

GUIDANCE REGARDING EEO PROCEDURES

(1/25/2000)

This provides overall guidance to Foreign Service employees on the procedural requirements for filing a complaint or grievance under the Equal Employment Opportunity (EEO) laws and regulations. It is a companion piece to AFSA's guidance for witnesses involved in EEO complaints (available on our web site at www.afsa.org).

Legal Basis for EEO Complaints/

Grievances

Title VII of the Civil Rights Act (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. In addition, the Equal Pay Act prohibits discrimination in pay on the basis of sex. Discrimination on the basis of age (for persons at least 40 years old) is prohibited under the Age Discrimination in Employment Act (ADEA). Discrimination on the basis of disability is prohibited under the Rehabilitation Act and the Americans with Disabilities Act. Section 1101(a)(1)(H) of the Foreign Service Act authorizes the Foreign Service Grievance Board to decide grievances alleging discrimination under the above mentioned statutes.

Sexual Orientation Discrimination

Discrimination on the basis of sexual orientation is prohibited under Executive Order 13087 (May 28, 1998). In addition, it is the policy of all of the foreign affairs agencies to prohibit discrimination on the basis of sexual orientation. While the executive order and the agencies' regulations convey administrative policy, only a law can create enforcement rights, such as the right to proceed before the Equal Employment Opportunity Commission (EEOC) or to obtain a new review on the merits (a "de novo" review) in federal district court. Therefore, at this time, employees alleging discrimination on the

basis of sexual orientation do not have the full range of rights and remedies available to victims of other types of These employees may, however, file a grievance through the Service Grievance System. If they lose their grievance, they may judicial review of the Grievance Board's decision in district court under the Administrative Procedure Act (which provides for a more limited review). In addition, several of the Foreign Affairs agencies have implemented regulations that authorize the agency's EEO office to process complaints based on sexual orientation discrimination. The State Department's regulations are at 3 FAH-1 H-1520. These regulations do not provide for judicial review of the EEO office's decision in a case involving sexual orientation discrimination. An employee may be able to appeal the decision under the Administrative Procedure Act, though.

Freedom from Retaliation for EEO Activities

A person who files a complaint of discrimination, participates in an investigation or charge, or opposes a discriminatory employment practice is protected from retaliation under the above statutes. In addition, a person who files a grievance alleging discrimination is protected from retaliation under the Foreign Service Act.

EEO Complaint Versus Grievance

Since November 1991, Foreign Service employees have been able to whether they will pursue an EEO complaint through the statutory procedures or grieve the matter under the Foreign Service grievance system (Foreign Service Act, Section 1109(b)). A person is deemed to have a binding election with the filing of a formal EEO complaint or a grievance. Use of the EEO pre-complaint process, discussed below, does not

constitute an election. Only a careful analysis of the EEO complaint and remedies sought will establish the best forum in which to proceed. AFSA advises that employees consult with AFSA, an EEO counselor, and/or a private attorney before making an election.

Pre-complaint Processing

Pre-complaint processing is a prerequisite to the filing of a formal complaint of discrimination. (However, in the case of age discrimination only, the administrative process can be waived and the individual may go directly to court after giving the EEOC 30 days to try to resolve the matter.) If an employee wishes to pursue the matter through the EEO procedures, he/she must consult with an EEO counselor within 45 days of the discriminatory act or practice or within 45 days of the date he/she knew or reasonably should have known of the discriminatory act or practice. This requirement applies to individual and class complaints. EEO cases involving "continuing violations" must be brought within 45 days of the last act of discrimination. (Continuing violations may include such matters as discriminatory pay practices and hostile environment sexual harassment, etc.) If the employee does not consult with a counselor within this time frame and does not provide a sufficient explanation for the untimeliness, the Agency may dismiss the complaint.

A list of EEO counselors for State Department employees is maintained by the Department of State Office of EEO and Civil Rights in Washington, which can be reached at 202-647-9258. Employees of the Agency for International Development should call 202-712-1110. Employees of the Department of Commerce should call 202-482-0625. Employees of the Department of Agriculture should call 202-720-7233. Most posts have EEO counselors. If your post does not have an EEO counselor or if you do not wish to speak with the EEO counselor at post, you should select EEO counselor from

the Agency's list of counselors or contact the Agency's EEO Office in Washington for assistance.

Once the employee reports the discriminatory act to the EEO counselor, the counselor will inquire into the facts and attempt to resolve the matter informally. This is called the pre-complaint counseling stage. Reasonable efforts to settle complaints of discrimination voluntarily will occur throughout the administrative processing of the complaint. Any agreement reached shall be in writing. If the matter is not resolved within 30 days, EEO counselor will issue a written notice of right to file a discrimination complaint with the Agency's EEO office.

Election of Formal EEO Complaint Procedures

Once the EEO counselor issues a written notice of the right to file a discrimination complaint, the employee may elect to pursue the matter through the grievance system rather than the EEO procedures (see discussion below). However, if the employee wishes to continue with the EEO procedures, a discrimination complaint must be filed in writing with the Agency's EEO Office within 15 calendar days of the employee's or his/her representative's receipt of the notice of the right to file a complaint. Please note that the complaint is filed against the Agency, not the individual who is alleged to have engaged in discriminatory conduct. In addition, the complaint may only raise matters that were raised with the EEO counselor or matters that are "like or related" to issues raised in the pre-complaint counseling stage. Finally, the complaint must specifically state what relief is being sought from the Agency.

The Agency's EEO office is required to conduct a complete investigation of the complaint within 180 days from the date the complaint was filed, unless the employee agrees in writing to extend this period.

(Technically, this period may only be extended by an additional 90 days. However, due to the enormous backlog in many EEO offices, further delays in the completion of the investigation are commonplace.) An investigator authorized by the Agency's EEO office will conduct the investigation and develop the investigative record. Such investigation includes, but is not limited to, conducting fact-finding conferences, taking affidavits (sworn statements) from the complainant (the employee who has filed the complaint) and relevant witnesses, and gathering documentary evidence deemed appropriate for the complaint. As part of this investigation, the investigator may interview the person who is alleged to have engaged in the discriminatory conduct.

After completion of the investigation, the complainant and his/her representative shall be given a copy of the investigative file and notification of further procedural rights. These include the right to request hearing or a final decision within 30 days from the date the complainant receives the report of investigation. This request must be in writing and submitted directly to the EEOC. (Employees alleging discrimination based on sexual orientation discrimination do not have the right to a hearing.) If the complainant fails to request a hearing or a final decision, the Agency shall issue a final decision.

If a hearing is requested, the complainant shall have the right to be represented by an attorney or another representative. In addition, the complainant has the right to seek discovery, testify, and identify witnesses to testify on his/her behalf. The Administrative Judge (judge) who conducted the hearing shall issue findings of fact and conclusions of law and order an appropriate remedy within 180 days of the complainant's request for the hearing. The Agency has 40 days from the receipt of the judge's decision to issue a final order. The final order states whether the agency will fully implement the judge's decision or not.

If the Agency does not fully implement the judge's decision the agency must file an appeal with the EEOC. The Agency has 20 days to file their brief.

The final decision of the Agency's EEO office shall be in writing and shall be transmitted to the complainant and his/her representative by certified or registered mail. Employees who are dissatisfied with the Agency's decision may appeal the final decision or the dismissal of all or part of a complaint to the Equal Employment Opportunity Commission's Director, Office of Federal Operations or they may institute a civil action in federal district court. (Employees alleging discrimination based on sexual orientation discrimination do not have the right to appeal to the EEOC.) The final Agency decision shall contain the applicable time limits for filing an appeal or a civil action.

A written notice of appeal to the EEOC's Office of Federal Operations must be filed within 30 calendar days of the date the employee receives the Agency decision, or his/her representative of record receives the Agency's final decision. (Note: throughout the EEO process, it is the employee's responsibility to advise the appropriate offices of any change in his/her address or that of his/her representative.) If the Agency does not implement the judge's decision, in full or in part, the Agency has 40 days to notify complainant and simultaneously file an appeal.

The EEOC's Office of Federal Operations shall review the Agency's EEO office's complaint file and the briefs submitted by the parties and either affirm the decision or remand it to the Agency's EEO Office for further investigation or a rehearing. (Note: there is no right to a hearing before the Office of Federal Operations.)

It should be mentioned that during the pre-complaint and formal complaint process, the Agency's alternative dispute resolution (ADR) program is available. The use of this

program is on a case-by-case basis and is voluntary.

Opting Out of the EEO Process to File a Lawsuit

Following the filing of a formal complaint with the Agency's EEO Office, an employee can opt out of the EEO process and file a lawsuit in Federal district court at the following stages of the EEO process: 1) 180 days after filing a formal complaint with the Agency, if an appeal has not been filed and a final decision has not been issued; 2) within 90 days of receiving the Agency's final decision, if no appeal to the EEOC Office of Federal Operations has been filed; 3) 180 days after filing an appeal of the Agency's decision with the EEOC, if there has been no final decision by then; or 4) within 90 days of receiving a final decision on appeal from the EEOC's Office of Federal Operations. (Employees alleging discrimination based on sexual orientation do not have the right to opt out of the EEO process to file a lawsuit.)

Employee Rights during EEO Process

At all stages in the EEO process (including the pre-complaint counseling stage), the employee has the right to be accompanied, advised, and represented by legal counsel or another representative. Members of AFSA may also request assistance from AFSA's labor management staff. The employee may also choose to remain anonymous during the pre-complaint counseling process. (This, however, may hinder the investigation). The employee shall be granted a reasonable amount of official time to prepare his/her complaint or otherwise participate in the EEO process.

Remedies Available through the EEO Process

The following remedies may be available to an employee who prevails on his/her discrimination complaint: cessation of the

discriminatory practices, expungement of records, back pay, front pay, reinstatement, reimbursement of attorney's fees and expenses. In some cases, compensatory damages for embarrassment and/or emotional distress may also be awarded. (Compensatory damages are not available to employees alleging discrimination based on sexual orientation.)

Election of Grievance Process

As stated above, Foreign Service employees may elect to pursue an EEO matter through the Foreign Service grievance system rather than through the Agency's EEO office. Once an employee makes an election, he/she cannot pursue the EEO matter through the alternative route. Employees make their election when they either file a grievance or file a formal complaint of discrimination. Thus, an employee may consult with an EEO counselor and then decide to file a grievance rather than a complaint with the Agency's. The time of election is after the pre-complaint counseling stage. If an employee wishes to grieve an EEO matter, he/she must file a grievance with the Agency within 180 days of the discriminatory act or practice. However, if the discriminatory act giving rise to the grievance occurred while the employee was assigned to a post abroad, the 180 day period does not commence until the earlier of (a) the date as of which the grievant is no longer assigned to such post; or (b) the expiration of the 18-month period beginning on the date of the occurrence giving rise to the grievance or the last such occurrence, as the case may be. [See Foreign Service Act, Section 1104 (c)(2).] In other words, employees posted abroad must file a grievance alleging discrimination within six months of returning to the United States or two years from the discriminatory event, whichever is earlier. (Employees who wish to file a grievance based on sexual orientation discrimination must file a grievance within the time limit established by the Foreign Service Act for non-EEO

grievances (i.e., within two years of the discriminatory act.)

The Agency has 90 days from the filing of the grievance to seek resolution of the matter. If the Agency has not rendered a decision within 90 days, the grievant may file a grievance with the Foreign Service Grievance Board (FSGB). If the grievant decides to wait for a decision by the Agency, he/she must file an appeal with the FSGB within 60 days of receiving the Agency's final decision. After an appeal is filed with the FSGB, the grievant may seek answers to written questions or the production of documents from the agency. (This process is called discovery.) Both the Agency and the grievant have the opportunity to submit additional evidence and arguments before the FSGB closes the "record of proceeding" in the case. The Grievance Board attempts to issue a final decision in the grievance within 90 days of closing the record of the proceeding. For more information on the grievance process, please see AFSA Grievance Guidelines (on our web site at www.afsa.org).

Remedies Available through the Grievance Process

The FSGB may award the following remedies: cessation of the discriminatory practices, expungement of records, back pay, front pay, reinstatement, reimbursement of attorney's fees and expenses. The FSGB may also award the interim remedy of prescriptive relief (maintenance of the status quo until the grievance is decided). Prescriptive relief is not available through the EEO process. Whether the FSGB would award compensatory damages to a grievant who can establish emotional distress, humiliation, etc. is an open question at this time. (Such relief would not be available to employees claiming discrimination on the basis of sexual orientation.)

A grievant may file a discrimination complaint (other than one alleging sexual orientation discrimination) in federal district

court within 90 days of issuance of the FSGB decision. The court will conduct a de novo (a new) review of the merits of the case. Employees who seek judicial review in federal district court of an adverse Grievance Board decision involving sexual orientation discrimination must do so within 180 days. The court's review in this type of case is much more limited. Because pleadings must conform to court rules and AFSA representation is unavailable at this level, AFSA suggests that employees retain a personal attorney. AFSA has a referral list of experienced attorney in the Washington, D.C. area to assist you.

For More Information

The above information, which has been verified by the Department of State's Office of EEO and Civil Rights, is intended as general guidance. Because EEO procedures are quite complicated, AFSA encourages employees to contact their Agency's EEO office with questions about specific cases (Department of State at 202-647-9258, Agency for International Development at 202-712-1110, Department of Commerce at 202-482-0625, and Department of Agriculture at 202-720-7233). AFSA assistance is also available to members. State Department, FAS, and FCS employees should contact AFSA at 202-647-8160 or at afsa@state.gov. USAID employees should call AFSA at 202-712-1941.