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COMPLAINT PROCESS FOR SEXUAL ORIENTATION DISCRIMINATION

Number: DAO 215-11

Effective Date: 1999-11-30

SECTION 1. PURPOSE.

This Order establishes Department of Commerce (the "Department") policies for providing employees and applicants for employment with a Department-wide and uniform 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.

.01 Executive Order 11478, as amended by Executive Order 12106, and as further amended by Executive Order 13087 (collectively, the Executive Order) prohibits discrimination and ensures equal opportunity for all persons, without regard to sexual orientation, employed I or seeking employment with the Federal government. The Department's nondiscrimination policy prohibits discrimination based on sexual orientation against Department employees, 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 applicants for employment on the basis of conduct which does not adversely affect the employee's job performance or the performance of others.

.02 These procedures covering complaints of discrimination based on sexual orientation are issued pursuant to the Executive Order and the Secretary of Commerce's authority to plan, direct, and control Departmental affairs.

SECTION 3. POLICY.

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

SECTION 4. EFFECTIVE DATE.

Incidents occurring on or after the effective date of this Order may be raised using this complaint process. For employees who are members of collective bargaining units, the procedures will become effective at such time as any collective bargaining/partnership obligations are fulfilled.

SECTION 5. DEFINITIONS.

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

orientation is real or perceived.

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

- a. their sexual orientation or perceived sexual orientation;
- b. their relationship 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.

.03 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.

.04 Day means a calendar day.

SECTION 6. PERSONS COVERED.

This Order applies to all employees and applicants for employment in the Department with the following exceptions:

- a. those who are temporary employees in the Bureau of the Census Decennial Program or are applying for such employment; and
- b. employees covered by a collective bargaining agreement which does not specifically exclude sexual orientation discrimination or related retaliation from its negotiated grievance procedure.

SECTION 7. RESPONSIBILITIES.

.01 The Chief Financial Officer and Assistant Secretary for Administration (CFO/ASA) shall:

- a. Approve policies, directives and other materials outlining the Department's policies and complaint process for sexual orientation discrimination;
- b. Receive and issue decisions on appeals on final agency decisions under this complaint process; and
- c. Fulfill, on behalf of the Secretary, the Secretary's responsibilities as head of an operating unit, i.e., the Office of the Secretary.

.02 Heads of operating units shall:

- a. Foster an environment free of sexual orientation discrimination;
- b. Ensure compliance with provisions of this Order; and
- c. Publicize this policy and the complaints processing procedures to all employees.

.03 The Director for Civil Rights (Director, OCR) shall:

- a. Develop and issue Department policy and procedures regarding sexual orientation discrimination;
- b. Advise Department officials regarding laws, regulations and Department policies pertaining to sexual orientation discrimination; and
- c. Process sexual orientation discrimination complaints filed under this Order.

.04 Operating unit Equal Employment Opportunity Officers (EEO Officers) shall:

- a. Ensure that managers, supervisors and human resources managers understand the law and policies regarding sexual orientation discrimination and advise them on these issues;

- b. Coordinate management and employee training on sexual orientation discrimination issues with human resources managers, as appropriate for each operating unit; and
- c. Process informal sexual orientation discrimination complaints under this Order.

.05 All managers and supervisors shall ensure that all personnel actions, policies, practices, and the work environment are free from discrimination and harassment on the basis of sexual orientation, and that no employee or applicant for employment shall be subjected to reprisal, intimidation, or coercion for raising an allegation of discrimination based on sexual orientation, or for participating in procedures addressing sexual orientation issues.

SECTION 8. INFORMAL COMPLAINT PROCESSING PROCEDURES.

.01 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.

.02 An aggrieved person must contact an EEO Counselor 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.

.03 The operating unit EEO Officer or the Director, OCR 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 limits and was not otherwise aware of them, that he or she did not know and reasonably would not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting an EEO Counselor within the time limits, or for other reasons considered sufficient by the EEO Officer or the Director, OCR.

.04 At the initial counseling session, EEO Counselors must advise the aggrieved person in writing of his or her rights and responsibilities in this process, 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 an aggrieved person of his or her duty to keep the operating unit or Department informed of his or her current address. During the pre-complaint counseling stage, employees will be advised of other forums for raising employment issues that may address discrimination based on sexual orientation. Some of these forums include the Office of Special Counsel which investigates prohibited personnel practices, the Merit Systems Protection Board which hears appeals of certain agency actions, the Federal Sector EEO Complaint Process, the Department's administrative grievance 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.

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

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

.07 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.

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

SECTION 9. FORMAL COMPLAINT PROCESS.

.01 Filing a complaint.

- a. A complaint may be filed with the Director, OCR or the EEO Officer of the operating unit where the alleged discrimination arose.
- b. A complaint must be in writing and must be filed within 15 days of receipt of the notice of right to file a complaint of sexual orientation discrimination.
- c. A complainant has a right to a representative, of his or her choice, throughout the complaint process. The representative may be, but does not have to be, an attorney.
- d. A complaint must contain a signed statement from the person claiming to be aggrieved (complainant) or the complainant's representative. This statement must be sufficiently precise to identify the complainant, the operating 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.
- e. The Office of Civil Rights (OCR) shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed and of the specific accepted allegations. Such acknowledgment shall also advise the complainant that the Department 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, OCR or the Chief, Compliance Division, to ensure the complete development of the investigative record.

.02 Dismissal of Complaints. The Director, OCR shall dismiss a complaint or a portion of a complaint:

- a. That fails to state a claim covered under this DAO or states a claim by the same complainant that is pending before or has been decided by the Department, except for those allegations being processed under 29 CFR Part 1614;
- b. That fails to comply with the applicable time limits contained in this Order, unless the EEO Officer or Director, OCR extends the time limits, or that raises a matter that has not been brought to the attention of an EEO Counselor or is not like or related to a matter that was raised in pre-complaint counseling;
- c. Where the complainant has raised the matter in a negotiated grievance procedure that does not exclude allegations of discrimination based on sexual orientation or in a Merit Systems Protection Board (MSPB) appeal;
- d. That is moot or alleges that a proposal to take a personnel action or other preliminary step to taking a personnel action is discriminatory;
- e. Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days of receipt of a notice of proposed dismissal sent to his or her last known address;
- f. Where the EEO Officer or the Director, OCR has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of receipt, or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated, if sufficient information for that purpose is available; or
- g. If, prior to the issuance of the final agency decision, the complainant refuses to accept, within 30 days of receipt, an offer of settlement by the operating unit which constitutes an offer of full relief and contains a

certification from the Director, OCR or a designee, that the offer constitutes full relief, provided that the offer gave notice that failure to accept within the period designated would result in dismissal of the complaint.

.03 Investigation of Complaints.

- a. The investigation of complaints shall be managed by OCR either directly or through contractual services.
- b. Any investigation will be conducted by a contract or government investigator(s) with appropriate security clearance(s). OCR may elect to conduct the investigation 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. The complainant, operating unit officials, and any employee of the Department shall produce such documentary and testimonial evidence as the investigator deems necessary.
 2. Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.
 3. When the complainant, or the operating unit against which a complaint is filed, or its employees 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.
- d. OCR shall develop a complete and impartial factual record sufficient to make findings on the matters raised by the written complaint.
- e. OCR is responsible for completion of the investigation within 180 days of the date of filing of the formal complaint; however, the Chief, Compliance Division, may extend the time period for up to an additional 90 days to ensure complete development of the investigative record.
- f. Within 180 days from the filing of the complaint or within the period of extension provided in subparagraph 9.03.e above, the Chief, Compliance Division 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, OCR will issue a final agency decision within 60 days.

.04 Final Agency Decisions (FADs). Within 60 days of issuing the Report of Investigation, the Director, OCR shall issue a FAD. The FAD shall consist of findings on the "merits of each matter in the complaint and, when discrimination is found, appropriate remedies and relief shall be ordered in accordance with applicable law. All FADs which propose to make a finding of discrimination must be reviewed by the Office of the General Counsel for legal sufficiency before they are issued.

.05 Remedies and Relief. When the Director, OCR finds that an employee, applicant for employment or former employee was discriminated against on the basis of sexual orientation or was the subject of reprisal prohibited by this Order, the Director, OCR shall provide appropriate relief which may include back pay and benefits for employees or former employees in appropriate circumstances, as authorized by 5 U.S.C. 5596 and any other applicable statute.

- a. Notification to all employees of the operating unit at the operating unit's facility in which the discrimination or reprisal took place that the operating unit was found to have engaged in reprisal or discrimination based on sexual orientation, that the employees have a right to be free from such reprisal or discrimination, and that the operating unit 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 operating unit'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 still a current employee, subject to the constraints of law.
- e. Commitment that the operating unit shall cease from engaging in the specific discriminatory employment practice found in the case.

.06 Appeal Process. If the complainant is dissatisfied with the FAD, an appeal may be filed with the CFO/ ASA. 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 DAO and the decision is of such exceptional 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, OCR. Opposition to the appeal must be in writing and must be submitted within 30 days from receipt of the appeal to the CFO/ASA 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 CFO/ ASA will issue the decision on the appeal no later than 60 days from receipt of the appeal and the supporting arguments.

.07 Resolution Agreements. Each operating unit 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, the EEO Officer and the Director, OCR. All terms of the settlement agreement shall comply with all Departmental policies, requirements, and legal authorities. Procedures for obtaining clearances of settlement agreements shall be identical to those used for EEO complaints processed under 29 CFR 1614. Operating units are strongly encouraged to use ADR procedures to facilitate early resolution.

.08 Compliance with Resolution Agreements and FADs

- a. 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. EEO Officers shall maintain all documentation and records supporting compliance with the resolution agreement including records associated with expungement of the operating unit's files. If the complainant believes that the operating unit has failed to comply with the terms of a resolution agreement, the complainant shall notify the Director, OCR 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, OCR will issue a FAD on the breach of resolution agreement claim within 60 days of receipt of the claim. If the Director, OCR determines that the agreement has not been complied with and the noncompliance is not attributable to acts or conduct of the complainant, the Director, OCR may order such compliance or order that the complaint be reinstated for further processing from the point processing ceased. There are no further appeals from a FAD on a breach claim.
- b. A FAD by the Director, OCR or an appeal decision by the CFO/ ASA shall be binding on both the operating unit and the complainant. The operating unit shall report to the Director, OCR and submit documentation supporting compliance with the FAD. If the complainant believes that the operating unit has failed to comply with the FAD, the complainant shall notify the Director, OCR in writing, of the alleged noncompliance.

.09 Relationship to other procedures. Nothing in this Order shall abrogate the rights of any employee to file a complaint of discrimination against the Department within the purview of the Federal Sector Equal Employment Opportunity Complaint Procedures, 29 CFR Part 1614, or in an appropriate U.S. District Court. To the extent possible and consistent with existing authorities, relevant Departmental 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.

.10 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.

.11 Additional complaint procedures. OCR may issue additional complaint procedures in its "Handbook for Processing Discrimination Complaints," issued pursuant to Department Administrative Order 200-0, "Department of Commerce Handbooks and Manuals."

SECTION 10. OTHER REFERENCES.

.01 Department Administrative order 215-9, "Filing Discrimination Complaints."

.02 "Handbook for Processing Discrimination Complaints," issued pursuant to Department Administrative Order 200-0. "Department of Commerce Handbooks and Manuals."

SECTION 11. ASSISTANCE.

Questions concerning this Order should be addressed to the Departmental Office of Civil Rights. This document will be made available in alternate format, such as large print or audiotape, upon request by calling (202) 482-4993 (V/TTY).

Signed - Director for Civil Rights

Approved Signed - Chief Financial Officer and Assistant Secretary for Administration

Office of Primary Interest Office of Civil Rights

Index Changes Add Complaint Process for Sexual Orientation Discrimination 215-11 Discrimination, Complaint Process for Sexual Orientation 215-11 Sexual Orientation Discrimination, Complaint Process for 215-11

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