

# U.S. Merit Systems Protection Board



## **POLICY AND PROCEDURES FOR PROCESSING COMPLAINTS BASED ON SEXUAL ORIENTATION**

# MSPB Policy and Procedures for Processing Complaints Based on Sexual Orientation

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## **SECTION 1. PURPOSE.**

This document establishes the U.S. Merit Systems Protection Board's (the Board or MSPB) policy and procedures for providing employees and applicants for employment with a complaint process by which to seek redress for claims of sexual orientation discrimination. The complaint process also provides an avenue of redress for claims of reprisal for participating in the sexual orientation discrimination complaint process or opposing sexual orientation discrimination.

## **SECTION 2. AUTHORITY.**

2.01 Executive Order 11478, as amended by Executive Order 12106, and as further amended by Executive Order 13087<sup>1</sup> (collectively, the Executive Order) prohibits discrimination and ensures equal opportunity for all persons, without regard to sexual orientation, employed or seeking employment with the Federal government. The MSPB's Equal Employment Opportunity and Diversity Policy Statement, in part, prohibits discrimination based on sexual orientation against agency employees and applicants, as well as retaliation. In addition, the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(10), prohibits any employee who has authority to take personnel actions from discriminating against any employee or applicant for employment on the basis of conduct which does not adversely affect the employee's job performance or the performance of others.

2.02 These procedures covering complaints of discrimination based on sexual orientation are issued pursuant to the Executive Order and the Chairman's authority to plan, direct, and control agency affairs. Nothing in these procedures shall be construed as creating any new substantive rights beyond those already in effect. 42 U.S.C Section 2000e-4(a).

## **SECTION 3. POLICY.**

It is the policy and intent of the MSPB to ensure that all employees receive equal employment opportunities on the basis of merit and qualifications regardless of their sexual orientation; and that they are free from reprisal for using the procedures set forth in this policy.

## **SECTION 4. DEFINITIONS.**

4.01 Sexual orientation is defined as homosexuality (Gay or Lesbian), bisexuality, or heterosexuality, whether such orientation is actual or perceived.

4.02 Employment discrimination based on sexual orientation is treating employees or applicants for employment differently from similarly situated coworkers or applicants or harassing employees because of:

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<sup>1</sup> Executive Order 13087 does not create any new rights that would allow for enforcement by the Equal Employment Opportunity Commission. In the absence of statute, relief provided under these procedures is a matter of management oversight and must be consistent with the law, including the Back Pay Act.

- a. their actual or perceived sexual orientation;
- b. their association with an individual(s) of a particular sexual orientation; or
- c. their affiliation with a group that is associated with sexual orientation issues or whose membership is composed mainly of people of a particular sexual orientation(s), including an employee organization.

4.03 Harassment is defined as unwanted or unwelcome intimidation or conduct that can be verbal or non-verbal.

4.04 Retaliation, as defined in this process, refers to retaliation for participating in the sexual orientation discrimination complaint process, as a complainant or in some other capacity, or for opposing sexual orientation discrimination.

4.05 Day means a calendar day, unless otherwise specified.

## **SECTION 5. PERSONS COVERED.**

This Policy applies to all employees and applicants for employment in the MSPB, but does not apply to appellants in MSPB proceedings.

## **SECTION 6. RESPONSIBILITIES.**

6.01 The Chairman shall receive appeals of final agency decisions under this complaint process and issues decisions on them.

6.02 The Executive Director shall:

- a. Approve policies, directives and other materials outlining the agency's policies and complaint process for sexual orientation discrimination.
- b. Provide appropriate relief for employees or applicants found, under this Policy, to have been discriminated against on the basis of sexual orientation or retaliation pursuant to section 8.05 of these procedures.

6.03 The Director, Office of Equal Employment Opportunity (Director, OEEO) shall:

- a. Develop and issue agency policy and procedures regarding sexual orientation discrimination;
- b. Provide guidance and assistance to agency employees regarding laws, regulations and agency policies pertaining to sexual orientation discrimination;
- c. Process informal and formal sexual orientation discrimination complaints filed under this Policy;

- d. Publicize this Policy and the complaint processing procedures to all employees; and
- e. Provide training to MSPB employees regarding sexual orientation discrimination issues. For example, despite complaints based on sexual orientation being processed under the same administrative timeframes, they cannot be subject to an appeal to EEOC.

6.04 MSPB Office Directors, managers, and supervisors shall:

- a. Foster an environment free of sexual orientation discrimination;
- b. Ensure that all personnel actions, policies, practices, and the work environment are free from discrimination and harassment on the basis of sexual orientation;
- c. Ensure that no employee or applicant for employment shall be subjected to retaliation, intimidation, or coercion for raising an allegation of discrimination based on sexual orientation, or for participating in procedures addressing sexual orientation issues; and
- d. Take appropriate steps to mitigate alleged sexual orientation discrimination.

6.05 Employees shall:

- a. Ensure that his or her conduct is not offensive to other employees, contractors, job applicants, or the public;
- b. Cooperate with inquiries into complaints of alleged sexual orientation discrimination by providing information in the employee's possession;
- c. Notify his or her immediate supervisor or higher-level management officials upon becoming aware of any conduct or action that appears to constitute sexual orientation discrimination; and
- d. Not engage in any intimidating or demeaning conduct against a person who has participated in the sexual orientation discrimination complaint process.

**SECTION 7. INFORMAL COMPLAINT PROCESSING PROCEDURES.<sup>2</sup>**

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

7.02 Forty-five (45) Day Time Frame. An aggrieved person must contact an EEO Counselor

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<sup>2</sup> An MSPB employee's right to file a complaint based on sexual orientation and his/her election to go through this complaint process is based on agency policy and does not derive from EEOC regulations governing the processing of discrimination complaints in the Federal sector.

within 45 days of the date of the matter alleged to be discriminatory, or the date he or she first became aware of or should have become aware of the matter; or, in the case of a personnel action, within 45 days of the effective date of the action, or the date he or she first became aware of or should have become aware of the personnel action.

7.03 Extending the 45-Day Time Frame. The Director, OEEO may extend the 45-day time for initiating EEO counseling when the aggrieved person shows that he or she was not notified of the time limit and was not otherwise aware of it, or that he or she did not know and reasonably would not have known that the discriminatory matter or personnel action occurred, or that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting an EEO Counselor within the time limit, or for other reasons considered sufficient by the Director, OEEO.

7.04 Initial Counseling Session. EEO Counselors shall conduct counseling activities in accordance with agency policies and procedures. During the initial counseling session, EEO Counselors must advise the aggrieved person in writing of his or her rights and responsibilities in this process, including the duty to mitigate damages, and that only the matter(s) raised in pre-complaint counseling (or matters like or related to matters raised in pre-complaint counseling) may be alleged in a subsequent formal complaint. EEO Counselors must also advise the aggrieved person of his or her duty to keep the agency informed of his or her current address. During the pre-complaint counseling stage, employees will be advised of other forums for raising employment issues that may or may not address discrimination based on sexual orientation. Some of these forums include the Office of Special Counsel which investigates prohibited personnel practices, the Merit Systems Protection Board which hears appeals of certain agency actions, the Federal Sector EEO Complaint Process, MSPB's administrative grievance procedure, which addresses matters of concern to employees (outside of issues that may be raised in the EEO complaint process) and, for those employees in a bargaining unit, the negotiated grievance procedures, as applicable. The EEO Counselor must also advise the aggrieved person of the limitations of this policy, including the fact that no hearing before the EEOC or District is available under this policy.

7.05 Final Interview and Notice of Right to File. The EEO Counselor shall conduct a final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the EEO Counselor's attention, unless the counseling period is extended for an additional 60 days by the Director, OEEO, to facilitate resolution or the aggrieved person elects to participate in the Alternative Dispute Resolution (ADR) process set forth in .06 of Section 7. If the matter has not been resolved, the counseling period has not been extended, and the aggrieved person has not elected ADR, the aggrieved person shall be notified in writing by the EEO Counselor, not later than the thirtieth day after contacting the EEO Counselor, of the right to file a formal discrimination complaint. If the aggrieved person elected to participate in the ADR process, or pre-complaint filing was extended and not resolution is reached, the EEO Counselor shall notify the aggrieved person in writing, no later than 90 days after initial EEO contact, of the right to file a formal complaint. The written notice shall inform the aggrieved person of the right to file a formal discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file the complaint, and of the aggrieved person's

duty to notify the agency immediately, in writing, if the aggrieved person retains counsel or a representative. The written notice will also advise the aggrieved person that a complaint that is not filed within the 15-day period may be dismissed as untimely. The EEO Counselor must obtain the signature of the aggrieved person on a copy of the written notice with the date of receipt, unless the written notice is otherwise sent by certified mail, return receipt requested.

7.06 Alternative Dispute Resolution. Where the aggrieved person agrees to participate in alternative dispute resolution (ADR) procedures, the pre-complaint processing shall be completed within 90 days. If the matter has not been resolved within such 90-day period, complaint processing shall resume.

7.07 Restraint and Anonymity of Aggrieved Person. The EEO Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The EEO Counselor shall advise aggrieved persons of their right to anonymity (unless waived) during counseling. The EEO Counselor shall not reveal the identity of an aggrieved person who consulted the EEO Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a formal discrimination complaint prepared in accordance with this Policy from the aggrieved person involving that same matter.

7.08 EEO Counselor's Report. When advised that a formal complaint has been filed by an aggrieved person, the EEO Counselor shall submit a written report within 15 days to the Director, OEEO, and to the aggrieved person concerning the issues discussed and actions taken during counseling.

## **SECTION 8. FORMAL COMPLAINT PROCESS.**

### 8.01 Filing a formal complaint.

- a. A formal complaint may be filed with the Director, OEEO, or the Chairman.
- b. A formal complaint must be in writing and must be filed within 15 days of receipt of the notice of right to file a formal complaint of sexual orientation discrimination.
- c. A formal complaint must contain a signed statement from the person claiming to be aggrieved (complainant) or the complainant's representative. This statement must be sufficiently precise to identify the complainant, the work unit where the complaint arose, and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant and the representative can be contacted.
- d. The Office of Equal Employment Opportunity shall acknowledge receipt of a formal complaint in writing and inform the complainant of the date on which the complaint was filed and of the specific accepted allegations. Such acknowledgment shall also advise the complainant that the agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint. The time limits may be extended by the Director, OEEO to ensure the complete development of the investigative record.

e. When complaints of discrimination contain claims based on sexual orientation and claims based on race, color, national origin, sex, age or disability, dual processing will occur at the appropriate stage.

f. A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. When a complaint has been amended, the agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint.

8.02 Dismissal of Complaints. The Director, OEEO shall dismiss a complaint or a portion of a complaint:

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

b. That fails to comply with the applicable time limits contained in this Policy, unless the Director, OEEO extends the time limits in accordance with this Policy, or that raises a matter that has not been brought to the attention of an EEO Counselor and is not like or related to a matter that was raised in pre-complaint counseling;

c. Where the complainant has raised the matter in a negotiated grievance procedure that does not exclude allegations of discrimination based on sexual orientation or the complainant has elected to pursue the claim through another non-EEO process, such as a Merit Systems Protection Board (MSPB) appeal or an Office of Special Counsel complaint of a prohibited personnel practice;

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

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

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

8.03 Investigation of Complaints.

a. The investigation of complaints shall be managed by OEEO and usually conducted through contractual services.

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

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

1. Complainant, MSPB officials, and any employee of the agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

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

3. When the complainant, or the employees of the office that gave rise to the complaint, fail without showing good cause to respond fully and in a timely fashion to requests for documents, records, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decision-maker should, in appropriate circumstances:

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

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

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

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

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

4. OEE0 shall ensure that a complete and impartial factual record is developed and is sufficient to make findings on the matters raised by the written complaint.

5. The Director, OEE0 is responsible for ensuring that the investigation is completed within 180 days of the date of filing of the formal complaint; however, the Director may extend the time period for up to an additional 90 days to ensure complete development of the investigative record.

6. Within 180 days from the filing of the complaint, or within the periods of extension provided in Section 8 03.c5 above, the Director, OEE0, shall notify the complainant, in writing, that the investigation has been completed and provide the complainant with a copy of the investigative file. The notice shall advise the complainant that the Director, OEE0, will issue a final agency decision within 60 days.

**8.04 Final Agency Decisions (FADs).** Within 60 days of issuing the Report of Investigation, the Director, OEEO, shall issue a FAD. The FAD will contain a certificate of service from MSPB with language indicating a presumption of receipt within 5 business days. The FAD shall consist of findings on the merits of each matter in the complaint and, when discrimination is found, appropriate remedies and relief.

**8.05 Remedies and Relief.** When the Director, OEEO finds that an employee, applicant for employment was discriminated against on the basis of sexual orientation, or was the subject of retaliation prohibited by this Policy, the Executive Director shall consider the relief recommended by the Director, OEEO, which may include:

- a. Notification to all employees that the agency was found to have engaged in retaliation or discrimination based on sexual orientation, that the employees have a right to be free from such retaliation or discrimination, and that the agency is committed to taking corrective or preventive action to ensure that violations similar to those found will not recur.
- b. Compensatory damages are not available to employees or applicants for employment for discrimination based on sexual orientation.
- c. Expungement from the agency's records of any adverse materials pertaining to the complainant that relate to the discriminatory employment practice.
- d. Full opportunity to participate in the employment benefit denied (e.g., training, preferential work assignments, overtime scheduling), if the complainant is a current employee, subject to the constraints of law.
- e. Commitment that the agency shall cease from engaging in the specific discriminatory employment practice found in the case.
- f. Back pay and benefits for employees pursuant to 5 U.S.C. § 5596 (5 C.F.R. § 550 Subpart H).
- g. Reasonable attorney's fees for employees, where back pay is at issue, as authorized by 5 U.S.C. § 5596. In all other situations, attorney's fees are not authorized.

**8.06 Appeal Process.** If the complainant is dissatisfied with the FAD, an appeal may be filed with the Chairman. The appeal must be in writing and must contain arguments or evidence which establish that the FAD was erroneous because:

- a. new and material evidence is available that was not readily available when the previous decision was issued; or
- b. the previous decision involved an erroneous interpretation of material facts, or misapplication of established policy or procedures contained within this Policy and the decision is of such nature as to have effects beyond the actual case at hand. The appeal, with supporting arguments

or evidence, must be filed within 30 days of the date the FAD is received. A complete copy of the appeal must be served on the Director, OEEO. Opposition to the appeal must be in writing and must be submitted within 30 days from receipt of the appeal to the Chairman with a copy to the complainant. All appeals and oppositions to appeals must be accompanied by a certificate of service containing the date and manner in which service was effected. The Chairman will issue the decision on the appeal no later than 60 days from receipt of the appeal and the supporting arguments. The Chairman's decision on such an appeal is final; no further appeals are available.

8.07 Resolution Agreements. All organizations within MSPB shall make reasonable efforts to resolve complaints of discrimination, voluntarily and as early as possible in and throughout the administrative processing of the complaint, including the informal stage. Any resolution agreement reached at any time in the process shall be in writing, signed by both parties, and shall identify the allegations resolved. A copy of the resolution agreement shall be given to the complainant, the manager responsible for implementing the agreement, and the Director, OEEO. All terms of the settlement agreement shall comply with all MSPB policies, requirements, and legal authorities. Procedures for obtaining clearances of settlement agreements shall be identical to those used for EEO complaints processed under 29 C.F.R. § 1614. All organizations within MSPB are strongly encouraged to use ADR procedures to facilitate early resolution.

#### 8.08 Compliance with Resolution Agreements and FADs

##### a. Resolution Agreements

Any resolution agreement knowingly and voluntarily agreed to and executed by all parties, reached at any stage of the complaint process shall be binding on all parties. The Director, OEEO, shall maintain all documentation and records supporting compliance with the resolution agreement including records associated with expungement of files. If the complainant believes that the agency has failed to comply with the terms of a resolution agreement, the complainant shall notify the Director, OEEO in writing, of the alleged noncompliance with the resolution agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the resolution agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point where processing ceased. The Director, OEEO will issue a FAD on the breach of resolution agreement claim within 60 days of receipt of the claim. If the Director, OEEO determines that the agreement has not been complied with and the noncompliance is not attributable to acts or conduct of the complainant, s/he may order such compliance or order that the complaint be reinstated for further processing from the point processing ceased.

##### b. FADs Issued on the Merits of the Discrimination Claim

Unless appealed to the Chairman, a FAD by the Director, OEEO shall be binding on both the agency and the complainant. Likewise, an appeal decision by the Chairman is binding on both the agency and the complainant. Agency officials responsible for implementing the decision shall report to the Director, OEEO and submit documentation supporting compliance with the FAD. If the complainant believes that the agency has failed to comply with the FAD, the complainant shall notify the Director, OEEO in writing, of the alleged noncompliance.

8.09 Representation and Official Time. At any stage in the processing of a complaint, including the counseling stage, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice. However, as under 29 CFR Parts 1614.605 (b) and (c), an exception would occur when the representative presents a conflict of interest with the representative's official or collateral duties. Additionally, the agency is not obligated to change work schedules, pay overtime, or pay travel expenses to facilitate the choice of a specific representative, if employed by the agency.

8.10 Relationship to Other Procedures. Nothing in these procedures shall abrogate the rights of any employee to file a complaint of discrimination against the MSPB within the purview of the Federal Sector Equal Employment Opportunity Complaint Procedures, 29 CFR Part 1614, or in an appropriate U.S. District Court. To the extent possible and consistent with existing authorities, relevant agency policies and practices generally used in processing complaints of discrimination under 29 CFR Part 1614 also will be applied to processing complaints of discrimination based on sexual orientation. This may include, but is not limited to: granting employees a reasonable amount of official time; computation and calculation of dates for resolving timeliness issues; and confidentiality of records. This does not, however, include the right to request a hearing before the Equal Employment Opportunity Commission over an allegation of sexual orientation discrimination.

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

8.12 Records/File Management. All records and files associated with a complaint based on sexual orientation shall be maintained in compliance with federal records management policy.

## **SECTION 9. ASSISTANCE.**

Questions concerning this Policy should be addressed to the Director, OEEEO. This document will be made available in alternate format, such as large print or audiotape, upon request by calling (202) 653-6772, ext 4405.

## **SECTION 10. DISTRIBUTION**

This Policy shall be made readily available to all MSPB employees and prominently posted in designated areas in the workplace. All new MSPB employees will be advised of this Policy as part of the new employee orientation process. Additionally, this Policy will be posted on the MSPB public web page and the MSPB portal page (intranet) to provide guidance to MSPB employees and applicants for employment with MSPB.

**11. EFFECTIVE DATE AND IMPLEMENTATION OF POLICY**

This Policy is effective immediately upon signature.



Susan Tsui Grundmann, Chairman

02.23.12

Date