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DEPARTMENT OF DEFENSE
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POLICY DIRECTIVE 2017-1

25 September 2017

SUBJECT: Hawaii National Guard Joint Civilian Discrimination Complaint Instructions

1. Effective: This instruction is effective on the date signed and will expire five years from the date of signature, unless cancelled earlier.
2. Applicability: This instruction applies to the processing and resolution of discrimination complaints arising from federal civilian employment and applicants for employment, who are managed under a designation of authority to an Adjutant General under section 709(d) of Reference (a) and section 10508 of Reference (b), as enacted in Reference (c), to include Title 5 civilian employees and NG technicians.
 - a. This instruction does not apply to complaints of discrimination from NG military personnel in a military status. They are covered by the National Guard Discrimination Program, IAW Reference (e).
 - b. This instruction does not apply to beneficiaries of services from the Army National Guard (ARNG) and Air National Guard (ANG) in programs receiving Federal financial assistance. Complaints from such beneficiaries are processed IAW Reference (f).
 - c. This instruction does not apply to NG Service members serving in a Title 10 status.
3. Purpose: This instruction implements recent statutory amendments to section 709 of Reference (a) and section 10508 of Reference (b), as enacted in Reference (c), with regard to the processing of civilian Equal Employment Opportunity (EEO) complaints within State National Guard (NG) programs in accordance with (IAW) Part 1614 of Reference (d). This instruction also establishes a uniform system to conduct legal and administrative reviews of EEO complaints for final agency decision by The Adjutant General.
4. References:
 - a. See Enclosure F

5. Guidance:

a. This establishes and adopts a discrimination complaint processing system and reporting instruction IAW Reference (c) and The Hawaii National Guard has submitted a copy of this instruction to NGB-EO no later than 1 October 2017.

b. For any EEO complaint, grievance, claim, or action arising from, or relating to a personnel action or condition of employment:

(1) The Adjutant General shall be considered the head of the agency and the NG of the State shall be considered the employing agency of the individual and the sole defendant or respondent in any administrative action.

(2) The NG of the State of Hawaii shall defend any administrative complaint, grievance, claim, or action, and shall promptly implement all aspects of any final administrative order, judgment, or decision.

(3) Any settlement, judgment, or costs arising from an action described in subparagraph (1) or (2) shall be paid from appropriated funds allocated to the NG.

6. Policy: This instruction establishes a discrimination complaint process IAW Part 1614 of References (d) and (g) and complies with reporting requirements of Reference (h).

7. Summary of Changes: None

8. Releasability: This instructions is approved for public release, distribution is unlimited.

FOR THE ADJUTANT GENERAL:

KENNETH S. HARA
Brigadier General, HING
Deputy Adjutant General

Encls:

A - Civilian Equal Employment Opportunity (EEO) Complaint Process

B - Disability Accommodation

C - Settlement Agreements

D - Compliance Actions

E - Notification and Federal Employee Antidiscrimination and Retaliation (No Fear) Act Of 2002 Compliance

F – Reference

GL – Glossary

ENCLOSURE A

EQUAL EMPLOYMENT OPPORTUNITY (EEO) COMPLAINT PROCESS

1. Civilian EEO Complaints Generally

a. Objective. The purpose of the civilian EEO complaint process is to provide for the prompt, fair and impartial processing and resolution of complaints, consistent with its legal obligations under 29 CFR Part 1614. The objective of civilian EEO counseling is to seek opportunities to resolve issues at the lowest organizational level at the earliest possible time.

b. Scope of Program. An aggrieved person who believes that he or she has been discriminated against on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 and older), disability, genetic information or who believes that he or she has been subjected to sexual harassment or retaliated against for participating in the complaint process must consult State Equal Employment Manager (SEEM) within 45 calendar days or when he or she becomes aware of the discriminatory action or the effective date of the personnel action. The 45-day time limit may be extended for reasons outlined in 29 CFR 1614.105(a) (2). Failure to contact an EEO Professional within 45 calendar days may result in dismissal of a formal complaint.

2. Proper Complainants. Agency civilian employees, former employees and applicants for employment who meet the criteria outlined in 29 CFR 1614 and 32 USC Section 709(f) (5), if applicable, may file civilian EEO complaints.

a. The aggrieved person starts the civilian EEO process by contacting an EEO Professional (SEEM) and advising that he or she has been subjected to unlawful discrimination.

b. Under EEOC and NG policy, independent contractors, contingent employees and NG military technicians in military pay status or actions concerning fitness for duty in the reserve components are generally not considered Agency employees for Federal Sector EEO purposes.

c. In exceptional cases, however, the EEOC has determined that an individual classified as a contingent employee or independent contractor may be considered an Agency employee under the protection of Federal EEO regulations if the Agency exerts substantial direction and control over the contingent employee/contractor's activities.

3. Other Military Services. When an individual alleges discrimination in a multi-service case (e.g., active component Air Force or Army employee alleges an NG management official has discriminated against him/her), the counseling and complaint processing are conducted by the Agency that will be fiscally responsible for any settlement or judgment resulting from the allegation. Typically, that will be the Agency for whom the

complainant works, but in this instance the Agency will be whom the discriminating official, employee or responsible management official works for because that Agency is responsible for the settlement or judgement.

4. Informal (Pre-Complaint) Civilian EEO Complaint Processing

a. EEO Professional (SEEM) Responsibilities:

(1) Determines if a claim is appropriate for processing under 29 CFR Part 1614, Federal Sector Complaint Processing, and where appropriate, offers the use of Alternative Dispute Resolution (ADR) or any other informal dispute resolution procedures to resolve the claim if otherwise found to be appropriate for such alternative procedures.

(2) Processes all claims through the informal complaint process, regardless of timeliness, merit, or other considerations.

(3) Complaints based on sexual orientation or gender identification may be covered under 29 CFR 1614.105(a) as sex stereotyping; therefore, an aggrieved person who believes he or she has been discriminated on the basis of sexual orientation may process their complaint under 29 CFR Part 1614 as sex discrimination.

(4) When an aggrieved person engages an EEO Professional for the purpose of obtaining information about, or articulating, a complaint, but does not elect to start the Informal (Pre-Complaint) process, the visit will be recorded as a Contact and documented as —EEO General Assistance.

(5) When an aggrieved person states their intent to file a complaint. The 30-calendar day informal processing period starts as of the first date the complainant contacts an EEO Professional, SEEM or other official designated to receive discrimination complaints.

(6) Assigns a docket number to each informal complaint.

(7) Advises aggrieved persons in writing of their rights and responsibilities. Note: Notice of Rights and Responsibilities Letter USE IS MANDATORY.

(8) If the complainant alleges sexual harassment, advises aggrieved persons of their right to request an administrative investigation (i.e., Commander Directed Investigation (CDI), AR 15-6 investigation, Office of Complex Investigation, etc. . .), and advises that any investigation would run concurrently with the EEO complaint.

(9) Advises the aggrieved person that he or she may choose between having his or her complaint processed under ADR procedures if deemed suitable and offered by the Agency or the traditional counseling activities described in 29 CFR

Section 1614.105(b) (2) and EEOC MD-110, Chapter 2. Ensure the complaint has been properly screened and found appropriate for ADR before offering ADR to the complainant. Do not decline to offer ADR solely because of the basis(es) alleged in the complaint (i.e., race, color, religion, national origin, sex (including pregnancy, gender identity, and sexual orientation), age, disability, genetic information, or retaliation) etc. [MD-110, Chapter 3, Section II (A)]. Participation in ADR by the complainant and management officials is encouraged. If ADR is not chosen because management is unwilling to engage in ADR, note that in the counselor's report and continue the limited inquiry. If the ADR procedure is chosen, the informal complaint processing period shall automatically extend to 90 days. [29 CFR 1614.105(f)]. The counseling and screening requirements of this subparagraph may be accomplished in accordance with CNGBI 0402.01 and CNGBM 0402.01, for ADR screening requirements. If ADR fails or does not occur, the SEEM must complete the inquiry and counselor's report.

(10) Inform the complainant of her/his right to remain anonymous during the informal stage. If anonymity is elected, take appropriate measures to protect the identity of the complainant until a formal complaint is filed or complainant grants written permission to cease anonymity.

(11) Complete informal complaint counseling within 30 calendar days or obtains written approval from the complainant and the SEEM, prior to the 30th day, to extend counseling for no more than an additional 60 calendar days. If ADR is offered and accepted, complete processing within 90 calendar days. In either case, if the matter is not resolved before the end of the authorized period, including extensions, issue the Notice of Right to File a Formal Complaint letter as described in paragraph 4b below. [29 CFR 1614.105(d)-(f)]

(12) The EEO Professional that worked the pre-complaint will not be the same EEO Professional conducting ADR, [MD-110, Chapter 3, Section III (K)] or preparing the acceptance/dismissal letter on behalf of the SEEM. The SEEM will assign another EEO Professional to complete the acceptance/dismissal letter to avoid compromising the integrity and neutrality of the ADR program. However, the EEO Professional that worked the pre-complaint can continue to maintain overall responsibility for tracking the complaint.

(13) Complainants will be advised that disclosure of case file information falls under the FOIA and Privacy Act guidelines. At the pre-complaint stage a complainant will not be provided documents collected from the Human Resource Office (HRO) or other agencies unless requested through the FOIA office.

b. Final Interview. Advise the complainant in the Notice of Right to File a Formal Complaint letter that any formal complaint must be filed with the SEEM or designee within 15 calendar days of receipt. Do not attempt in any manner to encourage or dissuade the person from filing a complaint. This correspondence is to be sent no earlier than the 30th day and no later than the 60th day after the issuance of the Notice of Right to File a Formal Complaint letter. Note: The final interview concludes the

informal (pre-complaint) process and there is no requirement that the final interview be conducted face-to-face with the complainant and her/his representative.

c. Counselor's Report. Submit a narrative counselor's report to the SEEM within 5 calendar days after the issuance of the Notice of Right to File a Formal Complaint. The report will include items outlined in MD 110, Chapter 2, Section III (6), The Roles and Responsibilities of an EEO Counselor, and Section IX, The EEO Counselor's Report.

5. Civilian EEO Informal Class Action Complaints

a. Informal Complaint Processing. An individual who wishes to file a class complaint, as defined in 29 CFR 1614.204(a) must seek counseling and be counseled in accordance with 29 CFR 1614.105. The SEEM notifies the HRO, the Staff Judge Advocate (SJA), and the Adjutant General, in writing, when an individual files a class complaint. The notification must include the complainant's name (if releasable), the name of the complainant's representative, the docket number, the date of initial contact, identification of the class, and claim(s) raised. [Note: The complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim(s) raised in an individual complaint. If the complainant moves for class certification after completing the counseling process, according to 29 CFR 1614.204[b], no additional counseling is required.]

b. Responsibilities.

(1) When notified of a class complaint, the SJA designates an attorney to represent the Agency.

(2) The SEEM tries to resolve individual allegations and personal concerns of the complainant. Before attempting to resolve class-wide issues, the SEEM must coordinate any proposed action with the Human Resources Officer (HRO), the SJA and the Adjutant General.

(3) The SEEM must coordinate the gathering and analysis of statistics with the HRO and the SJA before collecting the data.

(4) Before the final interview with the complainant, the SEEM prepares a draft report for coordination with the HRO and the SJA. This report must include, at a minimum, the following: class claim(s), basis(es), definition of the proposed class, information as to potential class size, how agent's claim(s) reflect claims of class (commonality and typicality), and adequacy of representation of the class. [29 CFR 1614.204.]

6. Civilian EEO Formal Complaint Processing

a. Guidance. Formal complaints are processed in accordance with 29 CFR 1614. SEEMs process formal complaints.

(1) A formal complaint must be filed with the SEEM or designated EEO Professional, and the complainant, or the attorney designated to represent the complainant, must sign and date it. It must describe the action(s) or practice(s) that form the basis of the complaint that was discussed with the EEO Professional during the Informal phase of the process.

(2) If a complainant is dissatisfied with the processing of his or her pending complaint, whether or not it alleges prohibited discrimination as a basis for dissatisfaction, he or she should be referred to his or her chain of command. A written response should be provided to the complainant indicating the actions the Agency took to resolve the concerns and attach a copy of the letter to the complaint files maintained on the underlining complaint. Complaints alleging dissatisfaction are processed as required by 29 CFR 1614.107(a) (8). A record of the complainant's concerns and any actions taken to resolve the concerns must be made a part of the complaint file. If no action is taken, the file must contain an explanation for not taking any action.

(3) A complainant may amend a complaint at any time before the mailing of the notice required by 29 CFR 1614.108(f) at the conclusion of the investigation, to include claim(s) that are like or related to those raised in the complaint.

b. SEEM Responsibilities.

(1) Notifies the complainant and their representative (if designated) of the docket number and instructs them to refer to it in all future correspondence. Advises the complainant, in writing (within 5 days), of receipt of the formal complaint, the date that the complaint is considered filed, and the right to appeal to EEOC/OFO any full dismissal of the complaint. An identical acknowledgment, in writing, is also required for an amendment to a complaint. [29 CFR 1614.106 (d) and (e)]

(2) Obtains written determination by the HRO as to whether the complainant is eligible under Merit Systems Protection Board (MSPB) jurisdiction. The SEEM will coordinate with the HRO to determine if the individual has identical issues filed under a negotiated grievance procedure (NGP) or the Merit Systems Protection Board (MSPB) appeal procedure. Note: A complaint filed under the Administrative Grievance Procedure (AGP), or those NGPs that do not allow discrimination complaints, will not preclude the complaint from being filed under the Formal EEO process.

(3) Reviews the complaint file to determine that it has all required forms and supporting documents with signatures including the counselor's report, verifies the employment status of the complainant [29 CFR 1614.103(c)], perfects the claims, and ensures information covered by the Privacy Act is properly protected. Questions concerning the Privacy Act and its coverage are addressed to the SJA.

(4) Provides the counselor's report to the complainant within 15 calendar days of the date the formal complaint is filed [29 CFR 1614.105(c)].

(5) Submits the proposed acceptance and/or dismissal letter, including all proposed amendments, formal complaint (Form XXXX), counselor's report, and HRO determination of the MSPB jurisdiction to the SJA, within 21 days in receipt of the formal complaint. Sends the request for additional information that includes a Notice of Proposed Dismissal [29 CFR 1614.107(a) (7)] by regular or certified mail, as appropriate.

(6) Notifies the HRO, the SJA and the Inspector General of any non-frivolous allegations of wrong doing against any senior officials, colonels (or civilian equivalents), or colonel selects.

(7) If ADR is offered and agreed to by the parties, the SEEM may request a third-party neutral from Investigation Resolution Directorate (IRD), from a roster of neutrals maintained for such purposes, or from the NG ADR Program. Expenses for contract neutrals or NG neutrals brought in TDY may be funded locally or from the Joint Forces Headquarters. Coordinates with IRD to de-conflict ADR proceedings from the investigation.

c. Acceptance and Dismissal.

(1) The Agency is required to process formal EEO complaints in accordance with 29 CFR Part 1614 and EEO MD-110. The EEOC requires federal agencies to discharge certain responsibilities once a formal EEO complaint has been filed.

(2) The agency must acknowledge receipt of each formal EEO complaint and amendment to a formal EEO complaint (29 CFR 1614.106[e]).

(3) The agency must process all formal complaints expeditiously and make a determination whether to accept, dismiss, or partially dismiss a complaint or portion of a complaint to allow for an investigation to be completed and the report of investigation (ROI) to be received by the complainant within 180 days from the date of filing [29 CFR 1614.106(e) (1) and (e) (2) and 1614.107(b), and EEOC MD 110, Chapter 5, Section A]. The acceptance and dismissal (A&D) letter shall be provided to the complainant no later than 30 days from the date of the filing.

(4) If dismissed in part or in whole, the Agency must provide appeal rights indicating that partial dismissals may be reviewed by an EEOC Administrative Judge (AJ) if a hearing is requested, or appealed to the EEOC Office of Federal Operations (EEOC/OFO) when a final decision or final action is taken on the complaint, or if dismissed in whole, informing the complainant that he or she has the right to an immediate appeal to EEOC/OFO. The Agency is required to investigate accepted

claims and provide the ROI to the complainant within 180 calendar days of the filing of the complaint. [29 CFR 1614.106 (e) (1) and (e) (2) and 1614.107(b)].

(a) If complaint is a mixed case follow procedures IAW MD 110, Chapter 4, Procedures for Related Processes, section II.B, Mixed Case Complaints and Appeals – 29 CFR 1614.302

(5) The Agency adopts the following procedures to assure prompt, fair, and appropriate performance in accordance with the EEOC requirements. SEEMs will ensure:

(a) Acknowledgement of receipt of a formal complaint and amendment to a formal complaint is completed as soon as possible, but not later than 5 calendar days after receipt.

(b) EEO Professionals issue counselor reports for internal EEO office review within 5 calendar days of the date of receipt of the formal complaint, and final counselor reports are issued to the complainant not later than the 15th day after receipt of the formal complaint.

(c) A comparison of the report is made to the formal complaint to ensure that the claims in the formal complaint were addressed and the EEOC criteria to Accept, Partially Dismiss, or Dismiss in whole were properly applied to the formal complaint [29 CFR 1614.107].

(d) Preparation of a standard Acceptance and/or Dismissal letter and submission of the formal EEO complaint, the counselor report, a written determination by the SEEM as to whether the complaint and the complainant are eligible for jurisdiction by the MSPB, and whether a formal negotiated grievance or MSPB appeal has been filed on the same claim(s) to the SJA.

(e) Issuance of the coordinated Acceptance and/or Dismissal letter (reference paragraph above) to the complainant or his/her representative, if any. The authority to sign decision letters is vested with the Adjutant General and can only be exercised by the SEEM if delegated this authority in writing.

(f) Legal reviews are for internal use and management's eyes only. Legal reviews are documents that are covered by attorney-client privilege and are protected from disclosure under the Freedom of Information Act, 5 USC 552 and are not to be released without prior authorization from the SJA.

(g) There must be a firewall between the EEO function and the Agency's defensive function. The firewall will ensure that actions taken by the Agency to protect itself from legal liability will not negatively influence or affect the Agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

(h) It is important for the SEEM to be provided with sufficient legal resources so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office.

(i) At a minimum, however, the Agency representative in EEO complaints may not conduct legal sufficiency reviews of EEO matters. Legal sufficiency reviews in the EEO process involve legal analysis made by the EEO office during the processing of EEO complaints, such as acceptance/dismissal of complaints, legal theories utilized by the EEO office during investigations, and legal determinations made in final agency actions. The optimal situation is for the EEO office to have sufficient internal legal resources. However, when necessary and requested by the EEO office, legal sufficiency reviews conducted outside the EEO office must be handled by individuals that are separate and apart from the Agency's defensive function.

(j) Similarly, impartiality or the appearance of impartiality is not ensured by simply rotating agency representatives within the same office and is undermined where the Agency representative's associates are assigned the legal sufficiency function in EEO cases from the representative's caseload.

d. Investigation of Formal Complaints.

(1) If the formal complaint is not dismissed in its entirety, within 30 calendar days of the date of receipt of the formal complaint, the SEEM shall request an IRD investigation. However, in no case should an IRD investigation be requested until the Acceptance and Dismissal process is complete. The request must include the following:

(a) Specific claims raised and which ones are accepted.

(b) Specific claims partially dismissed, including reasons and documentary evidence to support recommended dismissal(s).

(c) Complete case file and any other pertinent records.

(d) Name, office symbol, address (including e-mail address), phone and data fax number of the management representative.

(2) The SEEM will obtain the fund citation for IRD investigations and EEOC hearings related to the complaint. The unit/organization in which the discrimination complaint arises is normally responsible for all costs associated with the complaint—to include agency witness travel, complainant witness travel, depositions, back pay, attorney fees, compensatory damages, etc. stemming from an approved settlement agreement, litigation, or an administrative judge's decision.

(3) Investigators determine the scope of the investigation; however, the Agency's preferred method is for the investigator to take on-site affidavits. The on-site

affidavit method involves an on-site visit and results in an affidavit, which may be in either summary or question and answer format. If the SEEM desires a verbatim transcript of witness testimony, they will coordinate with the Adjutant General for a final decision on the type of investigation to be conducted. IRD investigators may not unilaterally impose a requirement for any complaint to be investigated by these methods or any other method that imposes additional costs. IRD investigators negotiate with the complainant or complainant's representative for extensions to the 180-day time limit for processing complaints. SEEMs, at the request of investigators, may act as intermediaries in these negotiations. In accordance with 29 CFR 1614.108(e), agreements to extend the 180-day time limit must be in writing and included in the investigative file.

(4) Upon completion of the investigation, IRD makes available an electronic copy of the ROI and the investigative file on its web site. This copy has not been sanitized to remove Privacy Act information (see unit Security Manager regarding classified material). The SEEM will download the file and provide an un-sanitized copy to the SJA. SEEMs and other base officials should not provide an un-sanitized copy of the ROI and/or the investigative file to complainants or their designated representatives, and should not create their own sanitized version of these files. The SEEM sanitizes the ROI and provides it (in printed copy form) to complainants and their designated representatives, along with the notification of further rights under the provisions of 29 CFR 1614.108(f), 29 CFR 1614.110, and 29 CFR 1614.302(d) (2) (mixed cases). Further, the notice must state that if the complainant desires a Final Agency Decision (FAD) without an EEOC hearing, he or she must request it from the SEEM, and if he or she requests an EEOC hearing (non-mixed case), he or she must request it directly from the EEOC district office the SEEM specifies. The SEEM tracks the 30-calendar day period for the complainant to elect further processing options.

(5) If the complainant does not request a hearing or a final decision without a hearing within 30 calendar days after receipt of the ROI and investigative file, the SEEM will notify the complainant that a final decision will be issued within 60 calendar days from the end of the 30 calendar day request period, and that further appeal rights will be provided at that time.

e. Hearings.

(1) SEEMs, in coordination with the SJA or the Agency representative, will make all needed arrangements as outlined in EEOC MD-110, Chapter 7, Hearings.

(2) The notice to the EEOC district office that services their area is issued by the SEEM and will include:

(a) Instructions to send the AJ's final decision and two copies of the hearing transcript to the SEEM.

(b) The name, address and telephone number of the Agency representative.

(c) A tabbed and bound copy of the complaint file, including the investigative file. With few exceptions, the SEEM prepares and submits complaint file to EEOC for Hearing.

(3) The complainant must submit the request for a hearing directly to EEOC with a copy to the SEEM. [29 CFR 1614.108(g)]

(4) Upon receipt of the AJ's decision, the SEEM will furnish a copy of the decision to the SJA and the Adjutant General and the SEEM will advise the Adjutant General of the projected date on which a final agency action will have to be issued in order to meet the EEOC 40-day time limit. The SJA will return any extra copies of hearing transcripts and investigative files to the SEEM. The SEEM will in turn furnish copies of AJ's decisions to the appropriate parties, such as commanders and HRO.

(5) EEO Professionals and HRO will assist the Agency representative with responding to discovery requests, setting up depositions, and responding to EEOC orders.

f. Final Agency Actions.

(1) All final actions (whether denominated final decisions or final orders) are prepared by the SEEM for review and signature by the Adjutant General or designee. All proposed final actions will be reviewed for legal sufficiency by an authorized SJA before they are submitted to the Adjutant General for signature.

(2) The SEEM is the official authority for all phases of the formal complaint process subsequent to issuance of the investigation.

7. Negotiation of Settlements.

a. The SEEM, working with the SJA, management representative, the complainant and his/her representative, may negotiate a settlement of the complaint during the pre-complaint stage of the process (prior to the filing of a formal complaint) within the parameters set by the settlement authority. After a formal complaint has been filed, the Agency representative has the authority to negotiate settlement of the complaint through negotiation, ADR or other approach. In complaints filed against persons in the grades of Colonel and above (or civilian equivalents), the Adjutant General is the primary settlement authority, but such authority may be delegated to subordinate personnel in coordination with the SJA and the management representative. Investigators and AJs may also seek to resolve a complaint with the parties during the investigation and/or hearing.

b. The settlement agreement may include remedial action, back pay, attorney's fees, and/or compensatory damages, if allowed by law. However, care should be taken not to stipulate that any compensatory damage amounts have been verified as claimed. Additionally, in age discrimination claims as well as reprisal claims based on prior age discrimination complaints, attorney's fees and compensatory damages are not payable. Insert statutory language as required by Older Workers Benefit Protection Act, 29 USC 626, Subsections (f) (1) and (f) (2), as appropriate, whenever settling allegations of age discrimination.

c. If the settlement binds an organization outside the authority of the Adjutant General, the SEEM/agency representative (whichever appropriate per 7a), obtains written concurrence of an authorized official within that organization before the agreement is signed.

d. Before having the settlement authority sign an agreement, the SEEM/agency representative shall, obtain coordination of the SJA and HRO on personnel actions to be taken as a result of the agreement. Such coordination does not include a determination on the merits of the case or on the settlement. For settlement agreements resulting from an ADR proceeding, the agreement may be signed before formal coordination, contingent upon subsequent coordination and approval.

(1) The SEEM/agency representative shall provide a copy of each finalized settlement agreement to the Adjutant General or designee within five (5) days of signature.

e. The SEEM/agency representative (whichever is appropriate per paragraph 7a) in coordination with the HRO must fax copies of signed settlement agreements requiring action by Defense Finance and Accounting Service (DFAS) (e.g., cancellation/correction of suspension actions, retroactive promotions, reinstatement of leave, etc.) to the servicing DFAS civilian payroll office immediately with copies of applicable SF (Standard Form) 50-B, Notification of Personnel Action.

8. Civilian Formal EEO Class Complaints

a. Guidance and Processing Procedures.

(1) HRO develops policy and oversees the processing of all class complaints of discrimination. HRO, in coordination with the SJA, helps prepare the Agency's position statements and briefs in class complaint proceedings, as appropriate.

(2) The HRO personally serves or designates a staff member to serve as a technical representative for class complaints. The HRO also ensures that applicable personnel records are maintained while a class complaint is pending.

(3) The SJA provides legal advice on all administrative class complaint matters and designates the Agency representative for all administrative class complaints.

(4) The complainant must file a formal class complaint with the SEEM no later than 15 calendar days after receipt of the final interview letter. The agent or attorney/representative must sign the class complaint. It must identify the policy or practice adversely affecting the class as well as the action or matter adversely affecting the agent.

(5) Upon receipt of a formal class complaint, the SEEM forwards the original and one copy of the case file to the SJA and the HRO.

(6) Within 30 calendar days of receipt of the written formal complaint, the Agency representative, in coordination with HRO, forwards it to the EEOC district office with the counselor's final report and the Agency recommendation to accept or dismiss based on the criteria at 29 CFR 1614.107 and 29 CFR 1614.204(a)(2). Copies are sent to the SJA, the HRO, and the SEEM.

(7) The EEOC AJ decides whether to accept or dismiss a class complaint. Immediately upon receipt of the decision, the SEEM will forward it to the SJA and will issue a final order within 40 calendar days after receipt, IAW 29 CFR 1614.204(d) (7). A complaint dismissed as a class complaint may be filed as an individual complaint and processed accordingly, or dismissed as an individual complaint if one or more grounds exist under 29 CFR 1614.107(a). The SEEM will notify the Complainant of decision along with his or her rights associated with the decision. If the final order does not implement the AJ's decision to accept a class complaint, the Agency will simultaneously appeal the decision IAW 29 CFR 1614.204(d) (7) and 1614.403. The class agent may appeal dismissal of a class complaint to the EEOC or file a civil action.

(8) When the SEEM receives an individual complaint that he or she believes is related to a pending class complaint, the SEEM will inform the HRO and the SJA of the issue(s) involved and the basis of the individual complaint, and provide a synopsis of the reasons for believing the individual complaint is related to a pending class complaint. Where appropriate, the HRO and the SJA will provide guidance on processing individual complaints related to pending class complaints.

(9) The SEEM makes arrangements for the hearing after the EEOC has set a date. The EEOC will hold a hearing of the accepted class complaint and issue a report of findings and recommendations to the SEEM as the designated service agent for the Agency. The SEEM will immediately notify the HRO and the SJA and provide copies of the report as appropriate. [29 CFR 1614.204(h)].

(10) The HRO and the SJA, who represents the Agency in all phases, are responsible for managing the processing of formal class complaints. Processing will be in accordance with 29 CFR 1614.204(e) through (k).

9. Civilian EEO Mixed Case Complaints

a. Guidance and Processing Procedures.

(1) Processing of mixed case informal complaints and formal complaints will be in accordance with 29 CFR 1614.105, 1614.106, 1614.107, and 1614.108 (a) through (d).

(2) An individual may file a mixed case appeal through the MSPB process or a mixed case complaint using the EEO discrimination complaint system, but not both. Whatever action the complainant files first, in writing, is considered the election. Merely receiving informal complaint counseling does not constitute an election; a formal complaint must be filed to restrict the complaint to the mixed case complaint system.

(a) When the complainant files a mixed case appeal, and the MSPB dismisses the appeal on jurisdictional grounds without a decision on its merits, a copy of the initial decision, and any subsequent decision issued by the full Board in response to the complainant's Petition for Review, will be provided to the SEEM. The SEEM will promptly issue the complainant with notice of his/her right to file an EEO complaint concerning the matter at issue. [29 CFR 1614.302 (b)].

(3) When a formal EEO complaint is accepted, the SEEM advises the complainant that if a decision on the claims appealable to the MSPB is not issued within 120 calendar days of filing the mixed case complaint, the complainant may appeal the matter to the MSPB as specified at 5 CFR 1201.154(b) (2) or file a civil action as specified in 29 CFR 1614.310(g), but not both. [29 CFR 1614.302 (d) (1) (i)].

(4) Upon completion of the investigation and receipt of the investigative file, the SEEM advises the complainant that a final decision will be issued on the claims appealable to the MSPB within 45 calendar days without a hearing.

(5) When a final decision is issued, the SEEM will advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 calendar days of receipt and the right to file a civil action as provided at 29 CFR 1614.310. [29 CFR 1614.302(d) (3)].

(6) Dismissal of a mixed case complaint on the basis of prior election of a mixed case appeal is as follows:

(a) If neither the MSPB nor the Agency disputes MSPB jurisdiction, the EEO claims involving actions appealable to the MSPB are dismissed IAW 29 CFR

1614.107(a) (4). The dismissal letter will advise the complainant to notify the MSPB of the allegations of discrimination contained in the dismissed complaint. It also advises the complainant of the right to petition the EEOC to review the MSPB final decision on the discrimination issue. [29 CFR 1614.302(c) (2) (i)]

(b) If the Agency or the MSPB questions the MSPB jurisdiction over the mixed case appeal, the SEEM will hold the mixed case complaint in abeyance until the MSPB rules on the jurisdictional issue. The SEEM notifies the complainant of the action being taken and instructs him or her to bring the allegation of discrimination to the attention of the MSPB.

(c) If the MSPB determines it has jurisdiction over the matter, the SEEM shall dismiss the mixed case complaint pursuant to 29 CFR 1614.107(a). The SEEM advises the complainant of the right to petition the EEOC to review the MSPB final decision on the discrimination issue.

(d) If the MSPB determines it does not have jurisdiction over the mixed case appeal, the SEEM recommences processing of the mixed case complaint as a non-mixed case EEO complaint.

10. Civilian EEO Complaint Appeals

a. Guidance and Processing Procedures.

(1) Complainant Appeals. The SJA has primary responsibility as agency representative in all appeals initiated by the complainant under 29 CFR 1614.401(a).

(a) The SEEM is the central receipt point for all appeals. Upon receipt, SEEM will forward the appeal to the SJA. The SJA will file the complaint file with EEOC/OFO within 30 days of initial notification of the complainant's appeal. [29 CFR 1614.403(e)]

(2) The SEEM will establish suspense for response to the appeal. The SJA will file all appeal briefs directly with EEOC/OFO, IAW 29 CFR 1614.403, with service on the complainant and the complainant's designated representative.

(3) An unfavorable decision on an EEOC/OFO appeal will be processed for possible Request for Reconsideration (RFR) IAW the procedures in Section 11.

(4) Agency Appeals. The Adjutant General or designee is the final decision authority on all appeals to the EEOC/OFO initiated by the Agency. The SJA has primary responsibility as agency representative before the EEOC/OFO in all agency-initiated appeals.

(5) A final agency order that does not fully implement the decision of an EEOC AJ must be accompanied by a simultaneous appeal to the EEOC, IAW 29 CFR

1614.110(a). Upon receipt of an AJ decision finding of discrimination, the SEEM will immediately forward the decision to the SJA.

(6) If Adjutant General or designee issues a final order that does not fully implement the decision of the AJ, the SEEM will file the Agency Notice of Appeal form (see MD-110, Appendix O), with EEOC/OFO, including a copy of the final order, IAW 29 CFR 1614.403. The SEEM will request the SJA to prepare a brief or other documentation in support of the appeal. The SJA will file the brief or other statement in support of the appeal with the EEOC/OFO, with service on the complainant or the complainant's designated representative, within 20 days of filing the notice of appeal. [29 CFR 1614.403(d)]. The SJA will file the complaint file with EEOC/OFO within 30 days of filing the notice of appeal. [29 CFR 1614.403(e)]

(7) If EEOC/OFO grants the Agency appeal, the SEEM will notify the SJA. If EEOC/OFO denies the appeal, the SEEM will initiate action to establish compliance and notify the parties of their right to request reconsideration in accordance with Section 11.

11. Request for Reconsiderations (RFR)

a. Guidance and Processing Procedures.

(1) The SJA and the SEEM will assess the propriety of an RFR and notify the Adjutant General of its recommendation. Recommendations to file an RFR should focus on the grounds identified by the EEOC in 29 CFR 1614.405(b), (i.e., the appellate decision involved a clearly erroneous interpretation of fact or law, or the decision will have a substantial impact on the policies, practices, or operations of the Agency). The SJA will file the RFR with EEOC/OFO within 30 days of receipt of the appellate decision, IAW 29 CFR 1614.405(b).

(2) Upon disposition of the RFR by EEOC/OFO, the SEEM will notify the SJA, the HRO and the Adjutant General of the disposition for appropriate action.

12. Anonymous Complaints

a. Guidance and Processing Procedures. The EEO office will ensure that an anonymous complaint of discrimination on any basis is documented as an EEO General Assistance/Contact and if the complaint is pursued, ensures that the complaint intake form reflects sufficient details to clarify the complaint and indicate that the source is reliable. As in all EEO complaints, the SEEM has the responsibility of informing the Adjutant General or designee and briefing her/him on complaints raised by employees (complainants) when brought to the EEO office, whether or not they relate to EEO matters. The Commander may decide an investigation outside of the EEO realm is appropriate, (e.g. CDI, AR 15-6 or commander's inquiry, etc.). Keep in mind those interviewed in connection with the matter may be able to determine the identity of the individual making the complaint. However, in accordance with 29 CFR 1614.105(g), the

EEO Professional will not reveal the identity of the complainant. Additionally, complainants have the right to anonymity only up to the point of filing a formal civilian EEO complaint.

13. Allegations of Sexual Harassment (10 USC 1561 and 29 CFR 1614)

a. Counseling of Potential Civilian Sexual Harassment Complaints.

(1) When a civilian employee initiates contact with an EEO Professional regarding a complaint of sexual harassment, the EEO Professional must advise him/her of his/her rights and responsibilities under both statutes (Title VII, as implemented by 29 CFR 1614).

(2) The requirements for a commander to conduct an investigation upon receiving a complaint involving sexual harassment and provide the Adjutant General notification also apply to civilian employees when the employee has made the complaint to the Commander. When an employee initially contacts the commander with allegations of sexual harassment, the commander must immediately inform the SEEM of the contact prior to launching an investigation and encourage the employee to contact the SEEM to ensure he/she preserves his/her rights regarding the EEO complaint process. It is ultimately the employee's responsibility to initiate contact with a SEEM within 45 days of the alleged discriminatory event or within 45 days of the effective date of the personnel action leading to discrimination, IAW 29 CFR 1614.105(a)(1).

(3) The SEEM shall attempt to initiate contact with the employee who has contacted his/her commander to ensure the employee is aware of his/her options and rights. The EEO Professional shall inform the civilian employee of the following:

(a) There are two avenues available for complaints of sexual harassment. The commander's investigation, and the process provided under Title VII, as implemented by 29 CFR 1614, which entitles the employee to anonymity at the informal/pre-complaint stage. Both processes can be used simultaneously.

(1) Filing under the commander investigation process will not serve to exhaust administrative remedies with respect to 29 CFR Part 1614.

(2) Decisions under the commander investigation process are final with no right of appeal to the courts. Monetary damages also are not available.

(3) Anonymity is not a guarantee under the commander investigation process. Anonymity is also not an option at the formal stage of the process under 29 CFR Part 1614.

(b) Commander investigations must be completed no later than 14 calendar days after the start of the investigation. If the investigation is not completed by

the 14th calendar day, a progress report to the Adjutant General regarding the progress of the investigation must be submitted within 20 calendar days and every 14 calendar days thereafter until the investigation is closed. Once the investigation is closed, the commander must submit a final report to the Adjutant General.

(4) If a civilian employee elects to pursue both the traditional EEO process (29 CFR Part 1614) and the commander investigation process simultaneously, or if the employee elects to (at least initially) exclusively pursue recourse under the commander investigation process, the SEEM will immediately contact the responsible commander to request an investigation. If both processes are chosen, the SEEM will proceed with the traditional EEO process at the same time the investigation is being conducted.

(5) If an employee elects to exclusively pursue a complaint under the commander investigation process, the SEEM will document the contact, and refer the employee to his/her responsible commander to request an investigation. If the employee does not express intent to pursue an EEO complaint, counseling activities, as identified in MD 110, should NOT occur. The 30-day counseling period for an EEO complaint commences when the employee expresses intent to begin the EEO process and obtains counseling.

(a) EEO Professionals must inform civilians in writing if they wish to pursue the EEO process after the investigation is completed, they must contact the SEEM within 10 calendar days from the notification that the investigation is complete, to state their intention to begin the EEO process and obtain counseling on the EEO process. This applies when the employee has initiated contact with a SEEM within 45 days of the alleged discriminatory event (or of the effective date of the personnel action leading to the discrimination). It is ultimately the employee's responsibility to make contact, in a timely manner, with the SEEM to pursue complaints of discrimination.

(6) The EEO Professionals who serve as subject matter experts (SME) for an IRD investigation should not serve as the EEO Professional for a subsequent EEO complaint on the same issues/bases.

ENCLOSURE B

DISABILITY ACCOMMODATION

1. Accommodation Obligation.

a. The Rehabilitation Act of 1973 (29 USC Section 791 et seq.) as amended by the Americans with Disabilities Act of 1990, as amended (42 USC Section 12101 et seq.) requires all Federal agencies to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.

b. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. [29 CFR 1630.2(o)]

c. Disability Accommodation is a case-specific and fact-specific process. The EEOC's —Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act dated October 17, 2002 (<http://www.eeoc.gov/policy/docs/accommodation.html>) provide controlling guidance on this issue. Whenever dealing with a reasonable accommodation request, consult the SJA.

2. Qualified Individual with a Disability.

a. A qualified individual with a disability is an individual with a physical or mental impairment, or a record of having such an impairment, that substantially limits one or more major life activities, who can, with or without reasonable accommodation, perform the essential functions of the position that the individual holds or desires. An individual only regarded as having such an impairment is not entitled to reasonable accommodation.

b. Undue Hardship.

(1) Employers do not have to provide any accommodation that would pose an undue hardship on the operation of the Agency.

(2) Undue hardship focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation and refers to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.

3. Reasonable Accommodation.

a. Reasonable accommodation may include, but is not limited to:

(1) Making existing facilities used by employees readily accessible to and usable by persons with disabilities;

(2) Job restructuring, modifying work schedules, or reassignment of a current employee to a vacant position; and

(3) Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

b. An employer is not obligated to provide personal use items such as glasses or hearing aids.

c. An employer is not required to remove an essential function of the job as an accommodation.

d. An employer shall hold employees with disabilities to the same standards of performance and conduct as other similarly situated employees without disabilities. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation.

4. Interactive Process.

a. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer.

b. There is no requirement that the request be in writing and there are no specific forms or terms that an individual must use to request an accommodation.

c. The request may come from the individual, family member, friend, health care professional, or representative.

d. When the accommodation request involves or affects job performance, and using a problem solving approach, an employer should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position;

(4) Consult with management, the SEEM and the SJA. Unusual or difficult questions about requested accommodations may be referred to the HRO; and

(5) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer. The employer need not provide the employee's preferred accommodation. The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.

e. When the request for accommodation involves the application process or access to a benefit or privilege of employment, a similar approach to that outlined above should be used.

f. As a general rule, the individual with a disability who has the most knowledge about the need for reasonable accommodation must inform the employer that an accommodation is needed. However, the employer should initiate the reasonable accommodation interactive process without being asked if the employer:

(1) knows that the employee has a disability;

(2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and

(3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that he or she does not need a reasonable accommodation, the employer will have fulfilled its obligation.

5. Medical Documentation.

a. Medical Documentation. When the disability or the need for reasonable accommodation is not obvious, employers may request reasonable medical documentation to determine whether an individual requesting accommodation has a disability.

b. Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has a disability as stipulated in the Rehabilitation Act, and that the disability necessitates a reasonable accommodation.

c. Employers may also request information to document the need for accommodation and to help determine appropriate accommodations.

d. In most cases, employers cannot request complete medical records because such records may reveal information that is not relevant to determining whether the employee has a disability or needs an accommodation. Requests for medical information should be narrowly tailored to answer specific questions to help determine if the individual has a disability and/or if reasonable accommodation is needed (and if so, what specifically is required as a reasonable accommodation). Any medical information obtained from an employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except when disclosure is required to inform supervisors of necessary restrictions or accommodations or for emergency medical treatment.

6. Denial of Accommodation Requests.

a. Denials of reasonable accommodation must be in writing and include specific reasons for the denial and the employee or office that made the decision. A denial must notify the individual that he or she has a right to file an EEO complaint, the procedures for doing so, as well as identify and explain any avenues available for informal dispute resolution.

b. If an alternate accommodation is approved, the written notification should explain both the reasons for the denial of the original accommodation and the reasons it is believed the chosen alternative will be effective.

ENCLOSURE C

SETTLEMENT AGREEMENTS

1. Authority.

a. The Agency has general authority to settle EEO complaints during the informal and formal EEO complaint processes as required by 29 CFR 1614.603 and as described in EEOC Management Directive 110, Chapter 12. All EEO Professionals have authority to assist parties in drafting and executing settlement agreements in the pre-complaint stage, within the parameters set by the settlement authority. Agency representatives have the authority to negotiate settlements, within the parameters set by the settlement authority, after a formal complaint has been filed.

b. An Agency official is properly a settlement authority if he or she has the authority to grant the scope of the remedy requested and/or provided. If an expenditure of funds is contemplated and the commander wishes to delegate his/her authority for complaint resolution, such delegation must be in writing.

2. Settling Civilian EEO Complaints.

a. The Agency encourages resolution of civilian EEO complaints at the earliest possible time and the lowest level practical. EEO professionals/agency representatives must ensure coordination of settlement terms with the below offices prior to securing signatures of the complainant and the settlement authority to ensure that any such agreement is practical and enforceable. Such coordination is not required with respect to the merits of the case or the settlement.

b. Ensure settlement terms involving personnel actions or personnel processes are coordinated with the HRO.

c. Ensure settlement terms involving financial matters, including payment of money, are coordinated with the appropriate financial management office. Compensatory damages and payment of other monetary relief are paid from Operations and Maintenance funds.

d. Ensure settlement terms that involve other offices or other agencies are coordinated properly. If the settlement binds an organization outside the authority of the relevant commander, the SEEM or ADR Manager obtains written concurrence of an authorized official within that organization before the agreement is signed. For settlement agreements resulting from an ADR proceeding, the agreement may be signed before formal coordination, contingent upon subsequent coordination and approval. Such a contingency should be made clear to the parties prior to signature.

e. All settlements are subject to the provisions of the Privacy Act of 1974. All settlements reached during ADR proceedings are subject to the provisions of the

Administrative Dispute Resolution Act of 1996. Terms which further restrict management's ability to disclose settlement terms to those with a legitimate need to know are discouraged.

3. Compliance with Settlement Agreements.

a. All civilian EEO settlement agreements are binding upon the Agency and the complainant. To ensure compliance with the terms of settlement, the SEEM must accomplish the following actions:

b. Review the terms of settlement and determine the responsible office(s) executing the agreement. Provide each responsible office with a copy of the portion of the settlement agreement that pertains to their action.

c. The SEEM, in coordination with the HRO, transmits copies of signed settlement agreements requiring action by Defense Finance and Accounting Service (DFAS) (e.g., cancellation /correction of suspension actions, retroactive promotions, reinstatement of leave, etc.) to the servicing DFAS civilian payroll office immediately with copies of applicable Standard Form 50-B.

d. Collect documentation from the responsible office(s) indicating execution of their action and retain with the original settlement agreement and follow disposition instructions according to the Agency's Records Management System.

4. Allegations of Noncompliance with Settlement Agreements.

a. The SEEM must handle allegations of breach of settlement agreements involving civilian EEO complaints expeditiously and observe the timelines in 29 CFR 1614 Section 504. The SEEM must accomplish the following actions:

(1) Upon receipt of written notice by a complainant that a specific provision(s) of a settlement agreement is breached, promptly conduct appropriate fact-finding and determine if additional action is required to implement the agreement. If necessary, contact the responsible management official(s) and the SJA to ensure implementation of the specific provision(s).

(2) Provide a written decision signed by the Adjutant General or designee to the complainant within 30 calendar days on the determination as to whether the installation is in breach and/or efforts to resolve the matter and advise him/her of the right to appeal the decision to the EEOC for a determination as to whether the terms of agreement have been breached. [29 CFR 1614.504(b)]. Provide the Complainant a copy of EEOC Form 573, Notice of Appeal/Petition.

b. ADR may be used to resolve allegations of breach of agreements if the matter is determined to be appropriate for ADR.

ENCLOSURE D

COMPLIANCE ACTIONS

1. Compliance with EEOC Orders and Decisions.

a. The SEEM is responsible for the implementation of and compliance with EEOC Orders. The SEEM is responsible for determinations regarding the proper or improper dismissal of complaints, and all findings of discrimination, and identifying actions necessary to establish compliance, submitting interim and final compliance reports to the EEOC Office of Federal Operations (OFO), for internal finding of discrimination and findings by EEOC AJs, responding to the EEOC on behalf of the Agency with regard to orders issued by EEOC/OFO, and distributing copies of decision and orders to offices with oversight responsibility.

b. EEOC Remand Orders. The EEOC/OFO may issue such orders that remand civilian EEO complaints for processing, directing the Agency to submit additional documentation, or with regard to compliance with a settlement agreement. EEOC/OFO sends orders and decisions to the SEEM. The SEEM suspenses the orders to the appropriate official for action. The appropriate official must accomplish the following actions:

(1) EEOC Remands for Processing. Immediately implement the actions as directed by the SEEM and provide required documents to the SEEM.

(2) EEOC Orders Involving Findings of Discrimination. Inform the commander (director) and, in coordination with the SJA and HRO, implement the action as directed by the SEEM. Provide required documents to the SEEM in accordance with the suspense.

(3) EEOC Decisions Involving Default Judgments and/or Monetary Sanctions. Immediately inform the commander (director). In coordination with the SJA and HRO, implement the actions as directed by the SEEM. Provide required documents to SEEM in accordance with the suspense.

c. Agency Findings of Discrimination. The agency has the responsibility to comply with the Adjutant General's findings of discrimination to include initiate the actions ordered and submit the documentation to the SEEM.

2. Receipt of EEOC Decisions. The SEEM is the responsible office to respond and ensure compliance with EEOC Orders on behalf of the Agency. Other offices that receive an EEOC Order must immediately submit the Order to the SEEM electronically by email or facsimile.

ENCLOSURE E

NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION (NO FEAR) ACT OF 2002 COMPLIANCE

1. No FEAR Act Description and Procedures.

a. On May 15, 2002, Congress enacted The No FEAR Act (Public Law (PL) 107-174). One purpose of the Act is to require agencies to be accountable for violations of anti-discrimination and whistleblower protection laws. (PL 107-174 Summary) In support of this purpose, Congress found that agencies cannot be run effectively if those agencies practice or tolerate discrimination. [PL 107-174 Title I, General Provisions, Section 101(1)]. Settlements and judgments arising within the administrative or judicial processes are reportable by the Agency as required by the No FEAR Act.

b. For formal civilian EEO complaints in the administrative process, SEEMs will ensure that accurate and timely data is entered into the current Agency IT system on a monthly basis at a minimum.

c. For cases in federal court litigation, the SJA will timely notify the SEEM and the Adjutant General of any settlements or judgments subject to No FEAR Act reporting. The SJA is the sole source for settlements and judgments from the federal courts.

d. The Agency will timely reimburse the Department of Treasury, Judgment Fund for any judgments or settlements subject to the No FEAR Act in accordance with 5 CFR 724.104 and Chapter 3100 of the Treasury Financial Manual. The financial management office will provide the SJA a copy of the reimbursement document showing reimbursement to the treasury.

e. The SEEM will generate the annual report not later than 15 Oct of each fiscal year for review by HRO and submission to NGB, DoD, and EEOC.

f. HRO will approve and forward the final report to the Adjutant General for signature NLT 30 days from the end of the Fiscal Year (FY). The SEEM shall post the final report on a Public Web Site no later than 180 days after the end of the FY.

g. The development of No FEAR Act Training is the responsibility of the SEEM to implement IAW 5 CFR 724.203. The SEEM may implement the training via various media (e.g. briefings, etc.) and track numbers of individuals trained on a biennial basis.

h. The SEEM must ensure the Agency's workforce (to include military supervisors of civilian employees) is trained at least every 2 years.

i. EEO Professionals must train new employees as part of the Agency's orientation program within 90 calendar days of the new employees' appointment.

j. EEO Professionals must track numbers of individuals trained and report the statistics when requested by the SEEM.

2. No FEAR Notice.

a. EEO Professionals must provide notice to all of the Agency's employees, former employees, and applicants for Federal employment about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection applicable to them.

(1) Each EEO Professional must provide the notice to the Agency's serviced employees in paper (e.g., letter, poster or brochure) and/or electronic form (e.g., e-mail, internal agency electronic site, or Internet website). EEO Professionals with Internet websites can post the notice on those websites, in compliance with section 508 of the Rehabilitation Act of 1973, as amended.

(2) The format and minimum text to be included in the notice is outlined in the Code of Federal Regulations, Title 5, Chapter 1, Part 724, Subpart B – Notification of Rights and Protections and Training.

b. After the initial notice, each EEO Professional must provide the notice to new employees within 90 calendar days of entering on duty.

ENCLOSURE F

REFERENCES

- a. Title 32, United States Code
- b. Title 10, United States Code
- c. Public Law 114-328, 23 December 2016, "National Defense Authorization Act for Fiscal Year 2017"
- d. Title 29, Code of Federal Regulations
- e. CNGB Instruction 9601.01, 27 September 2015, "National Guard Discrimination Program"
- f. NGR 600-23/ANGR 30-12, 30 December 1974, "Nondiscrimination in Federally Assisted Programs"
- g. Equal Employment Opportunity Commission Management Directive 110, 05 August 2015, "Federal Sector Complaint Processing Manual"
- h. Equal Employment Opportunity Commission Management Directive 715, 01 October 2003, "EEO Reporting Requirements for Federal Agencies"
- i. Public Law 104-320, "Administrative Dispute Resolution Act of 1996", 110 Stat. 3870, codified at 5 USC Section 571, et seq.

GLOSSARY

ABBREVIATIONS, ACRONYMS AND TERMS

ADR	Alternate Dispute Resolution
AGP	Administrative Grievance Procedure
AJ	Administrative Judge
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
FAD	Final Agency Decision
HRO	Human Resources Officer
IRD	Investigations and Resolutions Directorate
MSPB	Merits Systems Protection Board
NG	National Guard
NGB	National Guard Bureau
NGP	Negotiated Grievance Procedure
OFO	Office of Federal Operations
ROI	Report of Investigation
RFR	Request for Reconsideration
SEEM	State Equal Employment Manager
SJA	Staff Judge Advocate
TDY	Temporary Duty

Administrative Judge (AJ)— For the purpose of this instruction and pursuant to 29 CFR 1614.109, an AJ is an individual appointed by the Equal Employment Opportunity Commission when a hearing is requested, who assumes full responsibility for the adjudication of the complaint--including oversight of the development of the record.

Aggrieved Person— For the purpose of this instruction, this refers to an employee, former employee, or applicant for employment who believes he or she has been discriminated against on the basis of race, color, religion, sex, national origin, age, disability or reprisal.

Alternative Dispute Resolution (ADR)— The Administrative Dispute Resolution Act of 1996, Public Law (PL) No. 104-320, 110 Stat. 3870, 5 USC Section 571, et seq. (1996) defines ADR as any procedure that is used to resolve issues in controversy, including but not limited to facilitation, mediation, fact-finding, mini-trials, arbitration and the use of ombudsmen, or any combination thereof. Sec. 4 (b), 5 USC Section 571(3).

Alternative Dispute Resolution Manager for Workplace Disputes— An individual appointed at the Joint Forces Headquarters, and installation level to promote the use of ADR processes for resolving military and civilian workplace disputes, to facilitate the development and implementation of the organization's workplace disputes ADR plan, and to provide oversight of the organization's workplace disputes ADR program.

Basis of Complaint— For the purpose of this instruction, the statutory source (Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act (ADEA), Equal Pay Act (EPA), or Rehabilitation Act) upon which the complainant believes she or he has been discriminated against, or the alleged motivation for the employment action being challenged; i.e., race, color, religion, sex, national

origin, age, disability and/or reprisal for opposing any practice made unlawful, or for participating in any stage of the complaint process under those statutes.

Class— A group of employees, former employees, and/or applicants for employment who allegedly have been or are being harmed by an agency's personnel policy or practice, based on their common race, color, religion, sex, national origin, age, or disability.

Compensatory Damages— Payments intended to fully compensate victims of intentional discrimination, if allowed by law, for pecuniary and non-pecuniary losses that result directly from the discrimination. These damages are in addition to equitable relief such as back pay, interest, reinstatement, and attorney's fees.

Complainant— For the purpose of this instruction, a military member or retiree, military family member, an employee, former employee, or applicant for employment who files a complaint of discrimination or who submits allegations of unlawful discrimination or sexual harassment.

Complaint Clarification— A process of gathering information regarding a formal EO complaint or Hotline complaint to determine whether a "preponderance of evidence" exists and/or that unlawful discrimination or sexual harassment has occurred.

Complaint— An allegation of unlawful discrimination based on race, color, national origin, religion, sex, age disability or reprisal filed by a civilian employee with an EEO Office; or an allegation of unlawful discrimination based on race, color, national origin, religion, or sex filed by a military member with an EEO Office.

Formal Complaint— Allegation of unlawful discrimination or sexual harassment that is submitted in writing by a complainant to the EEO Office.

Informal Complaint— Allegation of unlawful discrimination or sexual harassment, made either orally or in writing to the EEO office by a complainant that is not submitted as a formal complaint. If the complaint is made to the EEO office, it will be recorded on a form.

Confidentiality— As used in this AFI, refers to the protection from voluntary or compulsory disclosure, afforded by the Administrative Dispute Resolution Act of 1996, to certain dispute resolution communications given in confidence for the purposes of a dispute resolution proceeding. See ADRA, 5 USC Section 574.

Discrimination (Civilian EEO)— An unlawful employment practice that occurs when an employer fails or refuses to hire or promote, discharges, or otherwise discriminates against any individual with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, national origin, age, reprisal, physical or mental disability; limits, segregates or classifies employees or applicants for employment in any way that deprives or tends to deprive any individual of employment opportunities or otherwise adversely affects his/her status as an employee because of race, color, religion, sex, national origin, age, reprisal, physical or mental disability.

Disparate Treatment— Treatment that is different because of race color, sex, religion, national origin, age, disability, or reprisal.

Equal Employment Opportunity Commission (EEOC)— The Commission is responsible for, among other things, conducting hearings and issuing decisions on complaints of discrimination in the federal sector, as well as enforcing compliance with section 717 of Title VII of the Civil Rights Act of 1964, as amended; sections 501 and 505 of the Rehabilitation Act of 1973, as amended; section 15 of the Age Discrimination in Employment Act of 1977, as amended; and the Equal Pay Act, section 6(d) of the Fair Labor Standards Act of 1938, as amended.

Equal Employment Opportunity Commission Office of Federal Operations (EEOC/OFO)— The Equal Employment Opportunity Commission office responsible for federal sector complaint processing.

Genetic Information Nondisclosure Act (GINA)— GINA prohibits discrimination on the basis of genetic information. It creates a separate form of unlawful discrimination distinct from disability discrimination under the Rehabilitation Act. GINA prohibits discrimination based on genetic information and not on the basis of a manifested condition. The Rehabilitation Act and the Americans with Disabilities Act prohibit discrimination on the basis of manifested conditions that meet the definition of disability. For example, a woman who carries the genetic marker posing a risk for breast cancer (BRCA 2) but who does not have breast cancer is covered by GINA. If she develops breast cancer, she is likely covered by the Rehabilitation Act, but not by GINA.

Hostile Work Environment— A hostile work environment is a series of acts which are so severe and pervasive as to alter the terms and conditions of employment. The acts which make up the hostile environment may be discreet acts or may be ones which taken alone do not rise to the level of an adverse employment action.

Investigations and Resolutions Division (IRD)— Component of the Department of Defense (DoD), Civilian Personnel Management Service (CPMS) that is responsible for investigating discrimination complaints for DoD components.

Merit Systems Protection Board (MSPB)— The federal agency responsible for holding hearings and issuing decisions on complaints or appeals of adverse personnel actions, including disciplinary actions and performance based actions. Appeals to the MSPB may also contain allegations of discrimination, i.e., mixed cases.

Mixed Case Appeal— A mixed case appeal is an appeal filed with the MSPB that alleges that an agency action over which the MSPB has jurisdiction was effected, in whole or in part, because of discrimination based on race, color, religion, sex, national origin, age, disability, or reprisal.

Mixed Case Complaint— A mixed case complaint is a complaint of employment discrimination based on race, color, religion, sex, national origin, age, disability, or reprisal related to or stemming from an action that can be appealed to the MSPB. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

National Origin— An individual's or ancestor's place of origin. Also applies to a person who has the physical, cultural or linguistic characteristics of a national group.

Neutral— An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy. This individual may be a Federal government employee or someone outside the Government. For purposes of determining whether communications are confidential, the term —neutral also includes ADR intake or other administrative personnel designated and identified by the ADR Manager as a neutral for the purpose of taking information from the party or parties to a dispute to assist them in deciding whether to use a dispute resolution proceeding to resolve the dispute. See ADRA, 5 USC Section 571(9).

Reasonable Accommodation— A logical adjustment to the job and/or the work environment that enables a qualified person with a disability to perform the essential duties of the position without doing harm to themselves or others.

Race— A division of human beings identified by the possession of traits transmissible by descent and that are sufficient to characterize persons possessing these traits as a distinctive human genotype.

Religion— A personal set or institutionalized system of attitudes, moral or ethical beliefs and practices held with the strength of traditional religious views, characterized by ardor and faith and generally evidenced through specific religious observances.

Report of Investigation (ROI)— The summary of facts and documents collected during an investigation issued by the investigator pursuant to the investigation of a formal complaint of discrimination under 29 CFR 1614.108.

Reprisal (Civilian)— It is unlawful to retaliate against an individual for opposing employment practices that discriminate based on any of the protected categories or for filing an unlawful discrimination charge, testifying, or participating in any way in an investigation, proceeding, litigation, or expressing opposition to a perceived discriminatory practice.

Sexual Harassment— Harassment on the basis of sex is a violation of Title VII of the Civil Rights Act of 1964. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Substantiated— A substantiated finding occurs when a preponderance of the evidence supports (more likely to have occurred than not occurred) the complainant's allegation of a violation of law, regulation or NG policy or standards. The documented facts indicate that a violation occurred.