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## FILING DISCRIMINATION COMPLAINTS

Number: DAO 215-9

Effective Date: 1992-10-19

### SECTION 1. PURPOSE.

.01 This Order provides for the issuance of Department of Commerce procedures for the use of aggrieved employees or applicants for employment in the filing and processing of discrimination complaints.

.02 The procedures for filing and processing discrimination complaints included in Appendix A to this Order meet the Regulations of the Equal Employment Opportunity Commission (EEOC) which require Federal agencies to issue EEO complaints regulations for employees and applicants for employment.

### SECTION 2. STATUS AND APPLICABILITY.

.01 This Order is consistent with the EEOC regulations for Agency Discrimination Complaints Processing (29 CFR Parts 1614.105 through 1614.204) and incorporates those provisions of the EEOC regulations and any amendments thereto by reference. Whenever there is a conflict between the provisions and the requirements of this Order and the EEOC regulations, the EEOC regulations will prevail.

.02 This Order applies to employees and applicants for employment in the Department, except aliens employed or applying for employment outside the limits of the United States; and is limited to complaints of employment discrimination filed under;

- a. Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e);
- b. The Rehabilitation Act of 1973, as amended (29 U.S.C. 701-794);
- c. The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621-634); and
- d. Equal Pay Act (29 U.S.C. 201 et seq.).

## SECTION 3. DISTRIBUTION.

.01 The Office of Civil rights will issue and distribute Appendix A to EEO Officers for dissemination to EEO Counselors, management officials, interested employees, applicants for employment and their representatives. The Director of Civil Rights is authorized to develop and issue subsequent changes to the Appendix in accordance with DAO 200-3, and subject to prior review and comments by the Office of Inspector General and the Office of the General Counsel.

.02 EEO Officers shall submit a request for a supply of Appendix A to the Director of Civil Rights in accordance with instructions that the Director will issue.

**Signed by:** Director of Civil Rights

**Approved by:** Chief Financial Officer and Assistant Secretary for Administration

**Office of Primary Interest:** Office of Civil Rights, Compliance Division

### **Index Changes:**

Add

Complaints, Filing Discrimination 215-9

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APPENDIX A DAO 215-9

## PROCEDURES FOR PROCESSING DISCRIMINATION COMPLAINTS IN THE

## DEPARTMENT OF COMMERCE

The regulations of the Equal Employment Opportunity Commission (EEOC) require Federal agencies to promulgate procedures for complaint processing. This Appendix is in accordance with the EEOC's regulations and wherever possible uses language identical to those regulations. The purpose is to ensure that provisions in the appendix pertaining to government-wide requirements for complaint processing will be interpreted as intended by the EEOC. The effective date of this Appendix is October 1, 1992.

## SECTION 1. INDIVIDUAL COMPLAINTS OF DISCRIMINATION

### .01 PROCEDURE.

All individual complaints of discrimination on the basis of race, color, religion, sex, national origin, age, handicap or retaliation shall be processed in compliance with the principles and requirements of this section.

## .02 PRE-COMPLAINT PROCESSING.

a. An aggrieved person who believes that they have been discrimination against because of race, color, religion, sex, national origin, age or handicap, or retaliated against because of engaging in protected activity, must consult a Counselor prior to filing a complaint to try to resolve the matter informally. Contact should be made with a Counselor designated to serve the operating unit or Departmental office at the location where the discriminatory incident is alleged to have occurred.

1. An aggrieved person must initiate contact with a Counselor within 45 days of the matter alleged to be discriminatory or, if a personnel action, within 45 days of the effective date of the action.

2. The Department or the EEOC shall extend the 45-day time limit in subparagraph a.1. of this section when the individual shows that they were not notified of the time limit and was not otherwise aware of them, that they did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence they were prevented by circumstances beyond their control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the Department or the EEOC.

b. At the initial counseling session, Counselors shall advise individuals, in writing, of their rights and responsibilities, including the right to request a hearing after an investigation by the Department, election rights pursuant to 29 CFR 1614.301 and 302, the right to file a notice of intent to sue pursuant to 20 CFR 1614.201(a) and a lawsuit under the Age Discrimination Employment Act instead of an administrative complaint of age discrimination under this section, the duty to mitigate damages, raised in pre-complaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the Department. Counselors must advise individuals of their duty to keep the Department and the EEOC informed of their current address and to serve copies of appeal papers on the Department. The notice required by subparagraphs d. or e. of this section shall include a notice of the right to a class complaint. All notices issued by a Counselor must be transmitted to the aggrieved person and their representative either by certified mail, return receipt requested, or by any other method that enables the Department and the EEOC to determine the date of receipt.

If the aggrieved person informs the Counselor that they wish to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of the class agent.

c. The Director of Civil Rights shall distribute, through the operating unit EEO Officer, the Counselors procedures consistent with instructions contained in EEOC Management directives. The Counselor shall conduct all counseling activities according to procedures distributed by the Director of Civil Rights. When advised that a complaint has been filed, the Counselor shall submit a written report within 15 days to the Chief, Compliance Division, Office of Civil Rights, concerning the issues discussed and action taken during counseling. The Chief, Compliance Division, shall submit a copy of the report to the aggrieved person. The Director of Civil Rights may authorize an operating unit's or Departmental office's EEO Officer to notify the Counselor of the complaint, received the report and forward the original report to the Chief, Compliance Division.

d. Unless the aggrieved person and the operating unit's or Departmental office's EEO Officer mutually agree to a longer counseling period under subparagraph e. of this section, or the operating unit or Departmental office has an established alternate dispute resolution procedure under subparagraph f. of

this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter is not resolved, the aggrieved person shall be informed, in writing, by the Counselor of the right to file a discrimination complaint. The notice shall inform the aggrieved person of the right to file a discrimination complaint with the Director of Civil Rights or the operating unit's or Departmental office's EEO Officer within 15 days of receipt of the notice, and of the complainant's duty to assure that the Department is informed immediately if the complainant retains counsel or a representative.

e. Prior to the end of the 30-day period, the aggrieved person may agree, in writing, with the EEO Officer to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in subparagraph d. of this section shall be issued.

f. Where the operating unit or Departmental office has an established alternate dispute resolution procedure, approved by the Director of Civil Rights and the Office of the General Counsel, and the aggrieved individual agrees with the concurrence of the operating unit's or Departmental office's EEO Officer to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in subparagraph d. of this section shall be issued.

g. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who has consulted with the Counselor, unless authorized to do so by the aggrieved person, or until a formal complaint of discrimination involving the matter(s) discussed has been filed by the person.

h. When, at the informal counseling stage, an aggrieved person has named or otherwise identified an individual as responsible for an alleged act of discrimination, the Counselor must solicit the views of that "responding official" unless the Counselor otherwise obtains and provides information that exonerates the official to the clear satisfaction of the aggrieved person. Prior to the Counselor's interview with the official, the latter must be advised that they have been named or identified by a potential complainant, must be informed of the nature of any accusation made, and must be advised of the right to have a representative present during the interview to provide advice on how to respond to any questions the Counselor may ask the Counselor must be careful, however, not to reveal the identity of the aggrieved individual when the individual has not authorized the Counselor to do so.

i. Every counseling contact must result in a settlement agreement signed by the aggrieved person or issuance of a notice as described in subparagraph d. of this section.

### .03 FILING AND PRESENTATION OF FORMAL COMPLAINTS.

a. Complaint of discrimination filed with the Department must allege that the Department, an operating unit or a Departmental office of the Department discriminated against the complainant.

b. A complaint must be filed with the Director of Civil Rights, of the Department or the operating unit or Departmental office within 15 days of receipt of the notice required by subparagraphs .02d., e. or f. of this section.

c. A complaint must contain a signed statement from the person claiming to be aggrieved or that

person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the operating unit or Departmental office and to describe generally the action(s) or practices(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

d. The Office of Civil Rights shall acknowledge receipt of a complaint, in writing, and inform the complainant of the date on which the complaint was received. Such acknowledgment shall also advise the complainant that:

1. the complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

2. the Department shall conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend that period.

#### .04 DISMISSALS OF COMPLAINTS.

The Director of Civil Rights shall dismiss a complaint or a portion of a complaint:

a. that fails to state a claim under paragraph .01 or subparagraph .03a. of this section;

b. that fails to comply with the applicable time limits contained in paragraph 1.02, 1.03 and subparagraph 2.04b. of this Appendix, unless the Department extends the time limits; or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

c. that is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

d. where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in appeal to the Merit Systems Protection Board;

e. that is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action is discriminatory;

f. 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 its receipt or the complainant's response does not address the Department'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

h. if, prior to the issuance of the notice required by subparagraph .05f. of this section, the complainant refuses within 30 days of receipt of an offer of settlement to accept a Department offer of full relief containing a certification from the Director of Civil Rights that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result, provided that the offer gave notice that failure to accept would result in dismissal of the complaint.

## .05 INVESTIGATION OF COMPLAINTS.

- a. Upon the acceptance of a formal complaint, the Office of Civil Rights shall conduct or arrange for an investigation of the matter.
- b. The Office of Civil Rights shall develop a complete and impartial factual record upon which to make findings. Complaint investigations will be conducted in accordance with existing guidance provided by the EEOC.
- c. The following procedures apply:
  1. The complainant, the operating unit, Departmental office, or any Federal employee 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. A responding official, whether identified at the time a formal complaint is filed or during the investigation, must be given an opportunity to respond to all allegations made against them. In this respect, the investor should interview and receive information from the responding official as often as may be necessary to ensure that the responding official has an opportunity to respond to all the allegations. Pertinent documents (i.e., documents in which the responding official is identified and charged with discrimination or other wrongdoing) intended for inclusion in the investigative file, including the Counselor's report, in which the responding official is named, must be made available to the official for this purpose. Names of and identifying information on persons other than the complainant and the responding official should be deleted by the investigator from copies of the documents shown to the responding official, to protect such persons from unwarranted invasion of privacy.
  4. When the complainant, operating unit, Departmental office, or Federal employee fails without good cause to respond fully and in a timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decision maker should, or the EEOC on appeal may, 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;copyright 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 deemed appropriate.

5. When it becomes apparent to the investigator that a complainant may fail to respond as required, the investigator will immediately advise the complainant, in writing, that failure to respond within a specified time may result in an adverse inference.

6. When it becomes apparent to the investigator that an employee of an operating unit or Departmental office may fail to respond as required, the investigator will immediately notify the appropriate EEO Officer, in writing, of the failure to respond and request assistance in eliciting the response.

7. All investigations will be conducted by investigators with appropriate security clearances.

d. The Office of Civil Rights, as required by the regulations of the EEOC, shall complete an investigation within 180 days of the date of filing an individual complaint or within the time period contained in an order from the Office of Federal Operations, EEOC on an appeal from a dismissal pursuant to the EEOC's regulations at 29 CFR 1614.107. However, by written agreement within those time periods, the complainant and the Department may voluntarily extend the time period for not more than an additional 90 days. The Department may unilaterally extend the time period or any period of extension agreed upon for not more than an additional 30 days where it must sanitize a complaint file that may contain information classified pursuant to Executive Order No. 12356, or successor orders, in the interest of national defense or foreign policy, provided the Department notifies the complainant of the extension.

e. Where time permits, the Department, at its election, shall provide a draft copy of the investigation to both the complainant and the EEO officer for the operating unit or Departmental office for their review. Either party may request that additional information be gathered and added to the investigative file. The Office of Civil Rights, Compliance Division will review any comments received and make a final determination as to whether any supplementation of the investigative file is required.

f. Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations, EEOC on an appeal from a dismissal, or within any period of extension provided for in subparagraph d. above, the Department shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the final investigative file, and shall notify the complainant that, within 30 days of receipt of the final investigative file, the complainant has the right to request a hearing through the Office of Civil Rights before an administrative judge or to request an immediate final decision pursuant to 29 CFR 1614.110 from the Director of Civil Rights. In the absence of the required notice, the complainant may request a hearing, directly from the Equal Employment Opportunity Commission, at any time after 180 days has elapsed from the filing of the complaint.

#### .06 HEARING.

a. If the complainant makes a request within the time frames set forth in subparagraph .05f. of this section, for a hearing, the Office of Civil Rights shall request that the EEOC appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the Department has not had an opportunity to address, the administrative judge shall remand any such issue for counseling in accordance with paragraph .02 of this section and for such other processing as ordered by the administrative judge.

b. Discovery - The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, deposition, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, over burdensome, repetitious, or privileged.

c. Conduct of hearing - The Department shall provide for the attendance at a hearing of all its employees who are approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the EEOC may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

1. The following procedures apply to hearings of complaints:

(a) The complainant, the operating unit, Departmental office, or any Federal employee shall produce documentary and testimonial evidence as the administrative judge deems necessary.

(b) Statements from witnesses under oath (administrative judges are authorized to administer oaths), affirmation, or alternatively written under penalty of perjury.

copyright When the complainant, or the Department, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge may, in appropriate circumstances:

(1) 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;

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

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

(4) issue a decision fully or partially in favor of the opposing party; or

(5) take such other actions as appropriate.



d. Findings and conclusions without hearing.

(1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) If the opposing party files an opposition within 15 days of receipt of the statement in subparagraph d.(1) of this section, the opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue findings and conclusions without a hearing or issue findings and conclusions without holding hearing.

(3) If the administrative judge determines upon their own initiative that some or all facts are not in genuine dispute, they may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue findings and conclusions without holding a hearing.

e. Record of hearing - The hearing shall be recorded and the EEO Officer shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the Department submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the Department representative for reproduction.

f. Findings and conclusions - Unless the administrative judge makes a written determination that good cause exists for extending the time limit for issuing findings of fact and conclusions of law, the administrative judge shall within 180 days of a request for a hearing being received by EEOC, issue findings of fact and conclusions of law on the merits of the complaint, and shall order appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the findings and conclusions to the Director of Civil Rights by certified mail, return receipt requested. Within 60 days of receipt of the findings and conclusions, the Director of Civil Rights may accept, reject or modify the findings and conclusions or the relief ordered by the administrative judge and issue a final decision in accordance with 29 CFR 1614.110. If the Department does not, within 60 days of receipt, reject or modify the findings and conclusions of the administrative judge, then the relief ordered shall become the final decision of the Department and the complainant shall be notified of the final decision in accordance with section 29 CFR 1614.110.

.07 FINAL DECISIONS.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the Department or within 60 days of the end of the 30-day period for the complainant to request a

hearing or an immediate final decision, under subparagraph 1.05f. of this section, where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, under subparagraph 1.06f. of this section, the director of Civil Rights shall issue a final decision. The final decision shall consist of findings by the Department on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with 29 CFR 1614.501. The final decision shall contain notice of the right to appeal to the EEOC, the name and address of the department official upon whom an appeal should be served, notice of the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

## SECTION 2. CLASS COMPLAINTS OF DISCRIMINATION

### .01 COVERAGE.

All class complaints of discrimination on the basis of race, color, religion, sex, national origin, age or handicap shall be processed in compliance with the principles and requirements of this section.

### .02 DEFINITIONS.

- a. A "class" is a group of Department employees, former Department employees, or applicants for employment who, it is alleged, have been, or are being adversely affected, by a Department personnel management policy or practice which discriminates against the group on the basis of their race, color, religion, sex, national origin, or handicap.
- b. A "class complaint" is a complaint of discrimination filed on behalf of a class alleging that:
1. the class is so numerous that a consolidated complaint of the members of the class is impractical;
  2. there are questions of fact common to the class;
  3. the claims of the Agent of the class are typical of the claims of the class; and
  4. the Agent of the class, or , if represented, the representative, will fairly and adequately protect the interests of the class.
- c. An "Agent of the class" (Agent) is a class member who acts for the class during the processing of the class complaint.

### .03 PRE-COMPLAINT PROCESSING.

An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with paragraph .01 of this Appendix. EEO Officers may serve as Counselors on class matters.

### .04 FILING AND PRESENTATION OF A CLASS COMPLAINT.

- a. A class complaint must be signed by the Agent or representative and must identify the policy or

practice adversely affecting the class as well as the specific action or matter adversely affecting the Agent.

b. The complaint must be filed with the Director of Civil Rights not later than fifteen days after the Agent's receipt of the notice of right to file a class complaint. (See subparagraph .02d. of this Appendix).

c. The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

#### .05 ACCEPTANCE OR DISMISSAL.

a. Within 30 days of the Department's receipt of a complaint, the Department shall:

1. designate a Department representative who shall not be any of the individuals referenced in 29 CFR 1614.102(b)(3); and

2. forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the EEOC. The EEOC shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or Department to submit additional information relevant to the complaint.

b. The administrative judge may recommend that the Department dismiss the complaint, or any portion, for any of the reasons listed in 29 CFR 1614.107(a)(2) or because it does not meet the prerequisites of a class complaint under 1614.204(a)(2).

c. If an allegation is not included in the Counselor's report, the administrative judge shall afford the Agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall refer the allegation to the Department for further counseling of the Agent. After counseling, if timely, the allegation shall be consolidated with the class complaint.

d. If an allegation lacks specificity and detail, the administrative judge shall afford the Agent 15 days to provide specific and detailed information. The administrative judge shall recommend that the Department dismiss the complaint if the Agency fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge shall advise the Agent how to proceed on an individual or class basis concerning these allegations.

e. The administrative judge may recommend that the Department extend the time limits for filing a complaint and for consulting with a Counselor in accordance with the time limit provisions contained in 29 CFR 1614.105(a)(2) and 1614.604. When appropriate, the administrative judge may recommend that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

f. The administrative judge's written recommendation to the Department on whether to accept or dismiss a complaint shall be transmitted to the Department and notification of that transmittal shall be

sent to the Agent. The administrative judge's recommendation to accept or dismiss shall become the Department's decision unless the Department rejects or modifies the recommended decision within 30 days of the receipt of the recommended decision and complaint file. The Department shall notify the Agent by certified mail, return receipt requested, and the administrative judge of its decision to accept or dismiss a complaint. At the same time, the Department shall forward to the Agent copies of the administrative judge's recommendation and the complaint file. The Department's decision dismissing a class complaint, shall inform the Agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under Section 1 of this Appendix or that the complaint is also dismissed as an individual complaint in accordance with 29 CFR 1614.107. In addition, the decision shall inform the Agent of the right to appeal the dismissal of the class complaint to the Office of Federal Operations, EEOC or to file a civil action and include EEOC Form 573, Notice of Appeal/Petition.

#### .06 NOTIFICATION.

a. Within 15 days of accepting a class complaint, the Department shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

b. Such notice shall contain:

(1) the name of the Department or organizational segment, its location, and the date of acceptance of the complaint;

(2) a description of the issues accepted as part of the class complaint;

(3) an explanation of the binding nature of the final decision or resolution of the complaint on class members; and

(4) the name, address and telephone number of the class representative.

#### .07 OBTAINING EVIDENCE CONCERNING THE COMPLAINT.

a. The administrative judge shall notify the Agent and the Department representative of the time period that will be allowed both parties to prepare their cases. This time period will include at least 60 days and may be extended by the administrative judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, over burdensome, repetitious, or privileged.

b. If mutual cooperation fails, either party may request the administrative judge to rule on a request to develop evidence. If a party fails, without good cause shown, to respond fully and in a timely fashion to a request made or approved by the administrative judge for documents, records, comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the administrative judge:

1. to draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
  2. to consider the matters to which the requested information pertains to be established in favor of the opposing party;
  3. to exclude other evidence offered by the party failing to produce the requested information;
  4. to recommend that a decision be entered in favor of the opposing party; or
  5. to take such other actions as the administrative judge deems appropriate.
- c. During the period for development of evidence, the administrative judge may, at their discretion, direct that an investigation of facts relevant to the complaint or any portion be conducted by the Department.
- d. Both parties shall furnish to the administrative judge copies of all materials that they wish to be examined and such other material as may be requested.

#### .08 OPPORTUNITY FOR RESOLUTION OF THE COMPLAINT.

- a. The administrative judge shall furnish the Agent and the Department representative a copy of all materials obtained concerning the complaint and provide opportunity for the Agent to discuss materials with the Department representative and attempt resolution of the complaint.
- b. The complaint may be resolved by agreement of the Department and the Agent at any time as long as the agreement is fair and reasonable.
- c. If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the Agent and the Department.
- d. Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the relief, if any, to be granted by the Department. A resolution shall bind all members of the class. Within 30 days of the date of the notice of resolution, any member of the class may petition the Director of Civil Rights to vacate the resolution because it benefits only the Agent or is otherwise not fair and reasonable. Such a petition will be processed in accordance with 1614.204(d) and if the administrative judge finds that the resolution is not fair and reasonable, they shall recommend that the resolution be vacated and that the original Agent be replaced by the petitioner or some other class member who is eligible to be the Agent during further processing of the class complaint. The Department's decision that the resolution is not fair and reasonable vacates any agreement between the former Agent and the Department. The Department's decision on such a petition shall inform the former Agent or the petitioner of the right to appeal the decision to the Office of Federal Operations, EEOC and include EEOC Form 573, Notice of Appeal/Petition.

#### .09 HEARING.

On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing shall be conducted in accordance with subparagraph 1.06c. of the Appendix.

.10 REPORT OF FINDINGS AND RECOMMENDATIONS.

- a. The administrative judge shall transmit to the Department a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class and any individual relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint.
- b. If the administrative judge finds no class relief appropriate, they shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.
- c. The administrative judge shall notify the Agent of the date on which the report of findings and recommendations was forwarded to the Department.

.11 DEPARTMENT DECISION.

- a. Within 60 days of receipt of the report of findings and recommendations issued under paragraph .03 of this section, the Office of Civil Rights shall issue a final decision, which shall accept, reject, or modify the findings and recommendations of the administrative judge.
- b. The final decision of the Department shall be in writing and shall be transmitted to the Agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the administrative judge.
- c. When the Department's final decision is to reject or modify the findings and recommendations of the administrative judge the decision shall contain specific reasons for the Department's action.
- d. If the Department had not issued a final decision within 60 days of its receipt of the administrative judge's report of findings and recommendations, those findings and recommendations shall become the final decision. The Department shall transmit the final decision to the Agent within five days of the expiration of the 60-day period.
- e. The final decision of the Department shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.
- f. A final decision on a class complaint shall, subject to 29 CFR 1614.401, be binding on all members of the class and the Department.
- g. The final decision shall inform the Agent of the right to appeal or to file a civil action in accordance with 29 CFR 1614.401 and the applicable time limits.

.12 NOTIFICATION OF DECISION.

The Department shall notify class members of the final decision and relief awarded, if any, through the same method employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the Department within 10 days of the transmittal of its final decision to the Agent.

## .13 RELIEF FOR INDIVIDUAL CLASS MEMBERS.

- a. When discrimination is found, the Department must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief, including an award of attorney's fees and costs, to the Agent in accordance with 29 CFR 1614.501.
- b. When class-wide discrimination is not found, but it is found that the Agent is a victim of discrimination, 29 CFR 1614.501 shall apply. The Department shall also, within 60 days of the issuance of the final decision finding no class-wide discrimination, issue the acknowledgment of receipt of an individual complaint as required by section 1, subparagraph .03d. of this Appendix and process in accordance with the provisions of section 1 of this Appendix, each individual complaint that was subsumed into the class complaint.
- c. When discrimination is found in the final decision and a class member believes that they are entitled to individual relief, the class member may file a written claim with the Secretary of Commerce or the Director of Civil Rights within 30 days of receipt of notification by the Department of its final decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the Department found class-wide discrimination in its final decision. The Department shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with 20 CFR 1614.401, and the applicable time limits.

## Questions and Comments

*Send Questions or Comments on the Commerce Directives Management program to [Directives@doc.gov](mailto:Directives@doc.gov).*

Office of Privacy and Open Government  
Office of the Chief Financial Officer and Assistant Secretary for Administration  
U.S. Department of Commerce

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