

# DRAFT

20 January 2007

Departments of the Army and the Air Force  
National Guard Bureau  
Arlington, VA 22202-3231  
10 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

\*NGR (AR) 690-600/NGR (AF) 40-1614

## Personnel

### NATIONAL GUARD CIVILIAN DISCRIMINATION COMPLAINT SYSTEM

(Title VII)

By Order of the Secretaries of the Army and the Air Force

H Steven Blum  
Lieutenant General, USAR  
Chief, National Guard Bureau

Official:  
STEVEN SNIPES  
Colonel, USAR  
Chief Support Services

**Summary.** The purpose of this regulation is to provide guidelines establishing policy and procedures to file, process, investigate, resolve and adjudicate complaints of discrimination in the National Guard. It implements Federal statutes consistent with the EEOC regulation, 29 CFR Part 1614 regulations and the Department of the Defense directives prohibiting discrimination based on race, color, religion, sex (hereafter gender), national origin, age (over 40), or handicap condition (physical and/or mental).

The authority and maintenance of the system required by this regulation is the 42 U.S.C. 2000E-16(B) AND (C); 29 U.S.C. 204(F) and 206(d); 29 U.S.C. 633(A); 29 U.S.C. 791; Reorganization Plan No. 1 of 1978; 43 FR 19807 (May 9, 1978); and Executive Order No. 12106, 44 FR 1053 (January 3, 1979).

**Summary of Changes.** This is a revision of the National Guard Civilian Discrimination System and reflects changes enacted by the 29 Code of Federal Regulations (CFR) Part 1614 Implemented, 9 November 1999. This regulation revises and combines Volume I and Volume II of the National Civilian Complaint Processing and Adjudication as follows:

a. All agencies will establish and/or make an Alternative Dispute Resolution (ADR) program.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. EEO Counselors will provide aggrieved persons in writing of their Rights and Responsibilities in participating in the agency's ADR program during the initial counseling session (29 CFR Part 1614.105).

c. Complainants can amend a complaint at any time prior to the investigation (29 CFR Part 1614.106).

d. New dismissal provisions: (1) Dissatisfaction with complaint processing and (2) Clearly established patterns of misuse of the EEO process (29 CFR Part 1614.107).

e. The agency will develop an impartial and appropriate factual record (29 CFR Part 1614.108).

f. The appointed Administrative Judge (AJ) has full responsibility to adjudicate; develop records, and consider agency's written offers of resolutions not later than thirty (30) days of the hearing (29 CFR Part 1614.109).

g. Complainants can move for Class Certification at any reasonable point during the complaint process (29 CFR Part 1614.204).

h. The No Fear Act became effective October 1, 2003. The Act is designed to hold agencies and employees more accountable for discrimination by requiring agencies to repay the Judgment Fund; to make their EEO data more available, to report to Congress, to EEOC and the Attorney General on their EEO programs, and to ensure employees are aware of their EEO and Whistleblower rights. Although agencies are already required to submit EEO information to the EEOC annually, the Notification and Federal Employee Antidiscrimination and Retaliation Act, Public Law 107-174, has additional reporting mandates and requires agencies to post their EEO information on their web sites. Reference EEOC Management Directive 715, for implementation and compliance guidelines.

**Appeal Rights.** Decisions on appeals of the agency's final action shall be based on a "de novo" review. Amended at 1614.201(a); appeals by all parties must be filed with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036 using EEOC Form 573, "Notice of Appeal/Petition", and the nature of the appeal must be included in the form. Form 573 can be obtained via EEOC's website <http://eeoc.gov>. The appeal may be sent by mail, facsimile, or personal delivery.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Applicability.** This regulation applies to National Guard technician personnel, applicants for technician employment, former technicians, and to all personnel who supervise, manage, or regulate the National Guard Technician workforce. Members or former members of the National Guard alleging illegal discrimination regarding service as military members or applicants for membership in the National Guard or Active Guard Reserve (AGR) are governed by NGR (AR) 600-22/NGR (AF) 36-3, not by the provisions of this regulation.

**Internal Control System.** This regulation does not contain internal control provisions and is not subject to the requirements of AR 11-2. The complaints processing and adjudication procedures of this regulation are part of the National Guard Discrimination Complaints System and are managed by tracking usage of an automated system based on documentation and numerical case numbering.

**Impact on New Manning System.** This regulation does not contain information that affects the New Manning System.

**Supplementation.** Supplementation of this regulation and establishment of forms other than National Guard Bureau forms are prohibited without prior approval from the National Guard Bureau Directorate for Equal Opportunity (NGB-EO).

**Interim Changes.** Interim changes to this regulation are not considered official unless authenticated by the Director, Administrative Services. Users will destroy interim changes on the date of expiration unless superseded or rescinded.

**Suggested Improvements.** The National Guard Bureau Directorate for Equal Opportunity (NGB-EO) is the proponent agency of this regulation. Users are invited to send comments and suggested improvements on DA Form 2028, (Recommended Changes to Publications and Blank Form), directly to Chief, National Guard Bureau, Attn: NGB-EO, 1411 Jefferson Davis Highway, Arlington, VA 22202-3231.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## TABLE OF CONTENTS

### Chapter 1-General

Para	Title	Page
1-1	Purpose	1
1-2	References	1
1-3	Explanation, Abbreviations, and Terms	1
1-4	Implementation	1
1-5	The National Guard Civilian Discrimination Complaint System	1
1-6	Policies	1
1-7	Right to File a Complaint	2
1-8	Freedom from Retaliation and Restraint	2
1-9	Corrective and Remedial Actions	2
1-10	Referral of Complaints	3
1-11	Disciplinary/Adverse Actions	3
1-12	EEO Staff Resources	3
1-13	Who May file a Complaint	3
1-14	Filing and Processing Complaints	4
1-15	Role and Authority of NGB	4
1-16	Responsibilities	4
1-17	Time Limits	7
1-18	Education, Training, and Awareness	7
1-19	Documentation	8
1-20	Interpretation and Exemption	8

### Chapter 2 – Alternative Dispute Resolution (ADR)

2-1	Purpose	9
2-2	ADR Program Development	9
2-3	Responsibilities	9
2-4	ADR Methods	10
2-5	ADR Program Requirements	12
2-6	ADR Program Procedures	12
2-7	Evaluation and Assessment Measurement	13

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 3 – Pre-Complaint Processing

3-1	General	14
3-2	Informal Complaints (Purpose of Pre-Complaint Processing)	14
3-3	Filing an Informal Complaint	14
3-4	Assignment of an EEO Counselor	14
3-5	Initial Counseling Session	14
3-6	Rights and Responsibilities of the Complainant	14
3-7	Claims, Bases, and Supporting Material	16
3-8	EEO Counselor's Inquiry	17
3-9	Extending the Inquiry	17
3-10	Alternative Dispute Resolution(ADR Process)	18
3-11	Final Interview and Right to File a Formal Complaint	18
3-12	Final Interview After Extension or ADR	19
3-13	EEO Counselor's Report	19
3-14	Resolution During Pre-Complaint Processing	20
3-15	Assisting the Complainant in Filing a Formal Complaint	20
3-16	Mandatory EEO Counselor Training Requirements	21

## Chapter 4 – Formal Complaint Processing

4-0	General	23
4-1	Filing a Formal Complaint	23
4-2	Conflicts of Interest	23
4-3	Receipt of a Formal Complaint	23
4-4	Initial Review of the Formal Complaint	24
4-5	Clarification of Claims	25
4-6	Complainant May Amend a Pending Complaint	25
4-7	Acceptance and Dismissal Process	27
4-8	Fragmenting EEO Complaints	28
4-9	Request for NGB Review and Investigation	28
4-10	Review of Acceptance or Dismissal by NGB	29
4-11	Criteria for Acceptance or Dismissal	30
4-12	Processing of Partially Dismissed Complaints	33
4-13	Extension of Time Limits	33
4-14	Consolidation and Joining of Complaints	34

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 5 – Fact Finding and Investigation

5-1	General	36
5-2	Purpose of Fact Finding and Investigation	36
5-3	Fact Finding	36
5-4	Alternative Dispute Resolution	36
5-5	Assignment of an Investigator	37
5-6	Authority of the Investigator	37
5-7	Scheduling On-Site Investigation	38
5-8	State National Guard Support Requirements	38
5-9	Conduct of the Investigation	39
5-10	Amendment During Investigation	40
5-11	Investigative Fact finding Hearing	41
5-12	Witnesses and Testimony	42
5-13	Problems and Delays	43
5-14	Report of Investigation (ROI)	44
5-15	Purpose and Use of the Report of Investigation	44
5-16	Notice of Investigation Completion	45
5-17	Settlement Before a Decision	45
5-18	Failure to Issue a Notice of Investigation Completion	45

## Chapter 6 – Hearings, Adjudications, and Decisions

6-1	General	46
6-2	Adjudication and Decision Procedures	46
6-3	Adverse Inference	47
6-4	Input From the Adjutant General	47
6-5	Request for an immediate Final Decision	47
6-6	Request for a Final Decision with a Hearing	48
6-7	Arranging for a Hearing	48
6-8	The Hearing Process	48
6-9	Authority of the Administrative Judge (AJ)	49
6-10	Findings and Conclusions of the AJ	50
6-11	The National Guard Bureau Final Decision	51
6-12	Failure to Issue a Final Decision	Q
6-13	Other Final Decisions and Determinations	52
6-14	Closure of Formal Complaints	52

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 7 – Withdrawals, Settlements, Remedies, and Compliance

7-1	General	54
7-2	Withdrawal of a Complaint	54
7-3	Settlement Opportunities	54
7-4	Requirements for Settlement Agreements	55
7-5	Settlements of Complaints	56
7-6	Certified Offer of Resolution	57
7-7	Remedies	58
7-8	Relief for an Applicant	59
7-9	Relief for a Technician	59
7-10	Fees, Costs, and Monetary Awards	60
7-11	Awarding Attorney's Fees and Costs	61
7-12	Compliance With and Enforcement of Settlements	62
7-13	Compliance With and Enforcement of Decisions	63
7-14	Disciplinary or Adverse Personnel Actions	64

## Chapter 8 – Appeals and Civil Actions

8-1	General	66
8-2	The Right to Appeal and to File Civil Action	66
8-3	Appellate Procedures	66
8-4	Agency Procedures	67
8-5	Filing an Appeal	67
8-6	National Guard Actions on Appeals	68
8-7	Review of Final Decisions Issued by Administrative Judges	68
8-8	Review of Decisions Issued by Administrative Judges	69
8-9	Reconsideration of EEOC Decisions	69
8-10	Civil Actions in Civil Rights Act, Rehabilitation Act, and Age Discrimination Act Complaint	70
8-11	Civil Action in Mixed Case Complaints	71
8-12	Civil Action in Equal Pay Act Complaints	71
8-13	Damages in Intentional Discrimination	71
8-14	Coordination of Civil Actions	71
8-15	Effect of Filing a Civil Action	72

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 9 – Representation and Witnesses

9-1	Parties to the Complaint	73
9-2	Named Individuals	73
9-3	Witnesses	73
9-4	Representative of the Complaint or Agent	74
9-5	Corresponding with Representatives	74
9-6	Representing of the Agency	75
9-7	Official Time	75

## Chapter 10 – Related Processes and Special Provisions

10-1	General	76
10-2	Conditions for Using Grievance Procedures	76
10-3	Election of Negotiated Grievance Procedures	76
10-4	Final Decision Under the Grievance Procedure	76
10-5	Mixed Case Complaints and Appeals	77
10-6	Election of Mixed Case Procedures	77
10-7	Dismissals of Mixed Case Complaints	77
10-8	Special Provisions for Mixed Case Complaints	78
10-9	Petitions to EEOC from MSPB Decisions	79
10-10	Age Discrimination in Employment Act (ADEA)	79
10-11	Drug Use and the Rehabilitation Act	79
10-12	Employment Criteria and Reasonable Accommodations	79
10-13	Equal Pay Act Complaints	81

## Chapter 11 – Class Complaints

11-1	General	81
11-2	Guidance for Class Complaints	81
11-3	Requirements and Criteria	81
11-4	Pre-Complaint Processing	81
11-5	Filing a Class Complaint	81
11-6	Receipt, Review, and Transmittal of a Class Complaint	82
11-7	NGB Review and Designation of Representative	83
11-8	Acceptance and Dismissal	83
11-9	Notification of Existence of Class Complaint	84

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

11-10	Developing Evidence	84
11-11	Opportunities for, Vacating of and Complying with Settlements	85
11-12	Hearing	86
11-13	Findings and Recommendations to the AJ	86
11-14	The National Guard Bureau Final Decision	86
11-15	Failure to Issue Final Decision	86
11-16	Notification of NGB Decision	87
11-17	Relief for Individual Class Members	87

## Chapter 12 – Official Discrimination Complaint Case Files

12-1	General	88
12-2	Assignment and Use of Case Numbers	88
12-3	Titling of Complaints	88
12-4	Establishment and Maintenance of the Official Complaint File	89
12-5	Content of the Official Complaint File	90
12-6	Organization of the Official Complaint File	92
12-7	Safeguarding, Use, and Release of the Official Complaint File	93
12-8	NGB Case Number	94
12-9	NGB Inquiry Number	95

## Appendices

A	Remedies and Relief for Individual Complaints of Discrimination	A-1
B	EEOC District Offices and Geographic Jurisdiction	B-1
C	The Complaint Process and Time Limits	C-1
D	Flowchart – Discrimination Process	D-1
E	Reporting Requirements	E-1
F	Form Letters and Formats	F-1
G	Glossary	G-1

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 1

### General

#### 1-1. Purpose

This regulation explains the National Guard Discrimination Complaint System and establishes procedures for the processing, management, and adjudication of discrimination complaints. It further explains the avenues of redress available to complainants and the procedures of how to file, process, investigate, resolve, and adjudicate complaints of discrimination. It implements Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000E-16); the Civil Rights Act of 1991 (P.L. 102-166) applicable to National Guard personnel; the Age Discrimination in Employment Act (ADEA) of 1967, as amended (29 U.S.C. 633A); the Rehabilitation Act of 1973, as amended (29 U.S.C. 791 AND 794a); the Equal Pay Act (EPA) of 1963 (29 U.S.C. 206 (d)); the Americans with Disabilities Act (ADA) of 1990 (P.L. 101-336); Title 29 of the Code of Federal Regulations; Parts 1614, including revisions (29 C.F.R. Parts 1613 and 1614); Equal employment Opportunity Commission Management Directive (EEOC MD 110); Department of Defense (DOD) directive 1440.1, the DOD Civilian Equal Employment Opportunity (EEO) Program, as changed; and related case law and decisions and interpretation of EEOC.

#### 1-2. References

Required and related references listed in paragraph 1-1 of this regulation.

#### 1-3. Explanation and Abbreviations and Terms

This regulation uses many special terms whose exact definitions are found in the Glossary and are necessary to understand and be able to comply with the provisions of this regulation.

#### 1-4. Implementation

Effective 9 November 1999, all discrimination complaints, including those filed before the above date are subject to the provisions of 29 C.F.R. Part 1614, Federal Sector Equal Employment Opportunity Final Rule, as explained in this regulation.

#### 1-5. The National Guard Civilian Discrimination Complaint System

The National Guard has established and operated a Civilian Discrimination Complaint System, based on the statutes and regulations cited. The policy and purpose of this system is to: (1) foster equal opportunity; (2) resolve complaints fairly and in a timely manner and (3) provide a just and effective avenue of redress to aggrieved parties and to resolve complaints.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## 1-6. Policies

a. Equal Opportunity. The fair, equitable and nondiscriminatory treatment of all members and employees of the National Guard improves morale and productivity, fosters unit cohesion and readiness, and increases the combat effectiveness of the National Guard. It is the policy of the National Guard Bureau to provide equal employment opportunity for National Guard technician personnel, applicants for technician employment, or former technician personnel without regard to race, color, religion, gender (including sexual harassment, national origin, age, handicap condition (physical and/or mental), retaliation, or sexual

b. Sexual Harassment. All National Guard personnel are entitled to serve in an environment free from sexual harassment. Sexual harassment is a form of gender discrimination and will not be tolerated in the National Guard. Allegations of sexual harassment will be given prompt attention and resolved as expeditiously as possible. Sanctions outlined in military or civilian personnel regulations will be applied when individuals behaved inappropriately by engaging in sexual harassment.

c. Resolution of Complaints. It is the goal of the National Guard to resolve and settle all allegations and complaints of discrimination fairly, equitably and expeditiously. Whenever possible, complaints will be resolved before the formal stage. The settlement of a complaint should be pursued at any stage of complaint processing; however, settlements will not contain any provisions that abridge the rights guaranteed under the laws and regulations listed in paragraph 1-1 and as stated as policies herein.

d. Alternative Dispute Resolution (ADR) Program. To foster early resolution, an Alternative Dispute Resolution Program has been established in the National Guard Civilian Discrimination Complaint System. It provides for a variety of techniques for resolving complaints of discrimination.

## 1-7. Right to File a Complaint.

Personnel who believe they have been subjected to illegal discrimination have a right to have their allegations heard, initially as an informal complaint and, if it is not resolved, as a formal complaint of discrimination. These rights will not be withheld even if it may be evident to National Guard officials that discrimination did not take place or that the complaint does not fall within the criteria of this regulation. Such matters may only be decided in dismissals or final decisions of formal complaints.

a. Whenever an individual brings an allegation of discrimination to the attention of National Guard officials, it is appropriate that every effort be made to resolve the

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

complaint. Concurrently, however, the individual will be advised of the right to file a complaint and of the time limitations for contacting an EEO counselor.

b. EEO counselors, State Equal Employment Managers (SEEM), and other EEO officials contacted by aggrieved persons will advise them on criteria for acceptance or dismissal of complaints and on how complaints are processed under the Civilian Discrimination Complaint System, but they will not discourage aggrieved personnel from filing complaints. During pre-complaint processing (the informal stage), EEO counselors and SEEMs will not make conclusions on the merits of the complaint.

## **1-8. Freedom from Retaliation and Restraint**

The National Guard Civilian Discrimination Complaint System exists to resolve complaints and to provide a just and effective avenue of redress. Participation in this system, as established by this regulation, is a right that will not be abridged and individuals will not be discouraged from such participation due to fear of reprisal or retaliation. Not one shall be subjected to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, or the Rehabilitation Act, or for participating in any stage of administrative or judicial proceedings under these statutes or this regulation. Personnel who believe that retaliation has been taken against them have the right to raise such a matter as a complaint of discrimination.

## **1-9. Corrective and Remedial Actions**

When supervisors, managers, or commanders have reason to believe that discrimination may be occurring, they will conduct appropriate inquiries and take whatever corrective or remedial action necessary to eliminate and remedy such discrimination.

a. Nothing in this regulation requires supervisors, managers, or commanders to wait until a discrimination complaint is filed before they take remedial or corrective action on any real or perceived discrimination in their organization. They should consult with equal opportunity staffs to help identify and rectify potential areas of discrimination.

b. Dismissal or withdrawal of discrimination complaints does not lessen the responsibility of supervisors, managers, and commanders to determine the validity and merits of the allegations raised and to take corrective or remedial action, if warranted.

## **1-10. Referral of Complaints**

Allegations of discrimination by or on behalf of technician personnel, former technician personnel, or applicants for technician employment received by NGB will be referred to the State National Guard for processing. General allegations of discrimination made by persons or special interest organizations that are not within the scope of individual or

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

class discrimination complaints will be promptly answered by the Adjutant General (AG) or an officer acting for the AG.

## **1-11. Disciplinary/Adverse Actions**

Appropriate action will be taken against personnel who engage in discrimination. Disciplinary or adverse action against individuals who have engaged in discrimination is not a form of remedy and is taken separately and apart from the administrative processing of a discrimination complaint.

## **1-12. EEO Staff Resources**

The SEEM will be the senior State EEO official and will have direct access to the AG. The SEEM may work under the staff supervision of the Human Resource Officer (HRO) or as special staff of the AG. In either case, adequate resources will be provided in each State National Guard to ensure efficient and successful operation of the Civilian Discrimination Complaint System. EEO counselors may be designated as collateral or full-time duties. In either case, a sufficient number of EEO counselors will be appointed for easy and ready access to pre-complaint counseling and to ensure that counseling is initiated within the time limits in this regulation. Allocation of personnel, their qualifications, training, and experience is a matter reportable to the EEOC and NGB.

## **1-13. Who May File a Complaint**

Individual and class complaints of employment discrimination covered by this regulation are based on discrimination prohibited by the statutes cited in paragraph 1-1. Complaints of retaliation or reprisal for participation in actions authorized by these statutes are treated as complaints of discrimination. Sex discrimination cited in these statutes and regulations is referred to as gender discrimination herein.

a. Any National Guard technician, former technician, or applicant for technician employment who believes that he or she has been illegally discriminated against due to race, color, religion, gender (including sexual harassment), national origin, age, or physical or mental handicap in an employment matter (subject to the control of the National Guard) may file an individual complaint of discrimination.

b. Any group of National Guard technicians, former technicians, or applicants for technician employment who believe that they have been or are being adversely affected by a National Guard personnel management policy or practice (which illegally discriminates against the group on the basis of their common race, color, religion, gender, national origin, age, or physical or mental handicap in a matter subject to the control of the National Guard) may file a class complaint of discrimination.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. In some instances, discrimination allegations may also be raised under negotiated grievance procedures or under appellate provisions of the Merit Systems Protection Board rather than under this regulation. Chapter 10 of this regulation states under what circumstances these other procedures are available and how an individual chooses the procedure. The MSPB rules can be found at <http://www.mspb.gov>.

d. Members or former members of the National Guard, applicants for membership in the National Guard, or Active Guard Reserve (AGR) personnel alleging illegal discrimination that relates to their military status) are not covered by the provisions of this regulation. Such discrimination complaints are governed by NGR (AR) 600-22/NGR (AF) 36-3.

## **1-14. Filing and Processing Complaints**

Complaints of discrimination must be filed with the agency that allegedly discriminated against the complainant. Therefore, in order to file a complaint with the National Guard, the complaint must involve an employment matter subject to the control of the National Guard. A complaint involving an employment matter not under the control of the National Guard could be filed, but would subsequently be dismissed as "not within the purview of the National Guard" to remedy. Members or former members of the National Guard alleging illegal discrimination that relates to their military status and applicants for membership in the National Guard or for duty as Active Guard Reserve (AGR) are not covered by provisions of this regulation. Such discrimination complaints are governed by NGR (AR) 600-22/NGR (AF) 30-3.

## **1-15. Role and Authority of NGB**

The Secretaries of the Army and the Air Force have delegated to the Chief, National Guard Bureau the authority and responsibility for equal employment opportunity for National Guard technician personnel. Therefore, the National Guard Bureau acts as the "Agency" within the meaning of 29 C.F.R. Part 1614 in all aspects of administrative processing, management, and adjudication of complaints of discrimination.

## **1-16. Responsibilities**

a. Chief, National Guard Bureau. Responsible for equal employment opportunity within the National Guard. Acts as the Agency head within the meaning of 29 CFR Part 1614:

- (1) To ensure propriety of the acceptance and dismissal of complaints.
- (2) To issue final agency decisions on the merits of the claim in discrimination complaints.
- (3) To issue administrative closures of complaint cases.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

- (4) To approve offers of resolution.
- (5) To make determination on remedies and relief associated with a complaint in the final action by the agency.
- (6) To ensure compliance and enforcement of settlements and final agency decisions.
- (7) To make determinations to have EEOC reconsider its appeal decisions.
- (8) To authorize issuance of final agency decisions that follow a decision by an administrative judge.
- (9) To authorize denial of representative appeals.
- (10) To authorize acceptance and dismissal of class complaints.
- (11) To enforce decisions on petitions to vacate a resolution.

b. Director, Office of Equal Opportunity and Civil Rights (NGB-EO). Appointed by the Chief of NGB, the Director of the Office of Equal Opportunity and Civil Rights establishes EEO programs, plans and policies, and serves as the principal advisor to the Chief, NGB, on all EEO matters. The Director of NGB-EO issues determinations and certifications on discrimination complaints or delegates them to the Deputy Director of NGB-EO or the Branch Chief of Complaints Management.

c. Branch Chief, Complaints Management (NGB-EO). Establishes and administers the National Guard Civilian Discrimination Complaint System and develops policies and procedures for processing, management, and adjudication of discrimination complaints. The Chief of Complaints Management Branch issues decisions, determinations, and certifications on discrimination complaints.

d. Alternative Dispute Resolution (ADR) Manager (NGB-EO). Manages, directs, and evaluates the NGB-EO ADR Program. Develops NGB-EO ADR policy and regulations. Provides ADR training, advice, assistance, mediation and facilitation services. Promotes the use of ADR as an alternative method of resolving disputes. Reviews and monitors the implementation of NGB-EO ADR Plan at the state level. Analyzes ADR reports, data, settlement agreements, trends, and resolution statistics to evaluate the overall program effectiveness.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

e. Chief Counsel (NGB-JA). Provides legal advice on discrimination complaint matters. Reviews complaint cases, Reports of Investigation, settlements, offers of resolution, final decisions and other matters for legal sufficiency and compliance with EEO laws and regulations. Designates the National Guard representative for class complaints. Coordinates with the Department of Justice and the Litigation Offices of the Departments of the Army and the Air Force Judge Advocates General whenever a complainant files a civil action in Federal court.

f. Chief, Acquisition Contracting Division, (NGB-AQ). Provides advice on contracting investigators for discrimination complaints.

g. Director, Administrative Services, (NGB-SD). Acts on Freedom of Information Act (FOIA) requests for release of any part of the official discrimination complaint case file, to include Reports of Investigation.

h. State Adjutants General (AG). Administers the EEO program, implements and manages the Civilian Discrimination Complaint System in their State, and ensures that:

(1) The State National Guard operates in an atmosphere free of illegal discrimination and does not discourage personnel from participating in the complaint process due to fear of retaliation.

(2) Policies and requirements of this regulation are followed and procedures are established for expeditious processing of discrimination complaints and ensures adherence to the established time limits.

(3) Complaints are accepted or dismissed on procedural grounds, as listed in Chapter 4 of this regulation.

(4) Attempts are made to resolve complaints early and expeditiously and resolution attempts continue throughout the discrimination complaint process, using the ADR Program, to include mediation and other dispute resolution techniques.

(5) Full relief is provided, in accordance with 29 CFR 1614 and Chapter 7 of this regulation, to make the victim whole, including posting of required notices when a finding of discrimination is made by NGB, the Equal Employment Opportunity Commission(EEOC) or an EEOC Administrative judge.

(6) National Guard personnel called as witnesses during discrimination complaint investigations participate in a manner consistent with the overall objectives of the fact finding mission.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(7) Information on how to file complaints and on time limits for filing is regularly publicized and permanently posted on easily accessible bulletin boards for all technicians, former technicians, and to applicants for technician employment with the National Guard.

i. Human Resources Officer (HRO). Responsible for ensuring the compliance at the State level with the National Guard Civilian Complaint Discrimination System and that all parties adhere to the rules and regulations governing complaint processing. They are also tasked to provide assistance throughout the complaint processing by ensuring access to personnel records and documents (as well as maintain records relative to the complaint) to EEO Counselors, Investigators, Judge Advocate personnel or other parties legally entitled to review and retrieve relevant data.

j. State Equal Employment Managers (SEEM). Responsible for managing the Civilian Discrimination Complaint System on behalf of the Adjutant General (AG) and for ensuring that complaints are processed in accordance with the provisions and regulations provided herein.

(1) Provide expert advice and recommendations to the Human Resources Officer (HRO) and the AG on all aspects of discrimination complaints to include the acceptance/dismissal decisions, settlements/ resolutions to complaint and to coordinate legal aspects of complaint claim with the State JA.

(2) Advises the AG, along with the HRO, on resources needed to manage the complaint system effectively.

(3) Provide EEO training to National Guard personnel and Counselors in accordance with Code of Federal Regulations, DOD and NGB directives.

(4) Ensure EEO Counselors are trained in accordance with regulations and provided with adequate resources to accomplish mission of fact-finding and seeking resolution.

(5) Monitor and provide maintenance of complaint activity and official records for statistical reporting purposes to NGB-EO and EEOC.

k. EEO Counselors.

(1) Advise complainants of provisions of the law governing EEO complaints of discrimination, Federal and National Guard regulations regarding the complaint process and procedures.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(2) Conduct fact-finding inquiries into alleged complaints of discrimination; provide counseling; advise complainant's of rights and responsibilities and proper forum to pursue complaint; attempt to resolve complaints at the lowest level possible; maintain a thorough record of counseling and interviews between parties and assist complainants in identifying a clear and concise claim.

## l. State Judge Advocates (JA).

(1) Provide legal review and advise on all aspects of discrimination complaints.

(2) Review formal complaints filed and provide recommendation on acceptance and/or dismissal of complaints in accordance with applicable case law, CFR, DOD and NGB regulations.

(3) Serves as Agency Representative on behalf of the National Guard during the investigative and EEOC hearings, prepares and presents case law on behalf of the Guard. In conjunction with SEEM, assists in identifying appropriate witnesses for the State. Also, responsible for providing notification to NGB-EO and NGB-JA on the status of civil action suits initiated or terminated against the State.

(4) Advise AG on settlement agreements and claims for attorney fees and costs.

(5) Ensures full cooperation with EEO counselors, SEEMs, Investigators, Administrative Judges and other parties in the processing and fact-finding of a complaint.

## m. Supervisors, Managers, and Commanders.

(1) Prevent or correct situations that may give rise to complaints of discrimination.

(2) Ensure that all members of their organization refrain from actions or comments that might be viewed as discriminatory.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(3) Allow employees with collateral EEO duties enough duty time to perform their functions and allow complainants and their representatives reasonable amounts of duty time, both at the informal and the formal stages of a complaint, to pursue their complaints.

(4) Ensure full cooperation with EEO counselors, SEEMs, investigators, and Administrative Judges in discrimination complaint processing.

n. EEO Complaint Investigators. Examine formal complaints in depth and develop a complete and thorough record to include all applicable exhibits and statements of witnesses. The investigation includes a thorough review of the circumstances under which the discrimination is alleged to have occurred, the records of treatment of members of the complainant's group as compared with the treatment of other technicians in the organization, and policy practices that may constitute discrimination. The investigator submits the Report of Investigation to NGB-EO for approval and transmittal to the State.

o. EEOC Administrative Judges. The administrative judge will be responsible for conducting hearings and overseeing the development of the record. The administrative judge shall issue decisions of acceptance and dismissal and decisions on the merits of the complaint, with appropriate remedies and relief.

## **1-17. Time Limits**

Time limits in this regulation have been established to ensure that complaints are processed expeditiously, as prescribed by law and Federal regulations, and to ensure the availability of witnesses and information needed for investigation and resolution of complaints. Failure by complainants and their attorneys (or representative) to adhere to the time limits can result in dismissal of a complaint. Failure by State National Guard officials to adhere to the time limits can result in adverse inference and may cause NGB to issue a decision in favor of the complainant.

## **1-18. Education, Training, and Awareness**

Time limits and redress procedures of the Civilian Discrimination System are predicated on personnel being aware of such time limits, policies, and filing procedures. Such information will be included in all orientations of new personnel, in subsequent periodic orientations, and in sexual harassment prevention or other EEO training. These policies and procedures will be conspicuously posted, to include posting of NGB-EO Poster 93-160, "*You Have a Right to File a Complaint*", where all employees and applicants for employment have ready access to this information.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

a. Training in EEO subjects will include information on the Civilian Discrimination Complaint System.

b. Training for supervisors, managers, and commanders will emphasize their responsibility in preventing and eradicating discrimination in complaint resolution, and the use of ADR. EEO counselors will receive discrimination complaint counseling training in accordance with Management Directive 110 before they counsel complainants.

c. Formal training for EEO Counselors will include as a minimum, completion of a 32 hour basic EEO counseling course (Office of Personnel Management or equivalent) which includes information regarding provisions of the statutes cited in this regulation, EEOC regulations and management directives, and the complaints process described in this regulation. Eight hours of refresher training is required annually.

d. SEEMs will receive training prescribed for EEO counselors and any additional training applicable to their duties. Such training is available through the Defense Equal Opportunity Management and regional OPM offices. Additional training will be prescribed or made available by NGB.

## **1-19. Documentation.**

Decisions regarding timeliness of filing, dismissals, merits, and appeals of complaints are based on the record as evidenced in the official discrimination complaint case file. Failure to include all documentation in the case file may result in adverse inference and may cause the NGB or EEOC to issue a decision in favor of the complainant.

## **1-20. Interpretation and Exemption**

Requests for any interpretation of or exemption to any policy or provision of this regulation will be forwarded, in writing, through command channels, to the National Guard Bureau, Office of Equal Opportunity and Civil Rights, 1411 Jefferson Davis Highway, JP-1 Suite 2400, Arlington, VA 22202-3231.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 2

### Alternative Dispute Resolution (ADR)

#### 2-1. Purpose

This regulation sets policy and explains the NGB-EO Alternative Dispute Resolution Program Plan (ADRPP). The ADRPP provides prompt and inexpensive techniques to resolve disputes, which are an alternative to lengthy formal administrative procedures and litigation. ADR utilizes informal methods that remove the adversarial climate of the grievance and complaint process, is less costly, and results in a more positive, long-term solution and improved morale and productivity.

#### 2-2. ADR Program Development

a. The National Guard Bureau, Office of Equal Opportunity's Alternative Dispute Resolution Program Plan (NGB-EO ADRPP) establishes and implements policy and program procedures for encouraging the expanded use of ADR for Army and Air Force personnel. This policy is applicable to Title 32 technicians. This plan is designed pursuant to statutory requirements in the Administrative Dispute Resolution Act, Public Law 104-320 (October 19, 1996), Executive Order 12988 ADR Provisions of the National Performance Review (a) and (b), 29 CFR 1614, DOD Directive 5145.5 dated April 22, 1996, and NGB-EO All States Letter (P00-P00-0045). NGB is committed to ADR and strongly endorses the use of various techniques that would serve to expedite resolution of disputes in the workplace.

b. The NGB-EO ADRPP is designed to supplement, not limit or replace, the formal grievance and complaint procedures already established within the National Guard. Informal voluntary procedures used in the NGB-EO ADRPP include, but are not limited to, settlement negotiation conferences, fact-finding, mediation, ombudsman, conciliation, facilitation, and early neutral evaluation. Participation in ADR is voluntary and may be initiated through the command level or through the traditional administrative processes, prior to filing a formal complaint, as well as after the complaint goes formal. ADR can be a valuable tool to resolve Equal Employment Opportunity (EEO) complaints, grievances, appeals, and other unresolved disputes in the workplace.

#### 2-3. Responsibilities

a. The Chief of the National Guard is committed to improving the confidence, readiness and morale of the work force by increasing ADR awareness and by promoting the accessibility and willingness of all personnel to participate in the NGB-EO ADRPP.

b. The Chief Counsel is the agency-designated ADR Representative responsible for oversight, review, and monitoring the overall agency-wide ADR reports and data to

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

ensure consistency with DOD components, to ensure program effectiveness, and to ensure legal sufficiency in the use of ADR throughout the National Guard. The Chief Counsel provides legal counsel and technical ADR expertise for the NGB Alternative Dispute Resolution Program.

c. The Adjutants General of each state is required to implement the NGB-EO ADRPP fully throughout the state ensuring that ADRPP receives the widest distribution and promotion to all applicable personnel, as identified above. One way this is accomplished is the appointment of a State ADR Advocate who is a proponent in the State for promoting and coordinating the use of the ADR Program. States may modify and revise the NGB-EO ADRPP to enhance or broaden the use of ADR. Any deviations from the NGB-EO ADRPP must be reviewed and approved by the NGB-EO prior to implementation to ensure compliance with all ADR statutory requirements, DOD, Army, Air Force and NGB regulations.

d. The Office of Equal Opportunity and Civil Rights is responsible for the design and implementation of the NGB-EO nationwide ADR Program. The NGB-EO directs, reviews, and manages the design, implementation and evaluation of the ADR Program providing policy, regulatory and procedural guidance, for both Army and Air Force military and civilian personnel throughout the 54 states and territories. NGB-EO manages policy and procedures as defined in NGR (AR) 690-600/NGR (AF) 40-1614 by providing ADR training, mediation and facilitation services, and by promoting the use of ADR throughout the Guard.

e. National Guard commanders, managers and unit supervisors should make every effort to participate fully in ADR and forge a clear path towards the goal of working together to resolve conflicts in an expedient and fair manner.

f. The State Equal Employment Manager (SEEM) is the proponent in the state for the NGB-EO ADR Program management, administration, implementation and evaluation.

g. Employees are encouraged to utilize the ADRPP to resolve workplace disputes fairly, and quickly.

## 2-4. ADR Methods

a. Definition. ADR is a generic name for a continuum of processes that consist of a variety of approaches to early intervention and dispute resolution. Many of these approaches include the use of a neutral individual such as a mediator who can assist disputing parties in resolving their disagreements. ADR avoids the cost, delay and unpredictability of the traditional adjudicative "WIN-LOSE" scenario where both parties

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

lose control of the outcome to a third party senior commander or judge. ADR seeks to achieve a "WIN-WIN" resolution of the dispute and empowers the disputing parties to formulate a mutually agreeable resolution while maintaining management and employee rights and entitlements. The ADR process is a non-adversarial process which allows both parties to participate in conflict management in an environment that is conducive to mutual respect, consideration of others and mission accomplishment.

b. One or more of the following ADR methods may be used to resolve disputes.

a) Early Neutral Evaluation - A neutral, third party provides non-binding evaluation or assessment of the dispute orally or in writing. The third party neutral provides the disputing parties an objective perspective on the strengths and weakness of their cases. Under this method the parties will usually make informal presentations to the neutral to highlight each party's case or position.

Early neutral evaluation is appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases and when the top decision-makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases. Finally, it is used when the parties are seeking an alternative to the expensive and time-consuming process of following discovery procedures.

(2) Conciliation- Involves establishing communications and building a positive relationship between the parties involved in a dispute. To help build or improve relationships, the parties may use a third party or Conciliator (who may or may not be totally neutral to the interests of the parties). A Conciliator (i.e., EEO Counselor, Equal Opportunity Assistant, Military Equal Opportunity Officer (MEO), ADR Representative, Special Emphasis Program Manager (SEPM), Key Management Official, Union Representative, or Human Resources Officer) may assist parties by helping to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Since the general objective of conciliation is to promote openness by the parties (to take a risk to begin negotiations), this method allows parties to begin dialogues to get to know each other better, build positive perceptions, and enhance trust. The conciliation method is often used in conjunction with other methods such as facilitation or mediation.

(3) Facilitation- Involves the use of techniques to improve the flow of information in a meeting between disputants. The facilitator guides discussions, monitors and records the comments, suggestions, or results of brainstorming sessions, and process action teams, in an orderly and productive manner. The facilitator generally works with all the parties in a group setting, and provides directions as

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

to how the group can efficiently move through the problem-solving steps of the meeting and arrive at a jointly agreed upon resolution. Facilitators focus on procedural assistance and remain impartial to the topics or issues under discussion. The method of facilitating is most appropriate (1) when the intensity of the parties' emotions about the issues in dispute are low to moderate, (2) the parties or issues are not extremely polarized, (3) the parties have enough trust in each other that they can work together to develop a mutually acceptable solution, or (4) the parties are in a common predicament and they need or will benefit from a jointly acceptable outcome.

(4) Fact-Finding- Involves the use of an impartial expert or group (ADR Representative or third party neutral) selected by the parties, the agency, or by an individual with the authority to appoint a fact-finder in order to determine what the "facts" are in a dispute. The rationale behind the efficiency of fact-finding is the expectation that the opinion of a trusted and impartial neutral will carry weight with the parties. Fact-Finding was originally used in the attempt to resolve labor disputes, but variations of the procedure have been applied to a wide variety of problems in other areas as well.

Fact-finders do not resolve or decide policy issues. The fact-finder may be authorized only to conduct an inquiry or evaluate the matter presented and file a report establishing the facts. In some cases, he or she may be authorized to issue either a situation assessment or a specific non-binding procedural or substantive recommendation as to how a dispute might be resolved. In cases where such recommendations are not accepted, the data (or facts) have been collected and organized in a fashion that will facilitate further negotiations or be available as part of the case record for use in later traditional or administrative procedures.

(5) Mediation- The most popular form of ADR in use by agencies in employment-related disputes. The objective of this intervention is to assist the parties to voluntarily reach a mutually acceptable resolution of issues in dispute. The mediator is an impartial and neutral third party, who has no decision-making authority. Mediation is useful in highly polarized disputes where the parties have either been unable to initiate productive dialogue, or in cases where the parties have been talking and have reached a seemingly insurmountable impasse.

(a) A mediator, like a facilitator, primarily makes procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, and in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution.

(b) Mediators may differ in their degree of directness or control of the process depending upon the parties involved, the complexity of the issues, and the

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

subject-matter expertise required. Mediators perform the role of the catalyst that enables the parties to present their cases in an orderly fashion, defuses tensions and emotions in a non-adversarial environment allowing the parties to communicate in a non-threatening manner which is conducive to a free exchange of information and ideas. The mediator assists the parties in identifying the issues and guides the process utilizing interest-based bargaining techniques rather than positional-adversarial bargaining techniques. The objective is a “win/win” scenario which allows the parties to pursue common goals, interests and possible solutions while avoiding the pitfalls of positional bargaining which often results in impasses where neither party “wins”. The mediator sets the procedural ground rules for the proceedings to ensure a balance of power, mutual respect, and integrity of the process.

(6) Settlement Negotiation Conference- Involves a meeting between the opposing parties and/or their representatives in order to reach a mutually acceptable settlement of the matter in dispute. This method is generally mandated prior to use of the judicial system (i.e., prior to the courts, EEOC or MSPB hearing a case). In this proceeding there is no judge or individual who will render a decision. Resolution of the dispute rests with the parties involved. The disputing parties apply interest based problem-solving techniques to reach a mutual settlement agreement that would resolve the dispute. The key to success in utilizing a Settlement Negotiation Conference is the ability of both parties to come to the table in a good-faith effort and demonstrate their willingness to explore possible alternative solutions. Each party represented must have the authority to make a decision or commitment on their behalf that would be binding if a settlement agreement were reached. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed upon standard to reach a solution. Trust in the process and a willingness of each party to work towards resolution is essential for success.

(7) Ombudsman- An Ombudsman may have varying degrees of authority ranging from providing advisory services and recommendations to parties regarding employment disputes, to actually making the final decision in the matter of dispute. This service involves informal discussions regarding employee rights, benefits and entitlements; and employer rights, authority and requirements.

(8) Other ADR methods and procedures may be utilized as deemed appropriate by the NGB-EO Alternative Dispute Resolution Manager.

## **2-5. ADR Program Requirements**

NGB and the State will provide a wide range of ADR training of various types and sources for Commanders, Managers, Supervisors, Employees, Mediators, Facilitators,

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Third Party Neutrals (TPNs), SEEMS, HRO Staff, Equal Opportunity Advisors, EEO Counselors, and Special Emphasis Program Managers by educating and informing the workplace on ADR methods and procedures such as:

- a. Conduct ADR briefings, courses, workshops and skills training to enhance and improve the techniques and proficiency of ADR Third Party Neutrals.
- b. Provide a cadre of trained and certified NGB Third Party Neutrals.
- c. Advertise and promote the use of ADR nationwide.
- d. The State ADR Representative (ADRR)/State Equal Employment Manager (SEEM) will collect ADR data, administer the state-level ADRPP and determine the effectiveness by reviewing and analyzing the implementation of the ADR Program throughout the state. The ADRR/SEEM will also complete an Annual ADR Report assessing trends, causes, types, and costs associated with workplace disputes. The NGB-EO will monitor, review and evaluate nationwide implementation and effectiveness of the overall NGB-EO ADRP and make appropriate modifications or changes as necessary.

## **2-6. ADR Program Procedures**

- a. Aggrieved party makes initial contact with Management, an EEO Counselor, SEEM, or HRO.
- b. State ADR POC emails or faxes a completed ADR Request Form with signatures of disputants agreeing to participate in good-faith to NGB-EO to determine feasibility of ADR.
- c. NGB-EO selects the appropriate ADR method and appoints a Mediator or Third Party Neutral (TPN).
- d. Mediator or Third Party Neutral initiates contact with both parties to coordinate the ADR session(s).
- e. ADR process is conducted.
- f. Partial or full resolution is reached, a Settlement Agreement is formulated and coordinated with appropriate state officials (HRO, SJA, SEEM, and NGB-EO) before each disputant, and the TPN signs the agreement. Each participant will complete a Client or Mediator Evaluation Form and the TPN will forward forms to the SEEM. The SEEM will forward to NGB-EO.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

g. If no resolution, a Memorandum for Record will be written stating simply that a resolution attempt was made, the date(s), the participants and that no resolution/agreement was reached. Each participant will complete a Client or Mediator Evaluation Form and the TPN will forward forms to the SEEM. The SEEM will forward to NGB-EO.

h. If partial agreement or no resolution is reached, forward the remaining issues in dispute through the appropriate established traditional informal or formal administrative complaint or grievance process.

## **2-7. Evaluation and Assessment Measurement**

The NGB-EO ADR Program will be reviewed annually to assess program effectiveness. The overall program policy, procedures and regulatory guidance will be reviewed to evaluate the appropriateness and applicability to the National Guard. The ADRR/SEEM will assess the state's EO ADR Program to determine program improvements, significant trends, and problem areas requiring corrective action and overall need for modification and update. The ADRR/SEEM will complete and submit an "EO ADR Program Summary" along with the "NGB-EO State Annual ADR Report," as of 30 September, to NGB-EO, Suite 2400, 1411 Jefferson Davis Highway, Arlington, VA 22202-3231, NLT 15 October each year. Follow-up Client Reports will be completed by each participant of ADR to determine the satisfaction level of the resolutions reached and the process used for each instance where ADR was used.

**Chapter 3.**

**Pre-Complaint Processing**

**3-1. General**

The pre-complaint period begins when the claims which gave rise to the complaint are brought to the attention of an EEO counselor or the State Equal Employment Manager (SEEM). It ends with resolution or filing of a formal complaint.

**3-2. Informal Complaints – Purpose of Pre-Complaint Processing**

The purpose of pre-complaint processing, often referred to as the informal stage, is to resolve the complaint, to provide advice to the complainant and National Guard officials concerning the claims raised in the complaint, and to avoid the need for protracted formal complaint procedures. The National Guard's emphasis is on complaint resolution. National Guard officials should make full use of the National Guard Bureau Alternative Dispute Resolution (ADR) Program.

**3-3. Filing an Informal Complaint**

Before filing a formal complaint, complainants must first present an informal complaint to an EEO counselor within 45 days of the alleged discrimination (see Chapter 4-13 for extensions). The complainant must meet and cooperate with the Counselor. The informal complaint may be presented to the Counselor either orally or in writing, but the complainant is required to consult with the Counselor in order to try to informally resolve the complaint.

**3-4. Assignment of an EEO counselor**

An EEO counselor must be appointed and available to conduct an initial counseling preferably on the same day, or within 5 days of when, the matters giving rise to the complaint are brought to the attention of the counselor or the SEEM.

- a. Whether the complainant contacts the SEEM or the EEO counselor, the SEEM will appoint the Counselor for that complaint.
- b. If the Counselor is unable to perform the required pre-complaint counseling, or if the matters giving rise to the complaint are first brought to the attention of the SEEM, or another appropriate official, the SEEM will appoint a Counselor who is readily available.

**3-5. Initial Counseling Session.**

When the complainant first presents matters giving rise to the complaint to an EEO Counselor or to the SEEM, an initial counseling is held or an appointment for an initial

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

counseling is set (reference paragraph 3-4 above). Normally, the SEEM should not conduct the initial counseling or the inquiry. These functions should be performed by an EEO counselor. During the initial counseling session, the EEO counselor advises the complainant:

a. In writing of his/her rights and responsibilities, explains these rights and responsibilities (reference paragraph 3-6 below) and identifies the claims of the complainant (reference paragraph 3-7 below).

b. Of the availability of the ADR program and provides the complainant with the letter of agreement in figure F-6.

### **3-6. Rights and Responsibilities of the Complainant**

The complainant's rights and responsibilities in the discrimination complaints process will be provided in writing using figure F-2 and explained to him or her by the EEO counselor. This includes the complainant's responsibilities of proving discrimination by a preponderance of evidence, if the complaint is not resolved in the informal, pre-complaint processing stage.

a. The complainant may be accompanied, represented, and advised by a representative at all counseling interviews and at any stage of the complaint process by. Such a representative must be designated in writing. Chapter 9 and the definitions in the glossary explain the use of official time by complainants and their representatives and how correspondence is routed when the complainant has a representative or is represented by an attorney. See chapter 7 regarding limitations on attorney fees in the pre-complaint process.

b. In certain instances, the complainant may make an election of procedures for filing the discrimination complaint. A section of the Civil Service Reform Act of 1978 (5 U.S.C. 7121(d)) allows allegations of discrimination to be raised under negotiated grievance procedures in these instances. The complainant is provided with a written explanation of these procedures using figure F-3, whether or not the complainant is a member of a bargaining unit. The EEO counselor explains the possible applicability of election procedures and of mixed case complaints [reference Chapter 10].

c. When a complainant files an informal complaint under this regulation, the complainant has not waived the right to file a grievance on the same allegations of discrimination under a negotiated grievance procedure. An election is indicated only through filing of a formal complaint in writing [reference Chapters 4, 10, and 11].

d. If the complaint is based on age discrimination, the complainant has a right to file a lawsuit under the Age Discrimination in Employment Act (ADEA) as an alternative

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

to the administrative procedures of this regulation. Figure F-4 and Chapter 10 explains this alternative and associated requirements.

e. The complainant must identify for the Counselor the specific matters that gave rise to the complaint and the dates of the actions involved. Only claims raised in pre-complaint counseling, or like or related claims, may be included in a subsequent formal complaint. Paragraph 3-7 explains the importance of clear and concise claims.

f. The complainant has the duty of keeping the State Equal Employment Manager (SEEM) informed of his or her current address. If the complainant later files a formal complaint, the complainant must also keep NGB-EO informed of his or her current address. If the complainant then files an appeal with EEOC, the current address must also be provided to EEOC. Failure to locate a complainant can result in dismissal of a complaint [reference paragraph 4-11].

g. If the complainant has contacted the EEO counselor or the SEEM after the 45 day time limit, the complainant can request a waiver of this time limit as provided in paragraph 4-13. Notwithstanding such waivers, the complainant has a right to have his or her informal complaint processed by the EEO Counselor, even if the 45-day time limit has gone by; however, a formal complaint may be later dismissed as untimely.

h. EEO counselors will advise complainants of other channels of redress (reference Chapter 10) when a complaint does not appear to meet the criteria of this regulation, and will explain the procedural reasons in paragraph 4-11 under which formal complaints must be dismissed. EEO counselors are not authorized to make determinations or decisions on either procedural or merit grounds. If a complainant desires, he or she will be counseled even though a formal complaint may be later dismissed.

i. The complainant has a right not to have his or her identity revealed during the pre-complaint process; however, the complainant must be advised that this may make it difficult to achieve resolution. The Counselor will not reveal the complainant's name unless the complainant authorizes it, in writing, or after a formal complaint is filed.

j. If the complainant indicates that he or she wishes to file a class complaint or if the complainant's claims appear to indicate that the complainant is raising a class complaint, the EEO Counselor will explain the difference between individual and class complaints and the procedures for processing class complaints [reference Chapter 11].

k. The complainant has an obligation to be counseled and such counseling can continue for thirty (30) days from the day the matters giving rise to the complaint were brought to the attention of the Counselor or SEEM, unless:

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(1) The complaint is resolved before that time or the complainant voluntarily chooses not to pursue his or her complaint; or

(2) The Counselor has completed the inquiry prior to that time and has been unable to resolve the complaint; or

(3) The complainant agrees to an extension of the inquiry period (reference paragraph 3-9); or

(4) The complainant agrees to participate in the ADR process; in which the processing will be extended for 60 calendar days (reference 3-10).

### **3-7. Claims, bases, and supporting material**

a. Complainants, EEO counselors, SEEMs, JAs, and others involved in the complaint process must understand the importance of identifying and clarifying claims and distinguishing between claims raised, the bases on which the alleged discrimination took place, and supporting material. The complainant must clearly define the matters giving rise to the complaint and list all the elements of each claim. Complainants will be advised that:

(1) Only with this information is the EEO counselor able to counsel the complainant and management officials and to try to resolve the complaint.

(2) Claims that have not been counseled during the informal processing may be added at anytime during the complaint process if they are same or similar to the claim counseled, otherwise they may be referred back to counseling.

(3) This information is necessary to determine acceptance and/or dismissal of the claims if filed as a formal complaint.

(4) An investigation of the facts and circumstances can only be made if the complainant has clearly defined the claims.

b. The elements of a claim consist of:

(1) A brief and clear statement of the act or personnel action that the complainant believes was discriminatory. Explanations or descriptions of circumstances leading up to or surrounding the act or personnel action, discussion of the complainant's feelings, statements regarding the complainant's duties, justifications concerning any actions taken or not taken, or similar material may be included in supporting statements, but such supporting material does not constitute a claim.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(2) The date on which the alleged discriminatory act took place or the effective date of the alleged discriminatory personnel action.

(3) The basis or bases (more than one basis) on which the complainant believes that he or she was discriminated. The authorized bases under this regulation are race, color, religion, gender (including sexual harassment), national origin, age, physical or mental handicap, and retaliation due to EEO related actions.

(4) The organization or individual believed by the complainant to have discriminated against him or her. While the complaint is filed against the agency, the complainant may name a specific organizational element or an individual as being responsible for the alleged discriminatory act or personnel action.

c. Claims must be specific. For example, general allegations of sexual harassment or retaliation are not claims. The specific act of sexual harassment or act of retaliation must be cited. More than one act can be combined into one claim, but such acts must be related and include the date(s) of occurrence. Circumstances surrounding each act or related event that may have occurred prior to or after the act of discrimination may be listed as supporting material, not as a claim.

d. During the initial counseling session, the EEO counselor, in conjunction with the complainant, defines and records the specifics of the complaint and identifies the claims. Since clear claims are so important to the whole complaint process, Counselors must help complainants to frame acceptable claims. Complainants will be encouraged to number claims and state each as follows: "I was discriminated on the basis of (race, color, religion, age, gender, sexual harassment, national origin, physical or mental handicap, retaliation) on (date) when (the name of the alleged offender) (list the discriminatory act or personnel action)."

e. Either during the initial counseling session, or at a subsequent meeting with the complainant, the Counselor reviews the complaint to determine if any allegations or claims are outside the purview of the Civilian Discrimination Complaint System and this regulation. This includes claims and allegations that involve the complainant's National Guard military status, rather than technician employment matters. It may also involve a basis other than one in which a discrimination complaint may be filed under this regulation. For example, a complainant may believe that the incident or personnel action was motivated by a personality conflict, was the result of harassment (not sexual harassment), was based on improper personnel actions, or stemmed from retaliation not related to an EEO activity. In such cases, the EEO counselor will advise the complainant of the proper forum to seek redress (e.g., Inspector General or personnel channels). For military matters, the EEO Counselor will advise the complainant to use

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

the National Guard Military Discrimination Complaint System of NGR (AR) 600-22/NGR (AF) 36-3.

### **3-8. EEO Counselor's Inquiry**

By definition (see glossary), an inquiry is not intended to be formal or to have the same scope as the investigation under chapter 5, nor is it meant to be a substitute for that investigation.

a. The EEO Counselor inquires about the specific incidents and actions identified in the initial counseling session with the complainant. The EEO counselor interviews persons who can give direct information on these allegations, and reviews personnel or other related records. If the complainant has named specific individuals as having discriminated against the complainant, the EEO counselor must interview such named individuals unless the EEO counselor can achieve resolution of the complaint without such interviews.

b. At each step of the inquiry, the EEO counselor's aim is to reach a resolution to the claims of the complaint. The EEO counselor's inquiry need not be concerned with whether or not enough facts exist to support the claim of discrimination.

c. The EEO Counselor will use EEOC Management Directive 110 (EEOC MD110).

d. The EEO Counselor will not make any findings or determination on procedural grounds or the merits of the complaint or on whether discrimination has occurred. Rather, the EEO counselor will provide advice to the complainant and to National Guard officials in terms of attempts at resolution, the information obtained during the inquiry, and what has occurred during the counseling process.

e. If, during the course of the EEO Counselor's inquiry, National Guard officials and the complainant agree to a resolution, the terms of the resolution will be reduced to writing and signed by both parties to help ensure that they have the same understanding of the terms of the resolution.

### **3-9. Extending the Inquiry**

An inquiry will not be extended for the convenience of National Guard officials, the EEO Counselor, or the complainant. The sole purpose of such an extension is to provide additional time for the EEO Counselor to resolve the complaint.

a. Actions to extend the inquiry and counseling period, as provided for in this paragraph, must be completed before the end of thirty (30) calendar days after the date

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

on which the matters giving rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM. Otherwise, a final interview will be held (reference paragraph 3-11).

b. If the complaint has not been resolved and the Inquiry has not been completed within the 30-day period, and if the complainant and the EEO Counselor believe that an informal resolution is imminent, the complainant can agree to an extension of the counseling period for another thirty (30) days.

c. The Counselor will first obtain permission from the SEEM to extend counseling and then will ask the complainant to execute the letter of agreement in figure F-5.

### **3-10. Alternate Dispute Resolution process (ADR)**

The primary purpose of the ADR is to resolve complaints of discrimination during the pre-complaint processing stage through a forum separate from EEO. ADR may be offered at anytime during the pre-complaint processing. Some forms of ADR are also available after a formal complaint has been filed (reference Chapters 4 and 5). ADR supplements the informal attempts of the EEO Counselor by providing a structured process that differs to include involvement of top management and decision makers who have the authority to remedy grievances raised by the complainant and who can direct the necessary changes to resolve claims of discrimination within the National Guard.

a. Complainants may elect to use ADR at any time prior to the end of thirty (30) calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM. If, at the end of thirty (30) calendar days, the complainant has not elected to use ADR or to extend the counseling (reference paragraph 3-9), a final interview will be held (reference paragraph 3-11).

b. ADR provides for an extension of the pre-complaint counseling period for an additional 60 days. Therefore, a complainant can not elect to both extend the inquiry of the EEO counselor and the ADR.

c. Election of the ADR is made by execution of the letter of agreement in figure F-6, provided to the complainant during the initial counseling session.

### **3-11. Final Interview and Right to File a Complaint**

Unless an agreement to participate in ADR or to extend the inquiry has been executed, or if the complaint is not resolved within 30 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or SEEM, the EEO counselor will stop the inquiry and resolution attempts and conduct a final interview with the complainant and his or her representative, if one has

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

been designated. Informal resolution attempts should be continued by the SEEM and other National Guard officials, but they will not delay the final interview and notice of the right to file a formal complaint. During this interview, the EEO counselor:

- a. Reviews with the complainant the results of the inquiry and resolution attempts to date.
- b. Advises the complainant of the policy of the AG and NGB to take all steps possible to resolve a complaint before it proceeds to the formal stage. To that effect, the EEO counselor again will offer the complainant an opportunity to participate in ADR.
- c. Explains that the complainant does not forfeit the right of filing a formal complaint by participation in the ADR and that, if the complaint remains unresolved, the final interview and notice of right to file a formal complaint will be held at that time. If the complainant elects ADR, the interview is concluded and the pre-complaint process continues, not to exceed ninety (90) days.
- d. Tells the complainant that he or she has a right to file a formal complaint within fifteen (15) days after this interview.
- e. Gives the complainant a letter figure F-7 that serves as a notice of final interview and the right to file a complaint. The Counselor will not try in any way to stop the complainant from filing a formal complaint and will make it clear that this is the complainant's decision.
- f. Provides the complainant with NGB Form 713-5 (Complaint of Discrimination in the National Guard) and instructions for its use to file a formal complaint. The EEO counselor offers to assist the complainant in the preparation of this form and in definition of claims.
- g. Stresses that a formal complaint, if filed, must give specific information on the alleged acts of discrimination and must be limited to the claims that were discussed with the Counselor during pre-complaint counseling. The EEO Counselor explains the differences between basis, claims, and any statement by the complainant provided as supporting material to the claims raised.
- h. Advises the complainant that a formal complaint which does not contain clearly defined and specific claims that include dates of the alleged discrimination and state a proper basis will be returned for clarification or may be dismissed.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

i. Tells the complainant that he or she must immediately inform NGB-EO and the SEEM in writing if legal counsel, or any other representative, is retained at any time after a formal complaint is filed.

j. If the complainant refuses or is unable to participate in the final interview, the EEO counselor will mail the complainant a notice of final interview and right to file a complaint (Figure F-8).

### **3-12. Final Interview after Extension or ADR**

a. If the complainant agreed to an extension (reference paragraph 3-9) and the complaint has not been resolved, a final interview will be held not later than sixty (60) calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. The EEO counselor will provide the same information to the complainant listed in paragraph 3-9, except for references to ADR (paragraphs 3-11b and c).

b. If the complainant agreed to participate in ADR and the complaint has not been resolved, a final interview will be held not later than ninety (90) calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. The final interview will be held by the EEO counselor or a member of the ADR panel. That individual will review the resolution attempts during ADR and provide the same information to the complainant as listed in paragraph 3-11, except for references to the ADR effort.

### **3-13. EEO Counselor's Report**

a. Submission. The EEO Counselor's Report is submitted only to the SEEM. The report will become part of the complaint file if a formal complaint is filed. Copies to the complainant and other officials will be provided only as specified in paragraph 4-4b(3).

(1) Whether the inquiry has been completed or not, the EEO counselor will prepare a written report summarizing actions taken during the inquiry. The EEO counselor will provide the original of the report to the SEEM not later than three (3) calendar days after the date of the final interview.

(2) If the complainant has elected to participate in the ADR, the Counselor will provide the report within thirty (30) calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Counselor or the SEEM or within (3) calendar days of the completion of the inquiry, whichever comes first.

b. Content. The report will:

(1) Be presented in neutral and dispassionate language. It must reflect the EEO counselor's unbiased and objective approach.

(2) Include information provided by the EEO Counselor to the complainant and information obtained from the complainant during counseling, to include the date of the initial counseling session and the date on which the matters giving rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM (the initial contact).

(3) List the specific incidents and actions in the complaint and provide an accurate reflection of all aspects of the inquiry conducted. The report will reflect with whom the EEO Counselor spoke, the date the discussion was held, and a summary of that discussion. Verbatim transcripts or excessive detail are neither required nor desired.

(4) Contain as enclosures any notes of interviews, document reviewed, and copies of documents obtained by the EEO Counselor. The EEO Counselor will not retain any copies of these notes.

(5) Summarize all resolution efforts and the advice given to the complainant and to National Guard officials.

c. Notices. Along with the report, the EEO Counselor will provide the SEEM copies of all letters and notices given to the complainant, including proof of their receipt by the complainant [figures F-2 through F-8], authorization to reveal complainant's name, if given; and designation of representative, if made.

### **3-14. Resolution During Pre-Complaint Processing**

In keeping with the purpose of pre-complaint processing, EEO Counselors and National Guard officials are encouraged to seek compromise and to use a wide range of resolution techniques, to include the ADR. To assist in resolution, settlements during pre-complaint processing are informal in nature and National Guard officials may use a wide range of remedies and corrective actions to achieve resolution.

a. Except for enforcement of settlement agreements (reference paragraph 7-12), settlements during pre-complaint processing are not governed by the provisions of chapter 7. Nevertheless, remedies or corrective actions agreed upon must be in compliance with applicable personnel management and other regulations. NGR (AR)

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

690-600/NGR (AF) 40-1614 will not be cited or used as authority for remedies or corrective actions during pre-complaint processing.

b. The terms of any settlement will be contained in an informal agreement signed by both the complainant and an authorized National Guard official. The sole purpose of such an agreement is to insure that both parties mutually understand the resolution terms. The agreement must identify the allegations that had been resolved in the agreement.

### **3-15. Assisting The Complainant in Filing**

To expedite evaluation of the complaint for proper procedural acceptance or dismissal, EEO Counselors and SEEMs will assist complainants who wish to file a formal complaint.

a. In providing assistance to a complainant, the EEO Counselor or SEEM will make it clear that they are not making any judgement of the merits of the complaint.

b. As part of this assistance, the EEO Counselor or SEEM will review the claims counseled and help the complainant to number and frame claims as described in paragraph 3-7. In so doing, the Counselor or SEEM will not attempt to dissuade the complainant from raising any claim, but rather will advise the complainant on:

(1) How to separate or combine claims so that each contains only similar or related allegations.

(2) Including as part of each claim the date(s) of the occurrences of the alleged acts of discrimination.

(3) Stating the basis or bases for each claim.

c. The EEO Counselor or SEEM will also explain to the complainant how waivers of time limits are granted if it appears that the informal complaint was not filed within forty-five (45) days. If the complainant indicates a reason for the delay, he or she will be assisted in preparing a request for waiver.

### **3-16. Mandatory EEO Counselor Training Requirements**

a. General Counseling. The aggrieved person starts the equal employment opportunity (EEO) process by contacting an EEO Counselor. The Counselor's role is one of neutrality, and should provide prompt, efficient service to the complainant in the processing of the complaint. This portion of the regulation provides guidance and

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

procedures that EEO Counselors should adhere to when processing both individual and class complaints.

b. Full-Time Counselor. Agencies are encouraged to use full-time EEO Counselors to ensure professional services and knowledge of the EEO laws and rules and regulations are provided to employees and applicants.

c. EEO Counselor Training Requirements. Continuing education and training for EEO Counselors and employees are important in supporting and meeting the objectives and goals of equal opportunity. This portion regulates and establishes mandatory training requirements for Counselors.

d. ADR and EEO Counseling. Alternate Dispute Resolution (ADR) and EEO counseling are paramount to achieve resolution at the earliest stage possible. Informal resolution is desirable to all parties involved. ADR provides an alternate means to improve EEO complaint processing efficiency and differs in method to meet resolution. Aggrieved persons who seek pre-complaint counseling must be fully informed of the following:

(1) Aggrieved parties should be informed of the procedures of the agency ADR program and the parties may choose to participate at any point in the pre-complaint process.

(2) Aggrieved parties should be provided the opportunity to participate in the program where the agency agrees to offer ADR on a case by case basis. ADR participation is voluntary; therefore, **ALL PARTIES MUST** agree to participate.

(3) Aggrieved parties have the right to file a formal complaint if resolution is not attained using the ADR process.

e. Mandatory EEO Counselor Training Requirements.

(1) Minimum Requirements. To ensure quality counseling throughout the National Guard, EEO Counselors are mandated to receive a minimum of thirty-two (32) hours of EEO Counselor training prior to assuming counseling duties. New EEO Counselors must receive training in the following areas before an agency assigns them to provide EEO counseling to aggrieved persons.

(a) An overview of the entire EEO process set forth in accordance with the 29 C.F.R Part 1614, emphasizing important time frames in the EEO process and providing an overview of counseling individual and class complaints and analyzing

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

fragmentation claims (see Chapter 5, Section III of the MD 110 for a discussion of fragmentation)

(b) A review of the roles and responsibilities of an EEO Counselor, as described in Chapter 2 and the Appendices to the EEOC MD 110.

(c) An overview of the statutes that EEOC enforces, including Title VII of the Civil Rights Act of 1964, as amended, (Title VII), the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act of 1967, as amended (ADEA), and the Equal Pay Act of 1963 (EPA), explaining the theories of discrimination including the disparate treatment, adverse impact, and reasonable accommodation theories, and providing more detailed instruction concerning class actions and claims attendant to fragmentation;

(d) A review of practical claim developments by using role playing methods or other techniques designed to stimulate practice providing EEO counseling, including in-take sessions with an aggrieved party; identifying claims and basis, report writing and resolution attempts.

(e) A review of other procedures, such as ADR, and counseling to elect other forums, such as Negotiated Grievance Procedures (NGP), the right of the complainant to go directly to court when filing a complaint under ADEA; or mixed case processing claims with MSPB; and

(f) An overview of the remedies, including compensatory damages, attorney's fees and costs available to prevailing parties.

(2) Continuing Training. All Counselors are required to receive at least eight (8) hours of refresher training every year to stay informed of changes and developments in EEO practice, law, and guidance as well as enhance counseling skills. NGB will determine specific area for training to include segments on legal and policy updates, regulatory and statutory changes, and counseling development skills. NGB-EO may provide the training, or the SEEM may submit an eight hour training plan to NGB-EO for prior approval, to determine if the training meets the standards set forth by the 29 C.F.R. Part 1614, EEOC MD 110.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 4

### Formal Complaint Processing

#### General

This Chapter covers the period from the beginning of the formal complaint process, when the formal complaint is filed until the beginning of the investigation phase.

#### 4-1. Filing a Formal Complaint

A formal complaint of discrimination may only be filed after completion of pre-complaint processing (reference Chapter 3). See paragraph 4-5 for actions required for complaints that have not been so processed or do not contain all of the required information. The following identifies the proper filing of the formal complaint.

- a. The formal complaint **MUST** be filed in writing and signed by the complainant. The complaint may also be filed and signed on behalf of the complainant by an attorney provided the complainant has designated said attorney in writing.
- b. The formal complaint **MUST** be filed using the NGB Form 713-5, Complaint of Discrimination in the National Guard, which was provided by the EEO Counselor with the notice of final interview and right to file the complaint. Additional copies of NGB Form 713-5 may be obtained from any EEO Counselor or the SEEM.
- c. The formal complaint **MUST** clearly identify and define the claims, basis(es), and date of alleged discriminatory event and should be numbered so that it is readily set off from other claims and so that its scope is clear. The EEO Counselor and SEEM are available to assist complainants in preparing formal complaints.
- d. The formal complaint may be filed with the SEEM or the Adjutant General (AG), either in person, by facsimile transmission, or by mail.
- e. The formal complaint **MUST** be filed within fifteen (15) calendar days after the receipt of the notice of final interview and the right to file a complaint.

#### 4-2. Conflicts of Interest

If the AG, HRO, SEEM, JA, or other National Guard official is named by the complainant as being responsible for the alleged discriminatory act or personnel action listed in the complainant's claims he or she will not participate in the processing of such a complaint, providing that such individuals are named based on actions that they have personally taken against the complainant. If they are named merely by virtue of their position, these individuals may continue to process or adjudicate the complaint. When the

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

provisions of this paragraph apply, the AG will designate in writing another individual to perform the functions for the named individual. Such designation will be made part of the official complaint case file and a copy will be provided to the complainant.

### **4-3. Receipt of Formal Complaint**

a. The complaint shall be deemed filed on the date it is delivered or sent by facsimile to the SEEM or the AG. If the complaint is mailed, it will be deemed filed on the date postmarked, if it is addressed to the SEEM or the AG. In the absence of a legible postmark, it will be deemed filed 5 days prior to the date of receipt.

b. Upon receiving the formal complaint, the SEEM will:

(1) Note the date of receipt in block 17, NGB Form 713-5. If the complaint was mailed, envelope will be attached to the complaint form so that it may become part of the official complaint case file.

(2) Conduct an initial review as required by paragraph 4-4.

c. Within three (3) calendar days after receipt of a formally filed discrimination complaint, the SEEM will acknowledge receipt using figure F-9, and include the review, appeal, and civil suit rights and associated time limits in figure F-1.

### **4-4. Initial Review of the Formal Complaint**

The purpose of the initial review is to ensure that all required documents are present, that the formal complaint has been correctly filed, and that it contains properly framed claims that can be reviewed for procedural acceptance or dismissal.

a. If the SEEM receives a formal complaint that has not been processed through pre-complaint counseling (reference Chapter 3), the SEEM will treat it as an informal complaint under paragraph 3-3, and will assign an EEO Counselor (reference paragraph 3-4). However, if only some of the claims have not been counseled, see paragraphs 4-5d and 4-10d.

b. Upon receipt of the formal complaint, the SEEM will:

(1) Establish the official complaint file in accordance with chapter 12.

(2) Ensure that the EEO Counselor's written report and other documents generated during counseling are available and made part of the complaint file. If ADR was elected and all attempts were unsuccessful, the counselor report will indicate that ADR failed. No other information regarding the ADR session is to be provided. Further, nothing said or done during attempts to resolve the complaint through ADR, including

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

the failure by the agency to provide a neutral party, can be made the subject of an EEO complaint.

(3) Provide the complainant a copy of the EEO Counselor's report.

c. The SEEM will review the complaint to determine if all claims have been counseled, to ensure that claims are clearly defined and that all necessary information has been included to establish whether claims should be accepted or dismissed. In conducting the review, the SEEM should seek the assistance and advice of the legal staff. The SEEM may also contact NGB-EO for advice.

d. If the formal complaint contains claims that have not been counseled during the pre-complaint processing, the SEEM will determine whether these claims are like or related to those that had been counseled.

e. A complaint that contains claims that are not clearly defined or lack specificity, bases, or dates of the alleged acts of discrimination, or a complaint that is not clear enough to permit meaningful investigation will be returned by NGB to be clarified. To preclude delay, the SEEM will obtain any required clarification before the complaint is accepted or dismissed and forwarded to NGB.

f. Within 5 calendar days after the receipt of the complaint or within 5 calendar days after the completion of the clarification process, the SEEM will recommend to the AG whether the complaint is to be accepted or dismissed, in whole or in part.

### **4-5. Clarification of Claims**

The provisions of the pre-complaint processing established in chapter 3 should preclude the need for clarifying formally filed claims. However, if the claims filed do not contain the elements listed in paragraph 3-7b, additional clarification may be required.

Clarification under paragraphs 4-5a through 4-5d must be completed within 10 calendar days after receipt of the complaint.

a. The SEEM will personally meet with the complainant and/or representative to obtain the needed information and to assist the complainant. The complainant may prepare a list of revised claims, clearly identifying them as superseding claims listed in the formal complaint, or may provide additional information to be added to the already filed claims, specifying the claim to which the information pertains.

b. If the above is not possible, the SEEM may obtain such information from the complainant or representative via telephone. The SEEM will then make a memorandum for record of such conversation, include it as part of the case file, and provide a copy to the complainant and complainant's representative.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. If the above efforts are not successful, the SEEM will determine if the needed information is available in the EEO Counselor's Report or from organizational files, such as personnel records. If so, the needed information can be extracted (indicating the source) and included as part of the case file with a copy to the complainant and complainant's representative.

d. At times, a complainant may not submit clear and concise claims but may provide, instead, a narrative description of the events and circumstances of the matters that gave rise to the complaint. The SEEM will attempt, by personal contact with the complainant and/or the complainant's representative, to identify specific claims and have the complainant list them in the formal complaint. The narrative may be retained as a supporting document. If such efforts are not successful, the SEEM will review the narrative in conjunction with the EEO Counselor's Report and other documents in the file to determine if the narrative contains information that can be viewed as specific and distinct claims. If so, the claims will be framed by the SEEM.

e. If the claims can not be identified and clarified as discussed in subparagraphs a through d and the complainant refuses to meet or provide the requested information in person or by telephone, a written request will be prepared reference paragraph 4-11). If such a request is necessary, it must be sent to the complainant within five (5) calendar days after the receipt of the complaint.

(1) The request must be specific as to the information required. The complainant will be advised that he/she must provide the required information within fifteen (15) calendar days after receipt of the request, the reason for providing the information, and the consequences of failing to provide the information (Figure F-10).

(2) If the complainant does not furnish the required information within fifteen (15) days after the date of receipt of the request, the SEEM will wait another five (5) days (to allow for mail time) and then will recommend to the AG that the vague or general claims be dismissed reference paragraphs 4-7 and 4-10).

#### **4-6. Complainant May Amend A Pending Complaint**

A complaint can be amended at any time prior to NGB's mailing of the notice of investigation completion. The complainant can amend a pending EEO complaint to add claims that are like or related to those claims raised in the pending complaint. It should be noted that technical amendments to a complaint, such as changing the name of the agency head, should be handled quickly and without adding additional case processing time. There is no requirement that the complainant seek counseling on these new claims. A new EEO complaint is not necessary when the new claims are like or related to the original complaint. After the complainant has requested a hearing, the

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

complainant may file a motion with the Administrative Judge to amend the complaint to include claims that are like or related to those raised in the pending complaint.

a. When a complainant brings forth a new claim of discrimination during the processing of an EEO complaint, it must be determined whether this new incident:

(1) Proves additional evidence to support the existing complaint, but does not raise a new claim in and of it.

(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 is not like or related to the claim(s) raised in the pending complaint.

b. In order to make such a determination, the complainant will be instructed by the SEEM or investigator (or NGB if the complaint has been sent forward for review and determination) to submit a letter to the SEEM or appropriate EEO official describing the new event, clearly stating that the complainant wishes to amend the pending complaint to include the new claim. The SEEM or EEO official will review the request in an expeditious manner and determine the correct handling to of the amendment.

(1) If the SEEM or appropriate EEO official concludes that the new claim(s) provides additional evidence in support of the claim raised in the pending complaint, but does not raise a new claim in and of itself, then the SEEM or appropriate EEO official will instruct the investigator to include the new incident in the investigation. A copy of this letter of instruction will be sent to the complainant. The investigation period will not be extended beyond 180 days, except with the consent of the complainant, when related claim(s) are to be included in the investigation.

(2) During the processing of a complaint, some of new claim(s) raised by the complainant, may not be like or related to the pending complaint. In deciding if a subsequent claim is like or related to the pending complaint, a determination must be made as to whether the later incident adds to or clarifies the original complaint. If it is determined that the new incident(s) raises a new claim, but that this new claim is like or related to the claims in the pending complaint, the SEEM or EEO official must amend the pending complaint to include the new claims. In determining whether the new submission is like or related to the original complaint, a decision must be made as to whether the new claim adds or clarifies the complaint and/or could have been reasonably been expected to grow out of the investigation of the original complaint. Accordingly, the SEEM or EEO official shall acknowledge receipt of the amendment to

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

the complainant in writing and inform the complainant of the date on which it was accepted as officially filed. A copy also will be sent to the investigator (if an investigator has been assigned) instructing s/he to include the new claim in the investigation.

(3) In accordance with 29 CFR 1614.106(e)(2) and NGB regulation, the investigation of a complaint must be completed within 180 days of the filing of a complaint unless all parties approve an extension. When an amendment is accepted and added to the pending complaint, the above deadline is adjusted so that the agency must complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint. Both parties must agree, in writing, to adjust the deadline to exceed 180 days.

(4) Although the amendment is added to the complaint, the complainant still retains the right to request a hearing (even in the case of an amended complaint) after 180 days have passed since the filing of the original complaint. This direction will be applied even if the investigation has not been completed. If a hearing is requested, the Administrative Judge may develop the record through discovery and the hearing process, or utilize other methods to develop the record.

c. When the new claims of alleged discrimination do not add to or clarify the pending complaint, and it would not likely have been expected to be exposed during an investigation of the pending complaint, the new claims will be processed under a new EEO complaint. The complainant will be notified by the SEEM or other EEO Official of the conclusion that the claims raised were not like or related to the pending complaint and must be processed as a new complaint. The complainant will be advised in writing that s/he must seek EEO counseling on the new claims. The postmark date of the letter from the complainant requesting the amendment will be used as time for computation purposes to determine if initial Counselor contact was timely.

#### **4-7. Acceptance and Dismissal Process**

Formal discrimination complaints are accepted or dismissed by the Agency, the National Guard Bureau (NGB). To ensure expeditious processing of complaints, Adjutant General is authorized to initially accept or dismiss complaints, as described herein, subject to review by NGB.

a. Complaints will be accepted or dismissed at the State National Guard level by the AG, a Deputy or Assistant AG, or the Chief of Staff. Prior to accepting or dismissing a complaint, they will obtain recommendations of the SEEM and JA.

b. The AG will accept or dismiss the formal complaint within ten (10) calendar days of its receipt by the State National Guard or within the ten (10) calendar days of

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

completion of clarification actions. Issuance of notices of acceptance or dismissal will not be delayed because settlement or withdrawal of a complaint is imminent.

c. Acceptance or dismissal does not signify agreement or disagreement with the claims raised. It is based solely on the procedural criteria cited in paragraph 4-11, not on the merits of the complaint.

(1) Initial acceptance or dismissal of all or part of a formally filed complaint will be based only on the criteria listed in paragraphs 4-11. In some instances, initial dismissal may also be based on failure to cooperate under the criteria of paragraph 4-11i.

(2) Dismissal during administrative processing of an initially accepted complaint will be made only with concurrence or by direction of NGB.

d. If the AG accepts the complaint, the complainant will be notified in writing.

e. If the AG determines that the complaint, in whole or in part, does not meet the criteria for acceptance (reference paragraph 4-11), the complaint will be dismissed, in whole or in part, as appropriate. The complainant will be notified in writing, of the reason for the dismissal. Dismissal of a complaint constitutes an agency decision with appeal rights; therefore, it is particularly important that the dismissal notice and case file be transmitted to NGB without delay (reference paragraph 4-9).

f. Acceptance or dismissal will be made using the format in Figures F-11 or F-12, as applicable. When the complaint contains claims that do not require clarification, the claims will be cited verbatim and Figures F-11 or F-12 will be used. When it is necessary to frame the claims for the complainant from a narrative, these figures will be modified as provided in the notes for these figures. In these cases, the SEEM will frame the claims ensuring that all matters raised within the narrative by the complainant are addressed in one or more claims. When the complainant provides clarification for the claims, Figures F-14 or F-15 will be used.

## **4-8. Fragmenting EEO Complaints**

In order to determine legal claims of discrimination, the SEEM and other designated EEO officials must avoid fragmentation, or breaking up, of claims during complaint processing. The EEO process is structured to allow the complainant to present legal claims. Fragmentation during processing can compromise the complainant's ability to present an integrated and coherent complaint of discrimination for which there is a remedy under the federal equal employment statutes. Fragmentation may occur at the point that the agency identifies and defines the complainant's claims, most commonly

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

during the pre-complaint counseling and investigation. The complainant may present the alleged claims of discrimination and evidence. Fragmentation may occur when the agency does not properly distinguish between the claim and evidence that is offered to support the complaint. Often, when the complainant presents multiple claims with factual evidence, the SEEM or EEO designate may not properly distinguish between the claims and evidence when the claims of the complaint are determined. These kinds of errors normally occur during the filing of complaints with multiple claims during the pre-complaint process. NGB has determined that fragmented processing can increase case inventories and workload of the agency when it results in the processing of related claims that could have been best processed using other procedures. The fragmentation of EEO claims must be prevented at all levels of the complaint process, including pre-complaint EEO counseling.

#### **4-9. Request for NGB Review and Investigation**

Within three (3) calendar days after the AG claims a notice of acceptance or dismissal, the SEEM will request that NGB review the acceptance or dismissal and assign an investigator, if appropriate. The request for NGB review and transmittal of the case file will not be delayed because a settlement is being negotiated, a withdrawal of a complaint may appear to be imminent, or for any other reason.

a. The official discrimination complaint case file, prepared and assembled as prescribed in Chapter 12, will be transmitted with one original and three copies. The SEEM is responsible for ensuring that all copies of the file are complete and identical.

(1) At this point, custody of the case file passes from the State National Guard to the National Guard Bureau (NGB). Originals of any correspondence received by the State from the complainant or complainant's representative after this date will be forwarded to NGB together with any responses (references Chapter 12). The SEEM is responsible for ensuring that any documents contained in or added to the copy of the case file retained at state level are included in the official discrimination complaint case file now maintained at NGB.

(2) The official discrimination complaint case file will include all documents generated during the pre-complaint processing, including any documents resulting from the ADR process. If clarification of claims took place, all documents and Memorandums for Record dealing with clarification will be included in the case file.

b. The request for NGB to review will be in the format described in figure F-17. The original request will be the topmost tabbed document in the original complaint file. Copies of the request will be sent to the complainant and representative, if designated. The request for review will contain:

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(1) Separate listings of all claims that were accepted and of all claims that were dismissed. The actual letter of acceptance/dismissal must be included in the case file.

(2) The complainant's home and work mailing addresses, and home and work telephone numbers, commercial and, if appropriate a DSN number.

(3) The name of the complainant's designated representative, if any, including the representative's work mailing address and telephone numbers, commercial and, if appropriate, DSN. Indicate if the representative is an attorney.

c. Requests containing accepted claims will also contain:

(1) Designated location for the on-site investigation.

(2) The name, title, address, and commercial telephone number of the State National Guard official with whom the investigator is to make contact to schedule the investigation (normally the SEEM). An alternate point of contact will also be provided.

(3) The name, title, address, and commercial telephone number of the State National Guard JA or other legal officer who will represent the NG during the investigative fact finding hearing.

d. Requests containing dismissed claims will also contain the following information:

(1) If the notice of dismissal is personally delivered to the complainant or representative, the date of such delivery.

(2) If the notice was not personally delivered, the date the notice was mailed by certified mail with return receipt requested.

(3) Proof of receipt of the notice by the complainant will be forwarded to NGB, with one original and three copies, immediately upon receipt by the State National Guard. Transmittal of the case file and request for review will not be delayed pending the receipt of such proof of delivery.

e. If a complaint is settled or withdrawn after it is formally filed, but before a notice of acceptance or dismissal is claimed, the complete case file, one original and three copies, will be immediately forwarded to NGB for review and administrative closure of the case.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **4-10. Review of Acceptance or Dismissal by NGB**

NGB will review the acceptance and dismissal of complaints for compliance with statutory and regulatory requirements, applicable case law, and administrative correctness. Upon completion of the review, NGB will notify the State National Guard, the complainant and/or complainant's representative, if any.

a. Proper notification of acceptance or dismissal, either initially or after corrections, will be forwarded to the State National Guard. For properly accepted complaints, the State National Guard will also be advised of any investigation or other fact-finding methods to be used. Thereafter, any named individuals will be advised of allegations made against them.

b. Complaints containing claims that have been improperly accepted or improperly dismissed will be returned to the State National Guard for issuance of a revised notice of acceptance, a notice of dismissal, or notice of partial acceptance/dismissal.

c. Complaints containing claims that are not clear or specific will be returned to the State National Guard for clarification (reference paragraph 4-5).

d. Amendment to complaints will be processed by the State National Guard, unless received and reviewed at NGB. When amendments are submitted after a complaint has been forwarded for NGB review, NGB will review the new claim and factual evidence to determine whether the new claim will be incorporated into the original complaint for investigation.

e. Complaints containing administrative errors may be returned to the State National Guard for correction, depending on the nature of the error and its effect on the processing of the complaint.

f. In the interest of expediting complaint processing or for other good and sufficient reasons NGB reserves the right to issue notices of acceptance/dismissal directly to the complainant, with copies to the AG, in lieu of the above procedures.

g. Unwarranted delays by the State National Guard in processing the complaint, obstruction of complainant's rights to file, or other violations of NGB policies and procedures contained in this regulation may result in adverse inferences as explained in paragraph 6-3.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## 4-11. Criteria for acceptance or dismissal

Acceptance or dismissal of a formal complaint of discrimination is not based on the merits, the validity of the complaint, or on the claims raised therein. The veracity of any alleged act(s) of discrimination or the facts in support of or in opposition to any claims raised, have a role in the resolution and final decision process, but are not a determining factor in the acceptance and dismissal process. The criteria for accepting or dismissing claims raised in individual and class complaints of discrimination are established by statutes and federal rules and are the same for all federal agencies. Reasons authorized by 29 CFR 1614 for dismissing a complaint, in whole or in part, are limited to the procedural grounds below. When dismissing a complaint or claim, the specific paragraphs of this regulation and of 29 CFR 1614 must be cited.

a. Failure to state a claim of discrimination under 29 CFR 1614.107 will be dismissed. This includes any claim that:

(1) Is not within the purview of the State National Guard or the NGB to remedy. This refers to a situation over which neither the State National Guard or the NGB has jurisdiction. Among claims falling in this category are actions that the National Guard is required to take in compliance with the Technician Personnel Act of 1968 (32 U.S.C. 709). Federal regulations provide that the complaint must be filed with the agency that allegedly discriminated against the complainant. Therefore, complaints dealing with personnel policies and employment practices imposed on the National Guard by statutes, directives of the Department of Defense, or the Departments of the Army or the Air Force, or rules of the Federal Agencies, such as OPM, cannot be filed with the National Guard. (reference 29CFR 1614.106(a) and 107 (a)(1).

(2) Is not based on the complainant's race, color, religion, gender (to include sexual harassment), national origin, age, physical or mental handicap, or retaliation. Complaints of discrimination because of age are accepted only if the complainant is at least 40 years of age when the action complained of took place. (reference 29 CFR 1614.103(a) and 107(a).

(3) Involves a military complaint of discrimination. The statutes and federal rules implemented by this regulation do not apply to uniformed members of the military services, which include a member performing duty in a military status such as weekend drill, annual training, or as an Active Guard Reservist (AGR), etc. Nor does this regulation include military personnel actions; for example, those involving military promotions, applications for National Guard membership, or applications for AGR positions (reference 29 CFR 1614.103(d)(1) and 107(a).

(4) The complainant cannot provide evidence that an action taken has caused direct harm or some loss with respect to their terms, conditions, or privileges of employment for which there is no remedy.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. Complaints or claims that have been previously filed and that are now pending or that have already been decided in the administrative discrimination complaint process. (reference 29 CFR 1614.107(a).

c. Failure to comply with the time limits, unless a waiver of time limits is granted (reference 4-13).

(1) For raising the matter as an informal complaint (reference Chapter 3); 29 CFR 1614.105(a) or 204(c) and 29 CFR Part 1614.107(a)(2)

(2) To timely file the formal complaint (reference paragraph 4-1 and 29 CFR 1614.105(a) or 204(c) and 29 CFR 1614.107(a)(2).

d. Claims or matters raised in the formal complaint that have not been brought to the attention of the EEO Counselor during the pre-complaint counseling or that are not like or related to claims or matters that had been brought to the attention of the EEO Counselor. The provision of paragraph 4-6 above will be applied to determine whether amendment is appropriate. (reference 29 CFR 1614.107(a)(2).

e. If the complainant has raised the matter under negotiated grievance procedures (reference Chapter 10) and 29 CFR 1614.107(a)(4), Complaints or claims may be dismissed under this paragraph provided that:

(1) The collective bargaining agreement permits allegations of discrimination to be raised in a negotiated grievance procedure; and

(2) The complainant has filed a timely written grievance under the negotiated grievance procedure; and

(3) The matter filed under the negotiated grievance procedure is the same as the matter raised in the complaint filed under this regulation.

f. If the complainant has raised the matter as a mixed case appeal with the Merit Systems Protection Board, dismissals will be made in accordance with paragraph 10-7 and 29 CFR 1614.107(a)(4)

g. Allegations that a proposal to take a personnel action, or other preliminary step to taking a personnel action is discriminatory. Preliminary steps under this paragraph must be of a nature that does not, without further action, affect the complainant (reference 29 CFR 1614.107(a)(5).

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

h. A complaint or a claim that is moot (reference 29 CFR 1614.107(a)(5).

i. Failure of the complainant to cooperate. (reference 29 CFR 1614.107(a)(7). Dismissal under this paragraph requires that:

(1) The complainant will be given a written request to provide specific information or to take specific action to proceed with the complaint and the reason for the request.

(2) The complainant will be advised that if he or she fails to respond within fifteen (15) calendar days after the receipt of the request or if the complainant's response does not address the request, the complaint or the claim(s) will be dismissed or adjudicated. If sufficient documentation is available in the record, the complaint should be processed in lieu of dismissal under these provisions.

j. When a complainant cannot be located (reference 29 CFR Part 1614.107(a)(6). Dismissal under this paragraph requires that:

(1) Reasonable efforts have been made to locate the complainant; and

(2) A notice of the proposed dismissal has been mailed to the complainants last known address and the complainant has not responded within fifteen (15) days.

k. Abuse of Process. Dismissal under this paragraph may only be made as an appropriate provision under which an agency can determine a clear misuse or abuse of the administrative process. This requires a thorough analysis of whether the complainant evidences an ulterior purpose to abuse or misuse the EEO process. Be cautious that numerous complaint filings alone is not a sufficient basis for determining that there has been abuse of the process. However, multiple filings on the same claims, lack of specificity in the allegations, and the filing of complaints and allegations previously raised may be considered in deciding whether a complainant has engaged in a pattern of abuse of the EEO process. All pending complaints from a complainant that satisfy these criteria should be consolidated for dismissal under this section. reference 29 CFR Part 1614.107(a)(9).

l. Complainant alleges dissatisfaction with the processing of a previously filed complaint.

(1) When a complainant alleges dissatisfaction with the processing of a complaint, the complainant should be referred to the official responsible for complaint

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

processing in the State or NGB. All resolutions of claims of dissatisfaction must be processed as expeditiously as possible. A record must be developed of all actions taken to resolve the complainants concerns. If the state or NGB takes no action, an explanation(s) must be included in the file.

(2) All concerns of dissatisfaction with the processing of a complaint must be brought to the agency for resolution before being presented to EEOC.

(3) All concerns of dissatisfaction with the processing of a complaint that is brought to the agency and not resolved maybe presented after a request for a hearing, to the Administrative Judge. If the complainant has not requested a hearing and still has unresolved allegation of dissatisfaction with the processing of a complaint, these allegations may be submitted to the EEOC Office of Federal Operations (OFO) on appeal.

(4) All concerns of dissatisfaction with the processing of a complaint must be raised before the Administrative Judge issues a decision in the complaint and before NGB takes the final action on the complaint or the complaint is dismissed by the Administrative Judge.

(5) NGB, the Administrative Judge, or OFO will not accept allegations of dissatisfaction with the processing of a complaint after the issuance of the final action. reference 29 CFR Part 1614.107(a)(8).

n. A claim that is pending civil action in a United States District Court in which the complainant is a party, providing that at least 180 days have passed since the complaint was administratively filed under paragraph 4-1 (reference 29 CFR Part 1614.107(a)(3).

o. The same matter was the basis of a civil action decided by a United States District Court in which the complainant was a party (reference Chapter 8 and 29CFR 1614.107(a)(3).

## **4-12. Processing of Partially Dismissed Complaints**

There is no immediate right to appeal a partial dismissal of a complaint. Where the State believes that some but not all of the claims in a complaint should be dismissed for reasons contained in 4-11, the complainant must be notified in writing of the agency determination. This is set forth in an analysis of the rationale for that determination, and that the determination for acceptance and/or dismissal is pending approval from the National Guard Bureau. The complaint file must contain adequate documentation to support this decision and pending NGB-EO review, the complainant will be advised that

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

an Administrative Judge shall review its dismissal determination if a hearing is requested on the remainder of the complaint.

a. Where a hearing is requested, an Administrative Judge will evaluate the reason for believing a portion of the complaint should be dismissed and render a ruling accordingly with the remaining claims which were accepted.

b. Where a final decision is requested by the National Guard Bureau, NGB-EO will issue a decision addressing all claims in the complaint, including its rationale for dismissing claims, if any, and a finding on the merits of the remainder of the complaint. The complainant will be given the right to appeal the agency's decision, including any partial dismissals, to the Commission. The decision shall include:

(1) Findings of fact and conclusions of law on each claim based on merit in the complaint;

(2) Appropriate remedies and relief in accordance with subpart E of Part 1614 when discrimination is found;

(3) Notice of right to appeal to the Commission (EEOC Form 573, Notice of Appeal/Petition, to be attached), unless the complaint involves a mixed case, where the agency should provide notice of right to appeal to MSPB (not EEOC) within thirty (30) days of the receipt of the decision;

(4) Notice of right to file a civil action in a federal district court

(5) Name of the proper defendant in any such lawsuit; and

(6) Applicable time limits for appeals and lawsuits.

### **4-13 Extension of Time Limits**

The time limits imposed on the complainant are subject to waiver, estoppel, and equitable tolling. NGB or EEOC may extend these time limits based on the reasons cited in subparagraphs 4-11b and c, or for other good and sufficient reasons. Except as specifically provided for in this regulation, no authority exists, to extend time limits imposed on the State National Guard.

a. The AG, upon advice of the SEEM and/or JA, may extend the 45 day and 15 day time limits of paragraphs 3-3, 4-1e, or 11-5e, if the complainant can show that such a waiver is warranted. A complainant's request for a waiver will be considered in deciding whether a complaint will be dismissed under paragraph 4-11c.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(1) The documentation or statements by the complainant in support of an extension of time limits will be made part of the official case file.

(2) Granting or denial of any waiver will be made formally, in writing, to the complainant and complaint's representative, and will include specific rationale and documentation to support or rebut the claims made by the complainant. All documentation will become part of the official complaint file.

(3) All waivers granted or denied by the State National Guard are subject to review and approval by NGB.

b. Waivers will be considered when a complainant:

(1) Claims that he or she was not notified of the 45-day time limit for filing an informal complaint or that he or she was not otherwise aware of this time limit of fifteen (15) days for filing a formal complaint.

(2) For a waiver to be granted, the complainant must submit evidence for the record of any matter that may have prevented timely filing.

(3) Claims that he or she was not notified of the fifteen (15) day time limit for filing a formal complaint or that he or she was not otherwise aware of this time limit. Granting or denial of the waiver will be based on whether the complainant received the notice of final interview and right to file a complaint. The record will contain documentation regarding the presence or absence of this required notice and proof regarding the receipt or non-receipt by the complainant of the notice.

(4) Shows that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action had occurred.

(5) Shows that, despite due diligence, he or she was prevented by circumstances beyond his or her control from contacting an EEO Counselor within the 45-day time limit or from filing a formal complaint within the fifteen (15) day time limit. Consideration will be given to equitable tolling and estoppel.

c. Apparently, untimely claims within a complaint may also be accepted when two or more claims raised in the complaint indicate a pattern of continuing violations and at least one of these claims is timely. In such cases, a separate waiver is not required; however, the notice of acceptance will indicate the specific reason why one or more of the apparently untimely claims were accepted.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **4-14 Consolidation and Joining of Complaints**

a. Complaints of discrimination filed by two or more complainants which make substantially similar allegations of discrimination or which relate to the same matter, may be consolidated for joint processing by the State National Guard, NGB, or EEOC, after notifying the complainants. If the complaints have not been filed at the same time, the date of the first filed complaint is controlling of the time limits established in this regulation. Complaints will not be consolidated if this will prevent the timely processing of one or more complaints.

b. Two or more complaints of discrimination from the same complainant may be consolidated for joint processing by the State National Guard, NGB, or EEOC, after notifying the complainant. The date of the first filed complaint is controlling of the time limits established by this regulation. Complaints will not be consolidated if this will prevent timely processing of one or more complaints.

c. When two or more complaints have been consolidated for joint processing, the following rules apply:

(1) When there is more than one complainant, separate notices of acceptance or dismissal will be issued.

(2) Only one investigation will be conducted. However, if there is more than one complainant, each will receive a copy of the ROI.

(3) If a hearing is held prior to a final decision, the hearing will include all the complaints that have been joined for processing.

(4) When there is more than one complainant, withdrawal or settlement of the complaint by one complainant will not affect processing of the remaining complaints that have been consolidated.

(5) The final decision will address all complaints joined for processing when only one complainant is involved.

(6) When there is more than one complainant, separate final decisions will be issued for each complainant.

(7) Correspondence that relates to more than one complainant or complaint will be titled to reflect the names and case numbers of all involved reference Chapter 12).

## **Chapter 5**

### **Fact Finding and Investigation**

#### **5-1. General**

The fact finding and investigation period covered in this chapter extends from the time that NGB approves the acceptance of claims until the issuance of the notice of investigation completion.

#### **5-2. Purpose of Fact Finding and Investigation**

a. The purpose of fact finding and investigation of a discrimination complaint filed under this regulation is to uncover and develop a sufficient amount of factual information to determine:

(1) Whether a violation of the statutes and directives, cited in paragraph 1-1 of this regulation, has occurred.

(2) If any or all of the claims accepted in the complaint have validity and merit.

(3) An appropriate resolution of the complaint.

(4) What remedy and corrective action are appropriate.

(5) How the case should be adjudicated in the final decision.

b. Upon completion of fact finding or investigation, the official discrimination complaint case file must contain sufficient documentation to support by a preponderance of evidence a finding of discrimination or no discrimination on each accepted claim.

#### **5-3. Fact Finding**

a. As noted in the glossary, an investigation is a formal process that includes a detailed examination to uncover facts. As part of its review, NGB will evaluate the extent of fact-finding and investigation required to develop a complete and impartial factual record that can be used for settlement and adjudication of the complaint. In some instances, sufficient factual data is available in the official discrimination complaint case file so that a complete investigation is not required to achieve the desired results. In such cases, fact-finding, short of a complete investigation, may suffice to develop a factual record on which to make findings on the matters raised in the formal complaint.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. If fact-finding is appropriate, NGB may supplement the existing record by an exchange of letters, memorandums, or interrogatories with the complainant and NG officials instead of an on-site investigation. This will be done only when the record already contains sufficient data so that an adjudication of the case may be made with only limited supplementary material.

c. The authority assigned to an investigator in paragraph 5-6 is inherent in any correspondence from NGB that requests information as part of the fact finding under this paragraph.

## **5-4. Alternative Dispute Resolution (ADR)**

In keeping with the policy of seeking resolution throughout the complaint process, the fact-finding and investigative stages of the complaint process also incorporate procedures for resolution.

a. As part of evaluation under paragraph 4-9, NGB will review whether alternative dispute resolution procedures should be applied prior to assignment of an investigator. NGB will consider:

(1) The complainant's willingness to participate in ADR, as evidenced in the pre-complaint process reference paragraphs (3-10a and 3-10c).

(2) The results of any ADR in which the complainant may have participated (3-10).

(3) The likelihood of success of alternative dispute resolution at this point based on other documentation in the case file.

b. On-site investigative fact-finding hearings are conducted so as to encourage alternative dispute resolution. To this effect, investigative hearings are non-adversarial and permit parties, the State National Guard and the complainant, to be present throughout all testimony so that both are aware of all material presented and of the position of each side. If at any time during the on-site investigation it appears that there is a willingness or possibility for resolution of the claims, the investigator may suspend the investigative hearing so that dispute resolution may be attempted.

c. If a settlement is reached or the complaint is withdrawn, the provisions of chapter 7 apply and will be adhered to. The investigator may not cancel an investigation, based on a settlement or withdrawal of the complaint, until authorized by NGB (reference paragraphs 7-3e(3) and 7-5e(3)).

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **5-5. Assignment of an Investigator**

When NGB determines that the matters raised in the formal complaint require an investigation, an investigator will be assigned.

a. The investigator is independent of control by any of the parties (the State National Guard, the complainant, and/or their representatives). The investigator reports to the NGB-EO and represents neither the complainant nor the State National Guard.

b. Any individual designated by NGB to investigate a complaint of discrimination may not occupy a position in the National Guard that is directly or indirectly under the jurisdiction of the AG of the State in which the complaint arose.

c. Contract investigators may not be hired by or obligated to any NG official in the State in which the complaint arose.

d. When an investigator is assigned, NGB will transmit a copy of the official discrimination complaint case file to the investigator together with a letter of authorization and any pertinent instructions for the conduct of the investigation. The investigator's 45-day time limit to submit a Report of Investigation (ROI) starts with the receipt of these documents.

e. The SEEM and the complainant will also be notified of the assignment of the investigator, so that they can begin to prepare for the investigation. The SEEM will notify the State JA and assist the JA in preparation of the National Guard position to be presented during the investigative fact finding hearing.

## **5-6. Authority of the Investigator**

On behalf of the Chief, National Guard Bureau, investigators will be provided written authorization signed by NGB-EO . The complainant, National Guard officials, and all National Guard personnel are required to produce such documentary and testimonial evidence as the investigator deems necessary.

a. Investigators are authorized to:

(1) Investigate all aspects of the complaint of discrimination, to include reviewing and copying records judged by the investigator to be pertinent to the investigation.

(2) Require National Guard personnel to cooperate with the investigator in conducting the investigation.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(3) Require National Guard personnel who have any knowledge of the matter in the complaint to furnish testimony, unless such testimony would result in self-incrimination.

(4) Administer oaths and require that statements of witnesses be under oath or affirmation or by written statement, under penalty of perjury. Statements of witnesses are made without any pledge of confidentiality.

b. The investigator has the power to regulate the conduct of the investigative fact finding hearing, limit the number of witnesses where testimony would be repetitious, and exclude any persons from the hearing for contemptuous conduct or misbehavior that obstructs the hearing.

c. When the complainant, State National Guard officials, or any National Guard personnel fail without shown good cause, to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, the investigator will note this in the Report Of Investigation (ROI) and will, when appropriate, recommend that adverse inference be drawn by NGB (reference paragraph 6-3).

### **5-7. Scheduling On-site Investigation**

To ensure timely completion of the investigation and submission of the ROI, the investigation will begin as soon as possible after assignment of an investigator, but in any event, not later than twenty (20) days after the receipt of the case file by the investigator.

a. Planning for the on-site investigation by the State National Guard and by the complainant must commence upon receipt of the notification from NGB that the claims have been properly accepted and an investigation will be scheduled (reference paragraph 4-10). Planning will include the identification of witnesses and other participants in the investigative fact finding hearing and assuring their availability.

b. Upon initial review of the case file received from NGB, the investigator will contact the individual designated by the State National Guard, normally the SEEM (4-9c(2)).

(1) The investigator may request additional documents or information to supplement the record in the official case file.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(2) The investigator will request a list of witnesses proposed by the State National Guard and the complainant. The investigator may also indicate what witnesses he or she wishes to have testify.

(3) Within the time constraints imposed by this regulation, the investigator will schedule the on-site investigation.

c. Within five (5) days after the receipt of a copy of the official discrimination complaint case file, the investigator will provide an initial report to NGB that outlines the proposed investigation and provides the dates of the on-site investigation and fact finding hearing.

## **5-8. State National Guard Support Requirements**

The SEEM or other designated individual will make the necessary arrangements for the investigator's visit (4-9c(2)). This may include information on local hotel accommodations, public transportation, access to the investigative site, and assistance to the investigator required to conduct an efficient investigation. The State National Guard is also responsible for the following support:

a. An appropriate location for conducting the investigative fact finding hearing and private office space for the investigator with telephone access.

b. Services of a certified court reporter to provide verbatim transcripts of testimony. The transcripts will be provided, in four copies, exclusively to the investigator. Whenever possible, transcripts will be provided prior to the investigator's departure from the site. Otherwise, the court reporter must send them by express mail to the investigator within three (3) working days after the testimony has been taken.

c. Ensuring that the complainant and all witnesses for the complainant and for the State National Guard, to include any witnesses requested by the investigator, are available at one designated location at the specified date and time.

d. Making available all personnel and other records, statistical data, and other documents required by the investigator and assuring that necessary copies are provided to the investigator prior to the investigator's departure.

## **5-9. Conduct of the Investigation**

The investigator is required to make a fair and impartial investigation of the facts and circumstances surrounding the case and to ensure that sufficient evidence is available for NGB to reach conclusions and findings based on the preponderance of evidence (see glossary for definitions). Unless otherwise instructed by NGB-EO, the investigator

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

will use the NGB Investigators Procedural Manual in the conduct of the investigation, to include subsequent analysis and preparation of the ROI. Where provisions of that manual conflict with the provisions of this regulation, the last dated document will take precedence. The investigator will:

a. Make a thorough review of the official discrimination complaint case file provided to the investigator by the NGB.

b. Request and obtain additional documentary information needed to supplement the case file prior to the on-site visit (reference paragraph 5-7b(1)).

c. Schedule and conduct an on-site investigation, which will include obtaining documentary evidence and interviewing witnesses (reference paragraph 5-12). During this on-site visit, the investigator will:

(1) Collect facts and develop information to determine the merits of each accepted claim in the complaint and review the circumstances under which the discrimination is alleged to have taken place. This does not lessen the responsibility of the complainant and the State National Guard representative to prepare, present, and explain their positions as to the disputes and to provide supporting evidence.

(2) Collect and analyze information on how members of the complainant's group are treated compared to other personnel in the organization where discrimination is alleged to have occurred. This information may include statistical data on promotions, disciplinary actions, awards, or other personnel actions.

(3) Investigate work policies and practices, relevant to the complaint, that seem to constitute discrimination, even though they may not have been specifically cited by the complainant (reference paragraph 5-9d).

(4) Determine how much evidence is needed. In obtaining evidence, documentary or testimonial, the investigator will consider that enough evidence has been obtained when all evidence, likely to support both parties, has been examined and the evidence obtained on each claim raised by the complaint supports, by a preponderance of evidence, a finding of discrimination or no discrimination. The investigator need not be concerned in balancing the amount of evidence supporting the complainant as compared with the amount of evidence supporting the State National Guard. To ensure a balanced record, it is necessary only to exhaust all sources likely to support the complainant and the State National Guard.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

d. Refrain from expanding the scope of the investigation beyond the claims accepted and the charges or allegations that were accepted in the formal complaint. Bases of discrimination, however, can be changed or added.

e. Prepare and submit an ROI.

### **5-10. Amendment During Investigation.**

At any time prior to the agency's mailing of the notice of conclusion of the investigation, complainants are permitted to amend a pending complaint to add claims that are like or related to those claim(s) raised in the pending complaint. There is no requirement that the complainant seek counseling on these new claims. A separate EEO complaint is not appropriate if the new incident of discrimination raises a claim that is like or related to the original complaint. Rather the original complaint should be amended to include the new incident of discrimination.

a. When a complainant raises a new incident of alleged discrimination that is part of the existing claim during the investigation, the investigator shall immediately instruct the complainant to submit the new claim to the State Equal Employment Manager (SEEM) who shall review the new allegations to determine whether the 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.

The SEEM shall review the request and determine the correct handling of the amendment in an expeditious manner.

b. If the SEEM concludes that the new incident(s) provides additional evidence offered in support of the claim in and of itself, then the investigator shall include the new incident in the investigation. A copy of the determination shall be sent to the NGB-EO, complainant and documented in the ROI.

c. When a complaint is pending, a complainant may raise a new incident of alleged discrimination that is not part of the existing claim, but may be part of a new

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

claim that is like or related to the pending claim. A determination must be made by the SEEM as to whether the later incident adds to or clarifies the original claim, and/or could reasonably be expected to grow out of the investigation of the original claim. The investigator shall immediately instruct the complainant to submit the new claim to the State Equal Employment Manager (SEEM) who shall review the new allegations to determine whether the new incident meets the criteria.

d. If the SEEM concludes that the new incident(s) raises a new claim, but that this new claim is like or related to the claim(s) raised in the pending complaint, the agency must amend the pending complaint to include the new claim. A copy of the determination shall be sent to the NGB-EO, the complainant, and the investigator who is investigating the complainant's prior complaint with instructions to include the new incident(s) in the investigation.

### **5-11. Investigative Fact-finding Hearing**

The purpose of the investigative fact finding hearing is to obtain evidence bearing on the claims in the case from personal testimony of individuals. It is an administrative, rather than a judicial process; therefore, the rules of evidence used in a judicial process are not strictly applied. The fact-finding nature of this process is designed to provide both parties to the complaint with access to all testimony so as to bring out all relevant facts and to foster resolution.

a. Unless otherwise directed by NGB-EO, investigative fact finding hearings will be conducted as established herein and in the NGB Investigators Procedural Manual.

(1) Testimony will be obtained by personal interview and completed during on-site visits. The investigator will make use of a certified court reporter provided by the State National Guard to obtain sworn, verbatim transcripts. Such transcripts will not be reviewed or signed by the individual providing testimony.

(2) There may be rare occasions when it is impossible to obtain transcribed testimony in person or when some follow-up information is required. In that case, evidence may be obtained in a variety of ways, including written questions and answers (interrogatories); recorded telephonic interviews, using either handwritten notes or verbatim transcription; an exchange of letters or memoranda; or affidavits.

(3) The process of obtaining testimony will be non-adversarial and will be conducted in an orderly and dignified fashion. The State National Guard representative and any witness, to include the complainant, will be permitted to make a statement; however, the investigator will determine what questions are asked of the witness and the investigator may exclude or curtail long, repetitive, or irrelevant testimony.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(4) All questions of the witnesses are to be asked by the investigator and there will be no examination or cross-examination of the witness by either the complainant or the State National Guard representative. At the end of the testimony, the investigator will excuse the witness and, off the record, ask the complainant and the NG representative whether any part of the witness' testimony requires clarification. If the investigator deems it appropriate, the investigator may, but is not required to, recall the witness, go back on the record, and ask the witness to answer additional questions posed by the investigator. The investigator will provide witnesses with information stated in paragraph 5-12.

b. The fact-finding hearing is a part of the investigative process and is closed to the public. Attendance will be limited to persons with direct knowledge relating to the complaint. The following individuals will be present during testimony:

(1) The investigator, whose role is to elicit information in a fair and impartial manner and to ensure that the record of the proceeding is clear and complete.

(2) The court reporter provided by the State National Guard will prepare verbatim transcripts of the testimony.

(3) The witness providing testimony. This may include the complainant, an individual named by the complainant as being responsible for alleged acts of discrimination, NG officials, individuals requested by the complainant or the NG representative to provide testimony, or other individuals asked by the investigator to testify. The witness testifying and the witness' representative are present only during the time that the witness is testifying.

(4) An attorney or representative for the witness, if requested by the witness to be present, during that witness's testimony only.

(5) The complainant who may be accompanied by an attorney or representative. The complainant and the complainant's attorney or representative will be present during the testimony of all witnesses, unless the complainant personally elects not to be present. Since the burden of proof rests on the complainant, the complainant's absence and failure to be aware of the testimony being presented may make it difficult for him or her to show that discrimination has occurred or to demonstrate pretext of management actions.

(6) The State National Guard legal representative, normally the State Judge Advocate (JAG). This individual represents the National Guard, not any individual National Guard official nor any individual named by the complainant as being

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

responsible for alleged acts of discrimination. This representative will be present during the testimony of all witnesses. Although the representative will not cross examine any witness, he or she may make a statement to the investigator addressing or summarizing the case from the State National Guard's perspective.

(7) An observer, such as an EEO or NGB official, may be permitted by the investigator to sit in on the proceeding with the consent of the complainant or by direction of the NGB-EO .

## **5-12. Witnesses and Testimony**

The State National Guard and the complainant will provide the investigator with a list of witnesses they wish to have interviewed (5-7b(2)). The investigator may require the State National Guard or the complainant to indicate what testimony is expected from each witness.

a. The investigator will determine the witnesses whose testimony is necessary to the investigation and will interview and obtain testimony from only these witnesses. Testimony will be included in the investigative file only if the investigator deems the testimony relevant and necessary. The investigator will document in the ROI any witness identified by the complainant or by the State National Guard who was not interviewed and why any evidence that was offered was not accepted.

b. The complainant and the NG representative will be advised that witnesses have been selected based on those proposed by the complainant, the State National Guard, and those added by the investigator, and that the final decision on which witnesses are interviewed rests with the investigator. If any witnesses proposed by the complainant or the State National Guard are not interviewed, the reason will be noted in the ROI. The complainant will also be advised that if the complainant raises new claims that have not been accepted, the investigator will stop the testimony and advise the complainant to contact an EEO counselor on these claims.

c. The investigator will advise each witness about the conduct of the hearing and will explain the fact finding process. Witnesses will be advised that:

(1) They have a right to be represented at their own expense.

(2) The testimony that they provide will be under oath or affirmation. It will be transcribed verbatim by the court reporter and this verbatim testimony constitutes the only official record of this fact finding hearing and no other record is authorized or may be made.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(3) Their testimony will be part of the ROI to be included in the official complaint file and that the NGB, the State National Guard, and the complainant will receive a copy.

(4) The purpose of the investigative hearing is to obtain facts concerning the discrimination complaint so that the investigator may provide sufficient evidence for the NGB to make conclusions and findings on whether or not discrimination has occurred. It is not the purpose of the fact finding hearing to determine the culpability of any individual who may have been named by the complainant. The investigator will not make any finding on whether any individual is or is not guilty of discrimination.

(5) The testimony and exhibits must pertain to the claims raised that have been accepted. The investigator may exclude irrelevant or repetitious testimony or exhibits or testimony pertaining to any dismissed claims.

d. Any individuals named by the complainant as being responsible for alleged acts of discrimination will be advised of the details of such allegations by the investigator and the accepted claims in which they are named will be read to them verbatim.

## **5-13. Problems and Delays**

Every effort will be made to resolve problems that may cause delay in the investigation since it must be completed within 45 days. For contract investigators, that time limit also constitutes a contractual obligation.

a. Delay in scheduling of an on-site investigation, delay while the investigator is on site, or delay in submission of the ROI must be authorized by NGB-EO and, for contract investigators, concurred with by NGB-AQ. Whether a delay is authorized will depend on the reasons for the delay, on how many days have passed since the complaint was filed, and whether the complainant agrees to an extension.

b. By voluntary written agreement with the complainant, the investigation and issuance of the investigation completion notice may be extended for not more than an additional 90 days. Normally, extensions will be for lesser periods sufficient to cover the delay encountered. Such extension agreements will generally be appropriate for dispute resolution under paragraph 5-4 and when unavoidable delays are encountered.

c. Delays for the convenience of the complainant, the investigator, or State National Guard officials are not authorized. Vacation or leave time will not constitute a

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

valid reason for delaying an investigation. Absence of witnesses due to annual training or temporary duty will not be grounds for delay. Appropriate arrangements will be made

to return such individuals to provide necessary testimony or to use other means to obtain needed testimony (paragraph 5-12). Investigations will not be delayed or cancelled because of a settlement agreement or the complaint withdrawal is in progress or imminent (5-6c).

d. When either party, (the State National Guard or the complainant) causes an unjustified delay in the investigation, the investigator may recommend that adverse inference be drawn (5-6c).

e. When the investigator or National Guard officials believe that there is sufficient reason to justify a delay in the investigative process, they will provide specific details and justification for the delay and indicate by how many days the investigation will be delayed. This information will be provided in writing to NGB-EO and the investigator. To avoid delay, the information will be transmitted by facsimile or priority message. Such delay may entail additional investigative costs to the State National Guard or NGB and may result in the action described in paragraph 5-18.

f. When a complainant believes that good and sufficient reasons exist to delay an investigation, he or she will request the delay in writing, providing a copy to the SEEM and the investigator. The SEEM will transmit the information to NGB-EO by facsimile or priority message.

g. If a complaint is settled or withdrawn before the start of the on-site investigation, the State National Guard will immediately notify NGB-EO by facsimile or overnight mail service requesting that the investigation be cancelled (reference Chapter 7).

h. The JA or the SEEM will notify NGB-EO, in writing, of any actions or demands by the investigator that clearly violate EEOC or NGB guidelines. When time is of the essence and the circumstances are sufficiently serious to require immediate corrective action, the report will be sent by facsimile or priority message.

### **5-14. Report of Investigation**

a. Within 45 days and any extension authorized as described in paragraph 5-13, above, the investigator will prepare a ROI and submit it to NGB-EO. Unless otherwise instructed by NGB-EO, the content and format of the ROI will be in accordance with the guidance of the NGB Investigator's Procedural Manual.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(1) The investigator will provide a detailed narrative report of the investigation as part of the ROI. The report will include a description of the claims, testimony, documentation, and other exhibits and their relationship to the case and the claims that had been accepted for investigation; as well as a factual analysis of the complainant's case on each accepted claim.

(2) The investigator will include copies of all documentation relevant to the complaint. The evidence gathered will be clearly marked and placed as exhibits in the ROI.

(3) The investigator will prepare an executive summary of the narrative report to summarize key aspects of the case, the investigation, and the factual analysis of the ROI. The executive summary will not exceed two pages.

b. The ROI will be reviewed by NGB for legal and administrative sufficiency, to determine that it contains information to meet the requirements of paragraph 5-2, to verify that the analysis is consistent with the evidence in the entire official discrimination complaint case file, and to ensure that the information is sufficient to make necessary conclusions, findings, and recommendations.

c. The ROI is an NGB investigative document and NGB reserves the right to correct, amend, or rewrite narrative parts of the ROI. NGB will not change or alter any evidence, documentary or testimonial, in the ROI. NGB-EO may remand deficient ROI's to the investigator for additional analysis or corrections.

d. If the ROI is deficient, biased, or otherwise so flawed that it is insufficient to meet the requirements of paragraph 5-2, NGB may order a new or supplemental investigation or use other fact-finding methods to obtain necessary information.

e. Completion of NGB review of the ROI, acceptance of the ROI from the investigator, or the transmittal of the ROI to the complainant and the State National Guard do not indicate NGB agreement with the merits of the case or indicate findings of discrimination or no discrimination. Such determination is only made with the issuance of a final decision on the merits of the complaint.

## **5-15. Purpose and use of the ROI**

a. The ROI supplements the official discrimination complaint case file so that the objectives listed in paragraph 5-2 can be achieved.

b. The ROI will be used by State National Guard officials, NGB, and EEOC to resolve complaints, to adjudicate complaints by issuing decisions on the merits of the complaint and rulings on appeals, and to determine appropriate remedial and corrective actions.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. The ROI is also provided to the complainant. The ROI is covered by the Privacy Act and may not be released to unauthorized persons reference3 paragraph 12-7).

### **5-16. Notice of Investigation Completion**

After NGB-EO has completed the review of the ROI and ensured that all deficiencies, if any, have been corrected, the NGB-EO will issue a notice of investigation completion to the complainant with a copy to the SEEM (Figure F-23). The notice will be accompanied by a copy of the ROI to both the complainant and the SEEM. One copy of the ROI is retained by the SEEM to be used by the State National Guard and to be included in the complaint file. The other copy is for the exclusive use of the complainant and his or her representative, if designated. The notice of investigation completion will advise the complainant:

a. Of the right to request an immediate final decision from NGB-EO . This request must be submitted within thirty 30 days (reference paragraph 6-5).

b. Of the right to request a final decision by NGB-EO in conjunction with a hearing by an EEOC Administrative Judge (AJ). This request must be submitted within 30 days (reference paragraph 6-6).

c. That if the complainant fails to submit a request for a final decision within 30 days, the NGB will issue a decision without a request (6-11b).

d. That the complainant may be contacted by State National Guard officials to attempt settlement of the complaint, but that any settlement attempts do not modify or extend the time limits listed above.

### **5-17. Settlement Before a Decision**

In addition to the dispute resolution discussed in paragraph 5-4, State National Guard officials and the complainant have additional opportunities to resolve the complaint prior to issuance of a final decision by the NGB.

a. After completion of an investigative fact finding hearing, both the complainant and the State National Guard representative are aware of all testimony that has been presented in the case. As a result, they can use this information to seek resolution and settlement of the complaint.

b. Upon receipt of copies of the ROI, the complainant and State National Guard officials should review that document and again attempt resolution and settlement. They may also choose the use of the dispute resolution process listed in Chapter 2 to facilitate such resolution.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **5-18. Failure to Issue a Notice of Investigation Completion**

NGB is required to issue a notice of investigation completion within 180 days after the filing of the formal complaint or within the time limit established by EEOC on an appeal from dismissal (reference Chapter 8). These time limits are extended upon agreement with the complainant as indicated in paragraph 5-13b. In the absence of such notice, the complainant may:

- a. Request a hearing before an EEOC AJ by sending a request to the appropriate EEOC district office. A copy of the request must be sent to NGB-EO.
- b. File a civil action in an appropriate U.S. District Court as specified in chapter 8.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 6

### Hearings, Adjudication's, and Decisions

#### 6-1. General

This chapter covers the period from the receipt by the complainant of the notice of investigation completion until the issuance of the final decision by NGB. Appendix D contains a summary of time limits applicable to this chapter.

#### 6-2. Adjudication and Decision Procedures

On behalf of the Chief, NGB, the NGB-EO (in coordination with NGB JA and other NGB staff activities, as appropriate) will review the entire official discrimination complaint file before issuing decisions and determinations on discrimination complaints. This includes final decisions on the merits of accepted claims, decisions on procedural grounds, or dismissals subsequent to the acceptance of a complaint. The decisions or determinations will be made by the Director, NGB-EO or as delegated by the Director, NGB-EO.

a. In conducting the review and adjudication of the case, NGB-EO will take into consideration all attempts at resolution, results of any fact finding or investigation, any written statements or briefs included in the complaint file from either party (the complainant or the State National Guard), the findings and conclusions of the AJ, if a hearing was held, and any other documentation in the official discrimination complaint case file. NGB-EO will also consider the manner in which the complaint was processed and investigated and whether any adverse inferences should be drawn (reference paragraph 6-3).

b. The decisions and determinations made by NGB-EO include:

(1) Propriety of the initial acceptance and dismissal and (reference paragraph 4-10 and paragraph 4-11).

(2) Final decisions on the merits of the claims (reference paragraphs 6-11 and paragraph 11-14).

(3) Decisions on subsequent dismissals of accepted complaints (reference paragraph 6-13).

(4) Closures of complaint cases (reference paragraph 6-14).

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(5) Certifications of full relief (reference paragraph 7-6).

(6) Determinations and final decisions on attorney's fees and costs (reference paragraph 7-10 and 7-11).

(7) Compliance and enforcement of settlements and final decisions (reference 7-12 and 7-13).

(8) Determinations to have EEOC reconsider its appeal decisions (reference 8-9).

(9) Appeals of denial of representative (reference paragraph 9-4).

(10) Acceptance or dismissal of class com-plaints (reference paragraph 11-8).

(11) Decision on petitions to vacate is solution (reference paragraph 11-11).

### **6-3 Adverse Inference**

a. When the complainant, National Guard officials, or any National Guard personnel fail without shown good cause to timely process the complaint, respond fully and in timely fashion to requests of NGB-EO, the investigator, or the EEOC AJ, or otherwise obstruct or delay processing of a complaint of discrimination, NGB or EEOC may draw adverse inference in adjudicating the complaint.

b. In appropriate circumstances, EEOC or NGB may:

(1) Draw an adverse inference that the requested information or testimony of the requested witness would have reflected unfavorably on the party refusing to provide such information.

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

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

(4) Issue a decision fully or partially in favor of the opposing party.

(5) Take other appropriate actions.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **6-4. Input from the Adjutant General**

Within fifteen (15) days after receipt of the notice of the investigation completion and the ROI or the results of the fact finding, the AG may provide input for NGB's consideration in issuing a final decision.

a. A synopsis of the State National Guard position on the merits of the claims should be provided to NGB-EO. This is not intended to be a rebuttal to any testimony or information that was gathered during the investigation, nor should it restate the analysis contained in the ROI. Rather, this is an opportunity for the State National Guard to either agree with the analysis of the ROI or to present a brief statement of why the preponderance of evidence on a given claim should result in a particular decision on the merits of that claim.

b. If any resolution attempts have been made in accordance with paragraph 5-17, such attempts and the terms of any proposed settlement that were offered to the complainant, should be forwarded to NGB-EO to be made part of the record.

c. The Adjutant General's input to NGB should also include recommendations for what would constitute full relief in each claim if the final decision determines that discrimination has occurred, including any mitigation of damages (reference Chapter 7-7b). Absent such recommendations, an NGB final decision which favors a complainant, will require full relief based on the provisions of Chapter 7 and evidence in the case file.

## **6-5. Request for an Immediate Final Decision**

a. When the complainant receives the notice of investigation completion and the ROI or the results of the fact finding (reference paragraph 5-15a), he or she may ask for an immediate final decision by the Chief, NGB. This request must be made in writing within thirty (30) calendar days after the receipt of the notice. It must be addressed to NGB NGB-EO at the address provided in the notice with a copy to the SEEM.

b. The NGB final decision will be based on the record (reference paragraphs 6-2 and 6-3). The complainant may provide a synopsis of his or her position in the same manner as stated in paragraph 6-4. However, any new claims raised by the complainant will be returned for processing IAW chapter 3.

## **6-6. Request for a Final Decision with a Hearing**

a. When the complainant receives the notice of investigation completion and the ROI or the results of the fact finding (reference paragraph 5-16a), he or she may ask for a final decision from the EEOC AJ (reference paragraphs 6-8 through 6-10). A hearing

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

request form will be provided from the NGB-EO in conjunction with the notice of investigation completion. The hearing request must be submitted within thirty (30) calendar days after receipt of the notice and submitted directly to the EEOC district or field office having jurisdiction over the geographic area in which the complaint arose. A copy of the request must be provided to the NGB-EO.

b. Within five (5) calendar days after receiving a copy of the complainant's hearing request, NGB-EO will require the SEEM to provide the following information:

(1) The name, title, address, and telephone number of the official (normally the SEEM) who will arrange for the conduct of the hearing and the certification of funds.

(2) The name, title, address, and telephone number of the official (normally the JA) who will represent the National Guard during the hearing.

(3) The location of the activity or unit where the complainant is permanently assigned or where the complaint originated. If another location is preferred, the SEEM will indicate where and why such location is proposed. However, EEOC has the final say on where a hearing is to be held.

### **6-7 Arranging for a Hearing**

a. When the complainant asks for a hearing from the EEOC AJ, the NGB-EO will submit the request within fifteen (15) calendar days after receiving a copy of the complainant's request for hearing or the docketing letter from the EEOC district or field office, whichever is received earlier, the following information:

(1) A copy of the complaint file, prepared as described in chapter 12, to include a copy of the ROI or fact finding.

(2) Information furnished by the SEEM in paragraphs 6-6b(1), (2), (3).

(3) Request that the AJ provide to NGB-EO (4) copies of the hearing record, to include the transcripts of testimony and the AJ's findings and conclusions. When there is more than one complainant, an additional copy of the hearing record, the transcripts, and the findings and conclusions will be requested for each additional complainant.

b. A copy of the request to EEOC will be provided to the State National Guard and the complainant.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## 6-8. The Hearing Process

Once an AJ is appointed, the AJ is fully responsible for processing of the complaint.

a. The hearing will deal only with the claims accepted in the formal complaint (bases of discrimination may be changed or added). However, the complainant may file a motion with the AJ to amend the complaint to include claims that are like or related to those raised in the pending complaint. The AJ may develop the record through discovery and through the hearing process, or utilize other means within his/her discretion to ensure that the amended complaint is properly addressed.

b. Once a complainant has request a hearing from an AJ the NGB-EO cannot dismiss a case. The AJ may dismiss complaints on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint. Before dismissing a complaint, the AJ must ensure that the claim has not been fragmented inappropriately into more than one complaint. A series of subsequent events or instances involving the same claim should not be treated as separate complaints, but should be added to and treated as part of the first claim.

c. The AJ will notify the parties of the right to seek discovery prior to the hearing and may issue appropriate discovery orders.

(1) Unless the complainant and the State National Guard agree in writing concerning the methods and scope of discovery, the party seeking discovery must request authorization from the AJ prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the claims accepted in the complaint, but the AJ may limit the quantity and timing of discovery.

(2) Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations, or production of documents.

(3) Requesting either party to produce evidence that is irrelevant, overburdensome, repetitious, or privileged may be grounds for objection by the opposing party.

d. Hearings are part of the investigative process and are closed to the public. Attendance will be limited to persons determined by the AJ to have direct knowledge relating to the complaint. The State National Guard will provide for the attendance at the hearing of all NG personnel approved as witnesses by the AJ.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

e. The AJ will receive into evidence any information or testimony that the AJ deems relevant to the complaint. Rules of evidence will not be applied strictly, and the AJ may exclude irrelevant or repetitious evidence.

f. The verbatim transcript and all documents submitted to and accepted by the AJ at the hearing will be made part of the record of the hearing.

(1) If the State National Guard submits a document that is accepted, it will provide a copy of the document to the complainant.

(2) If the complainant submits a document that is accepted, the AJ will make the document available to the State National Guard representative for reproduction.

### **6-9. Authority of the AJ**

The AJ has the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any persons from the hearing for contemptuous conduct or misbehavior that obstructs the hearing. In addition, the AJ is authorized to:

a. Require NGB, State National Guard, the complainant, or any employee of a federal agency to produce such documentary and testimonial evidence as the AJ deems necessary.

b. Administer oaths and require that statements of witnesses be under oath or affirmation or by written statement under penalty of perjury.

c. When the complainant, National Guard officials, or any National Guard personnel fail without shown good cause to respond fully and in timely fashion to an order of an administrative judge, or requests for investigative files, for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, the administrative judge shall, in appropriate circumstances:

(1) Draw an adverse inference that the requested information or testimony of the requested witness would have reflected unfavorably on the party refusing to provide such information.

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

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

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

(4) Issue a decision fully or partially in favor of the opposing party.

(5) Take other appropriate actions.

d. Refer to the Disciplinary Committee of the appropriate Bar Association any attorney who refuses to follow orders of the AJ or otherwise engages in improper conduct.

e. After reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or the National Guard any representative who refuses to follow orders of the AJ or otherwise engages in improper conduct.

f. Calculate compensatory damages awards.

g. Order a medical examination.

h. Calculate and award the amount of attorney's fees or costs.

i. Engage the parties or encourage the parties to participate in settlement discussions.

j. Issue an order determining full relief.

k. Hold a hearing in abeyance.

## **6-10. Findings and Conclusions of the AJ**

The AJ will issue findings of fact and conclusions of law on the merits of the complaint within 180 days of the receipt of the hearing request by EEOC, unless the AJ makes a written determination that good cause for an extension exists. The AJ will also order appropriate relief if discrimination is found with regard to the matters that gave rise to the complaint. The AJ may issue findings and conclusions without a hearing or with a limited hearing under conditions explained in subparagraphs a or b.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

a. If the complainant or the State National Guard believes that some or all of the material facts are not in genuine dispute and there is no genuine claim of credibility, the following procedures apply:

(1) At least fifteen (15) days prior to the hearing, or at an earlier time required by the AJ, the complainant or the State National Guard representative will file a statement with the AJ that must:

(a) Set forth the facts and refer to the record that supports these facts.

(b) Demonstrate that there is no genuine claim as to any such material fact or facts.

(c) Be served on the opposing party.

(2) The other party may file an opposition within fifteen (15) days of the receipt of the statement. This opposition may refer to the record to rebut the statement or may consist of an affidavit stating reasons why facts cannot be presented to oppose the request.

(3) The AJ may then order that discovery be permitted or may limit the hearing to the claims remaining in dispute or issue findings and conclusions without holding a hearing.

b. If the AJ determines, even though material facts remain in dispute, that there is sufficient information in the record to decide the case, that the material facts in dispute can be decided on the basis of the written record, that there are no credibility issues that would require live testimony in order to evaluate a witness's demeanor and that the case lacks merit, the administrative judge may issue a final decision without a hearing. In such a case, the AJ will give notice to the parties and provide them an opportunity to respond in writing within fifteen (15) days.

c. The AJ will send copies of the entire hearing record, including the transcripts of the testimony and the findings and conclusions, to the complainant and NGB-EO. If the AJ sends these documents to the State National Guard rather than to NGB-EO, the SEEM will immediately:

(1) Mark the package to clearly show the date and time that the package was received.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(2) Ensure that the entire package (including the box or wrapper in which it was received) is transmitted to NGB-EO in its entirety without delay by express mail or equivalent. Since EEOC time limits for decisions start as soon as the package is received by the National Guard at any location, any delay in transmittal could result in the inability to render a timely NGB decision.

(3) By telephone, notify NGB-EO of the receipt of the hearing record and of the transmittal schedule.

(4) Make sure that no part of the file is copied or kept locally and that no part of the file is provided to any individual.

## **6-11. The National Guard Bureau Final Decision**

On behalf of the Chief, NGB, the Director of NGB-EO will issue the final decision, in writing, on the merits of the complaint [Figure F-24]. The final decision will provide a finding on the merits of each claim in the complaint and set forth the reasons for the decision. The decision will direct appropriate relief in accordance with Chapter 7, if discrimination is found. The decision may also direct other remedial or corrective actions, even if no discrimination is found.

a. The final decision will be issued within 60 days of the receipt of the complainant's request for an immediate decision or within 60 days of the receipt of the hearing record and the findings and conclusions of the AJ (reference paragraph 6-10).

b. If the complainant has not requested an immediate final decision or a decision with a hearing (reference paragraph 6-5 and 6-6), a final decision will be issued within 60 days of the end of the 30 day period during which the complainant can request one of these decisions.

c. The decision will be sent to the complainant and his or her representative (reference paragraph 9-5) by certified mail, return receipt requested, and a copy will be sent to the AG. The decision may also be personally delivered to the complainant and the representative by an official of the National Guard. If so, the complainant and the representative will acknowledge receipt by signing and dating the official copy of the notice of decision. If they decline to sign the copy, the server will sign it and indicate on the copy to whom and when the decision was served. The receipt or the signed copy will be filed in the complaint file.

d. If a hearing was conducted, the complainant and the State National Guard will receive a copy of the hearing record, to include the findings and conclusions of the AJ.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

The NGB decision may adopt, reject, or modify the findings and conclusions of the AJ. If the NGB decision modifies or rejects the recommended decision, the decision letter will give the specific reasons for the rejection or modification.

e. The NGB final decision will require any remedial action authorized by law that is judged to be necessary or desirable to resolve claims of discrimination and promote the policy of equal opportunity, whether or not discrimination is found. If discrimination or retaliation is found, the NGB decision will require full relief. In addition, State National Guard officials will review the record, determine whether culpability should be assigned, and decide if disciplinary action should be taken against culpable individuals (reference paragraph 7-14).

f. If discrimination or retaliation is found, the decision will inform the complainant and his/her representative that the attorney's fees and costs may be awarded and that any request for this award must be documented and filed as described in chapter 7 of this regulation. In situations when NGB determines not to award attorney's fees and cost to a prevailing complainant, the decision will state the specific reasons for denying the award. A finding or admission of discrimination or retaliation raises a presumption of entitlement to attorney's fees and costs (reference Chapter 7).

g. The NGB final decision will inform the complainant of the right to appeal the decision to the EEOC, or the right to file a civil action, and of the applicable time limits (reference Chapter 8).

## **6-12. Failure to Issue a Final Decision**

a. If within sixty (60) calendar days after the receipt of the hearing record NGB has not issued a final decision rejecting or modifying the AJ's finding and conclusions, such findings and conclusions and the relief ordered will become the final decision.

b. If within 180 days after filing of the formal complaint, NGB has not issued a final decision, the complainant may file a civil action in an appropriate U.S District Court under conditions specified in Chapter 8. These limits are extended upon agreement with the complainant as indicated in paragraph 5-13b.

## **6-13. Other Final Decisions and Determinations**

When the provisions of paragraph 4-11 apply, subsequent to the acceptance of a formal complaint, NGB will determine whether a complaint should be dismissed or whether a final decision in lieu of dismissal is appropriate.

a. If at some stage after the formal complaint has been accepted, a complaint fails to provide relevant information or to otherwise proceed with the complaint, the

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

State National Guard will, after following procedures of paragraph 4-11i, request that NGB adjudicate the complaint. NGB may issue a final decision on the merits of the complaint if sufficient information is available to do so, or NGB may determine that the complaint will be dismissed.

b. Upon being advised by EEOC that a complainant failed to cooperate, such as by failing to appear at a scheduled hearing or by failing to provide information requested by EEOC, NGB may issue a final decision on the merits of the complaint or determine that the complainant will be dismissed (reference paragraph 4-11).

c. When, during the administrative processing of the discrimination complaint, the complainant files a civil action on the same matter, a copy of that civil action will be forwarded to NGB CMSA. Upon coordination with NGB JA, a determination will be made whether the complaint should be dismissed.

## **6-14. Closure of Formal Complainants**

When the complaint is administratively closed, the SEEM will submit a report of the disposition of the discrimination complaint case. Notwithstanding administrative closure of a complaint, the complaint will be considered as an open case during the time that any civil action is ongoing. A complaint will be considered administratively closed when:

a. NGB has reviewed the initial dismissal of a complaint and has determined that the dismissal was proper providing that an appeal has not been filed. To allow for the period of time for filing an appeal and its receipt by the National Guard, a dismissed complaint will not be closed until at least 35 days have passed after the complainant has received the notice of dismissal.

b. It has been dismissed at some stage after it has been properly accepted initially, providing that an appeal has not been filed. To allow for the period of time for filing an appeal and its receipt of the National Guard, a dismissed complaint will not be closed until at least 35 days have passed after the complainant has received the notice of dismissal.

c. NGB notifies the State National Guard of the administrative closure of the complaint subsequent to NGB's review of a withdrawal or executed settlement agreement.

d. NGB has issued a final decision, providing that an appeal has not been filed. To allow for the period of time for filing an appeal and its receipt by the National Guard, the complaint will not be closed out until at least 35 days have passed after the complainant has received the final decision.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

e. NGB notifies the State National Guard of the administrative closure of the complaint subsequent to EEOC issuing a decision that upholds an NGB dismissal or final decision, providing that a request for reconsideration has not been filed. To allow for the period of time for filing a request for reconsideration and its receipt by the National Guard, the complainant will not be closed until at least 35 days have passed after the complainant has received the EEOC decision.

f. NGB advises the State National Guard that a complaint is closed under conditions not listed above.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 7

### Withdrawals, Settlements, Remedies, and Compliance

#### 7-1. General

This chapter describes how complaints are withdrawn or settled. It supplements the procedures prescribed in other parts of this regulation.

#### 7-2. Withdrawal of a Complaint

A complainant has the right to voluntarily withdraw a complaint of discrimination at any time during the process. However, complainants will not be coerced into any withdrawal action. Withdrawal of a complaint terminates the administrative processing of the complaint and no further settlement is required. Administrative processing of a formally filed complaint will not be terminated until authorized by NGB (reference paragraph 6-14). For such authorization to be received the withdrawal must be:

- a. In writing, signed, and dated by the complainant.
- b. Voluntarily tendered by the complainant.
- c. Clear as to the claim(s) or discrimination complaint(s) that is/are being withdrawn. Whenever possible, the complainant should indicate the NGB Case Number of the complaint being withdrawn.
- d. Unconditional withdrawals, conditional withdrawals or withdrawals containing reservations stated by the complainant will not terminate the administrative processing of the complaint.

- e. Forwarded to NGB-EO for review and administrative closure of the complaint.

(1) If the withdrawal of a formal complaint occurs before the official discrimination complaint case file has been forwarded to NGB, the withdrawal will accompany the complaint case file, in original and two copies, prepared as described in chapter 12.

(2) If the withdrawal of a formal complaint occurs after an investigation has been requested but before the start of the on-site investigation, the withdrawal will be transmitted to NGB by facsimile or overnight mail service so that the investigation can be cancelled.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(3) If the withdrawal of a formal complaint occurs during the on-site investigation, the investigator will not cancel the investigation until authorized by NGB. Therefore, the withdrawal will be immediately transmitted by facsimile so that it can be reviewed and, if appropriate, the investigation will be cancelled.

### **7-3. Settlement Opportunities**

In accordance with policies in this regulation, National Guard officials will make reasonable efforts to voluntarily settle complaints of discrimination as early as possible and throughout the administrative processing of complaints, including the pre-complaint counseling stage.

a. This regulation specifically provides for Alternative Dispute Resolution in Chapter 2 to be used to assist in the settlement of complaints and includes specific opportunities for resolution attempts

b. To provide the widest possible latitude for resolving complaints before they are filed formally, the requirements of this chapter does govern the settlement of complaints during pre-complaint processing described in chapter 3, except for the enforcement provisions listed in paragraph 7-12.

### **7-4. Requirements for Settlement Agreements**

Settlement agreements, including an offer of resolution, are legally binding on both parties. The provisions of this paragraph are designed to ensure that such settlements meet the intent of Federal and National Guard regulations and are legally sufficient.

a. Settlement agreements will be in writing using the proper format Figure F-25. Settlement agreements will be executed between the State National Guard on one part and the complainant on the other part.

b. All settlement agreements, to include an offer of resolution, will contain the following statement: "This is a final resolution of all claims in the discrimination complaint NGB Case Number T-XXX-XX-X-XX-XX-X and any further administrative or legal proceedings, in any forum whatsoever, are waived except for enforcement of this settlement or attorney's fees, appeals under chapter 8, NGR (AR) 690-600/NGR (AF) 40-1614 and 29 CFR 1614.401(a) and 1614.501(e)(2)." The last sentence dealing with attorney's fees will be omitted when there is no attorney or when no attorney's fees are to be paid as part of the settlement.

c. When attorney fees are to be awarded as part of the settlement, the settlement will contain one of the following provisions:

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(1) After a specific monetary sum has been negotiated, and, if required by paragraph 7-5d, approved by NGB: "The \_\_\_\_\_ National Guard agrees to pay the amount of \_\_\_\_\_ dollars (\$\_\_\_\_\_) to Mr./Mrs./Ms. \_\_\_\_\_, attorney for the complainant, as reasonable fees and costs incurred in the processing of the complaint. Such payment will be made within \_\_\_\_\_ days (XX) after the date of the execution of this settlement agreement."

(2) In the case of offers of resolution, if no specific monetary sum has been negotiated, the agreement will read as follows: "The \_\_\_\_\_ National Guard agrees to pay Mr./Mrs./ Ms. \_\_\_\_\_, attorney for the complainant, reasonable fees and costs incurred in the processing of the complaint. Such payment will be made as provided in chapter 7 of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614. The receipt of a copy of that chapter is hereby acknowledged."

d. The statement in subparagraph b above suffices to indicate termination of the complaint. Therefore, a settlement will not contain provisions for the withdrawal of the complaint. It may contain provisions for the withdrawal of any civil action filed. If any administrative appeals or actions are pending with EEOC, NGB will advise EEOC to terminate such actions based upon the execution of a settlement agreement.

e. Punitive damages are not authorized in settlement during the administrative processing of discrimination complaints. Compensatory damages may be awarded under the Civil Rights Act of 1991.

f. Only technician remedies may be awarded in settlement of technician discrimination complaints.

g. Settlement agreements may not award to the complainant remedies or benefits beyond those of the complainant's entitlement. (reference paragraph 7-7).

h. Proposed settlements may indicate conditional terms; however, contingent and conditional clauses will not be included in final, executed settlement agreements. A complaint cannot be administratively closed until a complete unconditional settlement is executed.

i. Offers of resolution and settlements made prior to an NGB final decision will contain the following statement: "The National Guard Bureau (Agency) has not issued a final decision on the merits of the issues in this discrimination complaint and nothing in this settlement agreement constitutes a decision or a finding on the merits of the issues

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

in this complaint." Other disclaimers of fault, wrongdoing, or discrimination will not be used.

j. Terms of settlements will be as specific as possible. Dollar amounts should either be specified or the basis of computation listed. Words such as "never," "all," or "appropriate" should be replaced by quantifiable, specific terminology. The date of payment or approximate date of payment of all funds will be included in the settlement.

k. Formal apologies imposed disciplinary or adverse personnel actions will not be made a part of any settlement agreement.

l. Settlement agreements will not contain provisions that deny complainants the rights guaranteed by statutes, federal rules or this regulation. For example, the right to file a complaint, to oppose discrimination, or to participate in any process established by the National Guard Civilian Discrimination Complaint System. Likewise, a complainant may not settle rights or claims that arise after the date of the settlement.

m. Cash awards without corresponding personnel actions as settlements of EEO disputes may be awarded as monetary payments providing payment does not exceed back pay, attorney fees, other costs and/or damages to which the employee would be entitled to, absent a finding of discrimination. Lump sum payments of money which are unrelated to back pay or attorney's fees or costs should be avoided.

n. Lump sum payments may be settled informally providing a retroactive personnel action, and by providing a lump sum payment in lieu of back pay. The settlement must not exceed the relief the complainant would receive absent a finding of discrimination. All appropriate contributions to retirement funds must be made if retroactive personnel action is taken.

o. Complainants will be advised in writing that they should consult with an attorney before executing a settlement agreement.

## **7-5. Settlement of Complaints**

The provisions of this paragraph apply to settlements that do not involve an offer of resolution (reference paragraph 7-6). Settlements of individual complaints may be reached though management need not admit fault, wrongdoing, or discrimination (reference paragraph 7-4i).

a. Settlement conditions under this paragraph may include:

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(1) Retroactive appointment or promotion with back pay, or an opportunity for the complainant to have the benefit that had been denied, such as training, overtime scheduling, detailing, or other employment benefits.

(2) Action to change or do away with personnel policies or practices.

(3) Attorney's fees or costs (reference paragraph 7-10 and 7-11).

(4) Negotiated settlements that may not go beyond terms that would constitute remedies and entitlement (reference paragraph 7-4g).

b. Settlement agreements between the State National Guard and a complainant will be reviewed by the SEEM, the JA, and the HRO to ensure that the settlement is in accordance with the provisions of this chapter and that it does not violate laws and regulations, equal opportunity policies, or technician personnel rules. Unless a settlement requires approval by NGB (7-5d), it will be approved and signed at the State National Guard level.

c. When ADR (Chapter 2) is used to achieve settlement for an informal or formal complaint, the settlement must meet the requirements stated in this chapter.

d. NGB approval of a settlement is required when the payment to the complainant or to the attorney for the complainant will exceed \$15,000. A proposed, unsigned settlement agreement will be forwarded to NGB-EO for review and coordination with the NGB JA. Upon approval of the settlement, it will be returned to the State National Guard for execution and submission as described in paragraph 7-5e.

e. The administrative processing of a formally filed complaint will not be terminated until authorized by the NGB. The executed, signed, and dated settlement agreement will be forwarded to NGB for review and administrative closure of the complaint.

(1) If the settlement of a formal complaint occurs before the official discrimination complaint case file has been forwarded to NGB, the settlement will be accompanied by the complaint case file, in original and three copies, prepared as described in Chapter 12.

(2) If the settlement of a formal complaint occurs after an investigation has been requested but before the start of the on-site investigation, the settlement will

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

be transmitted to NGB by facsimile or overnight mail service so that the investigation may be cancelled.

(3) If the settlement of a formal complaint occurs during the on-site investigation, the investigator will not cancel the investigation until authorized by NGB. Therefore, the settlement will be immediately transmitted by facsimile so that it can be reviewed and, if appropriate, the investigation cancelled.

## **7-6. Certified Offer of Resolution**

The provisions of this paragraph apply to offers of full resolution made prior to a hearing by an EEOC Administrative Judge. An offer of resolution will be prepared in the form of a settlement agreement (reference paragraph 7-4). The settlement agreement will contain all the applicable elements of a resolution on each claim that has been accepted to which the individual would have been entitled if there had been a finding of discrimination (reference paragraphs 7-7 through 7-9).

a. When the State National Guard proposes to make an offer of resolution to a complainant, the offer should be informally discussed with the complainant and his or her representative. However, a formal offer will not be made until receipt of the certification described in paragraph 7-6c.

b. After the offer of resolution has been discussed with the complainant, it will be forwarded to NGB-EO for certification along with a copy of the notice required by paragraph 7-7a(1).

c. The offer of resolution will be coordinated with appropriate members of the NGB staff to ensure compliance with applicable legal and personnel requirements. If found sufficient, the offer of resolution will be certified as constituting the full entitlement of relief authorized and required by law and returned to the State National Guard for execution.

d. After such certification has been received from NGB, the complainant will be advised in writing of the offer of resolution. The complainant will also be advised that failure to accept the settlement offer within 30 calendar days may result in the dismissal of the complaint and nonpayment by NGB of attorney fees.

e. The offer will either be delivered in person with a signed and dated acknowledgment of receipt or sent by certified mail with return receipt requested. The complainant then has 30 calendar days after receipt to accept the offer.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

f. If the complainant fails to accept the offer of resolution within thirty (30) calendar days of the receipt of the offer of resolution, or if the complaint is before an AJ for a hearing, the complaint will be processed in accordance with EEOC guidance (Figure F-21) unless the complainant can show that circumstances beyond his or her control precluded a response within the thirty (30) day time limit.

g. If the complainant accepts the offer of resolution, the executed, signed, and dated settlement agreement (to include a copy of the notice required by paragraph 7-7a(1), will be forwarded to NGB-EO, so the complaint case may be administratively closed.

## 7-7. Remedies

a. When NGB, EEOC, or a Federal court finds that an applicant, a technician, or a former technician has been discriminated against, the National Guard must ensure all entitlements are provided the complainant. If NGB issues a final decision that includes a finding of discrimination, it will ensure that the complainant is made whole, which will include the following elements, as appropriate:

(1) Notification to all employees of the State National Guard in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not be repeated (Figure F-26).

(2) Commitment that corrective or preventive action will be taken to ensure that violations of the law, similar to those found, will not recur.

(3) An unconditional offer to each identified victim of discrimination of placement in the position that person would have occupied if the discrimination had not occurred, even if this results in the displacement of another employee (nondiscriminatory placement). The need to accomplish this objective in the least disruptive manner is recognized as a preferred remedy by the State National Guard, however; an offer of substantially equivalent position is acceptable.

(4) Payment to each identified victim of discrimination, on a make whole basis, for any loss of earnings that person may have suffered as a result of discrimination. This can be accomplished with the development of a settlement containing all of the remedies.

(5) Commitment that the State National Guard will cease from engaging in the specific unlawful employment practice found in the case.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. Specific relief for applicants, technicians, and former technicians is addressed in paragraphs 7-8 and 7-9. If the State National Guard believes that the complainant has failed to mitigate his or her damages, in good faith, it is the responsibility of the State National Guard to prove this by a preponderance of evidence and to ensure that this information is made part of the complaint case file prior to the issuance of the NGB final decision.

c. A finding of discrimination or retaliation raises a presumption of entitlement to attorney's fees and costs (reference paragraphs 7-10 and 7-11).

## **7-8. Relief for an applicant**

If NGB or EEOC finds that an applicant for technician employment has been discriminated against, the applicant will be offered the position he or she would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position, unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination.

a. The NGB final decision will advise the AG whether the applicant must be offered a position, as explained above. If required, the State National Guard will make the offer of employment, as described below.

(1) The offer will be in writing and will indicate whether the applicant is being offered the position for which he or she had applied or a substantially equivalent position (with an explanation of how this position is like the one for which the applicant had applied). The applicant will also be informed of his or her right to the award of back pay (reference paragraph 7-8c) if the offer of employment is declined.

(2) The offer will either be delivered in person with a signed and dated acknowledgment of receipt or sent by certified mail with return receipt requested. The complainant then has fifteen (15) calendar days from receipt to accept or decline the offer.

(3) Failure by the complainant to accept the offer within fifteen (15) calendar days of the receipt will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control precluded a response within the 15-day time limit.

b. If the offer of employment is accepted, appointment will be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, will be awarded from the date the individual would have

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

entered on duty until the date the individual actually enters on duty. Interest on back pay will be included in the back pay computation. The individual will be deemed to have performed service for the National Guard during this period for all purposes except for meeting service requirements for completion of a probationary or trial period that may be required.

c. If the offer of employment is declined, the State National Guard will award the individual a sum of money equal to the back pay that he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitations of paragraph 7-8f. Interest on back pay will be included in the back pay computation.

d. When NGB or EEOC finds that discrimination existed at the time the applicant was considered for employment but also finds clear and convincing evidence that the applicant would not have been hired even absent discrimination, the National Guard will, nevertheless, take all steps necessary to eliminate the discriminatory practice and to ensure that it does not recur.

e. This paragraph and 29 CFR 1614.501(b) will be cited as the authority under which the above described appointments and awards of back pay will be made.

f. Back pay under paragraphs 7-8 and 7-9 for complaints under Title VII of the Civil Rights Act or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the applicant initially formally filed the complaint.

## **7-9. Relief for a Technician**

If NGB or EEOC finds that a National Guard technician or former technician has been discriminated against, the NGB final decision will require the State National Guard to provide full entitlement (reference paragraph 7-7). The final decision will require remedial action that will include, but need not be limited to, one or more of the following actions:

a. Nondiscriminatory placement with back pay, computed in the manner prescribed by 5 CFR 550.805, unless the record contains clear and convincing evidence that the personnel action that had been taken would have been taken even in the absence of discrimination. Interest on back pay will be included in the back pay computation. The back pay is subject to limitation of paragraph 7-8f. For promotions, the back pay may not exceed the date on which the employee would have been promoted.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. If the record contains clear and convincing evidence that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the State National Guard will, nevertheless, take all steps necessary to eliminate the discriminatory practice and to ensure that it does not recur.

c. Cancellation of an unwarranted personnel action and restoration of the employee.

d. Deletion from National Guard records of any adverse materials relating to the discriminatory personnel practice.

e. Full opportunity to participate in the benefits denied the technician, such as training, preferential work assignments, or scheduled overtime.

## **7-10. Fees, Costs, and Monetary Awards**

All fees, costs, and monetary awards available as remedies for or in the settlement of discrimination complaints are only applicable to complaints involving discrimination prohibited by Title VII of the Civil Rights Act and the Rehabilitation Act. The State National Guard allegedly responsible for the discrimination will pay any fees, costs, or monetary awards under this regulation.

a. If discrimination or retaliation is found, the NGB final decision will advise the complainant, the complainant's representative, and the AG that the attorney's fees and costs (including expert witness fees may be awarded as prescribed in this chapter of the regulation.

b. Attorney's fees and costs in negotiated settlements will only be paid if it is determined that the complainant has substantially prevailed throughout the negotiated settlement.

The following restrictions apply to attorney' fees:

(1) No fees will be paid for the services of any employee of the Federal Government.

(2) Attorney's fees shall be paid for all services performed by an attorney, provided that the attorney submitted reasonable notice of representation to the agency,

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

administrative judges or Commission. Written submissions the agency that is signed by the representative shall be deemed to constitute notice of representation. . However, fees are allowable for a reasonable time prior to the notification of representation for any services performed in reaching a determination to represent the complainant.

(3) Fees are allowable only for the services of members of the Bar and for the services of law clerks or law students and paralegal, under the supervision of members of the Bar.

d. Reasonable expert witness fees may be paid as part of the attorney's fees and costs incurred in the processing of a complaint. Witness fees will be awarded in accordance with the provision of 28 U.S.C. 1821, except that no award will be made for a Federal employee who is in a duty status when made available as a witness.

e. Monetary awards of back pay are subject to the conditions and restriction of paragraphs 7-8b, 7-8c, 7-8f, and 7-9a. Interest on back pay will be included when the award of back pay is authorized.

f. Compensatory damages may be awarded, as applicable by statute (Civil Rights Act of 1991), and as a result of civil action in discrimination complaint cases in cases of unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact).

## **7-11. Awarding Attorney's Fees and Costs**

This paragraph describes the procedures and requirements when attorney's fees and costs are to be awarded based on a NGB final decision, an offer of resolution, or a negotiated settlement.

a. The complainant's attorney must submit to the State National Guard representative a verified statement (7-11e) of costs and attorney's fees, including expert witness fees as appropriate, within 30 calendar days of:

(1) The receipt of the NGB final decision, unless an appeal or request for reconsideration is filed.

(2) The date of the execution of an offer of resolution, if the amount to be awarded was not specified therein.

b. Based on the above submission and the guidance in this chapter, the amount of the fees and costs to be awarded will be made by mutual written agreement of the

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

complainant, the complainant's representative and the State National Guard. The State National Guard representative of the attorney's statement of fees and costs must reach such agreement within 10 days of the receipt. Any such agreement will be immediately reduced to writing. The amount agreed upon is subject to approval by NGB if:

(1) It exceeds the amount specified in the final decision or \$15,000 if an amount is not specified in the final decision.

(2) It exceeds \$15,000 as part of an offer of resolution under paragraph 7-6.

c. If agreement is not reached within 10 calendar days after receiving the certified statement, the State National Guard representative will forward to NGB-EO the original and two (2) copies of:

(1) The documentation submitted by the complainant's attorney, to include proof of when it was received by the State National Guard.

(2) The recommendation of the State National Guard on the amount to be awarded, to include specific rationale and explanation of differences between the position of the complainant's attorney and the State National Guard.

d. After coordination with NGB JA, EO will either approve the amount requested by the complainant's attorney or issue a final decision on the amount of attorney's fees and costs.

(1) The State National Guard must issue the decision within 30 calendar days after the receipt of the attorney's statement.

(2) The decision will give the specific reasons for the amount of the award provide a notice of right to appeal.

e. The complainant's attorney must submit a verified statement of costs and attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards:

(1) The starting point will be the number of hours reasonably expended multiplied by a reasonable hourly rate.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

The above amount may be reduced or increased in considerations of the following factors, although ordinarily many of these factors are subsumed within the calculations set forth above. Only in cases of exceptional success will these factors be used to enhance the award. These factors are: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly, whether the handling of this case prevented other employment; the customary fee, whether the fee for the case was fixed or contingent; time limitations imposed by the client or the circumstances, the amount involved and the results obtained; the reputation, ability, and experience of the attorney requesting the fees; the undesirability of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

f. To support the above calculations, the attorney should provide:

(1) The number of hours spent in preparing and presenting the case, as well as the time spent in preparing the fee request. This must specifically include the dates and a statement of exactly what was done. It must also describe the training and experience of each person who worked on the case and the number of hours spent by each.

(2) A sworn statement of the attorney's usual and customary hourly charge and the usual fee for each person who worked on the case. Other expenses that may be claimed include all telephone charges, photo copying, postage, and local transportation in connection with the processing or preparation of the complaint case.

(3) A sworn statement explaining if and how any other factors affect the amount of the award.

(4) Sworn statements by other attorneys in the relevant geographic area, who work in employment discrimination.

g. The costs that may be awarded are those authorized by 28 U.S.C. 1920, to include:

(1) Fees for the reporter for all or any of the stenographic transcripts necessarily obtained for the use in the case.

(2) Fees and disbursements for printing and witnesses.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(3) Fees for exemplification and copies of papers necessarily obtained for use in the case.

h. In situations when the NGB determines not to award attorney's fees and costs to a prevailing complainant, the final decision will state the specific reasons for denying the award.

## 7-12. Compliance with and enforcement of settlements

Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, will be binding on both parties.

a. If the complainant believes that the State National Guard has failed to comply with the terms of the settlement agreement, the complainant will notify NGB-EO. The notification must be in writing with a copy furnished to the AG. The notification of the

alleged noncompliance with the settlement agreement must be postmarked within 30 calendar days of when the complainant knew, or should have known, of the alleged non-compliance.

b. The complainant may request that the terms of the settlement agreement are specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased when the settlement was executed.

c. Within 7 calendar days after the receipt of the copy of the complainant's allegations, the State National Guard will furnish NGB-EO with appropriate comments regarding such allegations. If the complainant's allegations that the settlement agreement is not being adhered to are supported, the State National Guard will indicate what actions it is taking to comply with the terms of the settlement.

d. Upon receipt of the comments from the State National Guard, NGB will review the case, obtain additional information, as needed, and respond to the complainant. The response will either indicate how the allegations are to be resolved or will direct that the complaint processing be reinstated. NGB will make the determination within 30 calendar days of the receipt of the complainant's allegations. A copy of the NGB determination will be provided to the complainant and the State National Guard.

e. If the complainant is not satisfied with the NGB determination on the matter, he or she may appeal to EEOC within 30 days of the receipt of the NGB determination. A copy of the appeal must be provided to NGB-EO and the SEEM.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

f. If NGB has not responded to the complainant with a determination regarding the allegations of noncompliance, the complainant may file an appeal with EEOC 35 calendar days after NGB has received the written allegations of noncompliance. A copy of the appeal must be provided to NGB-EO and the SEEM.

g. NGB may submit a response to EEOC within 30 days after receiving a notice of the appeal.

h. If an appeal is made to EEOC, EEOC will determine whether the settlement agreement has been breached. Prior to rendering its determination, EEOC may request that the parties submit whatever additional information or documentation it may deem necessary or it may direct that an investigation or hearing on the matter be conducted. If EEOC determines that the agreement has been breached and the noncompliance is not attributable to acts or conduct of the complainant, EEOC may order compliance or it may order that the complaint be reinstated.

i. Claims that retaliation or further discrimination violates a settlement agreement will be processed as specified in chapters 3, 4, and 5.

### **7-13. Compliance with and Enforcement of Decisions**

Relief ordered in a final decision by NGB is mandatory and binding on the National Guard, unless the decision is appealed by the complainant to EEOC or to a Federal court. Relief ordered in a final decision on appeal to EEOC is mandatory and binding on the National Guard unless it is subject to reconsideration by EEOC.

a. If the complainant believes that the State National Guard is not complying with a final decision by NGB, the complainant will notify NGB-EO. The notification must be in writing and will specifically set forth the reasons that led the complainant to believe that the State National Guard is not complying with the decision. A copy will be furnished to the AG. The notification of the alleged noncompliance with the final decision must be postmarked within 30 calendar days of when the complainant knew, or should have known, of the alleged noncompliance.

b. Processing of noncompliance with an NGB final decision will be the same as for processing of noncompliance with a settlement agreement under paragraphs 7-12c through i.

c. A complainant may petition EEOC for enforcement of an EEOC appeal decision. The petition must be submitted to the EEOC Office of Federal Operations

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(OFO). The petition will specifically set forth the reasons that led the complainant to believe that NGB or the State National Guard is not complying with the decision.

d. On behalf of EEOC, OFO will take all necessary action to determine whether the EEOC decision is being implemented and will make efforts to ensure that it is implemented.

e. If necessary, OFO may issue a clarification of the decision. The clarification will not change the result of the decision or enlarge or diminish the relief ordered, but may further explain the meaning or intent of the decision.

f. If OFO cannot obtain satisfactory compliance, appropriate findings and recommendations may be made to EEOC or the matter may be referred to another appropriate agency.

g. EEOC may issue a notice to the Chief, NGB to show cause or to appear before EEOC or it may refer the matter to the Office of Special Counsel for enforcement action.

h. If EEOC determines that there is noncompliance and refusal to submit any required action for compliance, EEOC may notify the complainant of the right to file a civil action for enforcement and to seek judicial review.

i. When the agency appeals and the case involves removal, separation, or suspension continuing beyond the date of appeal, and when the administrative judge's decision orders restoration, the agency shall comply with the decision to extent of the temporary or conditional restoration of the employee to duty status in the position specified in the decision, pending the outcome of the agency appeal.

j. Service under the temporary or conditional restoration provisions of paragraph (l) of this section shall be credited toward completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the commission upholds the decision on appeal.

k. When the agency appeals, it may delay the payment of any amount ordered to be paid to the complaint until after the appeal is resolved. If the agency delays payment of any amount pending the outcome of the appeal and the resolution of the appeal requires the agency to make the payment, then the agency shall pay interest at the rate set by the IRS for the underpayment of taxes compounded quarterly from the date of the original decision until payment is.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

I. The agency shall notify the Commission and the employee in writing at the same time if it appeals that the relief it provides is temporary or conditional and, if applicable, that it will delay the payment of any amounts owed but will pay interest as specified in paragraph (k) of this section. Failure of the agency to provide notification will result in the dismissal of the agency's appeal.

## **7-14. Disciplinary or Adverse Personnel Actions**

a. When discrimination is found, the NGB final decision will require any remedial action authorized by law that is judged to be necessary or desirable to resolve issues of discrimination and promote the policy of equal opportunity, whether or not discrimination is found. However, neither the ROI nor the final decision makes a determination as to the culpability of any individuals who may have been involved in the matters that gave rise to the complaint. Such determination is to be made by the AG and appropriate State National Guard officials.

b. Disciplinary action is not a remedy that may be personally demanded by a complainant. It is, therefore, not an issue for discussion in a hearing or inquiry and is not specified in a final decision or the settlement of a complaint.

c. When discrimination is found or when a complaint is settled or withdrawn and it appears that discrimination may have occurred, the AG will direct appropriate inquiry or investigation to determine whether any culpability exists and whether to take any disciplinary or adverse personnel action against appropriate individuals. Discipline or adverse action against technician personnel is taken in accordance with TPR 752.

d. When discipline or adverse action is not warranted, other corrective action may be taken, if proper. For example, EEO training may be required for specific persons or specific authority, such as selection of personnel or leave approval may be withdrawn.

e. The basis for the decision to take or not take disciplinary action will be made a matter of written record and included in a report of corrective action taken. This report of corrective action, signed by the Adjutant General, is attached to the report of disposition [7-14] and sent to NGB-EO. The report will not be made a part of the complaint file.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 8

### Appeals and Civil Actions

#### 8-1. General

This chapter covers actions involving appeals and reconsideration and the filing of civil actions. Some special provisions on appeals are also contained in chapters 7 and 10.

#### 8-2. The Right to Appeal and to File Civil Action

a. If a complainant wishes to pursue the discrimination complaint beyond NGB, the complainant may appeal to the Equal Employment Opportunity Commission or may file a civil action in an appropriate United States District Court.

b. Civil action may be filed when a complainant has exhausted administrative remedies [8-8, 8-9]. In addition, a complainant is entitled, in certain cases, to file civil actions regardless of whether he or she pursued any administrative complaint processing or in lieu of such administrative processing [8-10, 8-11].

#### 8-3. Appellate Procedures

EEOC makes determinations on appeals based on the documentation in the official discrimination complaint case file and all written statements and briefs submitted with the appeal. EEOC may supplement the record by an exchange of letters or memorandums, by investigation, by remand to NGB, or other procedures.

a. A complainant has the right to dismissal of a complaint.

(1) When such a dismissal is made after a formal complaint is initially filed in accordance with paragraph 4-2, NGB automatically makes reviews the dismissal to ensure that the dismissal was proper [4-9].

(2) A dismissal made under the provisions of paragraph 4.10f is not appealable to EEOC unless the complainant alleges that the dismissed complaint or claims were not a mixed case matter.

(3) The complainant has no immediate right to appeal a partial dismissal of a complaint.

b. A complainant may appeal the NGB final decision on the merits of the complaint.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. An agent in a class complaint may appeal a NGB decision to accept or dismiss all or a portion of a class complaint or a final decision on a class complaint.

d. A class member may appeal the NGB final decision on a claim for individual relief under a class complaint.

e. Both the agent in a class complaint and a class member may appeal the NGB final decision on a petition regarding the resolution of a class complaint [chapter 11].

f. A complainant has a right to appeal the final decision of NGB, the arbitrator, or the Federal Labor Relations Authority (FLRA) on a grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A complainant may not appeal to EEOC if the matter initially raised in the negotiated grievance procedure is:

Still ongoing in that process.

(2) In arbitration.

(3) Before the FLRA.

(4) May be to MSPB.

g. A complainant, agent, or individual class member may appeal alleged noncompliance with a settlement agreement or a final decision [7-12, 7-13].

h. A complainant may appeal the NGB final decision on attorney's fees and costs [7-11].

## 8-4. Agency Procedures

a. NGB will appeal to the Commission, if it decides not to fully implement an Administrative Judge's decision to dismiss or on the merits of a complaint, in an appeal filed simultaneously with the final order served on the complainant. The appeal will be filed on the EEOC Form Notice of Appeal – Agency.

b. NGB will appeal to the Commission, if it decides not to fully implement an Administrative Judge's certification decision, in a class complaint, when an appeal is filed simultaneously with the final order served to the agent. The appeal will be filed on the EEOC Form Notice of Appeal – Agency.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. NGB may appeal an Administrative Judge's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole. The appeal will be filed on the EEOC Form Notice of Appeal – Agency.

## **8-5. Filing an Appeal**

a. An appeal is filed by the complainant, or agent as follows:

(1) by mail, to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. EEOC Form 573, Notice of Appeal/Petition should be used and should indicate what is being appealed.

(2) hand-delivered to the Equal Employment Opportunity Commission, Office of Federal Operations, 1801 L Street, NW, Washington, DC 20507. EEOC Form 573, Notice of Appeal/Petition should be used and should indicate what is being appealed, or

(3) facsimile at (202) 663-7022 using EEOC Form 573, Notice of Appeal/Petition should be used and should indicate what is being appealed.

b. A copy of the appeal will be furnished to NGB-EO and the SEEM or as indicated in the notice of dismissal or NGB final decision. In or attached to the appeal to EEOC, the complainant must certify the date and method by which service was made to NGB-EO and the SEEM.

c. A complainant may appeal allegations of noncompliance with settlements and final decisions 30 days after serving the notice of noncompliance on NGB.

d. An appeal of NGB determination on allegations of noncompliance must be filed within 30 days after the receipt of the NGB determination [7-12 and 7-13]. If an attorney of record represents the complainant, the attorney must file the appeal within 30 days after the receipt of the NGB determination.

e. For mixed case complaints, see paragraphs 10-5 through 10-9.

f. For all other appeals, the complainant must file the appeal within 30 days after the receipt of the dismissal notice or the NGB final decision by the complainant. If an attorney of record represents the complainant, the attorney of the dismissal or final decision must file the appeal within 30 days after the receipt.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

g. Any statement or brief in support of the appeal must be submitted to EEOC within 30 days after filing the appeal. A copy of the supporting statement or brief must be provided to NGB-EO and to the SEEM.

h. The Commission retains the right to supplement the record on appeal, if necessary.

## **8-6. National Guard Actions on Appeal**

a. When NGB receives the complainant's appeal and supporting statement, NGB will review the basis for the appeal and the matters presented by the complainant, the complaint case file, and the dismissal or final decision that is being appealed. Based on this review, NGB may decide to vacate or modify the dismissal or decision, submit a statement regarding the appeal, to oppose the appeal, or to take no action.

b. If NGB decides to submit a statement or brief regarding or in opposition to the complainant's appeal, NGB may request input from the State National Guard. To ensure that the statement or brief is provided to EEOC within the established time limit, any submission by the State National Guard will:

(1) Be prepared as representing an NGB position rather than a local State National Guard view and be typed on plain bond paper so that the document can be enclosed with the NGB submission to EEOC without revision or retyping.

(2) Make appropriate references to evidence in the complaint file and to citations of 29 CFR 1614, case law, or prior EEOC decisions in providing rationale to oppose the granting of the appeal.

Be transmitted to NGB-EO by facsimile or overnight mail delivery within 7 days after receiving the NGB request for input unless NGB-EO has established a different submission requirement.

c. Within 30 days of the receipt of a request from EEOC, NGB-EO will provide to EEOC a copy of the complaint file and any statement or brief regarding or in opposition to the appeal, after coordinating such statement or brief with NGB-JA. A copy of the NGB letter to EEOC, to include any comments made regarding or in opposition to the appeal, will be provided to the complainant and the State National Guard.

## **8-7. Review of Final Decisions Issued by the Agency on Appeal**

EEOC will issue written appeal decisions to NGB and the complainant, setting forth the reasons for the decisions. Decisions will be based on a de novo review. If the decision

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

contains a finding of discrimination, it will include the appropriate remedies and, where applicable, entitlements to interest and attorney's fees and costs.

a. As a general rule, no new evidence will be submitted on appeals unless there is clear and convincing reason that it was not available prior to or during the investigation or hearing.

b. EEOC will dismiss appeals that are not timely, if a civil action has been filed, as indicated in paragraph 8-14, or if the appeal is procedurally defective (5-10).

c. Upon receipt of the decision, NGB will review the rationale relied upon by EEOC in reaching its decision and the conclusions and findings in the decision. Depending on the outcome of this review, issues involved, and time constraints, NGB may file for reconsideration or determine that a request for reconsideration is not appropriate. NGB may request information or input from the State National Guard in reaching its decision or in the filing of a reconsideration request [8-7d].

d. Based on the above, NGB will transmit the EEOC appeal decision to the SEEM with instructions for the implementation of the decision or request for State National Guard input or additional information, as appropriate.

e. Decisions issued by EEOC are final unless a request for reconsideration is filed in accordance with paragraph 8-7, or EEOC on its own motion reconsiders the decision.

## **8-8. Review of Decisions Issued by Administrative Judges**

The Commission will consider an appeal by either the agency or complaint following the issuance of a final action on a decision from an Administrative Judge (AJ).

a. The Commission will review the post-hearing factual findings in cases that the decision is based upon.

b. The Commission will give deference to the AJ.

c. A finding of discrimination will be treated as a factual finding. Decisions issued by EEOC are final unless a request for reconsideration is filed in accordance with paragraph 8-7, or EEOC on its own motion reconsiders the decision.

## **8-9 Reconsideration of EEOC Decision**

a. A request for reconsideration is not a second appeal to the Commission.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. The decision on an appeal from a final decision shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to 1614.109(h) shall be based on a substantial evidence standard of review.

c. A decision issued under paragraph (e) of this section is final within the meaning of 1614.408 unless the Commission reconsiders the case. A party may request reconsideration within 30 days of receipt of a decision of the commission, which the Commission in its discretion may grant, if the party demonstrates:

(1) The appellate decisions involved a clearly erroneous interpretation of material facts or law; or

(2) The decision will have a substantial impact on the policies or operations of the agency.

d. An EEOC decision on a request to reconsider by either party is final and there is no further right by the either party to appeal the EEOC decision.

e. When the EEOC Commission finds that the agency has discriminated against an applicant or employee, the agency shall provide an appropriate remedy as explained in Part 1614; subpart B, see Appendix .

## **8-10. Civil actions in Civil Rights, Rehabilitation and Age Discrimination Acts Complaints**

The provisions of this paragraph apply to individual discrimination complaints, filed in accordance with paragraph 4-2, or class discrimination complaints, filed in accordance with chapter 11, under Title VII of the Civil Rights Act, the Rehabilitation Act, or the Age Discrimination in Employment Act. A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief in a class complaint may file a civil action in an appropriate United States District Court:

a. Within 90 days after the receipt of the NGB final decision in an individual or class complaint, unless an appeal has been filed.

b. After 180 days from the date of filing of an individual or class complaint if NGB has not issued a final decision, unless an appeal has been filed.

c. Within 90 days after the receipt of the EEOC final decision on an appeal.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

After 180 days from the date of filing an appeal with EEOC if EEOC has not issued a final decision on that appeal [8-6d].

## **8-11. Civil Action in Mixed Case Complaints.**

A complainant who has a complaint processed as a mixed case complaint under chapter 12, pursuant to 5 CFR 1201.151 et seq. or 29 CFR 1614.302 et seq., is authorized by 5 U.S.C. 7702 to file civil action in an appropriate United States District Court:

- a. Within 30 days after the receipt of a final decision by NGB, unless an appeal is filed with the MSPB; or
- b. Within 30 days after the receipt of the notice of final decision or action taken by the MSPB, unless the complainant files a petition for consideration with EEOC; or
- c. Within 30 days after the receipt of the notice that EEOC has determined not to consider the decision of the MSPB; or
- d. Within 30 days after the receipt of the notice that EEOC concurs with the decision of the MSPB; or
- e. If EEOC issues a decision different from the MSPB decision, within 30 days after the receipt of the notice that the MSPB concurs in and adopts in whole the decision of EEOC; or
- f. If MSPB does not concur with EEOC and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days after the receipt of the notice of the decision of the Special Panel; or
- g. After 120 days after the date of filing a formal complaint under paragraph 5-2, if there is no final action or appeal to the MSPB; or
- h. After 120 days after the date of filing of an appeal with the MSPB if the MSPB has not issued a decision; or
- i. After 180 days after the date of filing of a petition for consideration with EEOC if the EEOC has not issued a decision, MSPB has not made a reconsideration of the decision, or the Special Panel has not issued a decision.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **8-11. Civil action in Equal Pay Act complaints**

a. Under section 16(b) of the Fair Labor Standards Act, a complainant is authorized to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, within three years after the date of the alleged violation of the Equal Pay Act regardless of whether the complainant pursued any administrative complaint processing in accordance with this regulation.

b. Recovery of back wages is limited to two years prior to the date of filing the suit or to three years if the violation is deemed willful. Liquidated damages in an equal amount may also be awarded.

c. The filing of an administrative complaint in accordance with this regulation and 29 CFR 1614 will not toll the time for the filing of a civil action.

## **8-12. Damages in Intentional Discrimination**

a. Section 102 of the Civil Rights Act of 1991 makes compensatory damages, not to exceed \$300,000, available in cases of intentional discrimination (not an employment practice that is unlawful because of its disparate impact). Such compensatory damages are only available in violations of Title VII of the Civil Rights Act, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973.

b. Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

c. The compensatory damages are available in civil action involving intentional discriminatory conduct that occurred on or after the effective date of the Civil Rights Act of 1991, i.e., 21 November 1991. Punitive damages involving NGB or other government agencies are not available in either the administrative process or by civil action.

d. If a complainant files civil action seeking compensatory damages, either the complainant or the opposing party may demand a trial by jury.

## **8-13. Coordination of Civil Actions**

a. NGB-JA will coordinate any actions required by NGB or the State National Guard to be taken in connection with civil actions filed by complainants. NGB JA will coordinate with the Litigation Offices of the Department of the Army or the Department of Air Force Judge Advocate and with the Justice Department, if required. NGB JA will

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

be an advisor to the State National Guard what legal support or actions may be required in the case. NGB JA will notify NGB-EO of any action on the case and provide NGB-EO with a copy of the court's decision and any instructions for implementing the court decision.

b. If the SEEM or the State National Guard JA become aware that a complainant has filed a civil action on a pending or administratively closed complaint, he or she will immediately notify NGB EO-CM, in writing, including a copy of any available documentation regarding the civil action.

c. NGB-EO will provide the information to NGB-JA and will make the official discrimination complaint case file available to NGB JA or the appropriate government representative. Requests for the complaint file, or for any documents therein, received by the State National Guard will be promptly referred to NGB-EO, who is the official custodian of the discrimination complaint file.

d. If any action on a complaint is pending before EEOC when a civil action is filed by the complainant, NGB-EO will promptly notify EEOC and request that EEOC terminate any administrative processing.

## **8-14. Effect of Filing a Civil Action**

a. When a complainant files civil action under paragraph 8-10 or 8-12, the EEOC will terminate the processing of any appeal pending before the Commission.

b. When a civil action is filed before NGB has issued a final decision on the complaint, NGB will dismiss the complaint, providing that 180 days have passed since the filing of the complaint [4-10.].

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 9

### Representation and Witnesses

#### 9-1 Parties to the Complaint

A complaint of discrimination raised under the statutes implemented by this regulation and 29 CFR 1614 is filed against the Federal Agency that allegedly discriminated against the complainant. Thus, the two parties to the complaint are the Agency and the complainant.

a. As noted in this regulation, NGB is the Agency during administrative processing of the complaint and is considered a party to the complaint in administrative appeals and other actions before EEOC.

b. The State National Guard represents and acts for the agency (NGB) in the initial acceptance or dismissal of complaints, during investigative fact finding hearings, during hearings that precede a final decision by NGB; and in settlements of complaints. The State National Guard may be termed a party to the complaint in these specific instances.

c. For purposes of civil actions, the proper parties to the complaint are either the complainant and the Secretary of the Army, or Secretary of the the Air Force.

#### 9-2 Named individuals

A discrimination complaint is filed against the Federal Agency, not against any individuals named by the complainant as being responsible for alleged: acts of discrimination. Since 1 Nov 87, EEOC has taken the position that "the discrimination complaint process does not determine the rights of those who have taken the actions [of discrimination], and therefore, it is wasteful to build in regulatory rights in that process for these individuals. All references to the concept of an 'alleged discriminating official' have been eliminated."

a. Individuals named by the complainant as being responsible for alleged acts of discrimination have no special standing in the complaint process and are not a party to the complaint. However, such individuals usually have information that has a bearing on the matters raised in the; complaint, should provide testimony during hearings: and may have a role in settlement of complaints. In addition they are entitled to be apprised of the specifics of any allegations made against them:[7-13]. During the administrative complaint process such individuals will be made aware of allegations against them, as indicated below.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. In preparing the case for the investigative fact finding hearing or the hearing by the AJ, the National Guard legal representative will consult with such named individuals and review with them the allegations made against them.

c. During the investigative fact finding hearing, the investigator will advise any named: individual providing testimony of the allegations against him or her.

## **9-3. Witnesses**

National Guard military and technician personnel needed as witnesses during pre-complaint processing under chapter 3, during the investigation under chapter 5, or during the hearing under chapter 6, will be made available unless there is sufficient justification why the individual cannot appear in person. In such cases their testimony: may be obtained by other means. Adverse inference may be drawn if a witness is not made available.

a. If a needed witness is employed by another; Federal agency, National Guard officials will coordinate with that agency to secure the witness' testimony.

b. Witnesses who are not Federal employees may be requested to appear and provide testimony. The investigator or AJ will be advised if such witness chooses not to appear or provide testimony.

c. Witnesses named by the complainant as being responsible for alleged acts of discrimination, are not entitled to be represented at government expense. During investigative hearings, they may be represented at their own expense.

## **9-4. Representative of the Complainant or Agent**

a. A complainant or an agent in a class complaint has the right to be accompanied by a representative of his or her own choice at any stage of the complaint process, including the pre-complaint counseling stage.

b. The complainant or the agent will designate the representative in writing. That notification must indicate if the representative is an attorney so as to establish the attorney's eligibility to claim fees and costs and to determine the proper service of documents.

c. The following individuals will not serve as representatives of a complainant or of an agent in a class complaint:

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(1) Attorneys in the Office of the Judge Advocate, NGB and National Guard judge advocates.

(2) Members of the Directorate for Human Resources, NGB, and members of the Support Personnel Management Office of a State National Guard.

(3) Inspectors General and members of their staff at NGB and State National Guard levels.

(4) NGB and State National Guard EEO, EO, HR/EO, or MEO officials, including members of NGB Equal Opportunity Division, SEEMs, EEO Counselors, and Special Emphasis Program Managers.

(5) Any National Guard technician or military member who declines to serve as a representative.

d. The AG may deny permission for a National Guard technician or military member to serve as a representative if this would constitute a conflict with the official or collateral duties of the representative. The denial will be made in writing to the complainant, giving the reasons for denial. The denial must advise the complainant that an appeal of the denial may be filed with NGB-EO within 7 calendar days after receiving the denial.

### **9-5. Corresponding with Representatives**

a. Unless the complainant states otherwise in writing, after the NGB or the State National Guard has received written notice of the name, address, and telephone number of a representative, all official correspondence will be with that representative with copies to the complainant.

b. When the complainant has designated an attorney as a representative, service of documents; and decisions on the complaint will be made on the attorney and not on the complainant. Time frames for receipt of materials shall be computed from the time of their receipt by the attorney.

c. Unless otherwise instructed in correspondence from NGB or State National Guard officials, the complainant must serve all official correspondence on the designated agency representative.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **9-6. Representative of the Agency**

a. For civil actions, NGB-JA will coordinate with the Litigation Offices of the Departments of: the Army and the Air Force Judge Advocate General and, as appropriate, with the Department of Justice. NGB-JA will advise the State National Guard and the NGB-EO, who will represent the agency in such civil action.

b. In class complaints, NGB-JA will designate the agency representative.

c. During the investigation and hearings of individual discrimination complaints, the State National Guard JA, or another State National Guard attorney designated by the AG will represent the interests of the National Guard. He or she will be responsible for making sure that the National Guard's position is based on sound legal theory and supported by competent evidence at both the investigative and hearing stages. He or she does: not represent any witnesses or individuals named by the complainant and may not serve as their representative during investigative hearings.

d. Individuals listed in paragraphs 9-4c(2), (3), and (4), will not represent the National Guard in discrimination complaint cases filed under this regulation.

## **9-7. Official time**

Complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the complaint process. Both the complainant and the representative, if they are employees of NGB where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to official requests for information, if otherwise on duty. § 1614.605. Former employees of NGB who initiate the EEO process concerning an adverse action relating to their employment with NGB are employees within the meaning of § 1614.605(b), and their representatives, if they are current employees of NGB, are entitled to official time. Witnesses who are federal employees, regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by either EEOC or NGB in connection with a complaint.

a. If the complainant is a technician employed by the National Guard, he or she has the right to a reasonable amount of official time, if otherwise on duty, to prepare and present a complaint filed under this regulation and to respond to requests for information from EEOC, NGB, or the State National Guard. Attendance at hearings and time spent preparing testimony or meetings with the investigator are also charged to official duty time if the individual is otherwise in a duty status. Both technicians and military personnel must arrange in advance with their supervisors or commanders to

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

use this duty time. The supervisor, commander, or a designee resolves disagreements as to what is “reasonable”.

b. The National Guard is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the National Guard and if otherwise in a pay status, will be on official time, regardless of their tour of duty, when their presence is authorized or required by EEOC, NGB, or the State National Guard during the investigation, hearing, dispute resolution, or other settlement of the complaint.

c. Witnesses who are Federal employees, to include technicians and National Guard military personnel will be in a duty status when their presence is authorized or required by EEOC, NGB, or the State National Guard in connection with a discrimination complaint. They will be in a duty status regardless of their actual tour of duty and regardless of whether the National Guard, NGB, or another Federal agency employs them.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 10

### Related Processes and Special Provisions

#### 10-1. General

There are several procedures that apply only to certain cases. These procedures include use of negotiated grievances, mixed cases, and the Rehabilitation Act. The provisions for these special cases are contained in this chapter. Appendix D contains a summary of time limits applicable to this chapter.

#### 10-2. Conditions for Using Grievance Procedures.

Under the conditions described in this paragraph, a complainant may have an option of how to file a complaint of discrimination. A section of the Civil Service Reform Act of 1978, permits raising of allegations of discrimination in a negotiated grievance procedure when the matter is subject to the negotiated grievance system. The following conditions must be met in order to have an option of how to file a discrimination complaint:

a. The complainant must be covered by a collective bargaining agreement with a labor organization; and

The collective bargaining agreement must not exclude the acceptance of grievances that allege discrimination or the negotiated grievance procedures in that agreement must not prohibit the raising of allegations of discrimination.

b. If both of the conditions stated above do not exist, any complaint of discrimination will be processed in accordance with the administrative complaint procedures of this regulation.

#### 10-3. Election of Negotiated Grievance Procedures

The election to use the negotiated grievance procedure or the administrative discrimination complaint procedure of this regulation is made by the filing of a written complaint. Only one option may be selected; election of one automatically eliminates the availability of the other.

a. The election to use the administrative discrimination complaint procedure of this regulation is made by filing a formal complaint in accordance with chapter 4 of this regulation. If the complainant files a formal complaint, the complainant may not thereafter file a grievance on the same matter.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. An election to use the negotiated grievance procedure is made by filing of a timely written grievance. If the complainant files a grievance then the complainant may not thereafter file a complaint under paragraphs 4-2 on the same matter.

c. If a complainant files a complaint under paragraph 4-2, after filing a grievance on the same matter, that complaint will be dismissed under the provision and subject to the conditions of - paragraph 4-10. Such dismissal is without prejudice to the rights of the complainant to proceed through the negotiated grievance procedure.

## **10-4. Final decision Under the Grievance Procedure**

When using the negotiated grievance procedure, a complainant is bound by the negotiated agreement. However, in this case, the complainant still has the right to appeal to EEOC the final decision given under the negotiated grievance procedure. The final decision is considered to be one of the following:

a. The final grievance decisions by the AG. If the union fails to invoke arbitration; note that a technician cannot individually invoke arbitration.

b. The decision rendered by an arbitrator, if neither the union nor the management appeals that decision to the Federal Labor Relations Authority (FLRA) note that a technician cannot individually appeal an arbitration award to the FLRA.

c. The decision rendered by the FLRA on appeal an arbitration award.

## **10-5. Mixed Case Complaints and Appeals**

A mixed case involves an action that may be appealed to the Merit Systems Protection Board (MSPB) and which is alleged to have been the result of employment discrimination based on race, color, religion, gender (including sexual harassment), national origin, age, or handicap. Within the technician personnel system only a limited number of actions may be appealed to the MSPB, such as failure to properly restore after military service, failure to properly restore after injury, and denial of within grade increase. Adverse personnel actions are not appealable to MSPB.

a. A mixed case complaint is a discrimination complaint, filed under the provisions of this regulation that stems from an action appealable to the MSPB.

b. A mixed case appeal is an appeal that is filed with the MSPB that alleges that an appealable action was due, in whole or in part, because of discrimination.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## **10-6. Election of Mixed Case Procedures**

When an individual who is the subject of an action that is appealable to the MSPB raises an issue of discrimination, either orally or in writing, he or she will be advised of the right to select either procedure. The EEO counselor, during the initial counseling session will advise complainants that they may not initially file both a mixed case complaint and a mixed case appeal on the same matter.

a. The initial election of procedures in mixed cases is made by filing a mixed case complaint under paragraph 4-2 or by filing a mixed case appeal with the MSPB. The filing of an informal complaint under the pre-complaint processing procedures of chapter 3, does not constitute an election of procedures. Whichever is filed first, will be considered as an election to proceed in that forum.

b. If the complainant files a mixed case appeal with the MSPB first and the MSPB dismisses the appeal for jurisdictional reasons, the SEEM will, within 5 calendar days, notify the complainant in writing of the right to contact an EEO counselor within 45 days of the receipt of the notice. For the purposes of determining timeliness, the date of initial contact with the counselor will be considered as the date on which the complainant filed the appeal with the MSPB.

c. If the complainant meets the requirements, he or she also may have three options in a mixed case. Only one of these options may be selected; election of one automatically eliminates the availability of the others, except as provided in 10-6b. The complainant may:

(1) Follow the EEO discrimination complaint procedures of this regulation.

(2) Follow the negotiated grievance procedure. In this case, the complainant may ask EEOC to review the final decision on the grievance procedure.

(3) File an appeal directly with the MSPB. In this case, the complainant may ask EEOC to review the MSPB final decision, as provided in paragraph 10-9.

## **10-7. Dismissals of Mixed Case Complaints**

Dismissal is made as prescribed in paragraph 4-10. Where dismissal is made on the basis of the complainant's prior election of the MSPB procedures, it will be made as follows:

a. If neither the State National Guard, NGB, nor the MSPB AJ questions MSPB's jurisdiction over the appeal, the dismissal will advise the complainant that he or she

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

must bring the claims of discrimination in the dismissed complaint to the attention of the MSPB. This dismissal is not appealable to EEOC, unless the complainant claims that the complaint or issue dismissed was not a mixed case matter. The complainant will also be advised of the right to petition EEOC to review the MSPB final decision on the discrimination issue.

b. If the State National Guard, NGB, or the MSPB AJ questions MSPB's jurisdiction over the appeal, acceptance or dismissal of the complaint will be held in abeyance until the MSPB AJ determines whether or not MSPB has jurisdiction. During this period of time all time limitations for the processing and filing of complaints under this regulation are tolled, and the following procedures apply:

(1) The SEEM will, within the time limits established for acceptance or dismissal of complaints, advise the complainant in writing to bring the allegations of discrimination to the attention of MSPB and will inform the complainant that the complaint is being held in abeyance. The complainant will also be advised that this decision is not appealable to EEOC but will be reviewed by NGB.

(2) Within time limits specified, the SEEM will forward the official discrimination complaint case file for review by NGB.

(3) If the MSPB AJ finds that the MSPB has jurisdiction over the matter, the complaint will be dismissed.

(4) If the MSPB AJ finds that MSPB does not have jurisdiction over the matter, processing of the complaint will resume as a non-mixed case discrimination complaint.

### **10-8. Special Provisions for Mixed Case Complaints**

For mixed case complaints filed and processed under the provisions of this regulation, the following special provisions apply.

a. NGB will issue a final decision without hearing within 45 days after the receipt of the complainant's request. The notice of investigation completion will advise the complainant of this time limit.

b. Upon issuing a final decision, the complainant will be advised of the appeal rights and time limits. If the complainant is not satisfied with a final NGB decision the complainant may, within 30 days after the receipt of the final decision:

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

- (1) Appeal the matter to the MSPB, rather than EEOC; or
- (2) File a civil action.

c. Upon issuing a notice of acceptance, the complainant will be advised of the appeal rights and time limits. If within 120 days after the date of the filing of the formal complaint, NGB has not issued a final decision, the complainant may at any time thereafter :

- (1) File an appeal with the MSPB; or
- (2) File a civil action.

### **10-9. Petitions to EEOC from MSPB Decisions**

Individuals who have received a final decision from the MSPB on a mixed case appeal or who have received a final decision from the MSPB on appeal of the NGB final decision of a mixed case complaint may petition EEOC to review that MSPB decision. EEOC will not accept appeals from MSPB dismissals without prejudice. The petition for review must be:

a. Filed with EEOC's Office of Federal Operations, P.O Box 19848, Washington, D.C. 20036 by certified mail with return receipt requested.

b. Filed either within 30 days after the receipt of the final decision of the MSPB or within 30 days after the decision of a MSPB field office becomes final.

c. Served on all individuals and parties on the MSPB's service list by certified mail on or before the filing with EEOC and the MSPB (addressed to the Clerk of the MSPB, 1120 Vermont Avenue, NW, Washington, D.C. 20419). The petitioner must certify the method and date of service.

d. EEOC Form 573, Notice of Appeal/Petition written or typed should be used but a letter may also be used. Details concerning contents of petitions, their consideration and adjudication by EEOC. Complainants who wish to file a petition on a mixed case appeal or complaint should refer to that regulation or contact their SEEM for assistance.

### **10-10. Age Discrimination in Employment Act**

a. As an alternative to the administrative procedures of this regulation, a complainant may file civil action. Regulatory provisions governing the exhaustion of administrative remedy requirements under ADEA are now the same as those under

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Title VII of the Civil Rights Act. Civil action can be brought under ADEA after administrative remedies are exhausted.

b. Complaints under ADEA require that an individual be 40 years of age at the time of the alleged act of discrimination. However, EEOC may exempt positions from the provisions of ADEA if EEOC establishes a maximum age requirement for a position on the basis of a determination that age: is a bona fide occupational qualification necessary to the performance of the duties of the position.

## **10-11. Drug Use and the Rehabilitation Act**

a. Definitions of a handicapped person are in the glossary. Excluded from the definition of a handicapped person is any individual who is currently engaging in the illegal use of drugs, as defined in the glossary.

b. This exclusion does not apply to individuals who are in or have completed a rehabilitation program and are not currently using illegal drugs. It is not a violation of this regulation to adopt and administer reasonable policies and procedures, to include drug testing, to ensure that such individuals are, in fact no longer using illegal drugs.

## **10-12. Employment criteria and reasonable accommodations**

The provisions of this paragraph apply to both competitive and military technicians. However, nothing in this regulation prescribes the medical requirements for National Guard military personnel. When a technician is required, as a condition of employment by the Technician Personnel Act, 32 U.S.C. 709, to be a military member of the National Guard, the technician or applicant for technician employment may be required to meet the physical standards, and employment criteria of the ARNG or ANG. Likewise, compatibility requirements of the Technician Personnel Act may limit reassignment availability.

a. An applicant for technician employment may not be subject to pre-employment medical examination or a pre-employment inquiry to determine a handicap or the severity of such handicap. Pre-employment inquiries may be made to determine if the applicant possesses the minimum abilities necessary for safe and efficient performance of duties of the position in question.

b. An offer of employment may be conditioned on the results of a medical examination prior to commencement of employment, provided:

(1) All entering employees are subjected to such an examination regardless of handicap; or

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(2) A pre-employment medical questionnaire may be used for positions that do not routinely require medical examination.

c. In the filling of positions that do not require military membership in the National Guard, the NG may not use any employment test or other selection criteria that screens out or tends to screen out qualified individuals with handicaps. Tests given to applicants or employees with a handicap that impairs sensory, manual, or speaking skills must accurately reflect the ability to perform the position or type of positions in question rather than reflecting the impaired skills.

d. Reasonable accommodations will be offered unless it can be demonstrated that this would impose an undue hardship on the operation of the program involved. Reasonable accommodations to the known physical or mental limitation of an employee who is a qualified handicapped person may include, but will not be limited to:

(1) Making facilities readily accessible to and usable to handicapped persons. For the purposes of this regulation, a facility is deemed to be accessible if it is in compliance with the Architectural Barriers Act of 1968 (42 U.S.C 4151 et seq.) and the American with Disabilities Act of 1990 (42 U.S.C. 12183 and 12204).

(2) Job restructuring, part-time or modified work schedules acquisition or modification of equipment or devices, the provision of readers and interpreters, and other similar actions.

e. When, due to a handicap, a non-probationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation the individual will be offered reassignment:

(1) To a funded vacant position, if available, located in the same commuting area, serviced by the same appointing authority, and at the same grade or level. The reassignment will be offered unless it can be demonstrated that this would impose an undue hardship on the operation of the program involved. The individual must be able to perform the essential function of that position, with reasonable accommodations, if necessary.

(2) If such a position is not available, then to a vacant position at the highest available grade level below the employee's current grade or level. Availability of such a vacancy will not affect the employee's entitlement, if any, to disability retirement under 5 U.S.C. 8451.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

f. If an announcement seeking application for a vacant position has already been posted at the time it is determined that a non-probationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then a reassignment obligation does not exist. However, the employee will be considered for that position on an equal basis with those who applied for such a position.

### **10-13. Equal Pay Act Complaints**

The administrative processing of discrimination complaints involving violations of the Equal Pay Act are the same as for other discrimination complaints filed under this regulation. In order to determine compliance with the provisions of the Equal Pay Act, EEOC may at any time investigate the employment practices of NGB or a State National Guard. EEOC will provide notice if it will be initiating an investigation.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 11

### Class Complaints

#### 11-1. General

This chapter covers class complaints of discrimination. Many procedures for class complaints are the same as for individual complaints of discrimination, they are not duplicated in this chapter (See Chapter 3). There are additional references pertaining to this chapter in 29 CFR 1614.105 and 29 CFR 1614.204.

#### 11-2. Guidance for Class Complaints

- a. The provisions of paragraph 5-3, regarding conflict of interests in individual complaints, also apply to class complaints.
- b. Each State National Guard will designate at least one individual to serve as a counselor for class complaints.
- c. Agents and potential agents must be thoroughly familiar with the criteria of this chapter, before they file a class complaint.
- d. Class complaints will be processed promptly. The parties must cooperate and proceed at all times without undue delay.

#### 11-3. Requirements and Criteria

A class complaint is filed by an agent of the class on behalf of that class (see the glossary for the definition of terms used here). Paragraph 1-8 explains who may file a complaint and the bases of a complaint. In addition, to be considered and accepted as a class complaint, the complaint must allege that:

- a. The class is so numerous that a consolidated complaint filed by individual members of the class under provisions of chapter 4 is impractical.
- b. There are questions of fact common to the class.
- c. The claims of the agent of the class are typical of the claims of the class. The agent must allege that a personnel policy or practice that the National Guard has the authority to change or abolish has personally harmed him or her.
- d. The agent for the class or, if represented the representative, will fairly and adequately protect the interests of the class.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## 11-4. Pre-Complaint Processing

a. A technician, former technician, or applicant for technician employment who wishes to be an agent in a class complaint and who believes that he or she has been discriminated against, must contact an EEO counselor or the SEEM within 45 calendar days of the matter giving rise to the allegation of discrimination, the effective date of a personnel action, or the date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

b. Assignment of a counselor and pre-complaint counseling procedures in class complaints are the same as those prescribed by chapter 3.

## 11-5. Filing a Class Complaint

A formal class complaint of discrimination may only be filed after completion of the pre-complaint processing [chapter 3]. If the agent is not satisfied with the result of that informal process, the agent has a right to file a formal class complaint. The formal class complaint must be filed:

a. By the class agent in writing, signed by the agent. The complaint may also be filed and signed on behalf of the class agent by a representative designated by the class agent in writing.

b. On NGB Form 713-5, Complaint of Discrimination in the National Guard, provided by the EEO counselor with the notice of final interview and right to file the complaint. Additional copies of NGB Form 713-5 may be obtained from any EEO counselor or the SEEM.

c. With clearly defined claims [3-7]. Each claims should be numbered so that it is readily set off from other claims and so that its scope is clear. The claims must identify the policy or practice that adversely affect the class, as well as the specific action or matter that is adversely affecting the class agent. EEO counselors and SEEMs are available to assist class agents in preparing a formal complaint [3-15].

d. With the SEEM or AG in person or by mail.

e. Within 15 calendar days after the receipt by the class agent of the notice of final interview and the right to file a complaint.

## 11-6. Receipt, Review, and Transmittal of a Class Complaint

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

The provisions of paragraphs 4-4 and 4-5a through also apply to the processing of class complaints. The SEEM will obtain an NGB case number, acknowledge receipt of the complaint, and review the complaint as provided in those paragraphs. Because of the time frame for forwarding the complaint to EEOC and the role of the AJ in the acceptance and dismissal process, any clarification that is needed will be accomplished within 5 calendar days after receipt of the complaint using only procedures of paragraph 4-6a through c. Any claim that have not been clarified within that time will be addressed in comments enclosed with the transmittal memorandum, as described below.

a. Immediately upon receiving the formal class complaint, the SEEM will review it, along with the EEO counselor's report and all other available data relevant to the acceptance of the class status of the complaint. The SEEM will coordinate with the JA and with the HRO the comments to be forwarded regarding their specificity, timeliness, and acceptability as a class complaint [4-10, 10-3].

b. Within 10 calendar days after receiving the class complaint, the SEEM will transmit to NGB NGB-EO the official discrimination complaint case file in original and two (2) copies [chapter 12]. The SEEM is responsible for ensuring that all copies of the file are complete and identical.

(1) At this point, the official custody of the complaint file passes from the State National Guard to NGB. Originals of any correspondence received by the State National Guard from the class agent or the agent's representative after this date will be forwarded to NGB together with any State National Guard responses [chapter 12]. The SEEM will ensure that any documents in or added to the copy of the case file retained by the State National Guard are also included in the discrimination complaint case files now maintained at NGB.

(2) The discrimination complaint case file will include all documents generated during the pre-complaint processing, including documents and memorandums for record dealing with clarification.

c. The transmittal memorandum to NGB will contain, as an enclosure, the comments as a result of the review of the complaint, including comments and recommendations on accepting or dismissing the complaint with supporting rationale [4-10, 10-3], and any other information to help NGB and EEOC determine acceptance or dismissal of the complaint. The comments will be prepared to represent an NGB position rather than a Local State National Guard view so that they can be enclosed

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

with the NGB submission to EEOC without retyping. The original of the transmittal memorandum and comments will be the topmost tabbed document in the original case file. The transmittal memorandum will contain:

(1) The name, title, address, and telephone number of the official (normally the State National Guard JA) whom the NGB JA may designate as the NGB representative or who will assist the NGB representative in the class complaint.

(2) The class agent's home and work mailing addresses, and home and work telephone numbers (commercial and, if appropriate, DSN).

(3) The name of the class agent's representative, if any, including his or her work mailing address and telephone number (commercial and, if appropriate, DSN). Indicate if the representative is an attorney.

## **11-7. NGB Review and Designation of Representative**

a. NGB NGB-EO will coordinate with NGB-JA and prepare any comments to be forwarded to EEOC.

b. NGB-JA will designate the National Guard representative for the class complaint. This may be the legal officer designated by the State National Guard, a member of the NGB-JA, or another representative appointed by NGB-JA.

c. Within 30 days after the receipt of the class complaint by the State National Guard, NGB will forward a copy of the complaint file to the appropriate EEOC district office that has geographical jurisdiction.

## **11-8. Acceptance and Dismissal Process**

Before NGB issues an acceptance or dismissal notice of a class complaint, an EEOC AJ or complaints examiner will review the case and make a recommendation to NGB.

a. The AJ may require the class agent or the National Guard to submit any additional information relevant to the complaint.

b. If an claim raised in the formal class complaint is not included in the EEO counselor's report, the AJ will give the class agent 15 calendar days to explain if the matter was discussed with the counselor and, if not, to explain why it was not discussed. If the explanation is not satisfactory, the AJ will recommend that NGB

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

dismiss the claim. If the explanation is satisfactory, the AJ will refer the claim for further counseling of the class agent. After counseling, the claim will be consolidated with the class complaint.

c. If a claim raised in the formal class complaint lacks specificity and detail, the AJ will give the class agent 15 calendar days to provide specific and detailed information. If the class agent does not provide the required information within the time limit, the AJ will recommend that NGB dismiss the complaint. If the information provided contains new claims outside the scope of the complaint, the AJ will advise the agent how to proceed on an individual or class basis concerning these claims.

d. The AJ will recommend that NGB extend time limits for filing a complaint and for consulting with a counselor, when waiver, estoppel, or equitable tolling is appropriate [4-11b(1) through (4)].

e. When appropriate, the AJ may recommend that a class is divided into subclasses and that each subclass be treated as a class. If NGB accepts this recommendation, the provisions of this chapter will be construed and applied accordingly.

f. The AJ may recommend that NGB dismiss all or part of a complaint based on the criteria listed in paragraph 4-10 or paragraph 10-3.

g. The AJ's recommendation to accept or dismiss a class complaint will be sent in writing to NGB along with the complaint file. A notification of the AJ's transmittal of the recommendation is sent to the class agent.

(1) On receiving the AJ's recommendation, NGB NGB-EO will prepare and coordinate decision to accept or dismiss the complaint. NGB may accept, reject, or modify the recommendation of the AJ.

(2) NGB will send its decision to accept or dismiss the complaint, along with a copy of the official discrimination complaint case file and the AJ's recommendation to the agent within 30 days after receiving the AJ's recommendation. The dismissal of a class complaint will also inform the agent either that the complaint is being filed on that date as an individual complaint under paragraph 4-2, or that the agent's complaint is also being dismissed as an individual complaint [4-10]. The NGB decision will also provide the appropriate appeal rights for dismissal of complaints.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(3) A copy of the NGB decision will be sent to the AJ, to the AG, and to the SEEM.

(4) If NGB fails to issue a decision within 30 days after the receipt of the AJ's recommendation and the complaint file, the AJ's recommendation to accept or dismiss the complaint will become the NGB decision.

## **11-9. Notification of Existence of Class Complaint**

a. Prior to issuing a decision to accept a class complaint, NGB NGB-EO, in consultation with NGB JA, will determine reasonable means for notifying all class members, e.g., delivery, mailing to last known address, distribution, or posting and will alert the SEEM to the notification requirement. Within 15 calendar days after issuance of the NGB decision to accept the class complaint, the SEEM will make reasonable efforts to notify all class members of the existence of the class complaint.

b. The notice will contain:

(1) The name and location of the appropriate State National Guard organizational element involved and the date of the acceptance of the complaint.

(2) A description of claims accepted as part of the class complaint.

(3) An explanation of the binding nature of the final decision or resolution of the complaint on class members.

(4) The name, address, and telephone number of the class representative.

## **11-10. Developing Evidence**

a. The AJ will provide the National Guard representative and the agent 60 calendar days to prepare their cases. This time period may be extended upon the request of either party.

b. In developing evidence, the National Guard representative may assign tasks to the SEEM, HRO, or other appropriate offices in the State National Guard. Both parties are entitled to reasonable development of evidence on matters relevant to the claim raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations, or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overly burdensome, repetitious, or privileged.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. During the time allowed to develop the evidence, the AJ may, at his or her discretion, direct an investigation of facts relevant to the complaint or to any portion thereof.

d. Both parties will give the AJ copies of all materials that they wish him or her to examine and other material as the AJ may request.

e. If mutual cooperation fails, either party may request the AJ to rule on a request to develop evidence. If either party fails without good cause shown to respond fully and in timely fashion to a request made or approved by the AJ for documents, records, comparative data, statistics, or affidavits, and the information is solely in control of one party, such failure may, in appropriate circumstances, cause the AJ to:

(1) Draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information.

(2) Consider the matters to which the requested information pertains to be established in favor of the opposing party.

(3) Exclude other evidence offered by the party failing to produce the requested information.

(4) Recommend that a decision be entered in favor of the opposing party.

(5) Take such other actions as the AJ may consider appropriate.

## **11-11. Opportunities For Vacating of and Complying With Settlements**

a. The AJ will furnish the agent and the representative of the National Guard a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the National Guard representative and attempt settlement of the complaint.

b. At any time after acceptance of a complaint, it may be resolved by agreement of the National Guard and the agent as long as the agreement is fair and reasonable.

c. The complaint is resolved the terms of any settlement will be reduced to writing and signed by the agent and the National Guard representative after coordination with NGB NGB-EO and NGB-JA [chapter 7].

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

d. Notice of the resolution will be given to all class members in the same manner as notification of the acceptance of the class complaint and will state the relief, if any, to be granted by the National Guard. A resolution will bind all members of the class.

e. Within 30 days of the date of the notice of resolution, any member of the class may petition the Director, EEO, to vacate the resolution because it benefits only the class agent or is otherwise not fair or reasonable. Such a petition will be processed in the same manner as acceptance or dismissal of complaints under paragraphs 11-6 and -7.

(1) If the AJ finds that a resolution is not fair and reasonable, the AJ will recommend that the resolution be vacated and that the original class agent be replaced by the petitioner or some other class member who is eligible to be the class agent. The new class agent will act for the class during further processing of the class complaint.

(2) A NGB decision that the resolution is not fair and reasonable, vacates any agreement between the former class agent and the National Guard.

(3) A National Guard decision on such a petition will inform the agent or the petitioner of the right to appeal the decision to the Office of Federal Operations.

f. Any settlement agreement reached at any stage of the complaint process will be binding on both parties. If the agent believes that the National Guard has failed to comply with the terms of a settlement agreement for reasons not attributable to acts or conduct of the agent, his or her representative, or class members, the procedures described in paragraph 7-12 apply.

### **11-12. Hearing**

On the expiration of the period allowed to prepare the case, the AJ will set a date for a hearing. The hearing will be conducted in accordance with paragraphs 7-8 and 7-9. Only persons directly connected to the complaint, as determined by the AJ, may attend the hearing.

### **11-13. Findings and Recommendations of the AJ**

a. The AJ will transmit to NGB a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class, and any individual relief, where appropriate, with regard to any personnel action or matter that gave rise to the complaint.

b. If the AJ finds no class relief appropriate, the AJ will determine if a finding of individual discrimination is warranted and, if so, will recommend appropriate relief.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. The AJ will notify the agent of the date on which the report of findings and recommendations was forwarded to NGB.

## **11-14. The National Guard Bureau Final Decision**

a. Within 60 calendar days after receiving the AJ's report, NGB NGB-EO will, in consultation with NGB-JA, develop and issue a decision to accept, reject, or modify the findings and recommendations of the AJ.

b. The NGB final decision will be sent to the class agent and the AG with a copy of the findings and recommendations of the AJ.

c. If the NGB final decision rejects or modifies the findings and recommendations of the AJ, it will state the specific reasons for the NGB action.

d. The final decision will direct any remedial action authorized by law and determined to be necessary or desirable to resolve the complaint and to promote the policy of equal opportunity, whether or not there is a finding of discrimination.

e. The final decision will inform the agent of the right of appeal or to file a civil action, and of the applicable time limits [chapter 8].

f. A final NGB decision on a class complaint filed under this regulation is binding on the National Guard and all members of the class, subject to the provisions of Chapter 8.

## **11-15. Failure to Issue Final Decision**

If NGB has not issued a final decision within 60 calendar days after receiving the AJ's report, the findings and recommendations of the AJ will become the final NGB decision. This decision must then be sent by NGB to the class agent within 5 calendar days after the end of the 60-day period.

## **11-16. Notification of NGB Decision**

a. Class members will be notified of:

(1) The NGB final decision and of the relief awarded, if any.

(2) The right of class members to seek individual relief, where appropriate, and of the procedures to be followed [11-17c].

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. The notification will be made in the same manner as the notification of the existence of a class complaint under paragraph 11-8. Prior to issuing the final decision on a class complaint, NGB NGB-EO will alert the SEEM to be prepared to accomplish the notification requirement. Within 10 calendar days after issuance of the NGB final decision, the SEEM will make reasonable efforts to notify all class members of the NGB final decision.

## **11-17. Relief for Individual Class Members**

a. If discrimination is found, the National Guard must do away with or change the personnel policy or practice that gave rise to the complaint, so that the policy or practices will no longer cause such discrimination. Also, the National Guard must provide individual remedial action to the agent, including an award of attorney's fees and costs [chapter 7]. The National Guard must fulfill obligations to consult or negotiate, as applicable, with the unions that have exclusive recognition, before doing away with or changing personnel policies or practices.

b. If the NGB decision does not find class wide discrimination, the State National Guard will:

(1) Issue a notice of receipt for any individual complaint subsumed into the class complaint. The notice of receipt will be issued within 60 days after issuance of the NGB final decision. Thereafter, such complaints will be processed as individual complaints [chapters 4, 6, and 7].

(2) Provide the class agent full relief if it is determined that the class agent was a victim of discrimination [chapter 7].

c. If the NGB decision finds discrimination and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with a person designated in the notice [11-14]. The claim must:

(1) Be submitted within 30 calendar days after receipt of the notification.

(2) Include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice and that this discriminatory action took place within the period of time for which NGB found class-wide discrimination in its final decision. The period of time for which NGB finds class-wide discrimination begins not more than 45 days prior to the class agent's initial contact with the EEO counselor and ends not later

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

than the date when the National Guard eliminates the policy or practice found to be discriminatory, as stated in the final decision.

(3) Be ruled on by NGB with a final decision issued on the claim within 90 days after the filing of the claim. The decision will include the rights to appeal [chapter 8].

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Chapter 12

### Official Discrimination Complaint Case Files

#### 12-1. General Guidance

a. Official discrimination complaint case files and related correspondence will be prepared, organized, and assembled as prescribed in this chapter.

b. Official discrimination complaint case files and other documentation submitted to NGB or EEOC must be complete and appropriately indexed, tabbed, and assembled. NGB and EEOC may remand official discrimination complaint case files to the State National Guard for correction if they do not meet requirements, as explained herein.

#### 12-2. Assignment and Use of Case Numbers

a. When a complaint is formally filed, the SEEM will immediately obtain a case number from NGB-EO [12-8]. This case number will be used in all correspondence pertaining to the complaint.

b. For complaints referred from NGB, a case number will be assigned by NGB [12-9]. This number will be used on all correspondence pertaining to this complaint until and unless the complaint is formally filed in accordance with chapter 5 or 12. At that time, the NGB assigned "Inquiry" number will be replaced by the NGB case number, obtained as described in paragraph 12-2a.

c. The complete NGB case number will be used in the titling of complaints and in any correspondence with complainants, their representatives, and EEOC. In the body of correspondence between NGB and the State National Guard and in telephone conversations, the Key Number, part of the NGB case number, is sufficient to identify a complaint.

#### 12-3. Titling of Complaints

a. For purposes of identifying the proper party defendant in case of a civil action, the Secretary of the Army or the Air Force will be listed, by name in the complaint caption or the subject of any letter or memorandum concerning a complaint case.

b. To facilitate identification and reference, the following information will be included in the subject line of any correspondence pertaining to formally filed discrimination complaints:

(1) The complainant's or class agent's full name, followed by the name of the State and "Army National Guard" or "Air National Guard."

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(2) The full name of the Secretary of the Army or the Air Force.

(3) The NGB case number [12-8].

c. For complaints referred from NGB, the subject of correspondence will contain the following information:

(1) The NGB case number [12-9].

(2) The complainant's full name, followed by the name of the State and "Army National Guard" or "Air National Guard," as appropriate.

d. Complaint titles or subjects

(1) Complaint of Joe T. Doe, Maryland Army National Guard, and (Full name), Secretary of the Army, NGB Case No. T-323-MD-A-02-93-RL.

(2) Class complaint by Janet A. Rowe, Ohio Air National Guard, and (Full name), Secretary of the Air Force, NGB Case No. T-043-OH-F-01-93-CGS.

(3) Inquiry No. I-212-DC-A-02-93-RO regarding Technician Discrimination Complaint by Peter J. Alexander.

## **12-4. Establishment and Maintenance of the Official Complaint File**

a. The official discrimination complaint case file is initially established by the SEEM. It will contain the documents and be organized as pre-scribed in paragraphs 12-5 and 12-6. The official discrimination complaint case file is established:

(1) When the complainant elects to use the dispute resolution process during the pre-complaint processing stage [chapter 3 and appendix B]. That official discrimination complaint case file will contain all the documents generated during the counseling, including the EEO counselor's report. A copy of the complaint file will be made available to the ADR panel for use in the dispute resolution process. The original is retained by the SEEM.

(2) When a formal complaint is filed.

b. The original of the official discrimination complaint case file is retained by the SEEM until a review of acceptance or dismissal of the formal complaint is requested from NGB [5-8]. At that time the official custody of the complaint file passes from the SEEM to NGB NGB-EO. Upon receipt of the official discrimination complaint case file from the SEEM, NGB NGB-EO will maintain the original of the complaint file.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. The SEEM will send the original and two copies of the complete official discrimination complaint case file to NGB. One complete copy of the complaint file is retained by the SEEM. The SEEM is responsible for ensuring that all copies of the official discrimination complaint case file are identical. If additional documents are placed in the complaint file by the SEEM and these documents have not been made available to NGB NGB-EO, an original (if there is one) and two copies of such documents will be forwarded to NGB NGB-EO.

d. If an investigator is assigned in [6-5], one copy of the complete official discrimination complaint case file will be forwarded by NGB to him or her. The investigator will return all documents in that file along with the ROI to NGB NGB-EO.

e. If the complainant requests a hearing in conjunction with a final decision by NGB [7-6] or makes an appeal to EEOC [9-4], one copy of the official discrimination complaint case file will be forwarded by NGB to EEOC. After completion of the hearing, EEOC will return the official complaint file to NGB along with a record of the hearing and EEOC conclusions and findings.

f. When a complaint is closed administratively or following any judicial proceedings, the official discrimination complaint case file is closed by NGB. It is maintained as a closed file for 4 fiscal years following its closure (6 years for cases involving age discrimination) and then destroyed.

## **12-5. Content of the Official Complaint File**

a. The official discrimination complaint case file will include all documents pertinent to the complaint. The file will not contain:

(1) Any document that has not been made available to the complainant or to his or representative.

(2) Any National Guard decision to take or not to take action against any official accused of discrimination [8-14].

(3) Any internal copies of legal memorandums or opinions, internal staffing and coordination actions or other internal management documents not available to the complainant.

b. The most frequently found documents in an official discrimination complaint case file are listed below. The specific documents in a file depend on the particular case. The documents that are required to be in the official discrimination complaint

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

case file are indicated by the word "(required)." The documents will be organized in the order specified in paragraph 12-6.

- (1) Rights and responsibilities of complainants (required).
- (2) Written authorization by the complainant to reveal his or her name during pre-complaint processing or his or her statement that he or she does not want the name revealed (required).
- (3) The complainant's written designation of a representative.
- (4) Agreement to extend counseling.
- (5) ADR agreement.
- (6) Any documents generated during the ADR process.
- (7) Notice of final interview and right to file a complaint (required).
- (8) EEO counselor's report, to include the inquiry and all relevant exhibits (required).
- (9) The formal complaint (required).
- (10) Notice of receipt of the formal complaint (required).
- (11) Notice of acceptance/dismissal of the complaint (required).
- (12) Documentation to support dismissal, such as copies of collective bargaining agreements, previously filed complaints, documentation of military status, etc.
- (13) Correspondence regarding clarification of claims.
- (14) If a waiver of time limits for filing or for providing any other response is granted, all documentation to justify the waiver and the written notification to the complainant of this waiver.
- (15) Request for NGB review/ investigation (required).
- (16) Deficiency notices concerning accepted or dismissed complaints.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

- (17) Notification from NGB of properly accepted or dismissed complaints.
- (18) Designation of an individual to process a complaint in place of an individual named by the complainant (to avoid a conflict of interest).
- (19) NGB's notification of the appointment of an investigator.
- (20) NGB's letter to the investigator transmitting the official complaint file.
- (21) NGB's letter of authorization for the investigator.
- (22) Any correspondence between the investigator and the National Guard or the complainant.
- (23) Any correspondence that is part of the fact finding process.
- (24) Any correspondence dealing with problems or delays during the investigation.
- (25) Agreement to extend investigation.
- (26) Notice of investigation completion and transmittal of the ROI.
- (27) A complete copy of the ROI.
- (28) Any letters from the State National Guard to the complainant offering resolution meetings and providing terms of settlements.
- (29) If a resolution is not reached, a memorandum for the record documenting the meeting, any offers made by the State National Guard, and the complainant's response.
- (30) If a resolution is reached, the written, signed, and dated settlement agreement.
- (31) If full relief is provided, NGB certification of full relief, the executed settlement agreement, and a copy of the required notice to employees.
- (32) Any other correspondence between the State National Guard and

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

the complainant regarding settlements, or memorandums of any telephone or in person conversations on this subject.

(33) If the complaint is withdrawn, a written, signed, and dated statement of the complainant or the representative to that effect.

(34) Notification that failure to cooperate may be cause for dismissal of the complaint and the notice to the complainant of the dismissal and advising him or her of the rights of appeal.

(35) Input from the AG and the complainant prior to NGB issuance of a final decision.

(36) The complainant's request for a final decision.

(37) If the complainant has requested a hearing, all correspondence from the complainant, the State National Guard, NGB, or EEOC relative to that hearing.

(38) If a hearing was held, a complete record of that hearing.

(39) The final NGB decision.

(40) Copies of any appeal by the complainant, supporting and opposing statements, and any other correspondence regarding the appeal or subsequent reconsideration.

(41) Copies of any civil action filed by the complainant and any correspondence between the State National Guard, NGB, and any other parties involved in the civil action. Note that internal documents concerning legal advice or the processing of the civil action are not part of the official case file.

(42) Any other correspondence from or to the complainant and his or her representative relative to the complaint.

(43) A copy of all certified receipts and other documentation showing notification of delivery of materials to the complainant and/or his or her representative, or other parties to the complaint. Envelopes showing postmark or lack of postmark and any proof of receipt, such as certified mail return receipt cards, are filed with the document to which they pertain (required).

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## 12-6. Organization of the Official Complaint File

Official discrimination complaint case files will be assembled and organized with an index (NGB Form 690-R), tabbed index sheets, and a hard backing. All documents and index sheets will be fastened together with appropriate paper fasteners.

a. NGB Form 690-R (National Guard Official Discrimination Complaint File Index) will be placed as the top document over the complaint case file. A copy of this form is located at the back of this regulation. It will be locally reproduced on 8 1/2- by 11- inch paper. The index will be updated each time a document is added to the complaint file. It will contain:

- (1) The name of the complainant (last name, first name, middle initial).
- (2) The NGB case number, constructed as described in paragraph 12-8.
- (3) To whom each document was sent and the originator of the document, entered in the "TO/FROM" column.
- (4) The date on which the document was mailed, sent by facsimile, or delivered in person, or the date on which a document was received by the holder of the official complaint file (not the date of the document) entered in the "ON: DATE" column. Dates will be shown as YY/MM/DD (year/month/day).
- (5) A brief description of the document, entered in the "DESCRIPTION OF DOCUMENT" column.
- (6) The date of the document, entered in the "DOC DATE" column. For outgoing documents it may be the same as the date the document was sent or delivered. The date the document was actually mailed, sent by facsimile, or delivered in person, may be later than the date of the document. In some cases it may also be the same date as the date the document was received, e.g., when the document was received by facsimile or by personal delivery. Dates will be shown as YY/MM/DD (year/month/day).
- (7) A letter indicating under which tab the document is to be found, in the "TAB" column.

b. Alphabetical tabs will be used to separate documents listed in paragraph 12-5. A full set of alphabetical index sheets (containing tabs A through Z) will be included,

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

even if documents existing at a point in time use only a portion of these tabs. The remaining tabs will be included to be used for the addition of future documents.

c. Documents will be arranged in chronological order with the earliest document at the bottom and the last document on top. As an exception, reports (such as the ROI or the EEO counselor's report of inquiry) and enclosures to documents may contain material that is not chronologically organized.

d. Index sheets with alphabetical tabs will be placed over each document, or set of documents in the file, starting with tab A at the bottom, over the first document in the file.

e. When multiple documents are placed under one alphabetical tab (such as the EEO counselor's inquiry or the ADR report), the enclosures, appendixes, or other appropriate parts of such reports will be sub-tabbed using numerical tabs (i.e., 1, 2, 3, etc.) or alphanumeric tabs (e.g., C1, C2, C3, etc.). There will be an index listing the specific document to be found under each sub-tab. For example, the EEO counselor's report of inquiry will be organized as follows:

(1) The counselor's written report (dated and signed) summarizing the counselor's inquiry [3-12] will be the top document below the index.

(2) Enclosures to the report such as notes of interviews, a summary of documents reviewed by the counselor, or copies of documents obtained by the counselor or provided to the counselor by the complainant and witnesses, will be listed in an index and will be tabbed, as described above.

(3) The index to the documents in the EEO counselor's report, the report itself, and tabbed enclosures to the report, will all be placed under one main tab of the complaint case file.

(4) Notices issued to the complainant by the counselor, the complainant's authorization to reveal his or her name and designation of a representative will not be attached to the counselor's report but will be included in the discrimination complaint case file under separate tabs.

f. Tabs or sub-tabs will not be affixed to documents. They will be attached to or be a part of blank pages to form index sheets.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

g. More than one set of index tabs may be used if warranted by the number of documents in the complaint file. In such cases, the NGB Form(s) 690-R, attached to a given set of tabbed documents, will be annotated as "Part I," "Part II," etc.

## **12-7. Safeguarding, Use, and Release of the Official Complaint File**

Official discrimination complaint case files, including the EEO counselor's report, the ROI, and other documents listed above, contain information subject to the Privacy Act. The files will be maintained and safeguarded in the same manner as other sensitive, personnel files.

a. Release of any part of the official discrimination complaint case file, including the ROI, is subject to the Privacy and Freedom of Information Acts. Case files may contain items which are not releasable information; therefore, any request for their release will be referred to NGB-AD. Each request will be reviewed to determine what material is releasable. ROI's are investigative documents and are not considered completed and final until such time as they are accepted by NGB as part of the adjudication process in the issuance of a final decision.

b. The official discrimination complaint case file is a management document. It will be used by officials of the State National Guard, NGB, and EEOC to make recommendations and decisions regarding the complaint. Providing the official discrimination complaint case file (including the ROI) to a State National Guard, NGB, or EEOC official in connection with their official duties, as explained below, does not constitute release of information.

c. Because of the sensitive nature of the official discrimination complaint case file, only those individuals who are directly involved in the processing, management, or adjudication of discrimination complaints will have access to the official discrimination complaint case file, including the ROI. This includes the AG, the HRO, the SEEM, State National Guard or NGB legal officers, the investigator, members of NGB NGB-EO, etc.

(1) All documents in the file will also be made available to the complainant and his or her representative. However, this does not include internal management documents listed in paragraphs 12-5a(2) and (3); these documents will not be included in the official discrimination complaint case file.

(2) Officials who have been disqualified from participation in the processing or adjudication of a complaint under paragraph 5-3, and other individuals named by the complainant as allegedly responsible for acts of discrimination against the complainant, will not have access to the official discrimination complaint case file.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## 12-8. NGB Case Number

Each formal complaint will be assigned a case number by NGB on the day that the formal complaint, in its proper format is physically received by NGB-EO. The number will be entered on NGB Form 690-R, and in the subject line of any correspondence pertaining to discrimination complaints.

The case number is composed of the following elements: T- \_\_\_\_ - \_\_\_\_ - \_\_\_\_ - \_\_\_\_ - \_\_\_\_ - \_\_\_\_  
{a} {b} - {c} {d} {e} {f} {g}

and continues according to proper formatting.

a. The letter "T" identifies the type of complaint, (i.e., a technician complaint of discrimination filed under the provisions of this regulation).

b. The first three digits, following the letter "T" are assigned by NGB on the date the complaint is received at NGB-EO. The first three digits represent a sequential number and the last digit represents the fiscal year in which the formal complaint was filed. Together with the letter T, they form the Key Number, a unique identifier for any discrimination complaint case.

c. The two letter State abbreviation immediately follows the dash after the Key Number.

d. An "A" is used to for ARNG or an "F" for ANG technician, former technician, or applicant for a technician position. The letter "A" or "F" immediately follows the dash after the State abbreviation.

e. A two digit number is used for each formal technician complaint filed with that particular State National Guard, starting with 01 for the first formal complaint received during a fiscal year. This number immediately follows the dash after the letter "A" or "F".

f. A two-digit number representing the last two digits of the fiscal year based on the date the formal complaint is filed. The fiscal year immediately follows the dash after the State's case number.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

g. One or more letters representing the basis of the complaint. The letter or letters immediately follow the dash after the fiscal year. The authorized bases of complaints are:

- (1) R for Race.
- (2) C for Color.
- (3) L for religion.
- (4) G for Gender (not involving sexual harassment).
- (5) S for Sexual harassment.
- (6) N for National origin.
- (7) A for Age.
- (8) H for Handicap.
- (9) O for retaliation.

## **12-9. NGB inquiry case number**

When NGB receives an allegation of discrimination from a complainant or from a third party on behalf of the complainant, NGB will assign it a number and refer it for inquiry and processing to the State National Guard in accordance with paragraph 2-4. This number will be used in the subject line of any correspondence pertaining to such discrimination complaints. This inquiry number will continue to be used until and unless a formal complaint is filed, in which case a new number will be assigned [12-2, 12-8]. The inquiry case number is composed of the same elements shown in paragraph 12-8, except that:

a. This number will begin with an "I" rather than "T" to indicate that this is an allegation referred by NGB to the State National Guard for inquiry.

b. The first three digits, following the letter "I" are assigned by NGB on the date the complaint received by NGB NGB-EO. Together with the letter I, they form the Key Number, a unique identifier for any discrimination complaint case.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. The two digit number following the dash after A or F represents the number of inquiries referred to a State National Guard, starting with 01 for each fiscal year

d. A two-digit number representing the last two digits of the fiscal year based on the date the inquiry is received by NGB-EO. The fiscal year immediately follows the dash after the State's case number.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## APPENDIX A

### REMEDIES AND RELIEF FOR INDIVIDUAL COMPLAINTS OF DISCRIMINATION

“On September 11, 1984, the Equal Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency’s law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices. Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency’s mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation, pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances;

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

(1) A requirement that all employees of respondent in the affected facility be notified of their right to be free from unlawful discrimination and be assured that the particular type of discrimination found or conciliated will not recur;

(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similarly found or conciliated violations of the law will not recur;

(3) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

<sup>1</sup> For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case: (1) XYZ, Inc. will not refuse to hire employees on the basis of their sex; (2) XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and (3) XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission.

The component of these remedial elements is as follows:

(1) Notice Requirement. All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or union members if respondent is a labor organization), prepared by the agency on EEOC forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there be no discrimination against any employee or applicant for employment because of the employees race, color religion, sex, national origin, or age (40 and older) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment )Federal sector notices will include handicap as an unlawful basis of discrimination).

(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred. <sup>1</sup>

(e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court. <sup>2</sup>

(2) Corrective, Curative or Preventive Provisions. In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where those measures are likely to prevent future, similar violations.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Thus, where a policy or practice is discriminatory, the policy or practice must be changed. Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by insulating employees from that discriminator for a period of time, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices.

These and any other appropriate measure, or any combination thereof, designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

<sup>2</sup> For example, employees could be notified of the relief obtained in the following way: (1) XYZ, Inc will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to promote them to that position. (2) XYZ, Inc. has adopted an equal employment opportunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) Nondiscriminatory Placement. Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of the respondent's employees (this is referred to as Nondiscriminatory Placement). The Nondiscriminatory Placement may take place by initial employment, reinstatement, promotion, transfer, or reassignment and must occur without any prejudice to, or loss of, any employment-related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employment for which the discriminatee is qualified must be

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

offered to the discriminate in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminate may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and that respondents not gain by their misconduct. Accordingly, the contention by a respondent that a discriminate is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the respondent to demonstrate that the inability of the discriminate to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the respondent to demonstrate a contention that the post-discrimination conduct by a discriminate renders the discriminate unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job placement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminate is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminate until a Nondiscriminatory Placement can be accomplished.

(4) Backpay. Each identified victim of discrimination is entitled to be made whole for any loss of earnings the discriminate may have suffered by reason of the discrimination. Each individual discriminate must receive a sum of money equal to what would have been earned by the discriminate in the employment during the period, after normal expenses incurred in seeking and holding the interim employment (Net Interim Earnings). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Net Backpay accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuation in working time, overtime rates, changing rates of pay, transfers, promotions, and other prerequisites of employment that the discriminate would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) Cessation Provisions. All respondents must agree to be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order, which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of prelitigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, conciliation must be actively pursued by the agency. In this regard, all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counter-proposals to the full range of remedies described in this policy may be considered if those compromises or counter-proposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially completed relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## APPENDIX B

### EEOC DISTRICT OFFICES AND GEOGRAPHIC JURISDICTIONS

#### Albuquerque District Office

EEOC  
505 Marquette, N.W.  
Suite 900  
Albuquerque, New Mexico 87102

COM No. 505-248-5201  
FTS No. 8-505-248-5201  
FAX No. 8-505-248-5233  
TDD No. 8-505-248-5240

Geographic Jurisdiction: State of New Mexico

#### Atlanta District Office

EEOC  
100 Alabama Street  
Suite 4R30, 4<sup>th</sup> Floor  
Atlanta, Georgia 30303

COM No. 404-562-6930  
FTS No. 8-404-562-6930  
FAX No. 8-404-331-6909/6910  
TDD No. 8-404-562-6801

Geographic Jurisdiction: State of Georgia

#### Baltimore District Office

EEOC  
Crescent Building  
10 South Howard Street  
Third Floor  
Baltimore, Maryland 21201

COM No. 410-962-3932  
FTS No. 8-410-3932  
FAX No. 8-410-962-4270  
TDD No. 8-410-962-6065

Geographic Jurisdiction:  
States of Maryland and Virginia (except for those Virginia cities and counties under the jurisdiction of the Washington Field Office)

#### Birmingham District Office

EEOC  
1900 3<sup>rd</sup> Avenue, North Suite 101  
Birmingham, Alabama 35203-2397

COM No. 205-731-1359  
FTS No. 8-205-731-1359  
FAX No. 8-205-731-2101  
TDD No. 8-205-731-0095

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Geographic Jurisdiction: States of Alabama and Mississippi

## Charlotte District Office

EEOC

5500 Central Avenue

Charlotte, North Carolina

COM No. 704-344-6682

FTS No. 8-704-344-6682

FAX No. 8-704-344-6734/6731

TDD No. 8-704-344-6684

Geographic Jurisdiction: States of North Carolina and South Carolina

## Chicago District Office

EEOC

500 West Madison Street

Suite 2800F

Chicago, Illinois 60661

COM No. 312-353-2713

FTS No. 8-312-353-2713

FAX No. 8-312-353-7355

TDD No. 8-311-353-2421

Geographic Jurisdiction: State of Illinois except counties of:

Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perry, Pulaski, Randolph, St. Clair, Union, and Washington (which are under the jurisdiction of St. Louis District Office)

## Cleveland District Office

EEOC

1660 West Second Street

Suite 850

Cleveland, Ohio 44133-1412

COM No. 216-522-2001

FTS No. 8-216-522-2001

FAX No. 8-216-522-7395

TDD No. 8-216-522-7296

Geographic Jurisdiction: State of Ohio

## Dallas District Office

EEOC

207 S. Houston Street

3<sup>rd</sup> Floor

Dallas, Texas

COM No. 214-655-3355

FTS No. 8-214-655-3355

FAX No. 8-214-655-3443

TDD No. 8-214-655-3363

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Geographic Jurisdiction: States of Oklahoma and Texas counties of:

Anderson, Archer, Baylor, Bell, Bosque, Bowie, Brown, Callahan, Camp, Cass, Cherokee, Clay, Coleman, Collin, Comanche, Cooke, Coryell, Dallas, Delta, Denton, Eastland, Ellis, Erath, Falls, Fannin, fisher, Franklin, Freestone, Grayson, Gregg, Hamilton, Harrison, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jack, Johnson, Jones, Kaufman, Lamar, Lampass, Leon, Limestone, McLennan, Madison, Marion, Milam, Mills, Montague, Morris, Nacogdoches, Navvaro, Nolan, Palo, Pinto, Panola, Parker, Rains, Red River, Robertson, Rockwall, Runnels, Rusk, Shackelford, Shelby, Smith, Somervell, Stephens, Tarrant, Taylor, Throckmorton, Titus, Upshur, Van Zandt, Wichita, Wilbarger, Wise, Wood, and Young

## Denver District Office

EEOC  
303 E. 17<sup>th</sup> Avenue  
Suite 510  
Denver, Colorado 80203

COM No. 303-866-1300  
FTS No. 8-303-866-1300  
FAX No. 8-303-866-1385  
TDD No. 8-303-866-1950

Geographic Jurisdiction: States of Colorado, Montana, Nebraska, North Dakota, South Dakota, and Wyoming

## Detroit District Office

EEOC  
477 Michigan Avenue  
Room 865  
Detroit, Michigan 48226-9704

COM No. 313-226-4600  
FTS No. 8-313-226-4600  
FAX No. 8-313-226-2778  
TDD No. 8-313-226-7599

Geographic Jurisdiction: State of Michigan

## Houston District Office

EEOC  
1919 Smith Street 7<sup>th</sup> Floor  
Houston, Texas 77002

COM No. 713-209-3320  
FTS No. 8-713-209-3320  
FAX No. 8-713-209-3381  
TDD No. 8-713-209-3439

Geographic Jurisdiction: State of Texas, counties of:

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Angelina, Austin, Brazorla, Chambers, Colorado, Fort Bend, Galveston, Grimes, Hardin, Harris, Jasper, Jefferson, Liberty, Matagardo, Montgomery, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Waller, and Wharton

## Indianapolis District Office

EEOC  
101 West Ohio Street  
Suite 1900  
Indianapolis, Indiana 46204-4203

COM No. 317-226-7212  
FTS No. 8-317-226-7212  
FAX No. 8-317-226-7953/5571  
TDD No. 8-317-226-5162

Geographic Jurisdiction: States of Indiana and Kentucky

## Los Angeles District Office

EEOC  
225 E. Temple Street  
4<sup>th</sup> Floor  
Los Angeles, California 90012

COM No. 213-894-1000  
FTS No. 8-213-894-1000  
FAX No. 8-213-894-5482  
TDD No. 8-213-894-1211

Geographic Jurisdiction: State of Nevada and California counties of:

Imperial, Los Angeles, Orange, Riverside, San Bernadino, Santa Barbara, San Diego, San Luis Obispo, Ventura

## Memphis District Office

EEOC  
1407 Union Avenue, Suite 621  
Memphis, Tennessee 38104

COM No. 901-544-0115  
FTS No. 8-901-544-0115  
FAX No. 8-901-544-0111  
TDD No. 8-901-544-0112

Geographic Jurisdiction: States of Arkansas and Tennessee

## Miami District Office

EEOC  
One Biscayne Tower  
2 South Biscayne Boulevard  
Suite 2700

COM No. 305-536-4491  
FTS No. 8-305-536-4491  
FAX No. 8-305-536-4011  
TDD No. 8-305-536-5721

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Miami, Florida 33131  
Geographic Jurisdiction: State of Florida and Panama Canal Zone

## Milwaukee District Office

EEOC	COM No. 414-297-111
Henry S. Reuss Federal Plaza	FTS No. 8-414-297-111
310 West Wisconsin Avenue, Suite 800	FAX No. 8-414-297-4133/3146
Milwaukee, Wisconsin 53203	TDD No. 8-414-297-1115

Geographic Jurisdiction: States of Iowa, Minnesota, and Wisconsin

## New Orleans District Office

EEOC	COM No. 504-589-2329
701 Loyola Avenue, Suite 600	FTS No. 8-504-589-2329
New Orleans, Louisiana 70113	FAX No. 8-504-589-6861
	TDD No. 8-504-589-2958

Geographic Jurisdiction: State of Louisiana

## New York District Office

EEOC	COM No. 212-748-8468
7 World Trade Center	FTS No. 8-212-748-8468
18 <sup>th</sup> Floor	FAX No. 8-212-748-8464/8465
New York, New York 10048	TDD No. 8-212-748-8399

Geographic Jurisdiction: States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands

## Philadelphia District Office

EEOC	COM No. 215-451-5800
21 South 5 <sup>th</sup> Street	FTS No. 8-215-451-5800
Suite 400	FAX No. 8-215-451-5804/5848
Philadelphia, Pennsylvania 19106-2515	TDD No. 8-215-451-5814

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Geographic Jurisdiction: States of Delaware, New Jersey, Pennsylvania and West Virginia

## Phoenix District Office

EEOC  
3300 N. Central Avenue  
Suite 690  
Phoenix, Arizona 85012-1848

COM No. 602-640-5000  
FTS No. 8-602-640-5000  
FAX No. 8-602-640-5071/5070  
TDD No. 8-602-640-5072

Geographic Jurisdiction: States of Arizona, New Mexico and Utah

## St. Louis District Office

EEOC  
1222 Spruce Street Room 8100  
St. Louis, Missouri 63108

COM No. 314-539-7800  
FTS No. 8-314-539-7800  
FAX No. 8-314-539-7894  
TDD No. 8-314-539-7803

Geographic Jurisdiction: States of Kansas, Missouri, and Illinois counties of:

Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perey Pulaski, Randolph, St. Clair, Union, Washington

## San Antonio District Office

EEOC  
477 Michigan Avenue  
Room 865  
Detroit, Michigan 48226-9704

COM No. 512-229-4810  
FTS No. 8-512-229-4810  
FAX No. 8-512-229-4806  
TDD No. 8-512-229-4858

Geographic Jurisdiction: State of Texas, counties of:

Andrews, Aransan, Arkansas, Armstrong, Atacosa, Bailey, Bandera, Bastrop, Bee, Bexar, Blando, Borden, Brazos, Brewster, Brisco, Brooks, Burlson, Burnet, Caldwell, Calhoun, Cameron, Carson, Castro, Childress, Cochran, Coke, Collingsworth, Comal, Concho, Corsby, Crockett, Cottle, Crane, Culberson, Dallam, Dawson, Deaf Smith, De Witt, Dickens, Dimmit, Donley, Duval, Ector, Edwards, El Paso, Fayette, Floyd, Forad, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Guadalupe, Hale, Hall, Hansford, Hardeman, Hartley, Haskell, Hays, Hemphill, Hidalgo, Hockley, Howard, Hudspeth, Hutchinson, Irion, Jackson, Jeff Davis, Jim Hogg, Jim Wells, Karnes, Kendall,

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Kennedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, Lamb, La Salle, Lavaca, lee, Lipscomb, Live Oak, Llano, Loving, Lynn, Lubbock, McCulloch, McMullen, Martin, Mason, Maverick, Medina, Menard, Midland, Mitchell, Moore, Motley, Nueces, Ochiltree, Oldham, Parmer, Pecos, Potter, Presidio, Randall, Reagan, Real, Refugio, Roberts, San Particio, San Saba, Schleicher, Scurry, Sherman, Starr, Sterling, Stonewall, Sutton, Swisher, Terrell, Terry, Tom Green, Travis, Upton, Wheeler, Willacy, Williamson, Wilson, Winkler, Yoakum, Zapata, and Zavala.

## San Francisco District Office

EEOC

901 Market Street, Suite 500

San Francisco, California 94103

COM No. 415-356-5100

FTS No. 8-415-356-5100

FAX No. 8-415-356-5216

TDD No. 8-415-356-5098

Geographic Jurisdiction: States of Hawaii, Pacific Far East (the U.S. Possessions of American Samoa, Guam, Northern Mariana Islands, Wake Island), and California counties of:

Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Inyo, Kern, Kings, Lake, Lassen, Madera, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba (Hearings in Far East).

## Seattle District Office

EEOC

909 First Avenue

Suite 400

Seattle, Washington 98104-1061

COM No. 313-226-4600

FTS No. 8-313-226-4600

FAX No. 8-313-226-2778

TDD No. 8-313-226-7599

Geographic Jurisdiction: States of Alaska, Idaho, Oregon, and Washington

## Washington Field Office

EEOC

1400 L. Street N.W., Suite 200

Washington, D.C. 20005

Detroit, Michigan 48226-9704

COM No. 202-275-7377

FTS No. 8-202-275-7377

FAX No. 8-202-275-6834/0025

TDD No. 8-202-275-7518

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Geographic Jurisdiction: The District of Columbia and Virginia counties of:

Arlington, Clarke, Fairfax, Fauquier, Frederick, Loudoun, Prince William, Stafford, Warren, and Virginia independent cities of Alexandria, Fairfax City, Falls Church, Manassas, Manassas Park, and Winchester.  
(Hearings in Europe)

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## APPENDIX C

### THE COMPLAINT PROCESS AND TIME LIMITS

#### **C-1. Content**

This appendix is designed for use by EEO Counselors and State Equal Employment Managers in discussing the complaint process with complainants and as quick reference guide to the time limits established by this regulation. This appendix contains:

a. A summary of time limits corresponding to applicable chapter of the regulation. This is a summary only and the paragraphs of the regulation that contain more detailed information and an explanation of the associated requirements are shown in brackets following the specified time limit.

b. A flow diagram of the complaint process. This is also a summary and contains only the major steps of the process.

#### **C-2. Use**

The flow diagram of the process and the summary of time limits should be reproduced and used as handouts to assist complainants or in training sessions on discrimination complaints processing.

#### **C-3. Time Limits for Pre-Complaint Processing**

a. The complainant must bring allegations of discrimination to the attention of an EEO Counselor or the SEEM within 45 calendar days after the date of the alleged act of discrimination, the effective date of the alleged discriminatory personnel action, or the date the complainant knew or reasonably should have known of the discriminatory act or personnel action.

b. The initial counseling session with the EEO Counselor should take place on the same day the matters giving rise to the complainant are first brought to the attention of the EEO Counselor or the SEEM. If that is not possible, that initial counseling session will be scheduled within the next five (5) days.

c. For an extension of the inquiry for an additional thirty (30) days to be authorized, such extension must be agreed to by the complainant not later than thirty (30) calendar days after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

d. Participation in the Alternative Dispute Resolution (ADR) process must be agreed to by the complainant not later than thirty (30) calendar days after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM.

e. If the complaint is not resolved during counseling, a final interview and notice of right to file a formal complaint will be issued by the EEO Counselor to the complainant not later than thirty (30) calendar days (60) calendar days if the complainant has agreed to an extension of the inquiry) after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM.

f. If the complaint is not resolved during ADR, a final interview and notice of right to file a formal complaint will be issued to the complainant not later than ninety (90) calendar days after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM.

g. The written report of the EEO Counselor's inquiry will be provided to the SEEM as follows:

(1) Three (3) calendar days after the issuance of the notice.

(2) If the complainant has elected to participate in ADR, the Counselor will provide the report within thirty (30) calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO Counselor or the SEEM or within three (3) calendar days of the completion of the inquiry, whichever comes first.

#### **C-4. Time Limits During Filing of Formal Complaint**

a. Formal complaints must be filed within fifteen (15) calendar days after the day the complaint receives the notice of final interview and right to file a formal complaint.

b. The SEEM will receive an NGB Case Number for a formal complaint upon receipt of the case file at NGB-EO.

c. The notice of receipt of the formal complaint will be issued within three (3) calendar days after the day that the formal complaint is received by the SEEM.

d. The SEEM will recommend to the AG whether the complaint is to be accepted or dismissed within five (5) calendar days after the receipt of the complaint or within five (5) calendar days after the completion of the clarification process

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

e. The clarification process will be completed within ten (10) calendar days after the receipt of the complaint, unless a written request for clarification is sent to the complainant.

f. Any written request for clarification must be sent to the complainant within five (5) calendar days after the receipt of the formal complaint.

g. The complainant must provide any required clarification of issues within fifteen (15) calendar days after the receipt of the request for clarification.

h. The AG will accept or dismiss the complaint within ten (10) calendar days after the acceptance or dismissal after its receipt or within ten (10) calendar days after the completion of the clarification process.

i. The complaint case file will be forwarded to NGB within three (3) calendar days after the acceptance or dismissal after the complaint.

### **C-5. Time Limits During Investigation**

a. The investigator and the State National Guard will decide on the time for the on-site investigation within five (5) days after the investigator's receipt of the complaint case file.

b. The investigator will submit an initial report to NGB within five (5) days after the investigator's receipt of the complaint case file.

c. The on-site investigation will begin not later than 20 days after the investigator's receipt of the complaint case file.

d. The court reporter (obtained by the State National Guard) will provide transcripts of the investigative fact finding hearing to the investigator prior to the investigator's departure from the site. Otherwise, the court reporter will send them by express mail to the investigator within three (3) working days after the testimony has been taken.

e. The investigator will submit a Report of Investigation (ROI) to NGB not later than 45 days after the receipt of the case file, unless and extension has been granted by NGB.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

f. NGB will be advised of unresolved problems or unavoidable delays encountered during the investigation within two days.

g. The investigation or the time for issuance of the investigation completion notice may be extended for not more than 90 days upon agreement by the complainant.

h. The notice of investigation completion will be issued within 180 days after the filing of the formal complaint or within the time specified by EEOC on appeal of a dismissal and any extension agreed upon by the complainant.

### **C-6. Time Limits for Adjudication**

a. Within 15 days after the receipt of the notice of investigation completion, the AG can provide input to NGB prior to the issuance of the final decision.

b. Within 30 days after the receipt of the notice of investigation completion, the complainant must request an immediate final decision or a final decision with a hearing.

c. Within five (5) days after the receipt of the complainant's request for a final decision with a hearing, the SEEM will forward to NGB information needed to request assignment of an AJ.

d. Within 14 days after the receipt of the needed information from the SEEM, NGB will request EEOC to assign an AJ and will provide EEOC a copy of the case file.

e. Not later than 15 days prior to the hearing, the complainant or the National Guard may file a statement with the AJ asserting that some or all facts in the case are not in genuine dispute.

f. Within 15 days after the receipt of the statement referred to in subparagraph e, above, the other party may file a statement in opposition.

g. The complainant and the National Guard have 15 days to respond to a notice by the AJ to limit the scope of the hearing or to issue findings and conclusions without a hearing.

h. Within 180 days after the receipt of a request for hearing by EEOC, the AJ will issue findings of fact and conclusions of law. This time limit can be extended if the AJ makes a written determination that good cause exists for the extension.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

i. Within 60 days after the receipt of the complainant's request for an immediate final decision or the receipt of the AJ's findings and conclusions, NGB will issue a final decision on the merits of the complaint.

j. Within 60 days after the end of the 30 day period for the complainant to request a hearing or an immediate final decision, where the complainant has failed to make such a request, NGB will issue a final decision on the merits of the complaint.

k. If, within 60 calendar days after the receipt of the hearing record, NGB has not issued a final decision rejecting or modifying the AJ's findings and conclusions, such findings and conclusions and the relief ordered will become the final decision.

l. If within 180 days after the filing of the formal complaint, NGB has not issued a final decision, the complainant may file a civil action in an appropriate U.S. District Court under conditions specified in Chapter 8.

### **C-7. Time Limits in Withdrawal and Settlement Actions**

a. The submission to NGB of a withdrawal or settlement of a complaint during on-site investigation will be done on the same day that the withdrawal or settlement occurred.

b. Within 30 days after the receipt of a certified offer of full relief, the complainant must accept that offer or the complaint may be dismissed.

c. Within 15 days after the receipt of an offer of employment, the complainant who was an applicant for employment must accept or decline that offer.

d. Back pay may not be given for more than two (2) years prior to the date on which the complaint was formally filed.

e. Request for attorney's fees and costs will be submitted within 30 days of the receipt of the request for the fees and costs.

f. Agreement on attorney's fees and costs must be reached within ten (10) days after the receipt of the request for the fees and costs.

g. A final decision on attorney's fees and costs must be issued within 30 days after the receipt of the request for the fees and costs.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

h. Allegations of noncompliance with settlements or final decisions must be submitted within 30 days after the date the complainant knew or reasonably should have known of the noncompliance.

i. State National Guard comments regarding a complainant's allegation of noncompliance will be submitted to NGB within seven (7) days after the receipt of allegations of noncompliance.

j. NGB's determination on the allegations of noncompliance must be issued within 30 days after the receipt of the allegations.

k. The complainant may appeal the NGB determination within 30 days after the receipt of the determination.

l. If NGB fails to issue a determination, the complainant may appeal to EEOC within 35 days after serving the noncompliance allegations on NGB.

### **C-8 Time Limits in Appeals and Civil Actions**

a. An appeal of noncompliance may be filed within 35 days after serving a notice of alleged noncompliance with a settlement or final decision.

b. If NGB issues a timely determination on the allegation of noncompliance, an appeal of that determination must be filed within 30 days after its receipt.

c. An appeal of the dismissal of all or part of a complaint and appeal of any NGB final decision must be filed within 30 days after the receipt of that dismissal or decision.

d. Any statement or brief in support of a complainant's appeal must be filed within 30 days after the filing of the appeal.

e. State National Guard input in opposition to an appeal or in conjunction with a reconsideration of an appeal will be submitted to NGB within seven (7) days after the receipt of NGB's request for the input.

f. The complaint file and any statement or brief in opposition to an appeal will be submitted to EEOC by NGB within 30 days after the receipt of the request from EEOC.

g. A request for reconsideration of an appeal must be submitted within 30 days after the receipt of the appeal or within 20 days after the receipt of the opposing party's request of reconsideration.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

h. Any statement or brief in support of a request for reconsideration will be submitted with that request.

i. Any statement or brief in opposition to a request for reconsideration will be submitted within 20 days of the receipt of the opposing party's request for reconsideration.

j. A complainant can file a civil action:

(1) Within 90 days (30 days in mixed case complaints) after receipt of a final NGB decision or a final EEOC appeal decision.

(2) After 180 days (120 days in mixed case complaints) from the date the appeal was filed if there has been no decision on the appeal.

(3) After 180 days (120 days in mixed case complaints) from the date an appeal was filed if there has been no decision on the appeal.

(4) Within 30 days of specified actions in mixed case complaints.

(5) After 180 days of filing a petition in a mixed case complaint.

(6) Within two (2) years of alleged violation (three years if the violation is willful) under the Equal Pay Act.

k. A complainant must give notice of intent to file civil action at least 30 days prior to filing such action in lieu of an administrative complaint under ADEA.

l. The notice under subparagraph 1 above must be filed within 180 days of the alleged discrimination.

### **C-9. Time Limits for Special Procedures and Processes**

a. If the MSPB dismisses a mixed case appeal for jurisdictional reasons, the SEEM will within five (5) calendar days notify the complainant in writing of the right to contact an EEO Counselor.

b. The EEO Counselor must be contacted within 45 days of the receipt of the notice in "a" above.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

c. If the MSPB dismisses a mixed case appeal for jurisdictional reasons, the date of initial contact with the Counselor shall be considered the date on which the complainant filed his or her appeal with the MSPB.

d. In a mixed case complaint, NGB will issue a final decision without a hearing within 45 days after the receipt of the complainant's request.

e. A complainant may appeal a final NGB decision on a mixed case complaint to the MSPB within 20 days after its receipt or may file a civil action.

f. If 120 days after the date of the filing of a mixed case complaint, NGB has not issued a final decision, the complainant may, at any time there-after, appeal to the MSPB or file a civil action.

g. A petition to EEOC from an MSPB decision must be filed within 30 days after its receipt or after the decision of an MSPB field office becomes final.

### **C-10. Time Limits in Class Complaints**

a. The time limits in paragraph C-3 above for pre-complaint counseling apply to class complaints filed under Chapter 11.

b. Formal class complaints must be filed within 15 calendar days after the class agent receives the notice of the final interview and right to file.

c. Within five (5) days after the receipt of the class complaint, the SEEM will complete any clarification of issues in the class complaint.

d. Within ten (10) days after the receipt of the class complaint, the SEEM will send the case file to NGB along with comments on the acceptability of the complaint.

e. Within 30 days after the receipt of the class complaint by the State National Guard, NGB will forward a copy of the complaint file to EEOC.

f. The class agent will be given 15 days by EEOC to explain why any issue raised in the formal complaint was not counseled or to provide specificity and detail regarding any issue.

g. Within 30 days after the receipt of the recommendation from EEOC, NGB will issue a decision to accept or dismiss the complaint or the recommendation will become the NGB decision.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

h. Within 15 calendar days after the issuance of the NGB decision to accept the class complaint, the SEEM will make reasonable efforts to notify all class members of the existence of the class complaint.

i. The National Guard representative and the class agent will have 60 days to develop evidence and prepare their case for presentation to EEOC.

j. Within 30 days of the date of the notice of resolution, any member of the class may petition the Director or EEO to vacate the resolution because it benefits only the class agent or is otherwise not fair or reasonable.

k. Within 60 calendar days after receiving the recommendations of the AJ, NGB will issue a final decision on the class complaint.

l. If NGB has not issued a final decision within 60 calendar days, the findings and recommendations of the AJ become the final decision, which must be sent to the agent within five (5) days after the end of the 60-day period.

m. Within 10 calendar days after the issuance of the NGB final decision, the SEEM will make reasonable efforts to notify all class members of the NGB final decision.

n. Within 60 days after issuing a final decision, the State National Guard will issue a notice of receipt of any individual complaint that was subsumed into the class complaint.

o. A claim for individual relief by a class member must be submitted within 30 calendar days after receipt of the notification of the NGB decision.

p. Within 90 days after filing the claim for individual relief, NGB will issue a final decision on the claim.

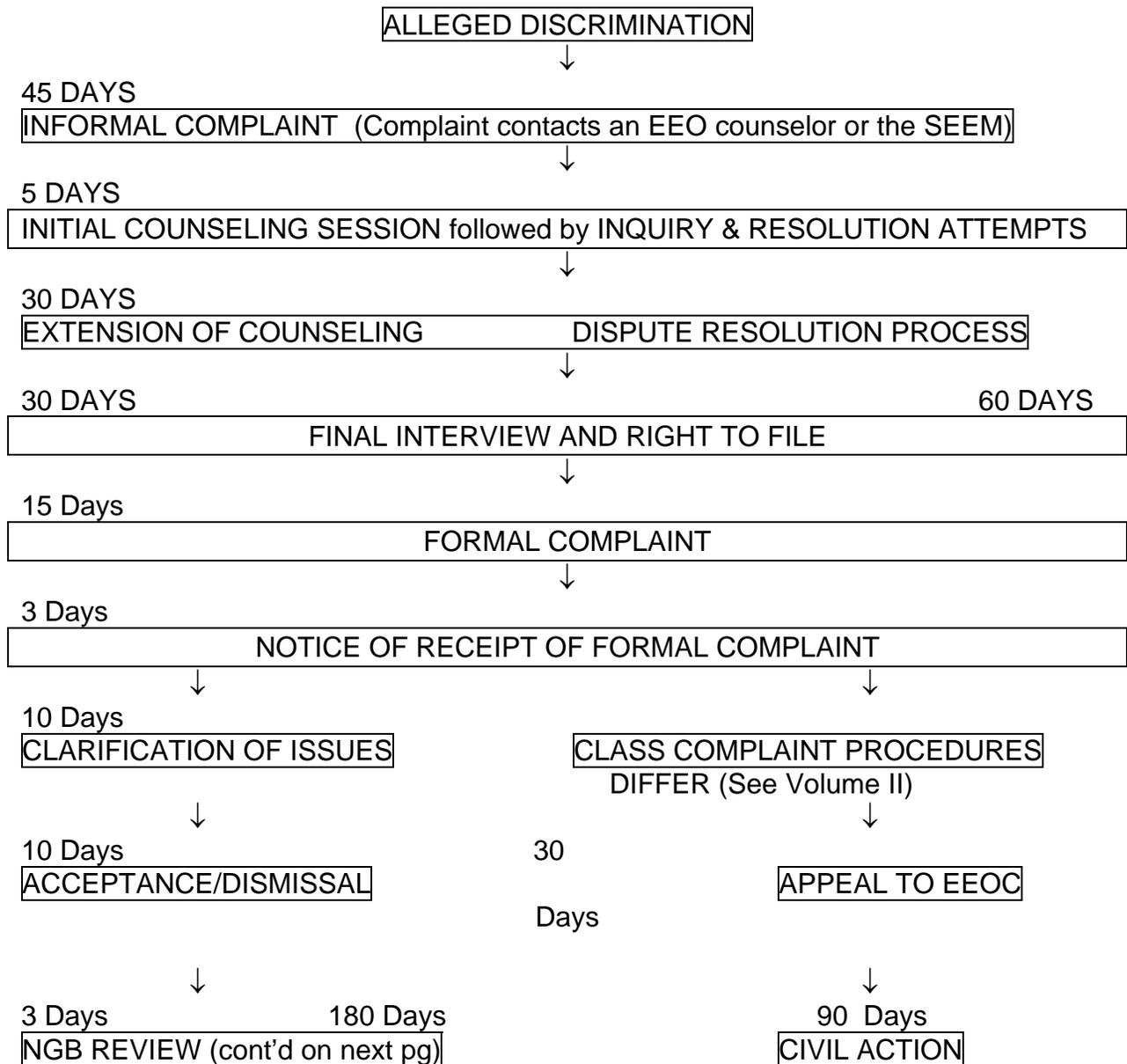
**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

APPENDIX D

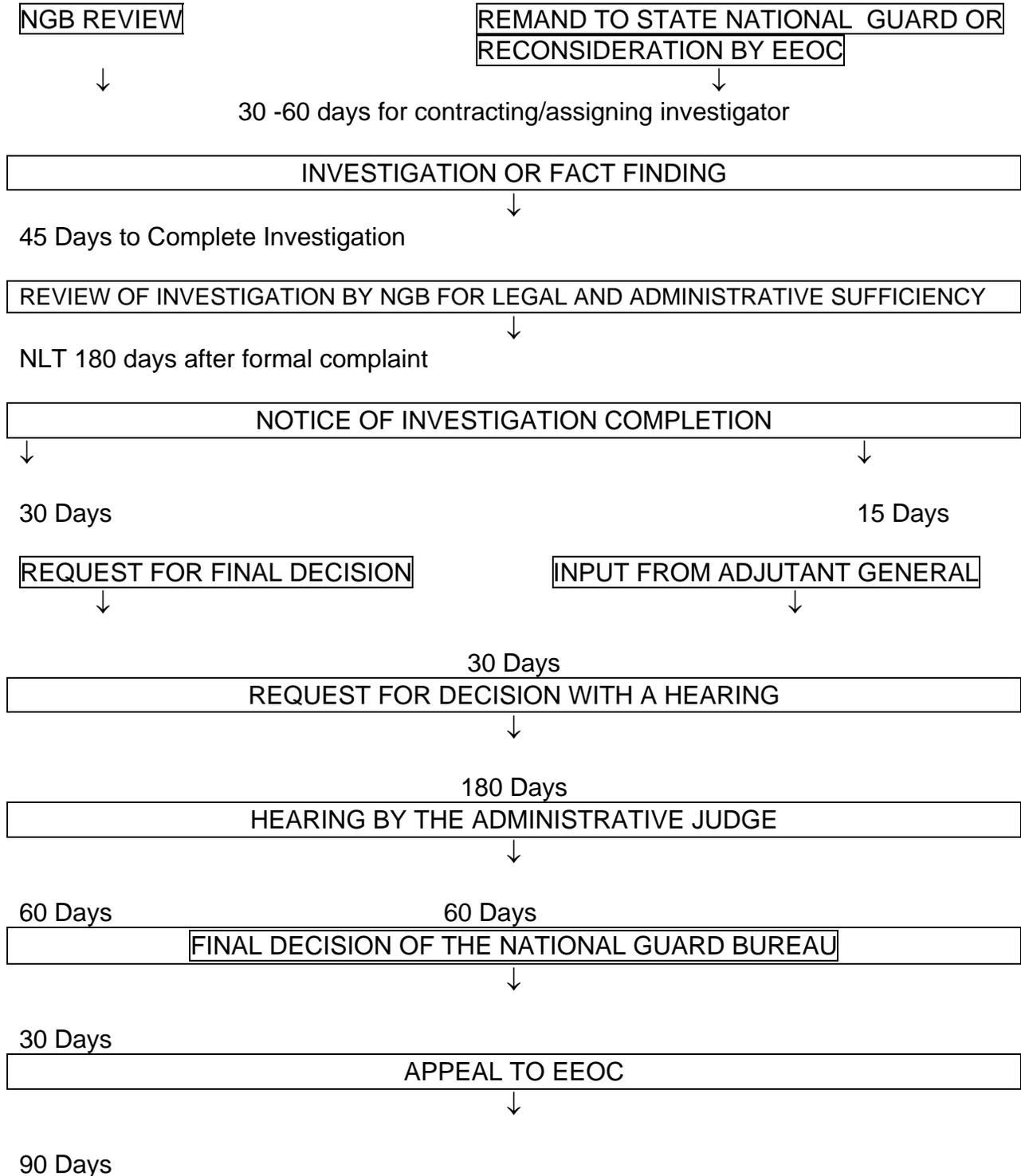
DISCRIMINATION COMPLAINT PROCESS



**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614



# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

CIVIL ACTION
--------------

Figure 1. Discrimination Complaint Process

APPENDIX E

REPORTING REQUIREMENTS

INTENTIONALLY LEFT BLANK

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## APPENDIX F

### FORM LETTERS AND FORMATS

This appendix contains the form letters and formats that are to be used in conjunction with the notification procedures, offers and decisions made during the administrative processing of discrimination complaints under this regulation. A listing of the form letters and formats in this appendix is found in the table of contents. Information contained in brackets [ ] is to be filled in by the preparer of the form letter or format. Form letters may be modified to conform to local correspondence formats. The following notes are common to more than one form letter and are referred to in the note section of a form letter.

#### NOTES:

1. This notice is given to the complaint during the initial counseling session with the EEO Counselor.
2. The complainant will acknowledge receipt by signing and dating the official file copy of this notice. If he/she declines to sign the copy, the EEO Counselor will sign it and indicate to whom and when the notice was given.
3. A copy of this notice will be forwarded to the SEEM together with the EEO Counselor's Report.
4. If the complainant has designated a representative, this form letter will be addressed to the representative with a copy to the complainant, unless the complainant has stated otherwise in writing. If the complainant has designated an attorney as his or her representative, service of documents will be made on the attorney and not the complainant. The complainant will be sent a copy of the document.
5. The notice is sent by certified mail, return receipt requested, or personally delivered. If the notice is personally delivered, the complainant and his/her representative will acknowledge receipt by signing and dating the official file copy of the notice. If he/she

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

declines to sign the copy, the server will sign it and indicate to whom and when the notice was served.

6. A copy of the notice and evidence of receipt will be filed in the official discrimination complaint case file.
7. Figure F-1 will be attached as an enclosure to this form letter.
8. The EEO Counselor indicates on the original of this form letter the date when he or she has received it. A copy is then given to the complainant.
9. Where a complainant has provided a narrative statement in lieu of separate and specific issues, and the issues are framed as provided in paragraph 4-5d, the following sentence will be added to paragraph 1: "Since the formal complaint did not list separate, clear, and specific issues, the issues cited in this notice were extracted from the narrative statement that was part of the formal complaint."

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Review, Hearing, Appeal, and Civil Action Rights

### 1. Review

The acceptance or dismissal of your complaint will be automatically reviewed by the National Guard Bureau. If the decision to accept or dismiss all or part of your complaint is reversed by the National Guard Bureau you and the State National Guard will be notified. However, if you plan to appeal the dismissal of your complaint, you must do so within thirty (30) calendar days after the receipt of the dismissal.

### 2. Hearing

If within 180 calendar days after the filing of a formal complaint and any extension agreed on, but not to exceed ninety (90) days, the National Guard Bureau has not issued a notice of investigation completion, you have a right to request a hearing by an Equal Employment Opportunity Commission Administrative Judge by writing to the EEOC District Office for your area. You may obtain that address from any EEO Counselor, the State Equal Employment Manager or from Appendix B of NGR (AR) 690-600/ NGR (AF) 40-1614.

### 3. Appeal

If all or a part of your complaint is dismissed and you are dissatisfied with a final decision issued by the National Guard Bureau, you may file an appeal and a statement or brief in support of the appeal with:

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

### 4. Time Limit for an Appeal

The appeal must be in writing and should use EEOC Form 573, Notice of Appeal/Petition, indicating what is being appealed. The appeal may be filed by mail, personal delivery, or facsimile. A copy of the appeal and a copy of any statement or brief in support of the appeal must be submitted within 30 calendar days of filing the appeal.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## 5. Civil Action

In accordance with 29 CFR 1614.408, a complainant is authorized to file a civil action in an appropriate U.S. District Court under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or the Rehabilitation Act, as follows:

(a) Within 90 days of receipt of the final decision on an individual or class complaint, if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint, if an appeal has not been filed and a final decision has not been issued;

(c) Within 90 days of receipt of the Commission's final decision on appeal; or

(d) After 180 days from the date of filing an appeal with the Commission, if there has been no final decision by the Commission.

## 6. Representation in Civil Action

If you do not have, or are unable to obtain the services of a lawyer, you may request the court to appoint a lawyer to represent you. In such circumstances as the court may deem just, the court may appoint a lawyer and may authorize the commencement of the action without the payment of fees, costs, or security. Any such request must be made within the time limits for filing the civil action and in such form and manner as the court may require.

## 7. Proper Defendant

If you file a civil action, you must name the Secretary of the Army or the Air Force, as listed in the subject of this notice, as the defendant. Failure to name Secretary of the Army or the Air Force, as appropriate, may result in the loss of any judicial redress to which you may be entitled.

## 8. Mixed Case Complaints

If your complaint includes an action that is also appealable to the Merit Systems Protection Board (MSPB), you have the following rights:

a. If your complaint is dismissed because you filed an appeal to the MSPB, you may not file an appeal with the EEOC unless you claim that the complaint or issue dismissed was not a mixed case matter. However, you will have the right to petition the EEOC to review the MSPB final decision on the discrimination issue.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. If you are dissatisfied with a final decision issued by the National Guard Bureau, you may file an appeal with the MSPB, rather than the EEOC, and your appeal must be filed within 20 calendar days after the receipt of the final decision.

F-2

c. If you have not received a National Guard Bureau final decision within 120 days after filing your complaint, you may at any time thereafter file an appeal with the MSPB as specified 5 CFR 1201.154(a) or you may file a civil action.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Figure F-1. Review, Hearing, Appeal, and Civil Action Rights

F-3

## **RIGHTS AND RESPONSIBILITIES IN DISCRIMINATION COMPLAINTS**

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

(DATE)

SUBJECT: Rights and Responsibilities for Complaints of Discrimination

TO: (Name of person counseled)

1. If you believe that you have been discriminated against, you have certain rights and responsibilities under the National Guard Civilian Discrimination Complaint System of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614.

Complaints under these regulation must:

a. Involve an employment matter subject to the control of the national Guard;  
and

b. Be based on race, color, religion, gender ( to include sexual harassment) age, national origin, physical or mental handicap; or

c. Be based on retaliation, restraint, interference, or coercion in connection with an equal employment opportunity matter or opposition to an unlawful employment practice under the anti-discrimination laws.

2. If you wish to pursue a complaint of discrimination, you must first participate in pre-complaint counseling so that an EEO Counselor may attempt to informally resolve your complaint.

a. You must meet and cooperate with the EEO Counselor. Such counseling may continue for thirty (30) days after the day you brought the matters giving rise to your complaint to the attention of the EEO Counselor or the State Equal Employment Manager (SEEM).

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. The EEO Counselor will not reveal your identity unless you authorize it or unless you file a formal complaint after completing counseling. However, it may be difficult to achieve a resolution if your identity is not revealed.

F-4

c. The National Guard has a Dispute Resolution Process; this process will be explained to you and you will have an opportunity to participate in it.

d. If your complaint is not resolved in the pre-complaint stage, you will be issued a right to file a formal complaint. You will not be restrained or discouraged from filing a formal complaint. The EEO Counselor or the SEEM will help you to fill out NGB Form 713-5, Complaint of Discrimination in the National Guard.

3. You may file a formal complaint only on the matters raised in pre-complaint counseling and discussed with your EEO Counselor or on like or related matters. Together with the EEO Counselor you must define these matters so they can be listed as clear and specific issues, and you must identify in each issue the act or personnel action that you believe was discriminatory, the date when the discrimination took place, and what you believe was the basis of the discrimination.

4. If your complaint is accepted, it will be investigated. The burden of proof rests with you to show by a preponderance of evidence that discrimination took place. You will receive a copy of the Report of Investigation. You can then request an immediate final decision from the Chief, National Guard Bureau, or request a decision after a hearing by an Administrative Judge from the Equal Employment Opportunity Commission. These and the other rights and responsibilities in this notice will be explained to you by the EEO Counselor during the initial counseling session.

5. If you are a member of a bargaining unit, if your complaint involves matters that can be appealed to the Merit Systems Protection Board, or if your complaint is based on age, you may have options in processing your complaint as explained in the enclosures to this notice. Your rights to appeal dismissals and decisions and to file civil action in a Federal court are also explained in an enclosure. During the EEO complaint process, if you choose to pursue it, you will again be advised of your rights and responsibilities.

6. You have a right to be represented at any step of the complaint process. You must advise the EEO Counselor and, if you file a formal complaint, the State Equal Employment Manager and the National Guard Bureau Complaints Management Branch of the name, address, and telephone number of your representative and whether your representative is an attorney. Unless you specify otherwise in writing, all

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

correspondence will be with your representative, with copies to you. If your representative is an attorney, decisions and other documents will be served on the attorney.

**Figure F-2. Rights and Responsibilities in Discrimination Complaints**

F-5

7. If you file a formal complaint, you must keep the State Equal Employment Manager and the National Guard Bureau Complaints Management Branch informed of your current address. If you file an appeal, you must also keep the Equal Employment Opportunity Commission informed of your current address. If you cannot be located, your complaint may be dismissed. Any appeals, statements or briefs must also be served on your State National Guard and the National Guard Bureau at the address that will be provided to you.

8. The EEO Counselor will explain to you the remedies to which you may be entitled if you file a formal complaint and if discrimination is found. If you are granted relief that involves back pay, it is your duty to mitigate damages.

(Signature of EEO Counselor)  
(Typed Name of EEO Counselor)

- 3 Enclosures
- 1. Election of Procedures
- 2. Age Discrimination
- 3. Review and Appeal Rights

I have read and understand my rights and responsibilities in this notice and the enclosures and have had them explained to me by the EEO Counselor or the State Equal Employment Manager

(Signature of person counseled) (Date Signed)

Notes for figure F-2 Notes 1,2,3 and 7 apply.

**Figure F-2. Rights and Responsibilities in Discrimination Complaints**

F-5

**ELECTION OF PROCEDURES FOR DISCRIMINATION COMPLAINTS**

1. If you believe that you have been discriminated against because of race, color, religion, gender (to include sexual harassment), age, national origin, physical or mental handicap, or have been subjected to retaliation, restraint, interference, or coercion in connection with an equal employment opportunity matter, and if the discrimination involves an employment matter subject to the control of the National Guard, you may have a choice of how to file your complaint and to have it resolved.

2. Your options are as follows:

a. If you are not a member of a bargaining unit covered by a union contract, you must follow the EEO complaint procedures established by the Equal Employment Opportunity Commission (EEOC) as outlined in National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614 and governed by Title 29 Code of Federal Regulations Part 1614.

b. If you are a member of a bargaining unit covered by a union contract and if the negotiated grievance procedures in that contract do not prohibit the raising of allegations of discrimination, you may:

(1) follow the discrimination complaint procedures in paragraph 2a, above; or

(2) Follow the negotiated grievance procedure in your union contract. If you elect this option, you have the right to appeal to the EEOC the final decision of the Adjutant General, the arbitrator, or the Federal Labor Relations Authority.

3. If your complaint is a mixed case, that is, if it is the result of alleged discrimination or retaliation and involves an action which is appealable to the Merit Systems Protection Board (MSPB), you may have a third option. (National Guard Technicians have appeal rights to the MSPB in cases of: (1) failure to properly restore from military service, (2) failure to properly restore from injury, and (3) denial of within-grade increase for General Schedule personnel). You may:

a. Follow the discrimination complaint procedures in paragraph 2a, above; or

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

- b. Use the negotiated grievance procedure, provided you are a member of a collective bargaining unit, as outlined in paragraph 2b, above; or
- c. Appeal directly to the MSPB. If you choose this option, you may ask the EEOC to review the MSPB final decision.

### **PROCEDURES FOR AGE DISCRIMINATION COMPLAINTS**

1. To file an age discrimination complaint you must have been at least 40 years of age when the alleged discrimination took place. If you believe that you have been discriminated against because of your age or have been subjected to reprisal, restraint, interference, or coercion in connection with an equal employment opportunity matter involving your age, and if the discrimination involves a matter that is subject to the control of the National Guard, you may have an additional choice of filing your complaint. You may:

- a. File a complaint as described in the "Election of Procedures for Discrimination Complaints" that was provided to you by the EEO Counselor; or

- b. Elect to bypass the administrative procedure and file a civil action directly in an appropriate U.S. District Court, after first filing a written notice of intent to file a civil action with the EEOC within 180 calendar days of the date of the alleged discriminatory action. Once a timely notice of intent to sue is filed with the EEOC, you must wait at least 30 calendar days before filing a civil action.

2. If you bypass the administrative procedure and file a civil action, your notice of intent to sue should be dated and must contain the following information:

- a. Statement of intent to file a civil action under Section 15(d) of the Age Discrimination in Employment Act of 1967 (ADEA), as amended.

- b. Your name, address, and telephone number.

- c. Name, address, and telephone number of your representative, if any.

- d. Name and location of the federal agency where the alleged discriminatory action occurred.

- e. Statement of the nature of the alleged discriminatory actions (s).

- f. Date(s) the alleged discriminatory action(s) occurred.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

- g. Your signature of your representative.
3. Notices of intent to Sue under the ADEA must be submitted to the Federal Sector Programs, Equal Employment Opportunity Commission, 1801 L. Street NW, Washington, D.C 20507
  4. If you elect to file an administrative complaint rather than filing directly in federal court, as described above, you must exhaust your administrative remedies before filing a civil action. These remedies are exhausted:
    - a. After the National Guard Bureau has issued a final decision or 180 days after filing your complaint, if NGB has not issued a final decision.
    - b. After the EEOC has issued a decision on an appeal or 180 days after filing your appeal if there has been no decision.
  5. Because the courts have issued different decisions on what is the correct statute of limitations in the Age Discrimination in Employment Act as it applies to Federal employees, if you elect to file a civil action instead of using the administrative process, you should file as soon as possible after the expiration of the 30 day waiting period. You may also wish to seek competent legal advice regarding the facts of your particular case and the jurisdiction involved before making your election of procedures.
  6. If you have any other questions, contact the EEO Counselor or State Equal Employment Manager.

Notes for Figure F-4: This is an enclosure to Figure F-2. Notes 1 and 3 apply.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure F-4. Procedures for Age Discrimination Complaints**

F-7

**AGREEMENT TO EXTEND COUNSELING**

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

(DATE)

SUBJECT: Agreement to Extend Counseling for 30 days

TO: (Name of EEO Counselor), EEO Counselor

1. On (DATE) I brought the matters giving rise to my complaint to the attention of (an EEO Counselor/the State Equal Employment Manager) and had my initial counseling session on (DATE). You have advised me that although your inquiry into my complaint cannot be completed within the required thirty (30) days from the date I first brought the matters giving rise to my complaint to the attention of an EEO Counselor or the SEEM, with some additional time you may be able to resolve my complaint. You have also informed me that the SEEM agrees with this assessment and has approved an extension of the inquiry and counseling not to exceed thirty (30) calendar days, for a total of sixty (60) days from the date I first brought the matters giving rise to my complaint to the attention of an EEO Counselor or the SEEM.

2. I agree to the extension. I understand that if by the end of that extension my complaint has not been resolved, you will hold a final interview with me and will issue a notice of right to file a formal complaint to me. I understand that this will take place not later than sixty (60) calendar days from the date I first brought the matters giving rise to my complaint to the attention of an EEO Counselor or the SEEM.

(Signature of Complainant)  
(Typed Name of Complainant)

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Notes for Figure F-5 Notes 3 and 8 apply.

## Figure F-5. Agreement to Extend Counseling

F-8

### DISPUTE RESOLUTION PROCESS AGREEMENT

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

(DATE)

SUBJECT: Agreement to Participate in the Alternative Resolution Dispute Process

TO: (Name of EEO Counselor), EEO Counselor

1. On (DATE) I brought the matters giving rise to my complaint to the attention of (an EEO Counselor/ the State Equal Employment Manager) and had my initial counseling on (DATE). You have advised me that the National Guard has a dispute resolution process and I understand that:

a. The purpose of the dispute resolution process is to help resolve discrimination complaints before they are filed as formal complaints. You have reviewed with me Chapter 2 of NGR (AR) 690-600/ NGR (AF) 40-1614, which explains how the dispute resolution process works.

b. In participating in the dispute resolution process, I do not forfeit my right to file a formal complaint if my complaint is not resolved.

c. If my complaint is resolved, any settlement agreement that is reached will be reduced to writing, and I will be provided a copy of the agreement.

d. By participating in the dispute resolution process, I agree to extend the pre-complaint process not to exceed sixty (60) days, for a total of ninety (90) days from the date I first brought the matters giving rise to my complaint to the attention of an EEO Counselor or the SEEM.

e. If by the end of the that extension my complaint has not been resolved, a final interview will be held with me, and I will receive a notice right to file a formal complaint. I understand that this will take place not later than ninety (90) calendar days from the

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

dated I first brought the matters giving rise to my complaint to the attention of an EEO Counselor or the SEEM.

2. I agree to participate in the dispute resolution process established in Appendix B of NGR (AR) 690-600/ NGR (AF) 40-1614. In addition to the dispute resolution procedure with a review by the Adjutant General, I do/do not (delete one option and initial) want to participate in the confidential mediation process.

(Signature of Complainant)  
(Typed Name of Complainant)

Notes for Figure F-6: Notes 3 and 8 apply.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-6. Alternative Dispute Resolution Process Agreement

F-9

### **NOTICE OF FINAL INTERVIEW AND RIGHT TO FILE A COMPLAINT (IN PERSON)**

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

(DATE)

SUBJECT: Notice of Final Interview and Right to File a Formal Complaint for (Full name of complainant), State (Army or Air) National Guard.

TO: (Name of person counseled)

1. This is notice that on the above date the final counseling interview was held in connection with the matter you presented to me as an EEOC Counselor. You initially brought the matter to the attention of an EEO Counselor/ the State Equal Employment Manager on (DATE) and had an initial counseling session on (DATE). You stated that you believed that you were discriminated on the basis of (basis of discrimination).
2. If you believe you have been discriminated against on the basis of race, color, religion, gender (to include sexual harassment), national origin, age, physical or mental handicap, retaliation for participating in an EEO activity, or for opposing an unlawful employment practice under the anti-discrimination laws, you have the right to file a formal complaint of discrimination WITHIN FIFTEEN (15) CALENDAR DAYS AFTER RECEIPT OF THIS NOTICE.
3. The complaint must be in writing on NGB Form 713-5, which is enclosed with this notice. It must be filed in person, or by facsimile, or by mail with the State Equal Employment Manager (SEEM) or the Adjutant General at the following address:
  - a. (Name, address, and facsimile number of the SEEM)
  - b. (Name, address, and facsimile number of the Adjutant General)
4. Your formal complaint must state clear and specific issues which form the basis of your complaint. If you include issues on which you have not been counseled, such

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

issues may be dismissed. Each issue must contain the specific act or personnel action that you believe was discriminatory, the date of the occurrence, and the basis of the discrimination. If your issues are not clear or specific or do not contain this information, you will have to clarify your issues before the complaint can be processed. To avoid any delay, your EEO Counselor or the SEEM is ready to assist you in completing NGB Form 713-5 and in preparing your formal complaint, should you choose to proceed.

5. The complaint must also state whether you have filed a grievance under a negotiated grievance procedure or an appeal to the Merit System Protection Board on the same subject matter and if so, the date it was filed.
6. If you retain a representative, you must provide his or her name, address, and telephone number to the SEEM at the above address. If your representative is an attorney, you must so indicate. You and your representative will receive a written notice of receipt of your discrimination complaint.

(Signature of EEO Counselor)  
(Typed name of EEO Counselor)

Enclosure  
NGB Form 713-5

Notes for Figure F-7: This notice is given to the complainant at the final interview. Notes 2 and 3 apply.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-7. Notice of Final Interview (in Person)

F-10

### NOTICE OF FINAL INTERVIEW AND RIGHT TO FILE A COMPLAINT (BY MAIL)

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

(DATE)

SUBJECT: Notice of Final Interview and Right to File a Complaint for (Full name of complainant), (State) (Army or Air) National Guard

TO: (Name and address of person counseled)

1. A final counseling interview was not held in person because (explain efforts to schedule the interview within the required time limit and the complainants refusal or inability to participate). I have, therefore, summarized the items I would have discussed with you in the final interview and enclosed this summary to this notice.
2. You initially brought this matter to the attention of an EEO Counselor/ the State Equal Employment Manager on (DATE) and had an initial counseling session on (DATE). You stated that you believed that you were discriminated on the basis of (basis of discrimination).
3. If you believe you have been discriminated against on the basis of race, color, religion, gender (to include sexual harassment), national origin, age, physical or mental handicap, retaliation for participating in an EEO activity, or for opposing an unlawful employment practice under the anti-discrimination laws, you have the right to file a formal complaint of discrimination WITHIN FIFTEEN (15) CALENDAR DAYS AFTER RECEIPT OF THIS NOTICE.
4. The complaint must be in writing on NGB Form 713-5, which is enclosed with this notice. It must be filed in person, by facsimile, or by mail with the State Equal Employment Manager (SEEM) or the Adjutant General at the following address:
  - a. (Name, address, and facsimile number of the SEEM)

CLXXXVIII

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. (Name, address, and facsimile number of the Adjutant General)

5. Your formal complaint must state clear and specific issues which form the basis of your complaint. If you include issues on which you have not been counseled, such issues may be dismissed. Each issue must contain the specific act or personnel action that you believe was discriminatory, the date of the occurrence, and the basis of the

discrimination. If your issues are not clear or specific or do not contain this information, you will have to clarify your issues before the complaint can be processed. To avoid any delay, your EEO Counselor or the SEEM is ready to assist you in completing NGB Form 713-5 and in preparing your formal complaint, should you choose to proceed.

6. The complaint must also state whether you have filed a grievance under a negotiated grievance procedure or an appeal to the Merit System Protection Board on the same subject matter and if so, the date it was filed.

7. If you retain a representative, you must provide his or her name, address, and telephone number to the SEEM at the above address. If your representative is an attorney, you must so indicate. You and your representative will receive a written notice of receipt of your discrimination complaint.

(Signature of EEO Counselor)  
(Typed name of EEO Counselor)

Enclosure

1. NGB Form 713-5
2. Summary of Final Interview

Notes for Figure F-7: This notice is given to the complainant at the final interview. Notes 2 and 3 apply.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-8. Notice of Final Interview ( by mail

F-11

### NOTICE OF RECEIPT OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Receipt of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complainant or complainants representative)

1. This notice acknowledges receipt on (DATE), of (your/your clients) discrimination complaint dated (DATE). Based on (personal delivery/postmark/lack of legible postmark), the complaint is deemed filed on (DATE). Unless the issues in the complaint require clarification, a notice of the acceptance or dismissal of the complaint will be mailed to you within ten (10) days after the date the complaint was received.
2. If the complaint ( or any issue contained in it) is dismissed, you will be able to appeal, as explained in the enclosure.
3. If the complainant is accepted, it will be investigated. You will be advised if an Investigator will be assigned or if other fact finding procedures will be used. The State Equal Employment Manager will contact you to schedule an investigation and will explain to you the procedures used in the investigation. You will be notified when the investigation or fact finding is completed, and you will receive a copy of the Report of Investigation or fact finding. At that time you will have an opportunity to ask for a decision by the Chief, National Guard Bureau, or by an Equal Opportunity Commission Administrative Judge, with or without a hearing.
4. If you are dissatisfied with the final decision form the National Guard Bureau, you will be able to file an appeal as explained in the enclosure.

CXC

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

5. Within 180 days after the filing the date of the complaint, the National Guard will issue you a notice of acceptance or dismissal and conduct a complete and fair investigation of the complaint. You may agree to extend the time of investigation for up to ninety (90) days. If within 180 days and any extension agreed upon, the National Guard Bureau has not issued a notification that the investigation or fact finding was completed, you may request a hearing on the complaint as explained in the enclosure.

6. If you have any further questions, contact your EEO Counselor or me at (Commercial/DSN number).

Enclosure  
Review and Appeal Rights

(Signature of State Equal Employment Manager)  
(Typed name of State Equal Employment Manager)

Notes for Figure F-9: Notes numbers 4,5,6 and 7 apply.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-9. Notice of Receipt of Discrimination Complaint

F-12

### REQUEST FOR CLARIFICATION OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Request for Clarification of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary, Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complainant or complainant's representative

1. This refers to (your/your clients) discrimination complaint filed on (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). In order to determine if the issues in the complaint should be accepted or dismissed and in order to be able to investigate any accepted issues, each issue must be clear and specific identifying in each issue the act or personnel action that you believe was discriminatory, the date the discrimination took place, and what you believe was the basis of the discrimination. A description of the events and circumstances surrounding the allegations of discrimination can be included as a supporting statement but should not take the place of listing the issues you wish to have considered as part of your formal complaint.

2. Attempts to clarify the issues in person have not been successful (explain the attempts made to clarify issues in person or by telephone).

3. In order to process your complaint, please provide the following information:

a. (List specific information that is needed that is not already available from the EEO Counselor's report, personnel records, or other available documents. General statements such as "clarify the issues," will not be used.

b. etc.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

4. This information must be provided within fifteen (15) calendar days after you receive this request. If you fail to respond or if your response does not provide the information requested, the complaint or the portions of the complaint that require clarification will be dismissed. In that case you will be provided a notice of dismissal and rights of appeal.

(Signature of State Equal Employment Manager)  
(Typed Name of State Equal Employment Manager)

Notes for Figure F-10: Notes numbers 4,5 and 6 apply.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-10. Request for Clarification of Discrimination Complaint

F-13

### NOTICE OF ACCEPTANCE OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Acceptance of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This refers to (your/your client's) discrimination complaint filed (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). The complaint was based on (basis of the complaint) discrimination in the following action(s): (Summarize the matter that gave rise to the complaint, as listed in the issue(s)).

2. Based on the criteria of Title 29 Code of Federal Regulations part 1614-107 as implemented in Chapter 4 of NGR (AR) 600-900/ NGR (AF) 40-1614, the following issues raised in the complaint are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

a. (Each issue will be cited verbatim)

b. Etc.

3. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(Signature)  
The Adjutant General

Notes for Figure F-11: Notes 4,5, 6, and 9 apply.

**Figure F-11. Notice of Acceptance of Discrimination Complaint**

F-14

**NOTICE OF DISMISSAL OF DISCRIMINATION COMPLAINT**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Dismissal of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This refers to (your/your client's) discrimination complaint filed (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). The complaint was based on (basis of the complaint) discrimination in the following action(s): (summarize the matter that gave rise to the complaint, as listed in the issue(s)).

2. Based on the criteria of Title 29 Code of Federal Regulations part 1614-107 as implemented in Chapter 4 of NGR (AR) 600-900/ NGR (AF) 40-1614, the following issues raised in the complaint are dismissed, subject to review and approval of the dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. (Each issue will be cited verbatim). (Cite the regulatory reason of dismissal from paragraph 4-10, NGR (AR) 690-600/ NGR (AF) 40-1614 and 29 CFR Part 1614. (Explain how and why this particular reason applies to the issue raised by the complainant).

b. Etc.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

3. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1,3,4 and 8 of the enclosed Review and Appeal Rights.

Enclosure  
Review and Appeal Rights

(Signature)  
The Adjutant General

Notes for Figure F-12: Notes 4,5, 6,7 and 9 apply.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-12. Notice of Dismissal of Discrimination Complaint

F-15

### NOTICE OF PARTIAL ACCEPTANCE/DISMISSAL OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Partial Acceptance/Dismissal of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This refers to (your/your client's) discrimination complaint filed (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). The complaint was based on (basis of the complaint) discrimination in the following action(s): (summarize the matter that gave rise to the complaint, as listed in the issue(s)).

2. Based on the criteria of Title 29 Code of Federal Regulations part 1614-107 as implemented in Chapter 4 of NGR (AR) 600-900/ NGR (AF) 40-1614, the following issues raised in the complaint are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

a. (Each issue will be cited verbatim)

b. Etc.

3. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

4. Based on the criteria in the regulations cited in paragraph 2 above, the following issues raised in the complaint are dismissed, subject to review and approval of the dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. (Each issue will be cited verbatim). (Cite the regulatory reason of dismissal from paragraph 4-10, NGR (AR) 690-600/ NGR (AF) 40-1614 and 29 CFR Part 1614.

(Explain how and why this particular reason applies to the issue raised by the complainant).

b. Etc.

Enclosure  
Review and Appeal Rights

(Signature)  
The Adjutant General

Notes for Figure F-13: Notes 4,5, 6, and 9 apply.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure F-13. Notice of Acceptance of Discrimination Complaint**

F-16

**NOTICE OF ACCEPTANCE OF DISCRIMINATION COMPLAINT**  
**(After Clarificaton)**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Acceptance of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This refers to (your/your client's) discrimination complaint filed (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). The complaint was based on (basis of the complaint) discrimination in the following action(s): (Summarize the matter that gave rise to the complaint, as listed in the issue(s)).

2. You have clarified the issues raised in the complaint (in person with the SEEM on \_\_\_\_/by telephone with the SEEM on \_\_\_\_/by letter, dated \_\_\_\_).

3. Based on the criteria of Title 29 Code of Federal Regulations part 1614-107, as implemented in Chapter 4 of NGR (AR) 600-900/ NGR (AF) 40-1614, the following issues raised in the complaint and clarified by you are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

- a. (Cite each issue as it now reads after completion of the clarification).
- b. Etc.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

4. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

(Signature)  
The Adjutant General

Notes for Figure F-11: Notes 4,5, 6, and 9 apply.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure F-14. Notice of Acceptance of Discrimination Complaint (After Clarification)**

F-17

**NOTICE OF DISMISSAL OF DISCRIMINATION COMPLAINT**  
**(After Clarification)**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Dismissal of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This refers to (your/your client's) discrimination complaint filed (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). The complaint was based on (basis of the complaint) discrimination in the following action(s): (Summarize the matter that gave rise to the complaint, as listed in the issue(s)).

2. You have clarified the issues raised in the complaint (in person with the SEEM on \_\_\_\_/by telephone with the SEEM on \_\_\_\_/by letter, dated \_\_\_\_).

3. Based on the criteria of Title 29 Code of Federal Regulations part 1614-107, as implemented in Chapter 4 of NGR (AR) 600-900/ NGR (AF) 40-1614, the following issues raised in the complaint and clarified by you are dismissal, subject to review and approval of the dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. (Cite each issue as it now reads after completion of the clarification).

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. Etc.

4. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1, 3, 4, and 8 of the enclosed Review and Appeal Rights.

Enclosure  
Review and Appeal Rights

(Signature)  
The Adjutant General

Notes for Figure F-15: Notes 4,5, 6, and 7 apply.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure F-15. Notice of Dismissal of Discrimination Complaint (After Clarification)**

F-18

**NOTICE OF PARTIAL ACCEPTANCE/DISMISSAL OF DISCRIMINATION  
COMPLAINT  
(After Clarification)**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Partial Acceptance/Dismissal of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This refers to (your/your client's) discrimination complaint filed (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). The complaint was based on (basis of the complaint) discrimination in the following action(s): (summarize the matter that gave rise to the complaint, as listed in the issue(s)).

2. You have clarified the issues raised in the complaint (in person with the SEEM on \_\_\_\_/by telephone with the SEEM on\_\_\_\_\_/by letter, dated\_\_\_\_\_).

3. Based on the criteria of Title 29 Code of Federal Regulations part 1614-107 as implemented in Chapter 4 of NGR (AR) 600-900/ NGR (AF) 40-1614, the following issues raised in the complaint are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

- a. (Each issue will be cited verbatim)
- b. Etc.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

4. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

5. Based on the criteria in the regulations cited in paragraph 2 above, the following issues raised in the complaint are dismissed, subject to review and approval of the

dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. (Each issue will be cited verbatim). (Cite the regulatory reason of dismissal from paragraph 4-10, NGR (AR) 690-600/ NGR (AF) 40-1614 and 29 CFR Part 1614. (Explain how and why this particular reason applies to the issue raised by the complainant).

b. Etc.

6. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1,3,4, and 8 of the enclosed Review and Appeal Rights.

Enclosure  
Review and Appeal Rights

(Signature)  
The Adjutant General

Notes for Figure F-16: Notes 4,5, 6, and 7 apply.

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-16. Notice of Partial Acceptance/Dismissal of Discrimination Complaint (After Clarification)

F-19

### REQUEST FOR NGB REVIEW/INVESTIGATION

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

MEMORANDUM FOR National Guard Bureau, Office of Equal Opportunity, 1411 Jefferson Davis Highway, JP-1, Room 2400, Arlington, VA 22202-3231.

SUBJECT: Request for Review of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

1. Request a review of the (acceptance/dismissal or partial acceptance/dismissal) of subject discrimination complaint. The official discrimination complaint case file (original and two copies) is enclosed.
2. The following issues were accepted:
  - a. (List each accepted issue. Omit this paragraph if not issues were accepted).
  - b. Etc.
3. The following issues were dismissed:
  - a. (List each dismissed issue. Omit this paragraph if not issues were dismissed).
  - b. Etc.

CCV

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

4. Information concerning complainant and representative:

a. (List complainant's work and home mailing addresses and telephone numbers),

b. (List name, address, and telephone number of complainant's representative. Indicate if the representative is an attorney. If there is no representative, so state).

5. Information for investigation: (Omit if no issues were accepted)

a. (Specific location of on-site investigation)

b. (Primary and alternate point of contact for investigation)

c. (State National Guard legal representative for investigation)

6. (Date the notice of acceptance/dismissal was mailed or personally delivered to complainant.

Enclosure  
Case file (3 copies)

(Signature)  
State Equal Employment Manager

Copy furnished:  
(Complainant & Representative)

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

## Figure F-17. Request for NGB Review / Investigation

F-20

### REQUEST FOR INFORMATION OR TO PROCEED WITH COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Request Information/Action in the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This request is submitted under the provisions of paragraph 4-11i of NGR (AR) 690-600/ NGR (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614.107 (a)(7). In order to process (your/your client's) discrimination complaint, please provide the following information or take the following action:

a. (List specific information that is needed that cannot be obtained from the complaint file, personnel records, or other available documents or the specific action required of the complainant).

b. Etc.

2. The reason for requesting this information/action is (explain the specific reason why this information is needed or the reason the action by the complainant is required. Cite regulatory authority or requirement imposed by NGB and EEOC.

3. This information must be provided/action must be taken within fifteen (15) calendar days after you receive this request. If you fail to respond or if your response does not address the request, all or part of the complaint may be dismissed for failure to cooperate, or the National Guard Bureau may adjudicate your complaint. You will then receive a notice of dismissal or a decision and your rights of appeal.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

(Signature)  
State Equal Employment Manager

Notes for Figure F-18: Notes numbers 4, 5 and 6 apply.

**Figure F-18. Request for Information or Action to Proceed with Complaint**

F-21

**PROPOSED DISMISSAL IN FAILURE TO LOCATE**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Proposed Dismissal of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This notice is sent under the provisions of paragraph 4-11j, NGR (AR) 690-600/ NGR (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614.107(a)(6). In order to continue to process your discrimination complaint, please respond to this correspondence and provide your current address.
2. The following efforts have been made to locate you and to provide information concerning your complaint (cite the efforts made to locate complainant).
3. If you fail to respond to this notice within fifteen (15) calendar days, your complaint will be considered dismissed and you have the appeal rights in the enclosed statement of rights.

Enclosure  
Review and Appeal Rights

(Signature)  
The Adjutant General  
or Designee

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Notes for Figure F-19: This notice is sent by regular mail and by certified mail with return receipt requested to the complainant's last known address. Note #7 applies.

**Figure F-19: Proposed Dismissal in Failure to Locate**

F-22

**OFFER OF STATE NATIONAL GUARD**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Offer of Full Relief in the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. This offer is made under the provisions of Chapter 7 of NGR (AR) 690-600/ NGR (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614.107(h) and 1614.501. The attached settlement agreement is an offer of full relief certified by or on behalf of the Director, Office of Equal Opportunity and Civil Rights, National Guard Bureau, as constituting the full relief authorized by law and regulations.
2. You have thirty (30) calendar days from the receipt of this notice to accept this offer. Failure to accept this offer within thirty (30) days will result in dismissal of your complaint.
3. If your complaint is dismissed because you refuse to accept this certified offer of full relief, you will have the right to appeal to the Equal Employment Opportunity Commission (EEOC). If EEOC affirms the dismissal of your complaint, then you may not receive any relief in the administrative process. You may then seek a de novo review of your complaint by filing civil action in an appropriate federal district court.

Enclosure  
Full Relief Settlement

(Signature)  
The Adjutant General  
(or official authorized to tender full relief offer)

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Notes for Figure F-20: Notes numbers 4,5, and 6 apply.

**Figure F-20. Offer of Full Relief**

F-23

**DISMISSAL FOR FAILURE TO COOPERATE OR ACCEPT OFFER OF FULL RELIEF**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Notice of Dismissal of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: (Name and address of complaint or complainant's representative)

1. On (DATE) you were provided a notice (requesting information/action in order to continue to process your complaint) (with a certified offer of full relief). You were advised that you had (15/30) calendar days from receipt of the notice for your response (response/action/acceptance). Our records indicate that you received the notice on (DATE).
2. Since you did not (respond/take the requested action/accept the offer of full relief) within the specified period, your complaint is hereby dismissed. This dismissal is based on the criteria of Title 29 Code of Federal Regulations Parts 1614.107 as implemented in Chapter 4 of NGR (AR) 690-600/ NGR (AF) 40-1614.
3. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1,3, 4 and 8 of the enclosed Review and Appeal Rights.

Enclosure

(Signature)  
The Adjutant General

CCX

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Review and Appeal Rights

Notes for Figure F-21: Notes 4,5, 6, and 79 apply.

**Figure F-21. Dismissal for Failure to Cooperate or to Accept Offer of Full Relief**

F-24

**AGREEMENT TO EXTEND INVESTIGATION**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

SUBJECT: Agreement to Extend Investigation of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

TO: Complaints Management Division  
National Guard Bureau (NGB-EO)  
1411 Jefferson Davis Highway  
JP-1 Room 2400  
Arlington, VA 22202-3231

1. This refers to (your/your client's) discrimination complaint filed (DATE). Receipt of the complaint was acknowledged by letter to you dated (DATE). The complaint was based on (basis of the complaint) discrimination in the following action(s): (summarize the matter that gave rise to the complaint, as listed in the issue(s)).
2. Subject complaint was formally filed on (DATE). I understand that the issuance of the notice of investigation completion may be delayed by \_\_\_\_\_ days (the period of the above extension).

(Signature)  
Complainant or representative

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

Concur: (Signature)  
State Equal Employment Manager

## Notes for Figure F-22:

1. This notice is given to the SEEM who transmit it to NGB-EO by facsimile and then mail the original to NGB-EO.
2. The investigation may not be extended beyond 270 days after the date of the filing of the formal complaint.
3. If the extension occurs during the investigative fact finding hearing, coordination of the State National Guard legal representative at the investigative hearing is required.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure F-22. Agreement to Extend Investigation**

F-25

**NOTICE OF INVESTIGATION COMPLETION**

NGB LETTERHEAD

(DATE)

Office of Equal Opportunity and Civil Rights

SUBJECT: Completion of Investigation/Fact Finding of the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

(Name and address of complaint or complainant's representative)

Dear (Title and name):

This is to advise you that the investigation/fact finding of the subject complaint has been completed. A copy of the Report of Investigation/Fact-Finding and a copy of the official discrimination complaint case file are enclosed.

In accordance with NGR (AR) 600-900/ NGR (AF) 40-1614 of Title 29 Code of Federal Regulations part 1614, you have the following rights dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. You may request an immediate final decision from the National Guard Bureau (NGB) within thirty (30) calendar days after receiving this notice. Your request must be in writing and addressed to the Complaints Management Division (NGB-EO), National Guard Bureau, 1411 Jefferson Davis Highway, JP-1, Room 2400, Arlington, Virginia 22202-3231. Within sixty (60) days after the receipt of your request a final decision will be issued on behalf of the Chief, National Guard Bureau. The decision on the merits of the complaint will be based on a preponderance of evidence.

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

b. You may request a final decision from NGB preceded by a hearing with an Equal Employment Opportunity Commission Administrative Judge (EEOC AJ). Your request must be in writing, within thirty (30) calendar days after receiving this notice, and addressed to the Complaints Management Division at the address above. A copy of the request must be sent to the State Equal Employment Manager at the address previously provided. The EEOC AJ will send recommended findings and conclusions to NGB within 180 days after receiving the hearing request, unless good cause exists for

extending this time. Within sixty (60) days after the receipt of the recommendation of the EEOC AJ, a final decision will be issued on behalf of the Chief, National Guard Bureau. The decision on the merits of the complaint will be based a preponderance of evidence.

If you are not satisfied with the NGB final decision, you will have the right to appeal or file civil action. These rights have been previously explained to you and will again be provided with the final decision.

You may also be contacted by National Guard representatives to resolve your complaint. You are encouraged to seek a resolution of your complaint. Please be advised, however, that such resolution attempts do not serve to extend the thirty (30) day limit for requesting a final decision. If you plan to ask for a National Guard Bureau decision, with or without a hearing, you still must do so within thirty (30) calendar days after the receipt of this notice.

If you choose to voluntarily and unconditionally withdraw your complaint, you must send a written withdrawal to the Complaints Management Division at the above address.

Enclosure

(Signature)  
EEO Specialist

Copies Furnished  
Complainant or representative  
The Adjutant General, (State)  
State Equal Employment Manager, (State)

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure F-23. Notice of Investigation Completion**

F-26

**NGB FINAL DECISION**

NGB LETTERHEAD

(DATE)

Office of Equal Opportunity and Civil Rights

SUBJECT: Final Decision in the Discrimination Complaint of (Full name of complainant), (State) (Army or Air) National Guard, and (Full name of Secretary), Secretary of the (Army or Air Force), NGB Case No. (T-XXX-XX-X-XX-XX-X)

(Name and address of complaint or complainant's representative)

Dear (Title and name):

This letter constitutes the final decision of the National Guard Bureau (NGB) on subject discrimination complaint and the rights of further appeal. You were issued a notice of investigation completion and advised of your rights in connection with that action. You have requested an immediate decision by the National Guard Bureau<sup>1</sup>

It is the National Guard Bureau's decision to adopt a finding of (no)<sup>2</sup> discrimination on the issued (s) raised in your complaint. This decision is based on a review and analysis of all evidence of record and a conclusion that the preponderance of the evidence supports this decision.

In accordance with Chapter 8 of NGR (AR) 690-600/ NGR (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614, subpart D, you may appeal this decision within thirty (30) calendar days of its receipt. You may file an appeal and a statement or brief in support of the appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O Box 19848, Washington, DC 20036. The appeal must be writing by using EEOC Form 573, Notice of Appeal/Petition, indicating what is being appealed. The appeal may be filed by mail, personal delivery, or

## DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

facsimile. A copy of your appeal must be sent to the Complainants Management Division (NGB-EO), National Guard Bureau, JP-1, Room 2400, Arlington, Virginia 22202-3231. A copy of the appeal should also be sent to the State Equal Employment Manager at the address previously provided.

Under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or the Rehabilitation Act, you may file a civil action in an appropriate U.S. District Court within ninety (90) calendar days of its receipt. You may file an appeal and a statement or brief in support of the appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, DC 20036. The appeal must be in writing by using EEOC Form 573, Notice of Appeal/Petition, indicating what is being appealed. The appeal may be filed by mail, personal delivery, or facsimile. A copy of your appeal must be sent to the Complaints Management Division (NGB-EO), National Guard Bureau, JP-1, Room 2400, Arlington, Virginia 22202-3231. A copy of the appeal should also be sent to the State Equal Employment Manager at the address previously provided.

Under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or the Rehabilitation Act, you may file a civil action in an appropriate U.S District Court within ninety (90) calendar days of receipt of this decision if no appeal has been filed; or within 90 calendar days of receipt of the decision on appeal; or after 180 calendar days from the date of filing an appeal if there has been no decision on the appeal. If you choose to file a civil action, and you do not have or are unable to obtain the services of a lawyer, you may request the court to appoint a lawyer to represent you. In such circumstances as the court may deem just, the court may appoint a lawyer for you and may authorize the commencement of the action without the payment of fees, costs, or security. Any such request must be made within the above time limits and in such form and manner as the court may require.

If you file a civil action, you must name the Secretary (shown in subject of this letter) as the defendant. Failure to name the Secretary may result in the loss of any judicial redress to which you may be entitled.

Sincerely,

(Signature)  
Director, Office of Equal Opportunity

Enclosure

Copies furnished:  
Complainant or representative

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

The Adjutant General (State)  
State Equal Employment Manager (State)

## Figure 24. NGB Final Decision

F-27

Notes for Figure 24:

1. This sentence may be replaced by one of the following, depending on the circumstances of the case:

“You had requested a decision by NGB with a hearing the an Equal Employment Opportunity Commission Administrative Judge (EEOC AJ). A transcript of that hearing is enclosed/has been sent to you by the EEOC AJ”.

“Our records show that you received this notice on (DATE) and you have not indicated your wishes within the prescribed 30-day period. Therefore, NGB is issuing the following decision”.

2. If the NGB decision is for discrimination on one or more issues, the following will be included:

“The Adjutant General of (State) has been requested to take appropriate remedial action authorized by law and determined to be necessary to resolve your discrimination complaint. Such actions will constitute the full relief required in your case.”

“Any request for attorney fees must be filed within thirty (30) calendar days after receiving this decision in accordance with Chapter 7 of NGR (AR) 690-600/ NGR (AF) 40-1614”.

3. This sentence may be replaced by one of the following, depending on the circumstances of the case:

“This decision is based on the findings and recommendations of the EEOC AJ”.  
Or;

“This decision is based on the findings and recommendations of the EEOC AJ, modified as follows: (state the modification). This modification is based on (reason)”.



# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

6. This is a final resolution of all issues in discrimination complaint NGB Case No. T- (number) and any further administrative or legal proceeding, in any forum whatsoever, are waived except for the enforcement of this settlement or attorney's fees appeals under Chapters 7 and 8, NGR (AR) 690-600/ NGR (AF) 40-1614 and Title 29 Code of Federal Regulations Parts 1614.401(a) and 1614.501(e)(2).

If the complainant believes that the National Guard has failed to comply with the terms of this settlement agreement for any reason not attributable to acts, omissions, or conduct of the complainant, the complainant must notify, in writing, the National Guard

Bureau Complaints Management Division (NGB-EO), 1411 Jefferson Davis Highway, JP-1, Room 2400, Arlington, Virginia 22202-3231, within thirty (30) calendar days of when the complainant knew or reasonably should have known of the alleged noncompliance.

7. The complainant acknowledges that he/she has read and understands this settlement agreement and knowingly and voluntarily accepts and agrees to its provisions. The complainant also acknowledges that he/she has had the opportunity to consult with any attorney, if he/she so desired.

FOR THE AGENCY:

FOR THE COMPLAINANT:

(Signatures, titles, and dates executed by authorized State National Guard representative (s) and the complainant and the complainant's representative).

Notes for Figure 25:

1. Paragraphs shown above are mandatory, except that the portion regarding attorney's fees is deleted if no attorney's fees are involved. Use appropriate number of paragraphs for the terms of settlement.

2. Original signatures are required on copies for the complainant, the State National Guard representative, and NGB-EO.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure 25. Settlement Agreement Format**

F-29

**NOTICE TO EMPLOYEES**

LETTERHEAD OF STATE NATIONAL GUARD

(DATE)

1. This notice is being posted as part remedy directed by (see note 2).
  
2. Federal law requires that there be no discrimination against any technician or applicant for technician employment because of race, color, religion, gender, national origin, age (between 40 and 70), or physical or mental handicap with respect to hiring, firing, compensation, or other terms, conditions, or privileges of employment.
  
3. The (State) National Guard supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under law.
  
4. The (State) National Guard will not engage in (see note 3).
  
5. The (State) National Guard will/ or has taken the required remedial action. (see note 4).

(Signature)  
State Equal Employment Manager

Notes for Figure F-26:

CCXX

# DRAFT

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

1. This notice is posted in affected facility for not less than 30 days.
2. In paragraph 1 of this notice, indicate the official or court that directed the remedy. If the notice is the result of a settlement agreement reached prior to a final decision, the official directing the remedy is the State Adjutant General. If notice is the result of a final decision by NGB, the official directing the remedy is Chief, National Guard Bureau. If the notice is the result of a court order, indicate the particular Federal court that issued the order.
3. Indicate the specific conduct that has occurred and that has led to a finding of discrimination. See examples in footnote 1 of Appendix A of this regulation. The notice will not admit discrimination on the part of the National Guard if it is based on a settlement agreement made without a finding of discrimination or decision on the merits of the complaint.
4. Indicate the remedial actions that have been or will taken in the case. See examples in footnote 2 of Appendix A of this regulation.

**DRAFT**

20 January 2007

NGR (AR) 690-600/NGR (AF) 40-1614

**Figure F-26. Notice to Employees**

F-30