all

administrative and legal rights to which they are entitled **as well as the opportunity to request ADR (see Chapter VI, ADR) as a means of resolution, and include a detailed explanation of available ADR options.** The agency will be furnished a copy of the letter of acceptance. If the initial material submitted as a complaint is not complete, CR will request that the complainant clarify the complaint and/or provide the missing material and allow 15 days for its submission.

- e Dismissal. A complaint that is not properly filed will be dismissed by the Director, Office of Civil Rights (see Dismissal Checklists in the Appendix). A complaint will be dismissed if:
- (1) the issue was not brought to the attention of an EEO counselor or submitted formally within the prescribed time limits, unless the time limits are extended and the issue is not remanded for counseling;
  - (2) the action or decision, or the factor or basis alleged, is not within the control of USDA or the scope of this appendix;
  - (3) the action or decision involved in the complaint is moot and there is no further potential relief available through the complaint process (when two conditions are satisfied): There is no reasonable expectation that the alleged violation(s) will recur; and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.
  - (4) it sets forth an issue identical to a complaint that is pending or that has already been decided (such as in a complaint within USDA, or under a negotiated grievance procedure that covers discrimination allegations, or as an appeal to the MSPB, or as a civil action in a Federal Court).
  - (5) the issues deal with a proposed action that is nonspecific to the complainant;
  - (6) the complainant fails to prosecute the complaint after being provided 15 days notice of the requirement to proceed and the potential dismissal;
  - (7) the allegation concerns the processing of a previous complaint (unless the allegation is consolidated with the previous complaint), or
  - (8) there is a clear pattern of abuse of the EEO complaint system. A dismissal is a final decision and will comply with the appropriate requirements (see Chapter VIII, Final Decisions).
- f Amendments. A complainant may amend a formal complaint, either before or after acceptance, to add additional factors or bases. Complainants may request to add additional issues to complaints, but only if each additional issue has been

presented properly to an EEO counselor. An additional incident cited as evidence in support of previously accepted issues does not need to be discussed with an EEO counselor to be reviewed in the complaint. USDA may, in its discretion, join individual complaints from the same complainant or from different complainants on the same issue for processing. CR will notify complainants and agencies of such actions. When a complainant wishes to amend a complaint after the initial complaint is filed, USDA will determine, on a case-by-case basis, how any additional issues will be processed and notify complainants and agencies.

At anytime prior to the conclusion of the investigation, a complainant may amend a pending EEO complaint to add claims that are like or related to those claim(s) raised in the pending complaint. The complainant is not required to seek EEO counseling on these new claims. After the complainant has requested a hearing, he or she may file a motion with the EEOC AJ to amend the complaint to include claims that are like or related to those raised in the pending complaint.

- a When a complainant raises a new incident of alleged discrimination during the processing of an EEO complaint, it must be determined whether this new incident:
  - (1) provides additional evidence offered to support the existing claim, but does not raise a new claim in and of itself;
  - (2) raises a new claim that is like or related to the claim(s) raised in the pending complaint, or
  - (3) raises a new claim that is not like or related to the claim(s) raised in the pending complaint.
- b In order to facilitate such a determination, the complainant must submit a letter to the Employment Complaints Division, Office of Civil Rights (ECD) specifically describing the new incident.
- d If the ECD concludes that the new incident(s) raises a new claim, but that the new claim is like or related to the claim(s) raised in the pending complaint, the pending complaint will be amended to include the new claim. The ECD will also send a copy of the letter to the EEO investigator with instructions to include the new incident(s) in the investigation.
- e If ECD concludes that the new claim raised by the complainant is **not** like or related to the claim(s) raised in the pending complaint, the complainant will be advised in writing that he/she must seek EEO counseling on the new claim and the applicable time limit. The postmark date of the letter from the complainant would be considered the actual date for the time computation purposes used to determine if the initial EEO counselor contact was timely in accordance with the EEOC regulations. Actual contact with a counselor will initiate the counseling time frames in EEOC

regulations.

- g Immediate agency responsibilities once an EEO complaint is accepted. The agency is responsible for ensuring that all Responsible Management Officials are notified of any accepted issues and the procedures involved in processing the complaint. The agency is required to retain records relating to the action involved, irrespective of any other retention schedule regulations. Willful failure to retain records will result in an adverse inference being drawn by the Office of Civil Rights or the EEOC with regard to the actions at issue.
- h Continuing violations. A complainant may also proceed with a discrimination claim where some or all of the discriminatory acts took place more than 45 days prior to contact with an EEO counselor by alleging and proving that the alleged discriminatory violation constituted a continuing violation.@ A continuing violation is a series (serial violation) of related acts, one or more of which falls within the 45-day limitation period, none of which is significant enough by itself to trigger the need to initiate the complaint process to protect an individual's rights. Under a Aserial violation@ theory, a complainant must show that:
- (1) there are a series of related acts, at least one of which occurred within the 45-day limitation period, and,
  - (2) The untimely and timely acts are sufficiently related by a common nexus. The key factors in determining whether a series of acts are sufficiently related include:
    - (a) subject matter;
    - (b) frequency (are the acts recurring or are they isolated?);
    - (c) permanency (were the acts of sufficient impact that an exercise of a right to challenge should have occurred), and
    - (d) the involvement of the same individuals or the maintenance of a practice concerning the issue

## CHAPTER VI - ALTERNATIVE DISPUTE RESOLUTION

### 1 OPPORTUNITY

The complainant will be notified in the acceptance letter of any Agency or Department ADR process available during the formal complaint processing. For ADR options on Class Complaints, see Chapter XIV in this manual. The EEO process to investigate individual EEO claims is separate and still be conducted in accordance with 29 CFR 1614.108. If no resolution is reached in any ADR effort, the case will be processed to closure under the regulations. The notice of an opportunity for ADR will note:

- a An extension of complaint investigation time, up to 90 days, is available in order to accommodate ADR.
- b In the event that a resolution or settlement is reached in ADR proceedings, the case will be closed and ECD will discontinue any investigation.
- c USDA ADR policies (DR 4710-1) and regulations will be followed in providing ADR on formal EEO complaints.
- d The ADR process is voluntary and confidential.
- e A contact point with phone number to obtain additional information about any available ADR process

### 2 OFFER

ADR is voluntary for the complainant. A complainant may request ADR efforts at any time during formal complaint processing, but the Agency may elect not to participate. However, if the Agency formally offers a complainant ADR on a complaint, management's participation is required once the complainant has responded to the offer and selected ADR.

## CHAPTER VII - INVESTIGATION

## 1 NOTICE

The Office of Civil Rights will notify the complainant and the agency of the accepted issues and obtain an investigation of those issues.

## 2 COVERAGE

The Office of Civil Rights will arrange for an investigation into the issues of the complaint. A contractor or USDA employee may conduct the investigation. The methods of investigation include direct examination, fact finding or other oral conferences, an interrogatory, request for admissions or position statements, or any combination of the above. The investigator is responsible for obtaining information that is material, relevant, and reliable. This includes:

- a comparative evidence between the complainant and similarly situated employees;
- b statistical evidence which may raise the inference of discrimination, and
- c direct evidence, such as testimony and other direct evidence of motive (ie., policy, regulations).

The investigative report will also include: all documentary evidence concerning the accepted issues; sworn testimony concerning the reasons for the actions included in the accepted issues; all evidence that supports or refutes testimony concerning the reasons for the actions included in the accepted issues, or stated reasons themselves, and all evidence that supports or refutes the specific evidence presented by the complainant in support of the allegations. In addition, witnesses shall be identified as belonging or not belonging to complainant's basis grouping. Where names of employees are removed from a statistical compilation or any supporting documents, labels or other identifiable notations will be used instead, and will be consistent throughout the investigative report. The Director of the Office of Civil Rights will be furnished a key to the substituted labels or notations.

## 3 SURVEY

Relevant general statistical information shall be obtained and recorded in the investigation. The investigation will also include a review of the treatment of members of the complainant's group in the organization segment responsible for the matter giving rise to the complaint, and any policies or practices relevant to the accepted issues which may constitute discrimination. This statistical information is not limited just to the type of issue involved in the complaint. The purpose is to provide statistical information of the general treatment of the complainant's group by the organization.

#### 4 BACKGROUND

The Office of Civil Rights will make reasonable attempts to provide already available statistical data when requesting an investigation. To assist in this matter, agencies may be requested to provide a copy of the affirmative employment plan, if any, and the most recent minority group statistics report, if any, for the unit involved in the complaint.

#### 5 IMPARTIALITY

The investigation will be conducted impartially. Information that the complainant or any Responsible Management Officials wish to present will be received by the investigator and submitted with the report. The investigator will include all other relevant information received in the report, and list any information received but excluded as not relevant. Any witnesses will be allowed to make corrections or additions to their sworn statements. The investigator will note for the record any substantial variation between oral and written statements from a witness.

#### 6 COOPERATION

Employees of USDA are required to cooperate with the investigators assigned to investigate an EEO complaint. This includes answering all questions asked, providing all documents requested, and expeditiously reviewing and signing an affidavit. Employees will deal directly with the investigator when requested, whether or not represented. Investigators will provide an opportunity for representation. Failure to cooperate with the investigator may be grounds for disciplinary action, up to and including removal from the service. In addition, an adverse inference may be drawn in any adjudication of the matter. All witnesses will be free from any interference, restraint, coercion, or reprisal for their cooperation in the investigation. Where an agency official believes that the investigation is exceeding authorized parameters, cooperation is expected until the Office of Civil Rights resolves the question. Such questions should be referred electronically to the Office of Civil Rights to expedite resolution.

#### 7 RESPONSIBLE MANAGEMENT OFFICIALS

Agencies are expected to notify Responsible Management Officials of the accepted issues when a complaint is accepted. At the time the official is being interviewed, and any time thereafter that new or additional information is developed, any Responsible Management Officials will be orally informed of relevant allegations in sufficient detail to articulate any and all reasons for the challenged actions. The Responsible Management Official will be provided sufficient description of the complaint issues to ensure that relevant information will be placed in the record if known or available.

#### 8 DISTRIBUTION

The Office of Civil Rights receives and logs the draft investigative report from the

investigator. A specialist reviews the draft for coverage of issues and completeness (including general adherence to the statement of work), sanitization, legibility, and full review of the background and reasons presented for the challenged actions (see Issues checklist in the Appendix). The specialist will request supplemental work if the report is deficient. If the report is accepted as final, the Office of Civil Rights will distribute it to the complainant, representative, and the agency. The agency and complainant will then be provided an opportunity to supplement the report with comments or evidence pertaining to the accepted issues.

## 9 ACCESS TO REPORT

The investigative report will be utilized by the agency solely in attempts to resolve the complaint, including mixed case complaints or appeals, or to address other problems developed in the investigation. Routine transmittal of the report (or excerpts) to individuals or units not responsible for complaint processing (or resolution of other problems identified) is not permissible without the approval of the Office of Civil Rights.

## 10 SUPPLEMENTAL INVESTIGATION

When an agency or the complainant wishes additional investigation, their request should be sent to the Office of Civil Rights within 7 days of receipt of the initial report, with a copy to the other party. The Office of Civil Rights will determine:

- a whether the additional requested information is required and, if so,
- b the manner in which the information will be obtained and added to the file. The Office of Civil Rights will distribute supplemental investigation in the same manner as with the initial investigation.

## 11 COMPLETION OF THE INVESTIGATION

The Office of Civil Rights will add any submission received from the complainant and agency to the file and notify both the complainant and agency of the completion of the investigation, with copies of any submission, by the 180<sup>th</sup> day from filing, unless the complainant has agreed to an extension under 29 C.F.R. 1614.108(e). Upon completion of the investigation, the complainant is provided a copy of the report of investigation (ROI) for review and resolution attempts. The complainant has 30 days from the receipt of the ROI to request a decision on the complaint after a hearing [except in mixed case complaints (Chapter XVI, Special Provision) or cases solely involving the bases of marital or parental status, genetic information, political beliefs or sexual orientation (Chapter VII, Hearings)], or to request a decision on the record. If, within 30 days from the receipt of the ROI, the complainant does not request a hearing, the Director of the Office of Civil Rights will issue the final agency decision (FAD) on the record (Chapter VIII, Final agency Decision).



## 12 ADEQUACY OF THE ROI

An investigation is adequate if it contains sufficient information to address each accepted issue and basis in the complaint. The investigator is authorized to investigate only issues that have been specifically accepted by the agency in the letter of acceptance. An adequate file meets both substantive and procedural standards and is presented in an appropriate format. To determine the sufficiency of the file, the reviewer must ensure whether the file contains sufficient evidence to address each element of the legal analysis appropriate to the accepted issues, i.e., enough information to establish the *prima facie* case, sufficient information to present management's articulated reasons or other defenses, and to allow for analysis of pretext (see Issues Checklist in the Appendix).

## 13 EVIDENTIARY CONSIDERATION

Where an allegation of discrimination has been made, the facts must initially establish that there is some substance to the allegation. In order to accomplish this, the facts must establish a *prima facie* case of discrimination. This means that there must be material or relevant evidence such that, were it not rebutted, the trier of the fact could conclude that discrimination did occur. Then the record must contain an articulated legitimate, nondiscriminatory explanation for the employment decision. Once the agency has articulated such a reason, the question becomes whether the proffered explanation was the true reason for the agency's decision, or merely a pretext for discrimination. Disparate treatment is the most easily understood type of discrimination. The employer simply treats some individuals less favorably because of their race, sex, etc.

Material evidence relates to one or more of the issues raised by the complainant. To determine what constitutes material evidence, the investigation must be clear as to the theory of discrimination at issue, the bases, and issues of the complaint. If these are correctly identified, it is not that difficult to determine whether evidence is material.

Relevant evidence is that which tends to prove or disprove an issue raised by a complainant or a reason articulated by management. The relevance of evidence is testable based on whether the file has correctly identified the theory of discrimination, the bases of the alleged discrimination, and the issues raised in the complaint.

Evidence is reliable if it is dependable or trustworthy. The more the adjudicator feels that a specific piece of evidence is trustworthy, the higher degree of reliability and the more weight can be ascribed to the particular piece of evidence. While hearsay testimony is admissible in the administrative forum, the degree to which an affiant has actually witnessed an event relevant to the issues and/or bases in the complaint also affects reliability, and hence, the weight to be accorded with his or her testimony. Reliability is a standard to be used in determining the weight a particular piece of evidence should be given compared to other evidence gathered during the investigation.

## CHAPTER VIII - HEARING

## 1 GENERAL

When a complainant requests a hearing on his/her complaint, the EEOC will appoint an EEOC AJ to conduct a hearing. Upon appointment, the EEOC AJ will assume full responsibility for the adjudication of the complaint, including overseeing the development of the evidence of record. An EEOC AJ, or the hearing examiner with appropriate security clearances, will conduct the administrative hearing.

After review of the complaint file, the EEOC AJ may:

- a Dismiss the complaint within his/her jurisdiction pursuant to 29 C.F.R. 1614.107(a) on his/her own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint;
- b Conduct the administrative hearing, or
- c Render a decision without a hearing, if some or all material facts are not in genuine dispute and there is no genuine issue as to credibility.

Anytime after the filing of the formal complaint, but no later than the date an EEOC AJ has been appointed to conduct the hearing, the agency may make an offer of resolution to a complainant. The offer of resolution must be in writing and must include a notice explaining the possible consequences of failing to accept the offer of settlement. The agency's settlement offer, to be deemed effective, must include attorney's fees and costs, if the complainant is represented by an attorney, and also must specify any non-monetary remedial relief. The acceptance by the complainant of a settlement offer must be in writing.

Upon receipt of the complainant's election for a hearing before an EEOC AJ, the Office of Civil Rights will notify the agency. The agency will designate a representative. The case file, including the investigative report, is duplicated in conformance with EEOC's specifications, and forwarded to the appropriate EEOC District Office.

Because the EEOC does not have jurisdiction in political belief, marital or parental status, sexual orientation, or genetic information complaints, any request for a hearing in a case where these are the only bases alleged will be handled completely within USDA. A determination will be made on whether a hearing is required for additional fact-finding before the FAD is issued. Complainants and agencies will be notified of this determination and the reason therefor. Where the EEOC has jurisdiction over some, but not all bases alleged, the Office of Civil Rights will request a hearing by the EEOC on the covered bases. USDA may hold the USDA-only bases in abeyance, and issue a final decision on them when the hearing process is completed, or issue a decision on those bases immediately..

## 2 POLICY

Every effort should be made to present all the facts. Cooperation with requests from the AJ is expected. Complainants, representatives, and witnesses who are employees of USDA will be on official time when participating in the hearing.

## 3 PROCESSING

The transmittal of the file to an AJ for a hearing will ask that the decision and the transcript be furnished to the Office of Civil Rights. CR will decide whether to file a notice of appeal or to fully implement the decision of the AJ after consultation with the Agency. CR will issue and distribute to the complainant and the Agency the USDA notice of final action on the complaint within 40 days of receipt of the file and decision from the AJ.

## 4 COSTS

The agency will bear all costs incidental to the hearing, including, but not limited to, the costs of travel for witnesses, complainants, and representative who are employees of USDA; and the costs of the transcripts. Travel of witnesses from other government agencies who are testifying based upon previous employment with USDA will also be paid by the agency.

## CHAPTER IX - FINAL AGENCY DECISION

## 1 PROCESSING

29 C.F.R. Part 1614 requires the issuance of the FAD within 60 days of receiving notification that a complainant has requested a decision on the record from the agency; or within 60 days of the end of the 30-day period for the complainant to request a hearing before the FAD where the complainant has not requested either a hearing or a decision.

The FAD must include findings on each issue of alleged discrimination raised by the complainant, as well as appropriate remedies and relief when discrimination is found. The final decision must also inform the complainant of his or her right to appeal to the EEOC or to file a civil action in the appropriate U.S. District Court, and of the applicable time frames.

## 2 CONTENT

The FAD will address all unresolved and accepted issues of a complaint (see Final Agency Decision Checklist in the Appendix). Any issues not accepted will be dismissed if not previously explicitly dismissed, with a statement of the reasons therefor. It will include the background of the complaint and an analysis of each issue as to whether or not there was discrimination. In disparate treatment cases, the analysis will include a determination of whether an inference of discrimination was shown and, if so, whether or not any stated reasons were supported or refuted by the evidence. In disparate impact cases, the analysis will include a determination of whether an adverse impact was established and, if so, whether or not business necessity or validation supported the policy or practice. Dismissals will contain a statement of the facts upon which the decision is based.

## 3 CORRECTIVE ACTIONS

The FAD shall include a legal analysis as to whether or not discrimination is found, and remedial action, including attorney fees, is deemed appropriate for individual relief of the complainant. Corrective action also includes any relief set forth by 29 C.F.R. Part 1614. If discrimination is found, the relevant statutes allow for remedial action, which may include:

- a equitable relief (back pay, restoration of benefits, rescission of personnel action, retroactive promotions, etc.);
- b injunctive relief (corrective measures to ensure that practices cease and environments change, such as training or discipline of supervisors or co-workers);
- c compensatory damages (pecuniary losses such as medical costs, loss of credit, etc., and nonpecuniary damages, such as payment for pain and

suffering), and

- d attorney's fees and costs (reasonable costs associated with legal representation).

#### 4 RIGHTS TO REVIEW

The FAD will inform the complainant of his/her right to appeal to the EEOC (see Chapter XIV) and/or file a civil action in a Federal District Court (see Chapter XV), except in the case of marital status, political beliefs, parental status, genetic information or sexual orientation complaint, to which there is no right of further review. The bases of parental status, marital status, sexual orientation, genetic information or political beliefs are not appealable to the EEOC.

#### 5 TRANSMITTAL

CR will transmit to the complainant, representative, if any, and to the agency's EEO officer, a copy of the FAD. The agency will transmit sanitized copies of the FAD to any Responsible Management Officials, and provide a copy to the agency Human Resource Management Office.

## CHAPTER X - RESOLUTIONS

## 1 VOLUNTARY DISPUTE RESOLUTION

- a General. The effectiveness of any workforce depends upon the manner in which managers and supervisors respond to day-to-day situations which impact hiring, promotions, evaluations, training, discipline, and working conditions. These are areas in which managers and supervisors are responsible for making sound decisions which will ensure an effective and efficient workforce capable of meeting agency requirements.

Federal managers and supervisors who possess a good understanding of EEO requirements will be better able to incorporate these requirements into their day-to-day decisions. However, even the most exemplary of managers may be involved in an EEO complaint.

- b Discrimination complaint - Form of conflict. Conflict is defined as antagonism or opposition between interests or parties. A discrimination complaint filed by an employee or applicant for a position reflects a disagreement, misunderstanding or controversy concerning an action taken by management, or the failure of management to take an action. The complaint process, therefore, is a management tool whereby an employee's allegations based on a prohibited basis of discrimination (i.e., race, color, sex, national origin, disability, religion, political beliefs, parental status, sexual orientation, marital status, or genetic information) are investigated, mediated, and resolved through either an agreement or an adjudication. Management exercises most control when the closure is through a voluntary agreement.

No matter how well an agency official may perform in meeting EEO goals or in advancing anti-discrimination policies, the possibility exists that an employee or an outside applicant for a job may perceive an action of decision as being discriminatory.

In dealing with any complaint, the basic goal of the agency official should be to resolve the complaint in a way that is fair to the complainant, acceptable to the agency, and perceived by the rest of the employees as an appropriate outcome.

The first and most important step in meeting that objective requires dealing with the agency official's personal feelings toward the complaint and the complainant. It should not surprise anyone that a person charged with discrimination might feel betrayed, angry, or disappointed. Nevertheless, in order to deal with the issue successfully, responsible agency officials need to set aside their feelings and deal with the issues on their substance. That means getting the facts, listening carefully to understand why the person feels that he or she was treated improperly, and then working towards resolution.

Being careful to treat a complainant in a polite, businesslike, and professional manner will not only help in working out an appropriate resolution to the matter, but it will also help in avoiding the filing of later complaints claiming reprisal for the EEO complaint.

It may help to keep in mind that until USDA decides otherwise, the complaint is only a claim or an allegation that reflects the perception of a situation by an individual. Allegations must be supported or refuted by facts. Therefore, the role of fact-finding and communicating the facts clearly to the complainant and those processing the case is important.

The agency has four distinct windows of opportunity to resolve EEO complaints prior to the issuance of the FAD. First, at the counseling stage; second, immediately after a formal complaint is accepted; third, after receiving a report of investigation, and fourth, before the hearing is conducted by the EEOC. The Agency and complainant are free to reach a voluntary resolution at any time until a decision in a civil action is issued.

## 2 EFFECT OF A RESOLUTION OFFER

- a Offer. When the agency offers the complainant a resolution that is rejected, it insulates itself from further costs or attorney fees unless the complainant achieves additional relief by proceeding with the complaint (see 29 C.F.R. 1614.109(c)(3)).
- b Documentation. If an agency wishes to preserve the record on the rejected offer, the transmittal offer and documentation of the rejection must be submitted to the Office of Civil Rights for inclusion in the complaint file. If the offer was presented in an ADR effort, it must be presented again outside of the ADR effort to preserve the confidentiality of the ADR process.

## CHAPTER XI – REMEDIAL ACTIONS

## 1 POLICY

Provision of relief greater than that which could be authorized through adjudication is not authorized. It is the policy of USDA to make completely whole any individual who has been found to have suffered from discrimination. It is also the policy of USDA to provide relief, where the Department or Agency deems it warranted, resolving a complaint whether or not discrimination is explicitly found. Where other improprieties have occurred, they will be corrected.

## 2 SCOPE OF RELIEF

When the USDA finds that the agency has discriminated against an applicant or employee, appropriate remedial measures as set forth in 29 C.F.R. Part 1614, Subpart E - Remedies and Enforcement, are awarded. Remedial relief is considered appropriate if such remedies reasonably guarantee that the actions challenged in the complaint will not recur to the complainant or an individual within the complainant's protected group. The test for adequacy of remedial relief is the implementation of measures which reasonably ensures that the corrective, curative, or preventive action will be taken, or measures adopted to ensure that violation of the law similar to those found will not recur. Any expenses, costs, or lost entitlements arising out of the employment situation may be included in the scope of any back pay or lump sum in lieu of back pay that is provided the complainant. The agency, independent of the complaint process, will take remedial actions concerning non-complainant employees when warranted or appropriate. Any officials against whom such action is proposed or taken will be provided access to the complete complaint file.

## 3 AGENCY DISCRETION

Agencies have reasonable discretion in determining appropriate remedial actions concerning complainants to remedy discrimination or the appearance of discrimination. When discrimination is found, corrective actions concerning other employees require the concurrence of the servicing Personnel/Human Resources Management Office.

## 4 PRESUMPTIONS

If discrimination is found, it is assumed that the discrimination affected the complainant unless clear and convincing evidence proves that the same action would have occurred in the absence of any discrimination.

## 5 LIMITATION

Back pay, computed in the manner prescribed by 5 C.F.R. '550.805, shall be awarded from the date the individual would have begun duty, assumed the duties of the position at



issue, or not been removed from the position unless clear and convincing evidence indicates that the applicant or employee would have not been selected for, placed into, or removed from the position, even absent discrimination. In cases relating to the remedial relief for the applicant for employment, back pay for complaints under Title VII or the Rehabilitation Act may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. Similarly, in cases relating to remedial relief for employees, the back pay liability under Title VII or the Rehabilitation Act is limited to 2 years prior to the date the discrimination complaint was filed. Interest on back pay shall be included in the back pay computation when sovereign immunity has been waived (see Sub Part E - Remedies and Enforcement - 29 C.F.R. 1614.501). Back pay is not limited to salary amounts, but also includes all benefits or entitlements that may arise out of the employment situation.

## 6 RELEVANCE

Relief provided the complainant should be relevant to the issues of the complaint or other matters involved. Relief will be granted in accordance with applicable law and regulations. Whether or not a finding is made, the law provides authority to grant such relief, as is appropriate, to make the complainant whole. The provisions of 29 C.F.R. 1614.501 will be followed in granting remedies on the complaints.

## 7 TYPES OF REMEDIAL RELIEF

Relief available to individual complainants falls into four general categories:

- a Equitable relief. Equitable relief is relief designed to restore the employee to the point at which he/she would have been if the contested decisions had been fully in his/her favor. It can include back pay, restoration of benefits, rescission of personnel actions, expurgation of documents, provisions of training or employment opportunities, retroactive promotions, front pay in limited circumstances, etc.
- b Injunctive relief. Injunctive relief includes corrective or curative measures to ensure that practices cease or environments change. It can include training or discipline of supervisors or co-workers, the issuance and/or posting of apologies, notices of policy statements, etc.
- c Compensatory damages. Compensatory damages are monetary payments beyond equitable relief (and attorney's fees) which repay the complainant for losses beyond direct effects to terms or conditions of employment. Pecuniary compensatory damages include quantifiable losses such as medical costs incurred, loss of credit, loss of residence, etc. Nonpecuniary losses include payments for pain, suffering, loss of reputation, embarrassment, etc. Punitive damages are not recoverable by Federal employees.
- d Attorney's fees and costs. Attorney's fees and costs are available for

representational services (see Chapter XI, Attorney Fees)

## 8 AGENCY NEGOTIATIONS

Agencies have reasonable discretion when reaching settlement with complainants within the following restrictions and guidelines:

- a No settlement agreement when viewed in its totality may exceed what the complainant could obtain if discrimination were found on all of the issues (see Chapter, Remedies).
- b The agency must document the basis of any decision to offer front pay.
- c The agency must obtain objective evidence of damages whenever it agrees to pay compensatory damages. The amount of evidence needed will increase with the amount of compensatory damages. Before offering to pay unspecified compensatory damages, the agency will consider how further gathering of evidence or adjudication may affect relationships within the unit.
- d When the amount of compensatory damages exceeds a given preauthorized amount, or if there is a disagreement between the agency and the complainant on a lesser amount, the agency will forward the complaint to the Office of Civil Rights for adjudication after it and the complainant establish a record regarding the damages incurred.
- e Whenever the amount of compensatory damages exceeds a given preauthorized amount, the agency will be required to take reasonable corrective actions to prevent recurrence of similar circumstances and the reasons therefor, and submit the information to the Office of Civil Rights. Either the Agency or the Department Office of human Resource Management will review these situations to determine if corrective or disciplinary action is warranted.

## 9 ATTORNEY FEES

If an agency decides to award attorney's fees, they will be determined in accordance with the provisions of 29 C.F.R. 1614.501(e). If the agency and representative are unable to achieve an agreement on appropriate fees, the fee submission and the agency's explanation for not paying fees is forwarded to the Office of Civil Rights for determination.

## CHAPTER XII - ATTORNEY'S FEES AND COSTS

Complainants who prevail on claims alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, *as amended*, and the Rehabilitation Act of 1973, *as amended*, are presumptively entitled to an award of attorney's fees and costs, provided attorney fees were incurred, unless special circumstances render such an award unjust. 29 C.F.R. 1614.501(e)(1). Further, complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, *as amended*, and the Equal Pay Act of 1963, *as amended*, or who solely allege the bases of marital or parental status, genetic information, political beliefs or sexual orientation are not entitled to attorney's fees at the administrative level. Only in the rarest of other circumstances, or where a Title VII or Rehabilitation Act complainant rejects an offer of resolution made in accordance with 29 C.F.R. 1614.109(c) and does not obtain more relief than the agency had offered, can the agency limit or deny an award of fees.

A prevailing party, within the meaning of Section 706(k) of Title VII, 42 U.S.C. 2000e-5(k), is a complainant who has succeeded on any significant issue that achieved some of the benefits the complainant sought in filing the complaint. A purely technical or **de minimis** success is insufficient to confer prevailing party status.

An attorney who represents himself/herself is not entitled to an award of fees. Neither a non-attorney, nor a Federal employee (including an attorney) who represents a complainant is entitled to an award of fees. 29 C.F.R. 1614.501(e)(1)(iii).

Attorney's fees are properly considered part of the relief available to the successful complainant. The EEOC's general guidance on fees is set forth at 29 C.F.R. 1614.501(e). In a final decision or settlement, the agency may award the complainant reasonable attorney's fees and costs (including expert witness fees) incurred in the processing of the complaint.

Whether as a result of a FAD finding discrimination and awarding attorney's fees, or a settlement in which the agency agrees to pay reasonable attorney's fees, all fee claims will be initially processed by the involved agency. The agency may agree to pay the fee claim as filed, negotiate a different amount with the representative, or not pay any fee. If the agency and representative are unable to achieve an agreement on appropriate fees, or the agency denies the requested amount of attorney's fees and costs, the fee submission, including the agency's explanation for not paying fees, is forwarded to the Office of Civil Rights. The Director, Office of Civil Rights, or a designee, will issue the final Department decision on any issue of attorney's fees and costs in dispute (see Attorney's Fee Checklists in the Appendix).

The basic formula for determining fees, if all other requirements are met, is the number of hours reasonably expended multiplied by a reasonable hourly rate. Thereafter, the amount of attorney's fees and costs may be reduced or increased based on the following factors:

- \$ the time and labor required;
- \$ the novelty and difficulty of the questions;
- \$ the skill requisite to perform the legal service properly;

- \$ the attorney's preclusion from other employment due to the acceptance of the case;
- \$ the customary fee;
- \$ whether the fee is fixed or contingent;
- \$ time limitations imposed by the client or the circumstances;
- \$ the amount involved and the results obtained;
- \$ the experience, reputation, and ability of the attorney;
- \$ the undesirability of the case;
- \$ the nature and the length of the professional relationship with the client, and
- \$ awards in similar cases.

### CHAPTER XIII - COMPLIANCE WITH SETTLEMENTS AND FINAL AGENCY DECISIONS

If the complainant believes that the terms of any settlement agreement (whether the settlement agreement was reached during the counseling stage or at any time in the formal complaint process) have not been implemented by the agency, the complainant may request compliance with the agreement, or reinstatement of the initial complaint at the stage at which it was settled. This request will be filed with the Office of Civil Rights either directly by the complainant or by the agency upon receipt of the request. The request must be filed within 30 days of learning of the alleged noncompliance.

Thereafter, an inquiry will be conducted and the Director, Office of Civil Rights (or a designee) will issue a decision (see Noncompliance Checklist in the Appendix) as to whether or not the agreement has been fully implemented, whether further compliance is required, or whether the complaint must be reinstated. The Director may also require any action deemed necessary by an agency to fulfill the terms and conditions of a settlement agreement. The decision on the compliance allegation will be a final Department decision with appropriate appeal rights (see Section VIII, Final Agency Decision and Section XIV, EEOC Appeals).

## CHAPTER XIV - CLASS DISCRIMINATION COMPLAINTS

### 1 GENERAL

A class is defined as a group of employees, former employees, or applicants who are alleged to have been adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or disability. A class complaint is a written complaint of discrimination filed on behalf of the class by the agent of the class, alleging that the class is so numerous that a consolidated complaint by the members of the class is impractical, that there are questions of fact common to the class, that the claims of the agent of the class are typical of the claims of the class, and that the agent of the class and, if represented, the representative, will fairly and adequately protect the interests of the class.

### 2 PRE-COMPLAINT PROCESSING

An employee who seeks to represent a class of employees must initially seek counseling and proceed with the pre-complaint processing within 45 days of the discriminatory event that implemented the policy or practice as to the complainant. The EEO Counselor will provide written notice of the rights and responsibilities of a class agent, and the requirements of a class complaint. The complainant does not have to indicate to the EEO Counselor that they wish to file a class complaint. The time period may be waived and is subject to estoppel and equitable tolling. If the complaint is not resolved on the 30th day following initial EEO counseling, the EEO counselor must give the agent written notice that he/she has 15 days from receipt of the notice to file a formal complaint.

USDA may extend the counseling period up to an additional 60 days if, prior to the expiration of the 30-day period, the aggrieved person agrees, in writing, to postpone the final interview.

The complainant may move for class certification at any reasonable point in the formal complaint process when it becomes apparent that there are class implications to the claim raised in an individual complaint. For example, the individual complaint potentially involves questions of law or fact common to a class and the complainant's claim is typical of that of the class. However, undue delay in requesting such certification will lead to dismissal of the class complaint. If a complainant moves for class certification after completing the pre-complaint process, no additional counseling is required. At this time, USDA or the EEOC AJ, as appropriate, must advise the complainant of his/her rights and responsibilities as the class agent.

EEO counselors must address both the individual concerns of the complainants and the class-wide allegations if raised. Each complaint, individual or class, must be closed by a settlement agreement, a notice of withdrawal, or a notice of a right to file a formal complaint. Settlement of informal class complaints requires prior review and approval of the Director, Office of Civil Rights.

### 3 FORMAL COMPLAINTS

- a Processing. Upon receipt of a formal class action complaint of discrimination, or a request to certify an individual complaint as a class action, OGC serves as USDA's representative.
- b Content. Formal class complaints must include a description specifically and in detail of:
  - (1) the policy or practice giving rise to the complaint, and
  - (2) the resulting personnel action or decision adversely affecting the class agent.

The complaint should also include an estimation of the number of members of the class, an indication of a typical claim of the class, and a showing of the common questions of fact. Any representative, and his/her background and experience, should also be presented.

### 4 REFERRAL FOR A RECOMMENDATION TO ACCEPT OR REJECT

- a Processing. The Office of Civil Rights will notify OGC of the complaint and forward the case file, including agency comments where appropriate, to the EEOC, with a request for the assignment of an AJ. The Office of Civil Rights will hold in abeyance any individual complaint filed by the agent (and any named members or potential members of the class who file formal complaints) on any acceptable issues raised. The Office of Civil Rights will notify Agencies of the names of complainants whose claims are being held in abeyance. If the class is certified and a class complaint is accepted for processing, any individual complaint on the same basis and issue as the class will be subsumed into the complaint. OGC will represent the agency during processing of the class complaint at the EEOC. If a class complaint is not certified, the individual complaints being held in abeyance will be placed back in processing.
- b Recommended decision. The AJ will review the complaint in accordance with provision 29 C.F.R.1614.204(d), and submit a recommended decision to the Office of Civil Rights on whether to accept or dismiss the class complaint.
- c Department decision. The Director, Office of Civil Rights, will issue USDA's decision to accept or dismiss the class complaint. This decision will be issued to the agent, the representative, the AJ, and the agency. Any decision to accept a class complaint will explain any available ADR options and the procedures to request ADR. The Director, Office of Civil Rights, may negotiate a settlement of any class complaint recommended for acceptance at any time prior to issuing a FAD.

- d Dismissal. A decision to dismiss a class complaint will be the final decision of USDA. Such a decision will notify the complaint/agent of the right to file an appeal or a civil action, and any processing being continued on individual issues.
- e Acceptance. If the class complaint is accepted, the Office of Civil Rights will prepare the file according to EEOC specifications. Agencies shall notify class members within 15 days after acceptance of the complaint acceptance. This notice will contain the name of the agency, its location, and the date of acceptance, fully describe the issues and background of the complaint; explain the binding nature of a final decision or resolution of the complaint; and include the name, address, and telephone number of the class representative. Agencies shall use reasonable means, such as delivery or mail to the last known address, to notify all class members. Agencies will furnish the Office of Civil Rights with copies of the notice.

## 5 PROCESSING ACCEPTED COMPLAINTS

- a Responsibility. The AJ will control the development of the case file until a recommended decision is issued.
- b Time frame. Both parties will develop evidence and prepare the case for the hearing. The agency representative is responsible for preparing the agency case in accordance with 29 C.F.R.1614.204(f),(g), and (h).
- c Resolution. A resolution of the complaint may be agreed upon at anytime by the Director, Office of Civil Rights, the agency, and the complainant/agent. Any resolution shall be reduced to writing by the Office of Civil Rights. Notice of resolution will be given by the agency to all class members using the same means used to notify of the acceptance, and shall state the relief granted. Resolution agreements of class complaints are subject to the provisions of 29 C.F.R. 1614.204(g)(4).

The Director, Office of Civil Rights, or a designee will participate in settlement negotiations for all class complaints.

## 6 RECOMMENDED AND FINAL AGENCY DECISION ON THE MERITS

- a Recommended decision. The AJ will review the class complaint, including an analysis of the hearing record, issue a recommended decision on the merits, and forward it to the Office of Civil Rights.
- b Final Agency Decision. The Director, Office of Civil Rights, will issue the FAD on the class complaint within 60 days from the receipt of the AJ's recommendation.



- c Transmittals. The FAD will be transmitted to the complainant/agent, the representative, the agency, OGC, and the AJ. In addition, the complainant/agent and the agency will be furnished copies of the hearing record.
- d Corrective actions. The FAD will authorize the necessary corrective actions and advise the complainant/agent of the right to any attorney's fees.
- e Notice. The agency will notify class members of the FAD on the merits of the issues of the complaint and the corrective action, if any.
- f Individual claims. If discrimination is found, any individual class member who believes that discrimination of the type found in the class complaint was applied to them may file a claim with the Director of EEO. Such a claim must be filed within 30 days of the notification by the agency of the decision on the class complaint. Such a claim must indicate specifically the basis for claiming class membership and the practice or policy and resulting personal effect claimed to be discriminatory. The action of effect must have occurred not earlier than 45 days prior to the agent's initial contact with an EEO counselor.
- g Processing. Any claim received by the Director of EEO will be referred by the Office of Civil Rights to the agency for processing. The agency will notify the Office of Civil Rights of all claims received. Within 30 days from the filing of the claim, the agency will either grant relief to accommodate the claimant or forward the claim and its comments thereon to the Office of Civil Rights for the preparation of the FAD.

## CHAPTER XV - APPEALS TO THE EEOC

## I RIGHT TO APPEAL AND APPLICABLE TIME LIMITS

- a Appeals. A complainant alleging race, color, sex, age, disability, national origin, religious or reprisal discrimination may appeal an agency's dismissal of or final action on a complaint or an agency's alleged noncompliance with a settlement agreement in accordance with 29 C.F.R. 1614.504. Also, an agency may appeal if it determines not to fully implement an EEOC AJ's decision to dismiss, or on the merits of a complaint in an appeal filed simultaneously with the final order served on the complainant. An agency must also appeal if it determines, in a class complaint, not to fully implement an EEOC AJ's certification decision in an appeal filed simultaneously with the final order served on the agent. In addition, an agency may appeal an EEOC AJ's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole.

Any complainant, with the exception of complaints which are limited to allegations of discrimination based on political beliefs, sexual orientation, genetic information, parental or marital status, mixed case complaints, or negotiated grievances, may file an appeal with the EEOC within 30 days of receipt of the USDA's dismissal, rejection, final action, or decision. The 30-day time limit is subject to waiver, estoppel, and inequitable tolling. 29 C.F.R. 1614.604(c).

- b Mixed case complaints. A complainant who has filed a mixed case complaint (see Chapter XVI) may appeal to the EEOC only after first appealing through the MSPB. A petition for appeal to the MSPB must be filed within 30 days of his/her receipt of the USDA's final decision. Once the MSPB has issued a decision on the complaint, an appeal may be filed with the EEOC.
- c Negotiated grievances. Where the negotiated grievance system is appropriately elected to address allegations of discrimination, a complainant may appeal to the EEOC within 30 days of receipt of: (1) a final agency decision; (2) an arbitrator's decision or award, or (3) a Federal Labor Relations Authority decision on exceptions to an arbitrator's award. If the allegation of discrimination in a negotiated grievance involves a mixed case issue, the appeal will be first to the MSPB, and subsequently, to the EEOC.
- d Notice. Any final agency decision, or any decision on a negotiated grievance that covers an allegation of discrimination, will notify the complainant of the right to appeal to the EEOC or the MSPB, the proper address to send the appeal, the time frames applicable, as well as EEOC Form 573.

## 2 PROCESSING

- a Notice. When an appeal has been filed with the EEOC, a complainant provides written notification and furnishes copies of any appeal submission to the following address:

**United States Department of Agriculture  
Office of Civil Rights  
1400 Independence Avenue, S.W.  
Mail Stop Code 9440  
Washington, D.C. 20250.**

The agency involved in the complaint will be allowed 15 days to submit comments to the Office of Civil Rights. Thereafter, the Office of Civil Rights will prepare the file and any brief in support of the USDA decision, and furnish it to the EEOC within the required time frame.

- b Location. The complainant, agent, grievant, or individual class claimant must file an appeal by mailing the appeal to the following address:

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

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

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

or faxed to the EEOC at **(202) 663-7022**.

- c Compliance: After the EEOC has rendered its appeal decision on the complaint and forwarded the decision to the Office of Civil Rights, the Office of Civil Rights will forward a copy to the agency which will provide a sanitized copy to any Responsible Management Officials.

Any corrective action required will be implemented within 30 days, and evidence of such compliance will be immediately furnished to the Office of Civil Rights, who will notify the EEOC that corrective action has been fully implemented.

- d Request for reconsideration. The Office of Civil Rights will initiate any request for reconsideration by the EEOC of a previous appellate decision. However, the

agency should be mindful that a request for reconsideration is not a second appeal to the EEOC. Rather, agencies that wish to request reconsideration of an appellate decision issued by EEOC must do so by notifying the Office of Civil Rights within 15 days of receipt of the EEOC appellate decision. The agency's notice must include all of the agency reasons supporting such a request for reconsideration. Specifically, the agency's notice must clearly demonstrate that: (1) the EEOC's appellate decision involved a clearly erroneous interpretation of material fact or law, or (2) the decision will have a substantial impact on the policies, practices, or operations of the agency. Thereafter, the Office of Civil Rights will review the agency's notice and accompanying documentation in support of its request and issue a determination as to whether further action is warranted. The Office of Civil Rights shall provide prompt and timely notification to the agency.

If the complainant requests that the EEOC reconsider its decision, the EEOC provides the Office of Civil Rights with notification of the complainant's request for reconsideration. The Office of Civil Rights will forward a copy of the EEOC notification and any attachment to the agency complaint processing office for comment. Agency comments will be considered for any brief that the Office of Civil Rights elects to submit in response to the complainant's reopening request.

## CHAPTER XVI - RIGHT TO FILE A CIVIL ACTION

## 1 RIGHT TO FILE

Any complainant, other than one who has alleged marital or parental status, sexual orientation genetic information or political belief discrimination, but including one who has filed a notice, mixed case, or negotiated grievance, may file a civil action in an appropriate Federal District Court.

## 2 TIME LIMITS

A discrimination complaint (including a mixed case complaint or a negotiated grievance covering discrimination allegations) based on race, color, sex, national origin, reprisal, religion, or disabling condition may be filed as a civil action within 90 days after a FAD.

A civil action may be filed on a complaint after 180 days from filing the complaint if no decision has been issued; and on a mixed case complaint after 120 days of filing the complaint if no decision has been issued. If the complaint has been appealed to the EEOC, the complainant may file a civil action within 90 days of receipt of the EEOC decision, or 180 days of filing the appeal, if no decision has been issued. If the mixed case complaint has been filed with MSPB, the complainant may file a civil action within 90 days of the MSPB decision, or request a review by the EEOC. Any final determination by the EEOC or the MSPB may be reviewed by filing a civil action within 90 days of receipt of the final decision.

## 3 PROCESSING

a Files. Upon receipt of a civil action complaint, OGC will notify the Office of Civil Rights, who may furnish copies of the official complaint file to OGC at the agency's request. The agency involved will be provided an opportunity to submit comments and a litigation report on the matter. The Office of Civil Rights may submit independent comments and a response to the complaint to OGC.

b Assistance. Agencies will directly assist OGC in providing witnesses, answering interrogatories, and otherwise responding to the civil action, and will furnish the Office of Civil Rights with copies of all documents generated or submitted in response to the civil action.

## 4 TERMINATION OF ADMINISTRATIVE PROCESSING

Filing a civil action on the issues contained in an EEO complaint terminates the administrative processing of a complaint. CR will issue a final agency decision dismissing the EEO complaint.

## CHAPTER XVII - SPECIAL PROVISIONS

### 1 ALLEGATIONS OF REPRISAL

Background. USDA established reprisal panels to address allegations of reprisal in employment complaints pursuant to Personnel Bulletin 752-1. The panels operated for a period of 1 year, and were then evaluated. Under the terms of Personnel Bulletin 752-1, authority for the program ceased as of December 31, 1998.

The Office of Civil Rights hereby implements an Early Resolution Process (pursuant to the *Administrative Dispute Resolution Act, 5 U.S.C. sec.581-591*) as an alternative to the reprisal panels. By adopting an early resolution strategy, reprisal allegations will be reviewed immediately to determine if the allegations warrant immediate action to protect the individual and preserve the integrity of USDA.

The following requirements and procedures address the processing of reprisal allegations. The effective date of implementation is December 1, 2000.

### 2 PROCEDURES FOR COMPLAINTS ALLEGING REPRISAL

- a Informal counseling stage (special requirements). The EEO counselor must notify the Office of Civil Rights immediately (within 24 hours or 1 working day) and in writing of all allegations of reprisal raised by complainants. The EEO counselor should also notify the Agency EEO and Human Resource Management offices when reprisal is alleged.

The Office of Civil Rights will conduct a review of facts (within 40 hours or 5 working days) to determine if the allegations warrant immediate action to preserve the integrity of the individual and USDA. If it is determined that the allegations warrant immediate action, the Office of Civil Rights will negotiate a stay or restraining agreement with the agency proposing such action. Counselors will continue counseling activities irrespective of actions by the Office of Civil Rights.

- b Negotiating a stay or restraining agreement. In situations where:
- (1) an action is pending and the probability of a finding of reprisal is high, or,
  - (2) an action is pending that will have a serious negative impact e.g., reduction in salary, change of location, etc.), regardless of the potential for a finding, the Director of the Office of Civil Rights or a designee will negotiate a stay of the pending action with the agency head. The stay will be in effect until the Office of Civil Rights review fact finding, investigation, and resolution efforts) is concluded.

In situations where the reprisal issues involve ongoing actions or conditions (harassment, working conditions, assignments) and the probability of a finding of reprisal is high, the

Director, Office of Civil Rights, or a designee will negotiate an agreement with appropriate Agency officials restraining the agency's actions affecting the complainant until USDA resolves the complaint issues, or some other agreed upon ending date occurs.

In instances where a negotiated stay or restraining agreement does not appear adequate, the Office of Civil Rights reserves the authority to negotiate one with the Agency at any time in the process should facts indicate it is appropriate.

EEO counseling will proceed in accordance with the time frames specified in 29 C.F.R. Part 1614. The EEO counselor in all reprisal cases must notify at least one official in the supervisory chain of the manager who is alleged to have committed reprisal, and determine, at that level, if a satisfactory adjustment or resolution can be achieved expeditiously.

### 3 FORMAL COMPLAINT PROCESSING STAGES

- a Acceptance stage. When a formal complaint is received and reprisal is alleged as one of the bases of discrimination, it will be immediately reviewed, and a determination as to whether the complaint can be processed will be prepared within 5 days.
- b Investigation stage. As soon as an acceptable reprisal complaint is identified and if there is a previous complaint at the investigation stage, the investigating contractor will be contacted to see if the issue can be added to the investigation in process. If so, the reprisal complaint issues (and all other bases alleged) will be joined to the complaint already being processed so that facts will be developed quickly.

If there is no ongoing investigation, or it is too far along to add the reprisal issues, then the Office of Civil Rights will ask the complainant in writing (by fax or email, whenever possible) whether the complainant wants the traditional investigation (which may take about 150 days to complete), or whether an expedited 45-day investigation (conducted by the Office of Civil Rights, using e-mail and fax for document transmission, interrogatories, and telephone interviews for testimony development) is requested. A full explanation of the differences in the process will be provided (the quality of work is expected to be the same). The complainant will have 15 days to indicate whether the expedited or regular investigation process is desired. If there is no response, the regular investigation will be initiated.

- c Report of Investigation. When the investigation (whether regular or expedited process) on any reprisal issue is received, it will be immediately reviewed (5 working days) to determine whether probable cause for a potential finding of reprisal is present. If so, a case summary of the evidence, analysis, and probable conclusion will be prepared by the Office of Civil Rights and furnished to the Agency. The Office of Civil Rights will initiate resolution efforts with the

complainant and the agency. If no resolution is achieved, or the 180 day period to complete the investigation occurs, the ROI will be distributed to the complainant and the Agency.

In cases where reprisal is found, the agency will agree to an immediate review of the case, including the gathering of further evidence to determine potential disciplinary or other corrective actions (Departmental Personnel Bulletin 752-2, Discipline Discrimination Cases; DPM Letter 920-11, SES Performance Appraisal System Revision; and USDA Personnel Bulletin governing the SES Performance Management and Accountability System).

- d Hearing, decision, and appeals. Upon completion of the ROI, whether through the regular or expedited process, copies will be furnished to the complainant to elect a final decision on the record or after a hearing before an EEOC AJ. From this point forward, the reprisal complaint will be handled in accordance with the customary procedures for processing complaints.

Once a complaint is closed by USDA, whether by a settlement agreement or final decision, a negotiated stay or restraining agreement becomes null and void. At that point, the remedy, if any, in the final decision or agreement becomes the controlling factor of the agency's actions towards the complainant. The remedy in any Office of Civil Rights' final decision finding reprisal will include a review and followup, including the requirement to take disciplinary action, on the agency's failure to address the reprisal at the agency counseling stage and when the ROI was distributed to the agency.

Further, where a finding of reprisal discrimination is entered, or a settlement agreement is negotiated with the complainant to stay a finding (where manager's actions were not justified), the Office of Civil Rights will review and document agency performance (Office of Civil Rights Performance and Accountability System). Agency efforts to seek early resolution of complaints in the counseling stage or after the investigative stage will be a factor in determining Office of Civil Rights performance ratings for senior executive employees.

#### 4 NOTICE OF INTENT TO SUE

- a Policy. Under the ADEA, special provisions apply to notice of intent to sue (see ADEA Notices).
- b Processing. Upon receipt of an ADEA notice covered by this sub-chapter, the Office of Civil Rights will notify the agency complaint processing office of the nature of the issues involved and furnish a copy of the notice. The agency is encouraged to settle the matter informally, if possible. Any settlement must be reduced to writing, with a copy to the Office of Civil Rights. Agencies will immediately forward to the Office of Civil Rights any ADEA notice filed with the agency. Agencies will notify any employee that is a prospective defendant in the



case of the ADEA notice.

- c Inquiry. The Office of Civil Rights will determine the nature of any inquiry to be conducted, which may include: (1) an administrative hearing; (2) an investigation; (3) documentary review; (4) interrogatories; (5) personal interviews, or (6) a combination of the above.
- d Decision. Upon completion of the inquiry, a FAD will be issued by the Director, Office of Civil Rights, or a designee, on the issues involved in the matter. A copy of the FAD will be forwarded to the complainant, the EEOC, and the agency. Copies of the inquiry will also be forwarded to the complainant and the agency.
- e Time limits. ADEA notices may be filed with the EEOC within 180 days of the action alleged to be discriminatory. Charges are deemed filed on the date of a postmark or, if not postmarked, the date of receipt.

## 5 MIXED CASE COMPLAINTS

- a Election and notice. Any matter appealable to the MSPB may be raised first with USDA, and then with MSPB, or be taken directly to MSPB, but may not be filed and processed by both at the same time. The employee makes an election to proceed under one process or the other by filing a timely complaint, or an MSPB appeal. Where an allegation of discrimination is raised during the processing of an action that is appealable to the MSPB, the notice of the agency decision will inform the employee of the requirement to elect a route of review (i.e., the right to file a complaint or an appeal, the full procedures of each forum, and the applicable time limits).
- b Policy. Complaints on matters that are appealable to the MSPB are to be processed as outlined in this subsection. Mixed case complaint issues will be broadly interpreted to include not only the specific appealable action, but all charges and incidents relied on or referenced by the agency in its action, and any affirmative defenses raised by the complainant. Allegations of coerced resignation or retirement from employees covered by 5 U.S.C. 7512 are considered appealable actions.
- c Processing. In general, mixed case complaints will be processed in accordance with the requirements of 29 C.F.R. 1614.302. The mixed case complainant has the right to appeal the action to the MSPB and receive an administrative hearing.
- d Decisions. The Office of Civil Rights will determine which allegations accepted for processing constitute mixed case issues. The Director, Office of Civil Rights, will dismiss a mixed case issue that is appealed to the MSPB, either after 120 days have lapsed from filing the complaint, or prior to the filing of the complaint, or which the MSPB has considered or should have considered in a previous appeal. Proper rejections of mixed case complaints are not appealable to the

EEOC.

- e Time frames. Every effort will be made to expedite the processing of a mixed case complaint so that a decision may be issued within a reasonable period of time.

## 6 RELATIONSHIP TO OTHER DISPUTE RESOLUTION SYSTEMS

- a Administrative grievance system. Where the issue in an EEO complaint is also the issue, or is related to the issue, of a grievance under DPM Chapter 771, the issue involving discrimination will be processed under this sub-chapter as a discrimination complaint. The grievance issue should be returned to the aggrieved person/complainant pending the processing of the complaint. If the grievance issue is adjudicated or resolved in the processing of the complaint, the grievance has been processed. If the grievance issue is not adjudicated, the grievance may be refiled within 30 days of the EEO complaint closure.
- b Negotiated grievance system. Where a negotiated agreement provides a remedy for discrimination complaints, allegations of discrimination may not be filed under both processes. The employee must elect one of the processes and make this election by filing a timely complaint or grievance under the appropriate procedure. The first filing requirement is satisfied by a formal EEO complaint or the first written submission of a negotiated grievance.

## APPENDIX A

EEO Counselor Checklist:

- \_\_\_ a. Right to anonymity in the counseling phase of the complaint process unless waived.
- \_\_\_ b. Right to representation.
- \_\_\_ c. Advised on other avenues of redress:
- \_\_\_ d. The potential opportunity to elect ADR in both the informal and formal stages, including the process necessary to do so, the time limits and time frames applicable, the Agency's right to not engage in ADR, and the policies applicable to the ADR process;

Special Counsel;

Merit Systems Protection Board, when the issue is an appealable action;

Negotiated grievance, when a procedure has been established for the bargaining unit that allows allegations of discrimination;

Classification appeal rights, when position classification is the issue and discrimination is not an allegation;

Administrative grievance, when discrimination is not an allegation;

ADEA right to a civil action after notice when age is the basis;

The right to file directly to U.S. District Court on claims of sex-based wage discrimination under the Equal Pay Act.

- \_\_\_ e. Requirement that the aggrieved person file a complaint within 15 days of receipt of the counselor's notice of right to file a formal complaint.
- \_\_\_ f. Right to a hearing before the Equal Employment Opportunity Commission in a non-mixed case after 180 days or after completion of the investigation.
- \_\_\_ g. Right to file a civil action in the U.S. District Court after 180 days after filing a formal complaint or 180 days after filing an appeal.
- \_\_\_ h. Duty to mitigate damages (the interim earnings or amounts which could be earned by individual with reasonable diligence generally must be deducted from an award of back pay).

- \_\_\_\_\_ i. Requirement to keep the agency informed of current mailing address and to serve copies of the appeal papers to the agency.
- \_\_\_\_\_ j. Only issues raised at the counseling stage may be subject of a formal complaint.
- \_\_\_\_\_ k. The time frames in the complaint process.

MANAGER REVIEW OF EEO

COUNSELOR'S REPORT
--------------------

Counselor: \_\_\_\_\_

Complainant: \_\_\_\_\_

Agency: \_\_\_\_\_

The following administrative problems are noted:

- Counselor not certified as completing required training
- Contact not reported as closed to CR
- Contact not reported at all to CR
- Time to closure is excessive
- Report late
- No counselor's report

A review of the report revealed:

- Issue not specifically defined
- Date(s) of issue(s) not provided
- Responsible Management Official not contacted
- Responsible Management Official not contacted in a timely manner
- Articulated reasons not provided
- Factual information concerning this case is not complete
- Report contains a chronological listing of contacts
- An excellent report - concise, detailed, complete

A review of the counselor's performance revealed:

- No offer or options were suggested to management for consideration.
- No reasonable offers were made or accepted by management and the case was not escalated to higher levels.
- Election rights are involved and there is no indication they were explained to complainant.
- Election rights improperly explained.
- Counselor stated a judgement on the merits of the case on whether or not there was evidence of discrimination.
- Counselor tried to dissuade the complainant from filing.
- Counselor made excellent substantive efforts at the appropriate levels, and achieved a reasonable offer.

ACCEPTANCE/DISMISSAL CHECKLIST
--------------------------------

YES NO

- |                          |                          |  |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | The complaint is filed within 15 days of receipt of the NRF.   |
| <input type="checkbox"/> | <input type="checkbox"/> | Complaint is signed by the person claiming to be aggrieved.  |
| <input type="checkbox"/> | <input type="checkbox"/> | Complaint is sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the issues of the complaint.  |
| <input type="checkbox"/> | <input type="checkbox"/> | The complainant contacted an EEO counselor within 45 days of the discriminatory event or within 45 days of the effective date of the personnel action, or within 45 days of reasonable suspicion of discrimination.  |
| <input type="checkbox"/> | <input type="checkbox"/> | If contact is beyond 45 days from the incident or reasonable suspicion of discrimination, the complainant showed the 45-day contact period should be extended because he or she was not aware of the time limits or did not know and reasonably could not have known that the matter or personnel action occurred or that despite due diligence was prevented by circumstances beyond his or her control from contacting a counselor within the 45-day time limit. |
| <input type="checkbox"/> | <input type="checkbox"/> | The complainant stated a claim of discrimination covered by law or regulation (i.e., a covered discriminatory basis is alleged, and the issues are within USDA's jurisdiction) and the issue is not moot.  |
| <input type="checkbox"/> | <input type="checkbox"/> | The complainant does not have the same claim pending before or had been decided by USDA or the EEOC.   |
| <input type="checkbox"/> | <input type="checkbox"/> | The complainant did not raise the matter in a negotiated grievance procedure or elect to appeal the matter to the MSPB.  |
| <input type="checkbox"/> | <input type="checkbox"/> | The alleged action is not a preliminary step or a proposal to take a personnel action (unless reprisal is alleged as the basis).   |

If any answer is "no," the complaint issue(s) are not accepted. Any dismissal Decision includes reasons for the action, cites the subsection of the EEOC's regulations and further rights of appeal. If all answers are "yes," complaint issues and bases are identified, accepted, and

referred for investigation.

In addition, at any time in the process, USDA may dismiss a complaint or a portion of a complaint that:

YES NO

- is the basis of a civil action in a U.S. District Court in which the complainant is a party, provided that at least 180 days have passed since the filing of the complaint, or that was the basis of a civil action decided by a U.S. District Court in which the complainant was a party.
- 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.
- USDA 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 its receipt, or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal.
- after the issuance of the certified offer of full relief, the complainant refuses within 30 days of receipt of the offer to accept, provided that the offer gave notice that failure to accept it would result in dismissal of the complaint.



## NONSELECTION CHECKLIST

When the complainant was among the best qualified applicants referred to the selecting official.

### Prima Facie:

YES NO

- Whether the complainant is a member of a protected group(s) on the basis of his/her (*basis*).
- Whether the complainant applied, was found qualified for but was not selected for the position of \_\_\_\_\_ advertised under vacancy announcement number \_\_\_\_\_.
- Whether an applicant not of the complainant's group was selected for the position, or some other fact raises a discriminatory inference.

### Articulated Reason

- Whether the agency selecting official(s) articulate(s) a legitimate, nondiscriminatory reason for the actual selection, the complainant's nonselection, or both (the reasons must be articulated clearly enough and with sufficient specificity to allow examination of them in the pretext phase of the investigation).

### Merit Promotion Package:

#### Evidence

YES NO

- Vacancy announcement
- Position description
- Evaluation criteria or crediting plan
- Rating of candidates
- Certificate of eligible candidates/selection roster
- Evaluation worksheets prepared by selecting official and panel members

Application materials for complainant, selectee, and other best-qualified applicants

Other documentation:

Evidence

YES NO

Classification standards for series.  
  Qualification standards for position in that series.  
  Employment roster or workforce profile for the organizational unit in which the vacancy occurred, by accepted protected bases.  
  Staffing and organization charts for the organizational unit in which the vacancy occurred, by accepted bases.  
  Relevant excerpts from official personnel folders of complainant and applicants, including selectee (identified by basis), such as SF-50 and SF-52 for selection at issue.  
  Agency promotion plan and guidelines in effect at time of selection.  
  Approved affirmative action plan in effect at time of selection if protected basis is addressed (unnecessary if basis is age, reprisal, or religion).  
  Any other relevant regulations/guidelines.  
  Questions and notes taken during interviews or notes of charts made by selecting official when reviewing application materials.  
  Promotional data for 2 years showing selections made by the selecting official by bases of selectees and best qualified applicants, vacancy announcement number, position title, job series, and grade, date of selection.

Testimony:

Evidence

YES NO

affidavit - complainant  
  affidavit - responsible management official  
  affidavit - personnel or staffing specialist  
  affidavit - witnesses, as relevant  
  affidavit - selectee  
  affidavit - some best-qualified applicants  
  affidavit - individuals who provided references of complainant and selectee, if selecting official contacted them for references

NONREFERRALS CHECKLIST

*Prima Facie:*

YES NO

- Whether the complainant is a member of a protected group(s) on the basis of his/her (*basis*).
- Whether the complainant applied, was found not best qualified and was not referred for possible selection for the position of \_\_\_\_\_ advertised under vacancy announcement number \_\_\_\_\_.
- Whether other candidates with the complainant's credentials and not of complainant's protected group(s) were referred for the selection, or another fact raises an inference of discrimination.

## Articulated Reason:

- Whether the agency official(s) responsible for not ranking the complainant among the best qualified and not referring the complainant to the selecting official for consideration for the position at issue articulated a legitimate, nondiscriminatory reason for the nonreferral.

## Evidence:

For the nonreferral complaint, the focus is on the criteria applied by the individual(s) who rated applicants against the KSAs for the position at issue.

- Many of the same documents are needed as for nonselection cases; however, obtain application materials for all candidates found qualified and rated, not just those on the best qualified list.
- Statistical data for nonreferral for the 2-year period prior to action at issue, showing the ratings, best qualified lists, and bases of all rated applicants for those earlier ratings.
- If the same panelists served together on earlier panels, obtain statistical data for nonreferral for those particular panels for the 2-year period prior to action at issue, including all rating sheets, best qualified lists, and a table of the bases and ratings of all rated applicants for those earlier positions.
- Affidavits should be taken from the complainant, the individual who requested the certificate, panel members (or personnel specialist) who rated the applicants, and the personnel officer who advised the panel.
- Position description
- Evaluation criteria or crediting plan

- Rating of candidates
- Certificate of eligible candidates/selection roster
- Evaluation worksheets prepared by selecting official and panel members

## APPRAISALS CHECKLIST

*Prima Facie:*

YES NO

- Whether the complainant is a member of a protected group(s) on the basis of his/her (*basis*).
- Whether the complainant received an annual performance rating of \_\_\_\_\_.
- Whether similarly situated employees not of complainant's protected group(s) received more favorable performance ratings, or another fact that indicates an inference of discrimination.

## Articulated Reason:

- Whether the agency official(s) responsible for complainant's performance appraisal rating articulate(s) a legitimate, nondiscriminatory reason for it.

## Evidence:

- Performance appraisals, including elements and standards for the rating period at issue for complainant, and others rated and reviewed by the same official showing relevant bases of employees.
- Workforce profile and organization chart.
- Complainant's position description.
- Testimony and backup work product documentation with regard to how the complainant was rated on each element compared to all others similarly situated.
- Notes on any counseling offered to complainant prior to the development of the appraisal at issue.
- Pertinent agency regulations on performance appraisals, including union contract, if applicable.

- Comparative data including the differential, if any, in appraisal scores for each person assessed by the rating officer, by the basis raised in the complaint, for a period of 2 years preceding the complaint. Include copies of all appraisals for a 2-year period.
- Affidavit from complainant.
- Affidavit from rating official.
- Affidavit from reviewing official.
- Affidavits from similarly situated coworkers regarding complainant's performance and/or work environment and/or other witnesses with knowledge of complainant's performance or the performance of significant comparators.

## DISCHARGE (DISCIPLINE) CHECKLIST

*Prima Facie:*

YES NO

- Whether the complainant is a member of a protected group(s) on the basis of his/her (*basis*).
- Whether the complainant was discharged from his/her employment.
- Whether similarly situated employees not of complainant's protected group(s) were not discharged from employment; whether the complainant was replaced by an employee outside the protected group(s), or whether another fact raises an inference of discrimination.

## Articulated Reason:

- Whether the agency official(s) responsible for complainant's discharge articulates a legitimate, nondiscriminatory reason for the complainant's discharge.

## Evidence

- Workforce profile showing position, title, series, grade, and protected bases for each employee under the direct and indirect supervision of highest level official responsible for the discharge at issue.
- Organization chart showing work relationships of the affiants.
- Documentation regarding decision to remove complainant from employment, including proposal to remove, underlying documentation, complainant's response, if any, and decision letter.
- Related earlier disciplinary actions, if any, warnings, reprimands, suspensions.
- Notes on any counseling offered to complainant prior to the development of the appraisal at issue.
- Documentation (proposal, responses, and decision letter) regarding other employees removed by responsible official during the 2-year period prior to the removal at issue, with each employee identified by the protected bases of the complaint, and all file information concerning individuals who allegedly committed performance or conduct violations and were not disciplined as severely or at all.

- Agency rules and regulations on discharge in effect at the time of the discharge at issue, if any, including union contracts.
- If discharge is based on misconduct allegations, agency rules and regulations on employee conduct and disciplinary action and table of disciplinary penalties.
- If discharge is based on performance deficiencies, include the complainant's position description, performance standards, record of counseling on performance deficiencies, pertinent work product documentation, and agency rules and regulations regarding performance.
- Documentation for other underlying reasons.
- Affidavit from complainant.
- Affidavit from responsible management official.
- Affidavit from witnesses with knowledge of underlying reasons for discharge.
- Affidavits from employee relations specialist with knowledge of procedures to be followed.



## REPRISAL CHECKLIST

## Prima Facie:

YES NO

- Whether the complainant is a member of a protected group by virtue of his/her participation in protected EEO activity (the protected activity must be EEO-based, not whistleblowing or union activity) or opposition to EEO violations.
- Whether the complainant experienced an adverse employment action after his/her participation in or opposition to EEO activity.
- Whether the management officials responsible for the alleged action knew or should have known of the complainant's participation in prior EEO activity before they took the action(s) at issue.
- Whether similarly situated employees with no prior EEO activity were treated differently by the responsible management officials in similar circumstances.

## Articulated Reason:

- Whether the agency management official(s) responsible for the action at issue articulate legitimate, nondiscriminatory reasons for their actions.

## Pretext:

- Whether the articulated reason is a pretext for discrimination, including whether there is a causal connection between the action at issue and the complainant's prior EEO activity.

## Evidence:

Reprisal allegations may involve almost any subject matter, such as nonselection, appraisal ratings, disciplinary actions, etc. Therefore, all documents relevant to the specific adverse action need to be collected.

- Connection between the alleged adverse action and the prior protected EEO activity.
- Whether the employer treated the employee differently than before the knowledge or differently than the way in which similarly situated nonprotesting employees were treated.
- Evidence of additional surveillance, unusual record keeping, etc.
- Time between the employer's learning of the prior protected activity and the alleged adverse action (the shorter the time, the stronger the inference of a casual connection).
- Whether the treatment of the complainant is considered unusually harsh by peers and/or coworkers.
- Affidavit from complainant.
- Affidavit from responsible management official.
- Affidavit from coworkers who have knowledge of work environment.
- If official denied knowledge of complainant's prior EEO activity, affidavits from others regarding official's knowledge.

## SEXUAL HARASSMENT CHECKLIST

*Prima Facie:*

YES NO

- Whether the complainant is a member of a protected group by virtue of his/her sex.
- Whether the complainant alleges that he/she was subjected to unwelcome sexual advances or activity.
- Whether the complainant alleges that terms, conditions, or the working environment was adversely affected as a result of unwelcome sexual advances or activity.
- Whether the unwelcome advances or activity came from a supervisor, coworker, or nonemployee.
- Whether, if by a coworker or nonemployee, the employer knew or should have known of the behavior at issue and did not take prompt and appropriate remedial action.

## Articulated Reason:

- Whether the employer articulates a legitimate, nondiscriminatory reason for the events (such as that the alleged events did not take place or that they were isolated or genuinely trivial).

## Evidence:

In general, sexual harassment cases depend on testimony. Harassment cases often involve an allegation that sexual behavior between parties other than the complainant has created an adverse action or hostile environment for the complainant. Often clarification regarding the following must be established:

- Whether the alleged harassment was quid pro quo or hostile.
- Whether the alleged contacts were voluntary.

- Whether the complainant made known her/his dislike of the advances.
- Affidavit from complainant.
- Affidavit from responsible management official.
- Affidavits from witnesses (credibility of the key actors).

## RESOLUTION STRATEGY

Every reasonable effort should be made to resolve the complaint without the necessity of carrying it to a final decision. The earlier the resolution is achieved, the less frustrating the conflict results for everyone involved. Voluntary settlement is a resolution of the complaint and is not only authorized, but encouraged. All parties should be on constant alert for opportunities to settle at every stage of the complaint process.

### I Interests, prerogatives, flexibilities

The first step in determining whether and how to resolve a dispute is usually the identification of the important management interests involved (hiring/promoting the best qualified; correcting/preventing inappropriate behavior/performance; encouraging or rewarding good performance; achieving program objectives; minimizing workflow disruption). The objective then becomes the retention of as much control over these interests as possible. When adjudication is selected by management instead of resolution, management interests and prerogatives are being placed in the hands of a third party, not only in the individual dispute, but possibly in other similar circumstances as well. The greater the policy implications, the greater the need for managers to retain as much control (by resolution) as possible. Settlement is the best method of protecting management interests.

- a. Identify the issue: \_\_\_\_\_
- b. Determine the prerogative involved: \_\_\_\_\_
- c. Assess its impact/importance: \_\_\_\_\_

### II Cost comparisons

Managers should strive to minimize costs, especially those that are not directly tied to program objectives (such as complaint processing costs). Where two options are both acceptable to management, the lower costs option is generally preferable. Long term total average costs should be factored in.

- a. Determine the amount at risk: \_\_\_\_\_
- b. Determine the average amount lost: \_\_\_\_\_
- c. Determine the cost of resolution: \_\_\_\_\_
- d. Determine cost of processing: \_\_\_\_\_

### III Impact on workforce relationships

Managers should strive to maximize good relationships and minimize adverse factors in

relationships. Three situations usually must be considered:

- a. The current relationship/performance assessment of the complainant. If the complainant is a satisfactory or better employee, management must decide if it wants to begin battle with the employee.
- b. Peer assessment of the complainant must be accurately determined (settlement with a "bad" employee should not be a simple "caving" in.)
- c. Settlement options must be assessed for impact on other employees.

#### IV Risk analysis

As integral part of balancing the first three factors is assessing the risks of a case in terms of strengths and weaknesses. This will vary depending on case facts and the theory of discrimination involved. Amount of risk, if high, may make settlement imperative. If low, settlement would be appropriate only on very favorable terms. The important operative is that settlement is still preferred, on the right terms, even if the chance of winning is very high. There is no guaranteed winner or loser.

- a. Establish the facts: \_\_\_\_\_
- b. Apply the law: \_\_\_\_\_
- c. Assess the strengths and weaknesses of the case: \_\_\_\_\_
- d. Quantify the chances: \_\_\_\_\_

#### V Strategy applied to options

In each case, there will be innumerable options. These range from absolutely no relief all the way to full relief. Each option will have a different impact on management interests; costs a different amount of money; will impact differently on the workforce, and will affect long term risks differently. In every case, there is a resolution that is completely acceptable to management. The model is used to identify it, determine the acceptable bargaining leeway, and justify resolution.

#### VI The merits of the claim are not a factor

Whether one is right or wrong is not important in resolution management. Reasonably resolving the case is what is important, and this depends on the strengths and weaknesses of the case. Every case has strengths and weaknesses. A manager is not right squandering tax dollars to satisfy a personal belief in having done the right thing. The right thing is what is best for the organization and the attainment of organizational objectives. Finally, if one is absolutely right, and one can achieve those same interests by resolution, it is morally reprehensible to risk management interests in the hands of a third party to satisfy the personal belief.

## VII There is no formula to weigh the factors

Usually management interests will be important in the case, but occasionally, impact will predominate. Risk factors also play a significant role if chance of success drops below 70 percent.

Cost, however, never is the sole factor or the most important factor in resolution. It is cheaper to settle every case for full relief than to process cases. Management should work to minimize costs, but not at the expense of interests or impact on workforce. Cost is, therefore, to be considered but not to predominate the decision-making process.

## VIII Use the strategy to justify litigation

Once an acceptable resolution is identified, and bargaining parameters established, the key is obtaining the complainant's agreement. If this cannot be obtained, the complainant's demands should be analyzed under the model to ascertain their impact on interests, costs, workforce, and risks. Where significant drawbacks exist, the model will justify going forward. If benefits still predominate over drawbacks, then resolution on those terms is still preferable to going forward to adjudication. The analysis at this stage can be likened to picking the terrain on which the conflict will be decided.

SETTLEMENT AGREEMENT ANALYSIS FORM

I COMPLAINANT:

II AGENCY:

III ISSUES:

IV BASIS

V TERMS:

(A) NON-MONETARY RELIEF: \_\_\_\_\_

(B) MONETARY: \_\_\_\_\_ LUMP SUM \_\_\_\_\_ BACK PAY \_\_\_\_\_ OTHER  
\_\_\_\_\_ COMPENSATORY DAMAGES

VI JUSTIFICATION FOR RESOLUTION AND RELIEF AWARDED:

(A) INTERESTS PROTECTED:

(B) RELATIONSHIPS PROTECTED:

(C) RISK OF LOSS:

(D) COST ANALYSIS:

(E) OTHER:

VII DAMAGES DETERMINATION:

(A) PECUNIARY DAMAGES:

(B) NON-PECUNIARY DAMAGES:

VIII ACTION TAKEN TO ELIMINATE SIMILAR FUTURE COMPLAINTS:

(A) TRAINING:

(B) DISCIPLINE:

(C) OTHER:



## ATTORNEY'S FEES CHECKLIST

YES NO

- A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.
- Complainant is the prevailing party in a settlement agreement.
- Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals, or law students under the supervision of members of the Bar.
- Attorney's fees shall be paid only for services performed after the filing of a written complaint.
- Attorney's fees shall be paid only for services performed after the complainant has notified the agency that he or she is represented by an attorney. (Fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant.)

Amount of Awards:

YES NO

- The complainant's attorney submitted a verified statement of costs and attorney's fees (including expert witness fees), within 30 days of receipt of the decision.
- The attorney's fees statement is accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services.
- The amount of fees shall be calculated in accordance with existing case law using the following standards:

Number of hours reasonably expended multiplied by a reasonable hourly rate. The amount may be reduced or increased in consideration of the following factors:

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill requisite to perform the legal service properly;
4. the attorney's preclusion from other employment due to the acceptance of the case;
5. the customary fee;
6. whether the fee is fixed or contingent;
7. time limitations imposed by the client or the circumstances;
8. the amount involved and the results obtained;
9. the experience, reputation and ability of the attorney
10. the undesirability of the case;
11. the nature and the length of the professional relationship with the client, and

## 12. awards in similar cases.

YES NO

- |                          |                          |  |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | A statement of the number of hours spent in the preparation and presentation of the case.  |
| <input type="checkbox"/> | <input type="checkbox"/> | The statement includes dates and exactly what was done.  |
| <input type="checkbox"/> | <input type="checkbox"/> | Statement describes the training and experience of each individual who worked on the case and the number of hours spent by each individual.  |
| <input type="checkbox"/> | <input type="checkbox"/> | A sworn statement of the attorney's usual and customary hourly charge, as well as the usual fee for each person who worked on the case.  |
| <input type="checkbox"/> | <input type="checkbox"/> | A sworn statement explaining whether the fee for the case was fixed or contingent, whether the handling of the case precluded other employment, the nature and the length of the professional relationship with client, and any other factors that might affect the amount of the award. |
| <input type="checkbox"/> | <input type="checkbox"/> | Sworn statements by other attorneys in the relevant geographical area who work in the field of employment discrimination.  |

## AGREEMENTS CHECKLIST

Under 29 CFR 1614.504, a settlement agreement, which is reached at any stage of the complaint process, is binding upon an agency and the complainant provided that it was "knowingly and voluntarily" entered into. In addition, a final decision is binding on the agency.

YES NO

- If complainant believes that an agency failed to comply with the terms of a settlement agreement or final decision, she or he must notify the EEO Director, in writing, within 30 days of when she or he knows or should have known of the alleged noncompliance. (The complainant must satisfy this notice requirement as part of his/her requirement to exhaust available administrative remedies.)
- The agency provided evidence showing compliance with the settlement agreement or the decision.

### Standards

The EEOC recognizes that a settlement agreement is a written contract between parties which is enforceable under 29 CFR 1614.504. Its analysis of noncompliance is based, therefore, on several longstanding legal principles underlying contract interpretation. These include the following:

YES NO

- The jurisdiction is limited to review of breaches in settlement agreements entered into by the parties during the EEO administrative process.
- The settlement agreement is a contract. It is in writing and supported by adequate legal consideration.
- The settlement agreement must be signed by both parties. (The EEOC will not enforce oral settlement agreements.)
- In contract interpretation, the critical inquiry is the wording of the document, the parties' intention when the agreement is executed and their actions after execution. To determine the parties' intention, the EEOC relies generally upon the plain meaning of the "words." If the document is "plain" and "unambiguous" on its face, its meaning must be determined from the four corners of document itself without resort to extrinsic evidence. The language is interpreted according to its usual meaning, such as "rescission" rather than "cancellation." The EEOC will apply the customary usage for terms and assume that the parties would have inserted additional language if they intended anything other than their ordinary and normal meaning.

- The parties explicitly described their expectations and understanding in the written document and did not rely on contradictory verbal or oral statements.
- If a settlement agreement is made in good faith and is otherwise valid, it may not be set aside merely because one party made a "poor" bargain.
- In the absence of bad faith or agency misrepresentation, a settlement agreement may be set aside where a complainant is deprived of the primary benefit for which she or he had bargained because of unforeseen extraordinary circumstances.
- If the term was legitimately misunderstood by one party or the other, then there was no meeting of the minds, and the agreement is void.

## FINAL DECISION

If yes to the following, a *prima facie* case has been established:

YES NO

- Does complainant identify a protected basis?
- Was the complainant affected by an agency personnel change or action affecting the terms and conditions of employment?
- Was the complainant treated less favorably than similarly situated employees outside his/her protected group or, in the alternative, is there some other evidence raising an inference of prohibited discrimination?

## Articulated Reasons

- Are there legitimate nondiscriminatory reasons for the employment action affecting the complainant?
- Are the reasons produced with sufficient clarity and completeness so as to allow a fair opportunity to analyze for pretext?

## Analysis for pretext

- Are the reasons offered by the agency a pretext for discrimination (pretext may be established if any of the following are answered yes.)
- Do the reasons lack credibility?
- Are the reasons contradicted by the facts?
- Are the reasons unreliable?
- Does a preponderance of the evidence support a finding of discrimination? (The complainant's protected trait must have played a role in the agency's decision-making process on the employment action affecting the complainant.)
- Are the reasons offered not legitimate managerial prerogatives?
- Are the reasons not applied uniformly and consistently?