



NASA Procedural Requirements

COMPLIANCE IS MANDATORY

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Request Notification of Change (NASA Only)

Subject: Procedures for Discrimination Complaints Based on Sexual Orientation

Responsible Office: Office of Diversity and Equal Opportunity

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Chapter 2. Complaint Procedures

2.1 Informal Complaints

2.1.1 Initiating the Complaint

2.1.1.1 An aggrieved person who believes that he or she has been discriminated against on the basis of sexual orientation shall initiate the informal process by contacting the NASA Center EO office within 45 calendar days from the date of the alleged discriminatory incident;² or

² At the informal stage of the process, the person raising the issue is referred to as an "aggrieved person" or "aggrieved individual." At the formal stage, the person is referred to as a "complainant."

2.1.1.2 In the case of a personnel action, an aggrieved person who believes that he or she has been discriminated against on the basis of sexual orientation shall initiate the informal process within 45 days of the alleged discriminatory act, the effective date of the alleged discriminatory action, or the date that the employee learned or reasonably should have suspected that the Agency action was discriminatory.³

³ All references to "days" throughout these procedures are to calendar days.

2.1.2 Informal Counseling

2.1.2.1 All aggrieved persons are entitled to EEO counseling under these procedures, which are based on the procedures set forth in Federal Sector EEO Regulations, Pre-complaint processing (informal counseling).

2.1.2.2 At the initial counseling session, EEO counselors shall advise aggrieved persons in writing of their rights and responsibilities in this process and their right to elect other forums (see Sec. 2.5).

2.1.2.3 Alternative Dispute Resolution (ADR) is as follows:

a. The ADR process under this NPR shall be based on EEOC Management Directive 110 and NPR 3713.2, Alternative Dispute Resolution for Discrimination Complaints.

b. Center EO staff (informal stage) and ODEO (formal stage) shall strongly encourage the use of ADR to resolve discrimination complaints raised under this process.

2.2 Formal Complaints

2.2.1 Intake and Jurisdictional Determinations

2.2.1.1 Formal complaints of discrimination based on sexual orientation shall be filed with ODEO (see Appendix D).

Forms, Discrimination Complaints Form).

2.2.1.2 ODEO shall review the complaint to assure that it meets jurisdictional prerequisites, including the following:

- a. A complaint shall be in writing.
- b. A complaint shall be filed within 15 days of receipt of the Notice of Right to File a Complaint of Discrimination on the basis of sexual orientation.
- c. A complaint shall contain a signed statement from the complainant or the complainant's representative. This signed statement will be sufficiently precise to identify the complainant, the Center where the complaint arose, and to describe generally the action(s) or practice(s) that form the basis of the complaint.
- d. The complaint shall also contain a telephone number and address where the complainant and the representative can be contacted.

2.2.2 Complaint Acceptance and Dismissal

2.2.2.1 The acceptance process is as follows:

- a. ODEO shall delineate the issues raised by the complainant.
- b. ODEO shall advise the complainant of any accepted issues.

2.2.2.2 The dismissal process and related requirements are as follows:

a. ODEO shall dismiss a complaint or a portion of a complaint based on one or more of the following. The complaint:

- (1) Fails to state a claim of sexual orientation under this NPR, or states the same claim that is pending before or has been decided by the Agency or Court of law.
- (2) Fails to comply with the applicable time limits contained in Section 2.1.1.1 above unless the Agency extends the time limits; or that raises a matter that has not been brought to the attention of an EEO Counselor and is not like or related to a matter that has been brought to the attention of a Counselor.
- (3) 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.
- (4) Where the complainant has raised the matter in a negotiated grievance procedure or NASA administrative grievance procedure that does not preclude allegations of sexual orientation discrimination or in an appeal to the Merit Systems Protection Board (MSPB) and it has been determined that the complainant has elected to pursue the non-EEO process, e.g., administrative and negotiated grievance or MSPB appeal.
- (5) Is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory.
- (6) 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 to a notice of proposed dismissal sent to his or her last known address.
- (7) Where the Agency 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 its receipt or the complainant's response does not address the Agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available.
- (8) Alleges dissatisfaction with the processing of a previously filed complaint.
- (9) Where the Agency, strictly applying the criteria set forth in EEOC decisions, finds that the complaint is part of a clear pattern of misuse of this process for a purpose other than the prevention and elimination of employment discrimination.

b. Where the Agency believes that some but not all of the claims in a complaint shall be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section:

- (1) ODEO shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated.
- (2) ODEO shall place a copy of the notice in the investigative file.

c. A determination under this section shall not to be reconsidered until final action is taken on the remainder of the complaint.

2.2.3 Investigation

2.2.3.1 Accepted complaints shall be investigated in the same manner as any other allegation of discrimination accepted by ODEO, utilizing the process established under Federal Sector EEO Regulations and EEOC MD 110.

2.2.3.2 In the event a complaint is received which contains an allegation of discrimination based on sexual orientation and bases covered under Federal antidiscrimination law, that is, EEO-protected bases or claims, all allegations shall be investigated concurrently and a single report of investigation (ROI) developed.

2.2.3.3. Upon conclusion of the investigation, ODEO shall provide a copy of the completed ROI and notify the complainant, in writing, that:

- a. ODEO shall issue a decision as to the merits of the claim within 60 days of completion of the review of the ROI and provide the individual and the NASA Center a copy of the decision.
- b. The complainant does not have a right to an EEOC hearing on his or her sexual orientation claims (see also Purpose Section (a)).

2.2.4 Decision on the Merits

2.2.4.1 In regard to complaints of sexual orientation discrimination, the AA, ODEO shall issue a final decision on the complaint to include the following:

- a. The final decision will consist of findings by ODEO on the merits of each issue in the complaint or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with Section 2.3 below.
- b. The final decision will contain notice of the right to request reconsideration of the decision by the AA, ODEO and the process for filing such request (see Section 2.2.5).

2.2.4.2 The OGC conducts legal sufficiency reviews of all decisions.

2.2.5. Request for Hearing

2.2.5.1 Under the EEO process defined at 29 C.F.R. part 1614, there is no right to request a hearing with the EEOC on cases solely based on sexual orientation.

2.2.5.2 In the event that a complaint contains both sexual orientation claims and one or more EEO-protected claims, and the complainant has received a notice of right to elect either an EEOC hearing or a final Agency decision, the process is as follows:

- a. At any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing on the EEO claims by submitting a written request for a hearing directly to the EEOC office indicated in the Agency's acknowledgment letter.
- b. The complainant shall send a copy of the request for a hearing to ODEO.
- c. Where a complainant requests a hearing on the EEO-protected claims, ODEO shall stay its decision on the sexual orientation claim until the EEOC Administrative Judge (AJ) has rendered a decision on the EEO-protected claims and will issue its decision on the sexual orientation claim no later than 60 days after the issuance of the AJ's decision.

2.2.5.3 The authority for decisions on complaints based on sexual orientation arising in the Office of Inspector General shall be retained in the Office of the Administrator.

2.2.6 Request for Reconsideration

2.2.6.1 If the complainant is dissatisfied with a final decision, a request for review may be filed with the AA, ODEO within 30 days of receipt of the final decision. The request shall:

- a. Be in writing.
- b. Contain arguments or evidence which establish that the final decision was erroneous because:
 - (1) New and material evidence is available that was not readily available when the previous decision was issued.
 - (2) The previous decision involved an erroneous interpretation of material facts, misapplication of law, or established policy or procedures contained within this NPR, or the decision is of such exceptional nature as to have effects beyond the actual case at hand.

2.3 Remedies and Relief

2.3.1 When the AA, ODEO finds that a NASA employee or applicant for employment has been discriminated against

under this NPR, the Agency shall provide relief to the fullest extent permitted by existing laws and regulations.

2.3.2 The authority to resolve complaints arising within the Office of Inspector General and to require and implement appropriate remedial actions, as described above in this paragraph, is delegated to the Inspector General, in consultation with the Office of the Administrator.

2.3.3 Possible Forms of Relief ⁴

2.3.3.1 Notification to all NASA employees in the affected Center that the Agency was found to have engaged in discrimination based on sexual orientation, that employees have a right to be free from such discrimination or from reprisal, and that the Agency is committed to taking corrective or preventive action to ensure that violations similar to those found do not recur.

⁴ Should the Agency have been found to have discriminated based on sexual orientation, this section discusses possible forms of relief to which complainants may be entitled based on the particular facts of the case. In determining appropriate remedies, ODEO shall consult with the Office of Human Capital Management and OGC.

2.3.3.2 An offer of placement in the position the person would have occupied absent the discrimination (or a substantially equivalent position), subject to the following:

- a. If the position has not been filled, the Agency shall extend an offer of employment to the complainant for that position, unless clear and convincing evidence indicates that the complainant would not have been selected even in the absence of discrimination.
- b. If the position has been filled, the Agency shall extend an offer of employment to a substantially equivalent position if such a position exists, unless clear and convincing evidence indicates that the complainant would not have been selected even in the absence of discrimination.
- c. If there are no substantially equivalent positions, then the Agency shall grant the complainant priority consideration rights. The requirements and process are as follows:

(1) Priority consideration means that the complainant receives bona fide consideration by the selecting official for any position for which the complainant is qualified before any other candidate is referred for consideration, and that the complainant is not to be considered in competition with other candidates and is not to be compared with them.

(2) While priority consideration does not mean that the complainant will actually be selected, it does mean that once the Agency determines that the complainant meets the qualifications for the position, it will refer the complainant to the selecting official for consideration.

(3) All requests for priority consideration shall be consistent with legal requirements for the position.

d. In the case of an applicant for employment, once an offer is made to the applicant, he or she has a maximum of 30 days to accept the offer, and failure to do so within the specified time period will be considered a declination of the offer.

2.3.3.3 Monetary awards are subject to the following:

- a. Compensatory damages are not available to employees or applicants for employment discrimination based solely on sexual orientation.
- b. If appropriate, employees shall be awarded back pay and monetary benefits computed pursuant to the Back Pay Act and OPM's Back Pay Act regulations.
- c. If appropriate, employees shall be awarded reasonable attorney's fees, where back pay is at issue. In all other situations, attorney's fees are not authorized.
- d. Applicants for employment are not authorized awards of back pay or attorney's fees.

2.3.3.4 Cancellation of an unwarranted personnel action.

2.3.3.5 Expungement from the Agency's records of any adverse materials pertaining to the complainant that relate to the discriminatory employment practice.

2.3.3.6 Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

2.3.3.7 Commitment that the Agency shall cease from engaging in the specific discriminatory employment practice found in the case.

2.4 Settlement Agreements

2.4.1 NASA shall make reasonable efforts to resolve complaints of discrimination voluntarily and as early as possible throughout the administrative processing of the complaint.

2.4.2 Centers are strongly encouraged to use ADR procedures to facilitate early resolution (see NPR 3713.2, Alternative Dispute Resolution for Discrimination Complaints).

2.4.3 Finalizing a Settlement Agreement

2.4.3.1 Any settlement agreement reached at any time in the process shall be in writing, signed by both parties, identify the allegations resolved, remedies provided, and be consistent with NPR 3713.2, Alternative Dispute Resolution for Discrimination Complaints.

2.4.3.2 Settlement agreements, both at the formal and informal stage, shall be reviewed by the Center OCC (or at Headquarters by OGC) for legal sufficiency. As part of this review, it is imperative that OGC/OCC be part of the consultative process to ensure that ADR offers are legally viable.

2.4.3.3 All terms of the settlement agreement shall comply with all NASA policies, requirements, and legal authorities.

2.4.3.4 Any settlement 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.

2.4.3.5 The original settlement agreement shall reside with the Center EO Director if signed at the informal stage and with ODEO if signed at the formal stage, in accordance with NPR 1441.1, NASA Records Retention Schedules.

2.4.3.6 A copy of the settlement agreement shall be given to the complainant, the manager responsible for implementing the agreement, the Center EO Director, Center HR Director, ODEO, and OCC/OGC.

2.4.3.7 For complaints involving the Office of Inspector General, settlement authority and signature authority for settlement agreements is delegated to the Inspector General, in consultation with the Office of the Administrator.

2.4.4 Compliance with Settlement Agreements

2.4.4.1 If the complainant believes that the Center has failed to comply with the terms of a settlement agreement, the complainant shall notify the AA, ODEO in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance.

2.4.4.2 The complainant has the opportunity to request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point where processing ceased.

2.4.4.3 The AA, ODEO shall issue a decision on the breach of settlement agreement claim within 60 days of receipt of the claim.

2.4.4.4 If the AA, ODEO determines that the Agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, ODEO may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints.

2.4.4.5 Center EO Directors shall maintain all documentation and records supporting compliance with the settlement agreement, including records associated with expungement of the operating unit's files, in accordance with NPR 1441.1, NASA Records Retention Schedules.

2.5 Relationship of NPR 3713 Process to Other Processes

2.5.1 A complainant under this process shall be deemed to have elected this process, that is, to choose to proceed pursuant to this process, only by the timely filing of a formal complaint as described in Section 2.2 above.

2.5.1.1 Use of the informal complaint process shall not constitute an election for purposes of this section.

2.5.2 By electing to pursue a complaint under other processes, such as those administered by the OSC or the MSPB (see below, this Section), a complainant shall be deemed to have waived his or her rights to seek redress of the alleged discriminatory actions pursuant to this process.

2.5.3 The determination as to which forum or process a complainant has elected shall be made based upon whichever written complaint/appeal/grievance is filed first.

2.5.4 Nothing in these procedures shall abrogate the rights of any individual to file a complaint of discrimination against NASA within the purview of Federal Sector EEO Regulations, or in an appropriate U.S. District Court.

2.5.4.1 If the individual files a civil action in a U.S. District Court on the same matter pending before NASA, the administrative complaint shall be dismissed (see Section 2.2.2.2 above).

2.5.4.2 The complainant shall have 45 days to request reinstatement of his or her complaint where the Court finds that it lacks jurisdiction to hear the case.

2.5.5 Making an Election

2.5.5.1 NASA Administrative Grievance System process is as follows:

a. When an individual is covered by an administrative grievance procedure that does not preclude claims of discrimination based on sexual orientation to be raised in the administrative grievance procedure, a person wishing to file a complaint shall elect to raise the matter either under these procedures or the administrative grievance procedure, but not both.

b. An election to proceed under the administrative grievance procedure shall be indicated by the filing of a timely grievance.

2.5.5.2 Collective Bargaining Unit Procedures are as follows:

a. When an individual is covered by a collective bargaining agreement that does not preclude claims of discrimination based on sexual orientation to be raised in the negotiated grievance procedure, a person wishing to file a complaint shall raise the matter either under these procedures or the negotiated grievance procedure, but not both.

b. An election to proceed under the negotiated grievance procedure shall be indicated by the filing of a timely grievance.

2.5.5.3 The Office of Special Counsel's (OSC) process is as follows:

a. A complainant shall initially file a complaint based on sexual orientation discrimination pursuant to these procedures or with the OSC pursuant to the Civil Service Reform Act of 1978, but not both.

b. If a complainant initially files with the OSC within 45 days of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action, and the OSC decides it does not have jurisdiction to investigate the complaint containing the claim of sexual orientation discrimination, the complainant shall be entitled to pursue the claim pursuant to these procedures.

c. The complainant shall initiate informal complaint counseling within 15 days of receipt of the OSC's denial of jurisdiction.

d. The date on which the complainant filed his/her complaint with the OSC shall be the date of initial contact with the EEO Counselor. The 30-day time period in which counseling is generally to be completed will not begin to run until the date on which the complainant actually initiates informal complaint counseling.

2.5.5.4 The Merit Systems Procedures Board's (MSPB) process is as follows:

a. A complainant can initially file a complaint of sexual orientation discrimination with NASA pursuant to these procedures or an appeal of an adverse personnel action with the MSPB pursuant to Federal appellate procedures, but not both.

b. If a complainant initially files with the MSPB within 30 days of the matter alleged to be discriminatory, or in the case of a personnel action, within 30 days of the effective date of the action, and the MSPB decides it does not have jurisdiction to investigate the complaint containing the claim of sexual orientation discrimination, the complainant is entitled to pursue the claim under these procedures.

c. The complainant shall initiate informal complaint counseling within 15 days of receipt of the MSPB's denial of jurisdiction as long as the MSPB's dismissal of the appeal was not based upon the appeal having been untimely filed.

d. The date on which the complainant filed his/her appeal with the MSPB shall be the date of initial contact with the EEO Counselor. The 30 day time period in which counseling is generally to be completed will not begin to run until the date on which the complainant actually initiates informal complaint counseling.

2.6 Representation and Official Time

2.6.1 At any stage in the processing of a complaint of discrimination because of sexual orientation, including the counseling stage, the complainant is entitled to be accompanied, represented, and advised by a representative of complainant's choice.

2.6.1.1 A representative who creates a conflict of interest or whose representation negatively impacts the Agency's priority needs or gives rise to unreasonable costs shall be excluded. In such cases the complainant will be so advised.

2.6.2 If the complainant is an employee of the Agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to Agency requests for information.

2.6.3 If the complainant is an employee of the Agency and designates another employee of the Agency as representative, the representative shall similarly have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to Agency requests for information.

2.6.4 The Agency shall not be obligated to change work schedules, incur overtime costs, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer.

2.6.5. Bargaining unit employees are not prohibited from requesting that a union representative accompany/represent them when engaging this process.

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