National Aeronautics and Space Administration

Headquarters
Washington, DC 20546-001

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Reply to Attn of: Office of Diversity and Equal Opportunity

TO: Officials-in-Charge of Headquarters Offices
Directors, NASA Centers

FROM: Associate Administrator for Diversity and Equal Opportunity

SUBJECT: Agency Anti-Harassment Program Implementation Guide, Second Edition

The Office of Diversity and Equal Opportunity (ODEO) is pleased to provide the second edition of its Anti-Harassment Program Implementation Guide (enclosed). ODEO provides this document as part of its continuing efforts under NASA Procedural Requirements (NPR) 3713.3, Anti-Harassment Procedures (also enclosed), to offer guidance and technical assistance to the NASA Centers on Agency policy for handling allegations of harassing conduct.

This second edition of the Guide includes all of the information contained in the first edition as well as a wealth of new material reflecting lessons learned from the first seven years of the Anti-Harassment Program (AHP). The overall intent of the new guide is to address the many issues that have emerged since the inception of the AHP. We seek for this new edition of the Guide to be a key reference tool for AHP practitioners, such as the Center Anti-Harassment Coordinators (CAHCs) and Fact-Finders (FFs), as well as for subject matter experts tasked with advising CAHCs and FFs, such as legal and labor relations staff. In keeping with these purposes, we ask that the new Guide be disseminated by CAHCs to their Center AHP Team members and to currently designated FFs. We anticipate using the Guide as a learning tool for newly appointed practitioners.

Any questions regarding the Implementation Guide should be directed to David Chambers, Director, Program Planning and Evaluation Division, ODEO. Mr. Chambers may be reached on 202-358-2128 or david.r.chambers@nasa.gov.

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Enclosures

cc:
Center Anti-Harassment Coordinators

EO Directors and Diversity Managers
Chief Counsels
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National Aeronautics and Space Administration

NASA ANTI-HARASSMENT POLICY AND PROCEDURES

Implementation Guide, 2nd Edition

STRIVING FOR A WORK ENVIRONMENT FREE FROM HARASSMENT

December 2016

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Preface to the 2nd Edition

The first edition of the Anti-Harassment Program Implementation Guide was issued in March 2010, shortly after the inception of the Anti-Harassment Program (AHP). This second edition of the Guide includes all of the information contained in the first edition as well as encompassing a wealth of new material that reflects the lessons learned from the first six years of the AHP. As those who have played a role in the implementation of this policy know, there have been myriad new and emerging issues since the inception of the program. The 2nd Edition compiles the guidance issued by ODEO since the issuance of the 1st Edition in March 2010 and also provides new guidance on a host of topics that have not been addressed in policy guidance over the years. The overall intent is to provide a reference and resource tool for the NASA Anti-Harassment community of practice. All of the new guidance is set off in blue boxes placed throughout the guide in that section of the guide that addresses the new topic in the context of the broader process element. For example, new guidance having to do specifically with fact-finding can be found in the Fact-Finding Section of the Guide. All guidance reflects coordination and collaboration between ODEO and key stakeholders Agency-wide, such as Equal Opportunity, Human Resources, Labor Unions, and Legal offices at the Agency level as well as their Center counterparts.

1. INTRODUCTION

NASA ANTI-HARASSMENT PROCEDURES

An Implementation Guide

This guide provides information on the development and implementation of the NASA Agency Anti-Harassment Program (AHP), under NASA Procedural Requirements 3713.3, Anti-Harassment Procedures (effective date: October 6, 2009). The guide is intended as a desk-reference for managers and supervisors, Center Anti-Harassment Coordinators, Fact-Finders, and other stakeholders (e.g., Equal Opportunity, Human Resources, and Legal) to assist in ensuring prompt, thorough and impartial action is taken regarding harassment allegations.[1]

This guide offers considerations to be addressed by NASA Centers[2] regarding specific aspects of the process. These considerations include designating a Center Anti-Harassment Coordinator, informing employees of the process and how to access it, handling reports of harassment, conducting inquiries (fact-finding) into harassment allegations, and tracking and monitoring of such allegations.

The appendices to the guide provide supporting information, including sample forms and formats for some of the key documents which are a part of the anti-harassment processes at NASA, such as a fact-finding report template. (See Appendix D.)

NASA's anti-harassment policy and procedures are intended to ensure that immediate and appropriate action is taken in response to allegations of harassing conduct, including the use of disciplinary action, and to eliminate harassing conduct regardless of whether the conduct violated the law.[3] The ***overarching goal of the policy and procedures is to address harassing conduct at the earliest possible stage, before it can become severe or pervasive***, e.g., behavior that is widespread, common, or repeated.[4]

The ***EEO complaints process and the AHP are separate and distinct***. The former is designed to make individuals whole for discrimination that already has occurred and to prevent the recurrence of the unlawful discriminatory conduct. The latter seeks to address and ***resolve harassing conduct before it ever reaches the level of discrimination, as defined under the anti-discrimination laws***. For this reason the EEOC stresses the need to maintain separate EEO complaints and anti-harassment processes.[5] It is also important to note that the anti-harassment process does not affect employees' right to file an EEO complaint, nor does it alter required timelines for filing.[6] Employees may also utilize either the Agency's Administrative Grievance Procedures, or negotiated grievance procedure if covered by a bargaining unit. CAHCs should provide employees raising allegations of harassment with Form 1796, which clarifies the distinctions between EEO and the AHP. (See Appendix G.)

[1] This guide relies primarily on NPR 3713.3 and on the U.S. Equal Employment Opportunity Commission's (EEOC's) established standards and guidelines for developing anti-harassment policies and procedures, *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002*, June 18, 1999 (hereafter Vicarious Liability Guidance).
[2] Use of the word Center(s) in this text includes NASA Headquarters and the NASA Shared Services Center.
[3] NASA Anti-Harassment Policy Statement.
[4] NPR 3713.3, P.1, Purpose (b).
[5] See generally Vicarious Liability Guidance; see also EEOC, Model EEO Programs Must Have an Effective Anti-Harassment Program (September 2005).
[6] NPR 3713.3, P.1, Purpose(e)

2. ANTI-HARASSMENT COORDINATION

2.1 Designation of the Center Anti-Harassment Coordinator

2.1.1 Appointment

Consistent with NPR 3713.3, each Center Director[7] shall appoint an individual to serve as the Center Anti-Harassment Coordinator ("CAHC").

Appointing Two Center Anti-Harassment Coordinators (CAHCs)

It is advisable for all Centers to appoint both a CAHC and at least one Alternate CAHC. Having an Alternate CAHC can assist in better ensuring the impartiality of the process. It also serves the practical purpose of allowing the Center to address matters that may arise when the CAHC is unavailable, for example, when the CAHC is on leave. Having an Alternate is most important for Centers with larger caseloads, but is advised for all Centers for both process enhancement and practical considerations.

2.1.2 Separation between EEO Complaints and Anti-Harassment Process

When selecting a CAHC, Center Directors must take into account the appearance of conflicts of interest with the EEO complaint process. This means that if the CAHC is an employee who works in the EEO office, the office shall ensure that there is a "firewall," that is, a means for avoiding conflict of interest by maintaining a separation between handling of the informal EEO complaints process and the Center's anti-harassment process.[8]

To help ensure that employees raising allegations of harassment are fully aware that the Agency's AHP is separate and apart from the EEO complaints process, CAHCs should provide employees raising harassment allegations with a Notice of Rights and Responsibilities clearly stating the distinctions between the two processes. (See Appendix G. Notice of Rights and Responsibilities of NASA Employees Alleging Harassing Conduct).

Firewall: Caution Against EO Directors Serving as CAHCs and Other Considerations in Naming CAHCs

In guidance to the field issued in December 2010, ODEO stated: "[T]he issue of ensuring an appropriate firewall between the EEO complaints process and the AHP is important to maintain the appropriate separation between the two processes. Such a separation is needed to ensure the integrity of both processes, including providing clarity for employees on the distinction between the two." ODEO, in consultation with the Office of the General Counsel (OGC), carefully examined the firewall issue. On closer examination of the operation of the process, the two offices expressed serious doubts about the feasibility of maintaining a meaningful and effective firewall between the EEO complaints process and the anti-harassment process if Center EO Directors also served as CAHCs. While leaving the ultimate decision to Center Directors, consistent with the Anti-Harassment NPR, ODEO strongly cautioned Centers against naming EO Directors as CAHCs.

Another key consideration in naming a CAHC: ODEO recommends that Center Directors name CAHCs at an appropriate level of authority within the organization and access to Center senior leadership. This would generally be a GS 15, SES, or ST/SL employee. The need for appropriate authority and access is especially critical for addressing those matters in which disagreement arises among the Center Advisory Team comprised of the CAHC, Legal, HR, and possibly other organizational representatives/subject matter experts.

[7] Any reference to Center Director(s) in this text includes the Executive Director for the Office of HQ Operations and the Executive Director, NASA Shared Services Center.

[8] See EEOC, Model EEO Programs Must Have An Effective Anti-Harassment Program (September 2005).

2.2 Notice to Employees

A notice to employees on the Anti-Harassment Policy and Procedures, and contact information for the office of the CAHC, should be displayed in public areas throughout the Centers. (See ***Appendix I. Sample Notice to Employees***).

ODEO will provide Centers with other information to help apprise employees about the anti-harassment process, such as web postings and brochures. When made available, Centers should ensure that all materials are thoroughly disseminated to managers, supervisors, and employees.

Anti-Harassment Training for the Workforce and Community of Practice

Beyond the notice to employees, CAHCs should work in collaboration with ODEO to ensure that Centers are appropriately trained on the Agency's anti-harassment policy and procedures. In this regard, we note several options available to Centers. First, ODEO has created an online Anti-Harassment Learning Tool, available and creditable on the Agency's online training system (Course Title: Anti-Harassment Procedures Program; Course No.: HQ-AHT-011). This tool comes complete with a video fictionalization of how an allegation of harassment can be processed, from a portrayal of the incident that gives rise to the allegation to the action taken by management, and closure of the case. CAHCs should work with Center training offices to inform the workforce about the availability of this training and encourage managers and supervisors to recommend it for their employees.

Secondly, since the AHP's inception, ODEO has offered classroom training for managers, supervisors and supervisors, which it expects to continue doing. This training, however, is limited in size (no more than 30 students per class) and subject to available resources. Therefore, ODEO works with Centers to supplement the training, both through CAHC-led training efforts utilizing ODEO-provided materials, and through periodic community of practice virtual meetings conducted by ODEO. The latter provides CAHCs, Fact-Finders, and subject matter experts with training for new members of the community and refreshers for seasoned members.

Notice to employees is a critical aspect of the program, and necessary to its functioning, as stated in Section 2.2. Training and technical assistance are no less important. In addition to the steps discussed above, CAHCs should develop, in collaboration with ODEO, well-thought-out communications strategies. These may include communications from Center leadership informing the Center community about the AHP and encouraging managers, supervisors and employees to avail themselves of available training options, such as those mentioned above. Given the importance of striving for harassment-free workplaces for both managers, supervisors and employees, Centers should give consideration to making AHP training mandatory. Other helpful tools for employees are the Anti-Harassment Brochure (accessible at http://odeo.hq.nasa.gov/documents/Anti-Harassment_Brochure_Tagged.pdf) and the Anti-Harassment FAQs (accessible at http://odeo.hq.nasa.gov/documents/AntiHarassment_FAQs.pdf). These should be disseminated as widely as possible at the Center level. Additional copies of the brochure are available through ODEO.

3. REPORTING AND RESPONDING TO HARASSMENT ALLEGATIONS

3.1 Harassment Defined

Harassing conduct, as defined in NPR 3713.3, is any unwelcome conduct, verbal or physical, based on an individual's race, color, gender, national origin, religion, age, disability, sexual orientation, status as a parent, gender identity, or retaliation when: (1) the behavior can reasonably be considered to adversely affect the work environment or (2) an employment decision affecting the employee is based upon the employee's acceptance or rejection of such conduct.

Allegations or claims outside the purview of the Agency's Anti-Harassment Procedures must be filed with the appropriate office with jurisdiction to process the matters. The CAHC, and other designated officials, will advise alleged harassees of the different avenues of redress available.

Specific Behaviors Inconsistent with NASA Policy

As of March 2013, the NPR references specific behaviors that are inconsistent with NASA's anti-harassment policy. These include, but are not limited to:

(1) Threatening that rejection of sexual overtures will affect appointments, promotions, transfers, or evaluations;
(2) Displaying belittling caricatures or objects depicting persons of a particular race, national origin, religion or other protected category;
(3) Telling racial or ethnic jokes or stories;
(4) Teasing, mimicking or repeatedly commenting on an individual¹s disability, accent, or other protected category;
(5) Making offensive comments, jokes or suggestions about an employee¹s gender;
(6) Making obscene or lewd comments, slurs, jokes, epithets, suggestions or gestures;
(7) Commenting on an employee's body or sexual characteristics;
(8) Displaying nude or sexually suggestive objects, pictures, images or cartoons;
(9) Continuing prohibited behavior after a co-worker has objected;
(10) Laughing at, ignoring or retaliating against an employee who raises a harassment allegation;
(11) Exhibiting bullying, intimidating, or threatening behavior.

While NASA's AH process specifically ties this behavior to a protected basis, NASA Centers should still consider looking into and addressing allegations of harassing conduct, such as bullying behavior, even when no link to a protected basis is made. Some key considerations to be taken into account in invoking the AH process in the absence of the alleged harassee raising a protected basis under the policy are:

(1) Is the allegations relating to interpersonal interaction in the workplace or relating to the workplace, e.g., travel?
(2) Is the allegation particularly related to bullying, intimidating, or threatening behavior?
(3) Is it possible that the fact-finding will show that a protected basis is involved?

(See also "Best Practice: Consideration of Fact-Finding Irrespective of Whether a Protected Basis is Raised," below.)

Responding in Cases Involving Physical Threats

In circumstances involving inappropriate physical contact or other disruptive behavior involving a direct or indirect threat of physical harm, Center AH Teams should immediately involve the Center's Threat Assessment Team under NPD 1600.3, Policy on Prevention of and Response to Workplace Violence. Such behavior is prohibited under NPD 1600.3.

EEO and Anti-Harassment: Key Differences in Analysis

In analyzing allegations of harassment under the Agency's Anti-Harassment Program, the focal point is on the behavior, or interpersonal interaction, at issue. In contrast, the focal point in EEO complaints, which are alleging impermissible discrimination, is often on a discrete action(s) that is being alleged to be discriminatory, such as a hiring decision, promotion, or performance rating. While harassment alleging a hostile work environment can be a form of discrimination if it meets a certain standard, that is, "severe or pervasive." Regardless of whether it meets the standard for discriminatory harassment, it is about behavior, or interpersonal interaction, and generally not about a discrete action(s). Again, this should be understood in contrast with the EEO complaints or discrimination complaints process where a discrete action, such as non-selection for promotion, or a lower performance rating than desired, may be at issue. In the AHP process, such a discrete action would not be considered a form of "harassment" unless accompanied by interpersonal related behaviors, such as telling offensive jokes or engaging in bullying or intimidating conduct.

Recently, there have been a number of situations where employees are coming to the CAHC about concerns that their supervisors are "harassing" them about their work performance and/or leave issues when the action(s) at issue would not be objectively viewed as "harassment" but rather as appropriate execution of supervisory roles and responsibilities. The CAHC should be mindful about whether these type of cases are appropriately handled under this process. Decisions should be made on a case-by-case basis.

This is also the case with retaliation, which is covered as a protected basis under both NASA's Anti-Harassment Policy and Procedures and under the EEO complaints process. However, just as the focal point under the Anti-Harassment Policy generally is behavior, retaliation under Anti-Harassment must also be in the form of allegations based on conduct or behavior, not based on a specific discrete employment action, such as a non-selection for promotion or a poor performance appraisal, or other issues than can be raised in the EEO complaints context.

3.2 Employees' Responsibilities

Employees who believe that they have been subjected to harassing conduct by another civil service employee or contractor employee in violation of NASA policy are expected to report the matter immediately to their first-line supervisor, the CAHC, or other official(s) as designated by the Center Director.[9] In the event that the employee's first-line supervisor is the alleged harasser, the employee shall contact the second-line supervisor, the CAHC or other(s) officials as designated. ***When the person to whom the alleged harassment is reported fails to take prompt action, the employee should immediately report the alleged incident of harassment to the CAHC*, or other official as designated by the Center Director**.

3.3 Managers' and Supervisors' Responsibilities

When an allegation of harassment is reported by a NASA employee, the supervisor (or designated official) shall assess the situation immediately, and consult with the CAHC and/or with subject matter experts, such as Legal, HR, and EO staff that comprise the Center AH Advisory Team, to determine whether a fact-finding or other action is warranted.[10] The supervisor should take the following steps:

3.3.1 Ensure **that the CAHC is notified**. A manager or supervisor receiving an allegation falling within the purview of the anti-harassment process will notify the CAHC as a matter of course. ***Managers and supervisors should be generally familiar with the definition of harassing conduct under Agency anti-harassment policy and procedures*** (see 3.1, above).

3.3.2 If the employees involved in the allegations are members of collective bargaining units, the manager or supervisor should immediately contact the Center Labor Relations Officer (LRO).

[9] NPR 3713.3, Sec. 1.1.
[10] NPR 3713.3, Sec. 1.2.

3.3.3. Determine **the extent to which a fact-finding is needed**. A supervisor should consult with the CAHC and relevant subject matter experts for this determination. Managers and supervisors should take all allegations of harassing conduct seriously. ***They should determine the extent of the fact-finding needed on a case-by-case basis***. For example, if the allegation involves a single instance and there are no witnesses other than the alleged harassee and the alleged harasser, the fact-finding should be relatively simple. On the other hand, if the alleged harassee describes more than one instance of harassing conduct, or indicates that there are others who may have witnessed the conduct, the fact-finding will involve more interviews in addition to the alleged harasser and alleged harassee. Finally, managers and supervisors should not allow the fact that there is no initial corroboration of the alleged harassee's allegation to prevent them from taking some initial remedial measures. When faced with an allegation that cannot be immediately substantiated, the Agency shall consider remedial measures such as increased monitoring of employee behavior or, if deemed necessary, separating the involved employees.[11]

Best Practice: Consideration of Fact-Finding Irrespective of Whether a Protected Basis is Raised

As we have noted in the past, we continue to see a trend in which many Anti-Harassment Program allegations do not involve EEO-related protected bases. We would advise Centers that, prior to conducting a fact-finding, the CAHC and Center AHP Team should make a determination as to whether they view the allegations as appropriate to be addressed as an AHP matter. In making this determination the Team should consider whether the behavior at issue:

1. Involves interpersonal interaction either on NASA premises or both on and off NASA premises
2. Involves one or more protected bases, e.g., race, gender
3. If the behavior at issue does not involve a protected basis, does it involve bullying, intimidation, threats
4. Can be addressed promptly and effectively through utilization of the AHP
5. Is physical violence or the threat of violence involved? For matters involving violence or threats of violence, a Threat Assessment Team should be immediately convened.

Centers should, at a minimum, establish a practice of consultation between the CAHC and the Center AHP Team on matters which, while not clearly within the scope of the AHP as envisioned in the NPR, cannot be said to be entirely outside the scope of the NPR either, based on the four part test above. (See also "Specific Behaviors Inconsistent with NASA Policy," above.)

Criteria for Determining Interim Relief Prior to or While Conducting Fact-Finding

The EEOC advises that it may be necessary to undertake intermediate measures before completing the fact-finding to ensure that further harassment does not occur, especially if the investigation is going to be time-consuming and may involve many accusations, several witnesses, and time to sort things out. Therefore, when an allegation of harassment is received, the manager or supervisor who receives it (or the CAHC if she or he receives it) shall conduct a mini-inquiry, with the advice of subject matter experts from the Center AHP Advisory Team, to determine whether immediate interim measures are necessary. Factors that may indicate an interim relief is appropriate when the allegations are very serious and/or when the alleged harassee asks for such relief.

Examples of interim relief measures include:

- Offering a temporary transfer to the alleged harasser to a position that requires the same general skills, with retention of all compensation and benefit levels;
- Making scheduling changes so as to avoid contact between the parties, e.g., telework;
- Reassigning the alleged harasser to a different building, floor, or department, or to a special project that can be completed either at home or in a different work area;
- Placing the alleged harasser on non-disciplinary (administrative) leave with pay, pending the conclusion

[11] Vicarious Liability Guidance, V.C.1.e.iii.

of the Fact-Finding (this should be a last resort);

- Having the alleged harassee report to a different supervisor (in case the actual supervisor is the alleged harasser);

If the parties have to be separated, then the separation should not burden the employee who has reported the harassing conduct. An involuntary transfer of the alleged harassee could constitute unlawful retaliation.

3.3.3 Act as or designate a Fact-Finder immediately, when it is determined that a fact-finding is necessary. As stated in the NPR, supervisors and supervisors dealing with allegations of harassing conduct should avail themselves of the expertise of subject matter experts and the CAHC throughout this process; including whom to appoint to serve as the Fact-Finder.

Supervisory Decision to "Act as" or Appoint Fact-Finder

In determining whether to act his or her own Fact-Finder or authorize a FF in a given case, supervisors, in consultation with Center AH Teams, should give careful consideration to the complexity of the case, e.g., number or individuals involved, number of separate incidents, number of witnesses to interview. Supervisors should balance the labor-intensiveness of the case with their regular job duties in making the decision of whether to take on their own fact-finding. A key consideration is that AHP cases should be handled as promptly as possible, ideally in a matter of days. If a supervisor does not have the time to handle a case quickly, he or she should authorize a fact-finder.

Best Practice: Fact-Finder Cadres

Some Centers, including Goddard, HQ, and Stennis, now have in place Fact-Finder cadres. These are groups of employees who are trained, willing, and able to serve as Fact-Finders on an as-needed basis. Such groups can be very useful in helping to increase the overall efficiency of a Center's Anti-Harassment Program. They are helpful in this regard specifically because they have been thoroughly vetted and trained on the AHP by CAHCs and other subject matter experts at the Center. As seasoned contributors to the Center's overall AHP effort, they can be called upon to both conduct fact-findings as well as help in the training of new Fact-Finders. Cadre members also can deal with complex cases in which managers or supervisors would not normally act as their own Fact-Finder. Such cadres have even proven useful to the overall Agency AHP because Centers are working with each other to "loan out" Fact-Finders who are willing and able to go to another Center to conduct a fact-finding. This has been particularly helpful when alleged harassees have requested outside Fact-Finders. In training Fact-Finder cadre members, CAHCs should use the Ant-Harassment Policy, Procedures, and Guidance compendium or E-Binder (June 2013) (available through ODEO upon request) as well as ODEO's online Anti-Harassment Training Tool.

3.3.4 Ensure that a prompt, thorough, impartial, and appropriate fact-finding is conducted. The elements of a fact-finding are discussed in Section 4, below.

Timeframes and Promptness

Promptness is one of the most critical aspects of the process. This is important to note in addressing any allegation. It is also important to note that harassment allegations vary in complexity, with each case reflecting a position on a continuum - from the very simple to the extremely complex. The simplest cases would be those where there is a single incident between co-workers and the supervisor acts as his or her own Fact-Finder (FF). For such cases, the timeframe should be ***under a week*** from allegation to closure. More complex cases involving an appointed FF might take a week to two weeks, possibly as much as a month, depending on the facts of the case. CAHCs should stay abreast of cases through appropriate and frequent consultation, for example, consulting with FFs to approximate the length of time for completion of a fact-finding, taking into account the circumstances of each case.

If a fact-finding is taking longer than expected, CAHCs should determine why and if there are any steps that can be taken to bring the fact-finding to a close, without compromising its effectiveness. Where a fact-finding is taking longer than one month, CAHCs should develop written justifications as to why the process is taking so long. In previous guidance, we recommended 45 days as a marker. However, recent case law suggests the need for agencies to move more quickly to ensure that they are taking prompt and effective action. We understand that cases taking longer than a month are going to happen. However, these should be very much the exception and not the rule. The point of the justification is to ensure that when it does happen, if the Agency is later called upon to defend its efforts, say, where the alleged harassee files an EEO complaint that is being reviewed by EEOC, the Agency will at least be able to explain why the process took so long in that case. CAHCs do not need to send a copy of the justification to ODEO, although we are certainly available to provide technical assistance. The important thing is that the justification exists. If you find yourself with a case that has gone on for over a month, it is time to make sure a justification is prepared that explains the amount of time the case is taking. CAHCs will need to consult, as always, with subject matter experts in the preparation of the justification. As mentioned, ODEO is available to provide assistance and review. In preparing justifications, consideration should be given to:

- The complexity of the case, e.g., the number of allegations, number of witnesses, need for acquiring outside expertise to conduct the fact-finding
  Availability of key witnesses, e.g., is someone on extended leave? Has someone left the Agency?

3.4 The Role of Labor

3.4.1 CAHCs and Center AH Advisory Teams should always coordinate with Center Labor Relations Officers to ensure any labor obligations are met regarding harassment allegations.

3.4.2 Parties and witnesses to anti-harassment cases who are members of collective bargaining units may consult with labor union representatives for advice and guidance.

3.5 Addressing Confidentiality Concerns and Requests for Anonymity

3.5.1 Generally

All information obtained from allegations of harassing conduct must be maintained on a confidential basis to the greatest extent possible. Managers and supervisors should make this clear to employees. ***The Agency will not guarantee complete confidentiality, since it cannot conduct an effective fact-finding without revealing certain information to the alleged harasser and potential witnesses***. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints will be kept confidential on the same basis.[12]

When an employee complaining of harassment requests anonymity tension will likely arise as a result of the employee's desire for confidentiality and the supervisor's obligation to take action in response to the allegation. ***Supervisors have an obligation to take immediate action regardless of an employee's confidentiality request. Supervisors should explain that they will maintain as much confidentiality as possible but they must investigate the matter***. Inaction by the supervisor in such circumstances could lead to Agency liability and possible disciplinary action against the supervisor.[13] Further, EEOC states that "While it may seem reasonable to let the employee determine whether to pursue a complaint, *the employer must discharge its duty to prevent and correct harassment*."[14]

Requests for Anonymity in the Informal EEO Complaints Process and the AHP

Employees have the right to request anonymity when entering the informal stage of the EEO complaints process. However, if the employee is raising allegations of harassment, hostile work environment, bullying or the like, the

[12] Id., Sec. V.C.1.d.
[13] Id.
[14] Id.

management obligation to take prompt and effective steps may supersede any request for anonymity. Therefore, EO officers, their staffs and EO counselors should inform CAHCs when aggrieved individuals entering the informal stage of the EEO process raise allegations of this kind.

3.5.2 Privacy Act Compliance

It is the responsibility of the CAHC to ensure that all records pertaining to allegations of harassment are compliant with the Privacy Act of 1974 and retained in accordance with NPR 1382, NPR 1382.1, and NASA Privacy Procedural Requirements. (See also Sec. 5.2).

CAHCs and managers and supervisors receiving allegations of harassment should provide the alleged harasee with a Privacy Act Statement. During fact-finding, Fact-Finders should provide all witnesses in the fact-finding a copy of the Privacy Act Statement. Consistent with Privacy Act requirements, the alleged harassee shall not receive a copy of the Fact-Finding report. (See also Sec. 5.2)

3.6 Harassment Allegations Involving NASA Contractors

As stated in the NPR, ***while NASA does not have the authority to address contractor-on-contractor issues pertaining to harassment; however, it is expected that all contract employees on NASA facilities will refrain from engaging in harassing conduct***.[15] For contractor-on-contractor allegations of harassment, NASA supervisors or the CAHC shall immediately contact their Center Director of Procurement for referral to the appropriate Contracting Official.
In instances where a contractor is alleging harassing conduct by a civil servant or vice versa, the allegations should be reported to the CAHC for further processing consistent with the NPR. This should include a determination as to the scope of the alleged harassing conduct. The CAHC should also contact his or her Center Director of Procurement for referral to the appropriate Contracting Official, as appropriate.

It should be noted that, where only one of the parties is a contractor or when a contractor has been identified as a witness, NASA Fact-Finders need to request access through their Center Director of Procurement or designee, before the Fact-Finder interviews any contract employee. Therefore, NASA cannot compel cooperation by the contracting organization; it would be voluntary on the part of the contract employee. It is important for CAHCs to know this, and to communicate this to supervisors, supervisors, and employees.

Contractor v. Contractor Allegations

When processing allegations involving an alleged harasee(s) and alleged harasser(s) who are BOTH contractor employees, keep in mind that the processing of the case is essentially outside the scope of the Agency anti-harassment process. This is because, as stated in this section, NASA does not have the authority to require contract employees to participate in an anti-harassment fact-finding. Moreover, when the allegations of harassing conduct involve contractors as parties on both sides, it is the obligation of the contractor employer(s) to address the matter. Nonetheless, it is in the best interests of the NASA workplace to make sure that the matter does get addressed.

To more clearly “step out” the process to be followed when both parties are contractor employees, start with the premise that in such cases it is the Center Office of Procurement that should be the lead office interfacing with the contractor employers. Provided below is a rough sketch of the step-by-step process for contractor v. contractor complaints:

1. If allegations are raised to a civil servant supervisor, that supervisor should immediately contact the CAHC.
2. Once the CAHC has been put on notice of the contractor v. contractor allegations, either directly from the alleged harasee(s) or through a third party to whom the alleged harassee(s) raised the matter, e.g., civil servant supervisor, the CAHC, with advice from the Center Anti-Harassment Program (AHP) Team shall

[15] NPR 3713.3, fn. 1.

contact the Center's Director of Procurement.

3. The CAHC promptly contacts the Center's Director of Procurement, with advice from the Center AHP Prior to contacting the Procurement Office, the CAHC and AHP Team should make a determination as to whether they view the allegations as appropriate for referral to the Procurement Office as an AHP matter. In making this determination the Team should consider whether the behavior at issue:
   - Involves interpersonal interaction either on NASA premises or both on and off NASA premises;
   - Involves one or more protected bases, e.g., race, gender;
   - Involves bullying, intimidation, threats (If the behavior at issue does not involve a protected basis).
4. The Center Director of Procurement, either personally or through a designee, consults with the CAHC and other members of the AHP Team to determine next steps.
5. The Procurement Office reaches out to appropriate officials of the contractor employer(s) to put them on notice that NASA has received allegations of harassment from a contractor employee.
6. The Procurement Office, in consultation with the CAHC and other members of the AHP Team, as needed, interfaces with contractor officials to urge the contractor employer to take appropriate steps to address the matter.
7. The Procurement Office follows-up in a reasonable period of time to ascertain action(s) taken by the contractor employer (normally measured in days not weeks, depending on the seriousness of the matter).
8. The Procurement Office works with the CAHC and the AHP Team to develop a close-out memorandum to the file, and other documentation, as deemed necessary, for example, a written communication to the contractor employer.

4. FACT-FINDINING

4.1 Determined Whether Fact-Finding is Necessary

Where fact-finding is determined to be necessary, supervisors will act as or designate the Fact-Finder to conduct fact-findings into allegations of harassing conduct.[16] When a supervisor chooses to appoint an independent Fact-Finder, he or she will do so through the CAHC, in consultation with the CAHC and other members of the Center AH Advisory Team as needed. The CAHC will serve as the primary liaison between Fact-Finders and supervisors. To the extent that a Center establishes a "Fact-Finder Cadre", the CAHC oversees selection and training of Cadre members (see also, "Best Practice: Fact-Finder Cadre," at Sec. 3.3.3m above). The primary goal of fact-finding is to ascertain the facts pertinent to the incident, what actually caused the incident, the outcome of the incident, and what actions need to be taken that will improve the probability that similar incidents will be prevented in the future.

Whether the supervisor acts as the Fact-Finder or one is appointed, the Fact-Finder should conduct this assigned investigation as his or her official duty. Conflicts with pre-existing regular duties should be resolved within the management chain. Finally, ***the appointed Fact-Finder may not be subordinate to any official or employee involved or alleged to be involved in the matter***.

The supervisor, working in collaboration with the CAHC, shall also ensure that designated Fact-Finders have been provided a copy of the NPR and this Implementation Guide and have had an opportunity to familiarize themselves with the contents of these documents. Additionally, CAHCs shall coordinate with ODEO to ensure that designated Fact-Finders have been provided access to other available resource materials on the Agency's anti-harassment procedures, such as online education and awareness information.

There may be some situations where fact-finding is very limited. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the Agency could immediately determine appropriate corrective action. However, there needs to be a document for the record, noting the incident and its resolution.

Role of the Fact-Finder

The fact-finder is to conduct an independent inquiry into the allegations and prepare the fact-finding report. The fact-finder is expected to interview the alleged harasser, the alleged harassee, and any witnesses who may have knowledge of the allegations. The Fact-Finder should also be available to answer any questions the supervisor, or other member of the Center Anti-Harassment Team may have regarding the facts of the case. Although it is recommended that the fact-finding report be as comprehensive as possible, **the fact-finding report is intended only to establish what the conduct was, that is, what happened, when and how frequently it happened, and who witnessed it.** The report should also address whether the witnesses' statements tend to corroborate the allegation or contradict it. In some cases it may be appropriate for the fact-finder to make some initial determination of credibility, based on the evidence, for example, the statements of the witnesses. The fact-finder should keep the CAHC involved throughout the fact-finding process and is especially critical in situations where the alleged harassee is trying to broaden the scope of the fact-finding or if witnesses are refusing to cooperate.

T**he fact-finder should not attempt to draw a conclusion as to whether the alleged conduct violated the policy; nor should he/she make recommendations as to what steps should be taken to address the situation. This is the role and responsibility of the supervisor**, in consultation with subject matter experts, for example, Legal and HR. The supervisor should take into account that **the Agency's anti-harassment policy and procedures are intended to address the conduct at the earliest possible stage, before it become more serious**. The most appropriate steps to be taken to address the situation should be the driving factor in the supervisor's deliberations, as the policy is designed to be proactive and preventive.

[16] NPR 3713.XX, Sec. 1.2.3.4.

Inter-Center Fact-Finding

Inter-Center cases are not uncommon. We have seen a number of cases involving more than one Center over the years – this can take many different permutations. It may be that the alleged harassee or the alleged harasser is officially located at a different Center, but is on a detail, or in a leadership development program, or has some other reason for being at the Center where the alleged harassment takes place. Another permutation: the alleged harassment involves parties from different Centers who are on official travel together, for example, attending an off-site meeting. These cases can become very complicated as far as determining who will serve as the CAHC, from which Center will the Fact-Finder be selected, and at which Center the Fact-Finding will be conducted. Still other questions: who will serve as the decision maker of record? Who will review the Fact-Finding report?

We offer a few guideposts for inter-Center cases:

1. The key point is communication between the CAHCs and AHP Teams at the involved Centers. As a general rule the ***decision-maker is the alleged harasser's supervisor***, or, if the supervisor is also an alleged harasser, than his or her supervisor, and so-on up the management chain. Inter-Center cases should operate the same way – the decision-maker would typically be the alleged harasser's supervisor, even if the alleged harasser's supervisor is located at a different Center from where the alleged harassment occurred, e.g., the alleged harassment occurred at NSSC, and the decision-maker resides at HQ.
2. The CAHC of record in inter-Center cases would normally be the CAHC at the Center where the decision-maker resides. However, it is possible that the CAHC at the Center where the harassment occurred can serve as the CAHC of record. The important thing is inter-Center communication – both (or multiple) CAHCs must communicate with each other in these cases. It is advisable that the involved CAHCs consult with their Center AHP Teams in making determinations about who will serve as the CAHC of record and who will conduct the Fact-Finding.
3. Given that the decision-maker and CAHC of record would normally be those residing at the Center where the alleged harasser resides, it follows that the Fact-Finder should be appointed from the same Center as the decision-maker and the CAHC. If it makes more sense to appoint a Fact-Finder from the Center where the alleged harassment occurred rather than the Center where the decision-maker and CAHC reside, that is perfectly acceptable if the decision is made jointly between the involved Centers.
4. To the extent that bargaining unit members are involved, CAHCs and Center AH Teams should consult with Center Labor Relations Officers (see Section 3.4).

4.2 Authorizing the Fact-Finding

Upon a determination that a fact-finding is needed, the supervisor will either: 1) conduct the fact-finding; or 2) prepare an authorization letter designating a Fact -Finder and setting out the subject of the fact-finding. The essential elements of the authorization letter are set forth below (see ***Appendix C. Fact-Finding Authorization Memo***):

Who Authorizes the Fact-Finding

The supervisor of record/decision-maker authorizes the fact-finding, using NASA Form 1796. However, it is acceptable for CAHCs to fill out the forms for the supervisor's signature.

4.2.1 Scope/Allegation: Defining the incident/allegation to be investigated. The scope of the allegation should be very clearly defined, relying on the allegations as set forth by the alleged harassee in NASA Form 1799 (Anti-Harassment Questionnaire) and/or by the CAHC. The supervisor should work closely with the Center AHP Team to clearly identify the scope of the allegation and convey this to the Fact-Finder.

4.2.2 Report Instructions: Establishing reasonable timelines for completion of the Fact-Finding Report. It is important that the Fact-Finder has a clear understanding of the need for both promptness and effectiveness in the conducting of the fact-finding and the development of the report. "Reasonable timeframes" for the AHP will be determined by the complexity and the seriousness of the case, including number of alleged harassers, length of time the alleged harassment occurred, number of separate alleged harassing incidents. Generally though, fact-finding should be completed in one to two weeks (see also Sec. 3.3.4, Timeframes and Promptness). Since time is of the essence in conducting these inquiries, fact-finders should make sure that they have the time to devote to addressing the matter quickly and are otherwise able to perform in an effective manner.

4.3 Conducting Interviews

The fact-finding shall include, at a minimum, interviews with key individuals such as the alleged harasee, the alleged harasser, and any witnesses to alleged harassing conduct.[17] For a detailed discussion on conducting interviews see ***Appendix F. Interview Tips***. For various examples of appropriate questions to ask alleged harassees, alleged harassers and other witnesses, see ***Appendix H. Questions to Ask Parties and Witnesses***, which also appears in NPR 3713.3. Several other considerations impacting the interview process are addressed below.

Telephonic Fact-Finding Interviews

Interviews conducted by telephone may be an acceptable means of conducting fact-finding. However, in making this choice, it should be remembered that consistency in the fact finding process is important. This is particularly true within the context of a specific fact-finding. For example, if one party or witness is interviewed by phone while the others are interviewed in person, there should be a record of the rationale behind this. Was the person interviewed by phone on travel? Was the person interviewed by phone one of the less important witnesses?

4.3.1 Credibility Assessments

Where the interview process results in conflicting versions of relevant events, as is often the case, the Fact-Finder or supervisor may ultimately have to weigh each individual's credibility. In such cases, credibility assessments can be critical in determining whether the alleged harassment in fact occurred. [18] If there are conflicting versions of relevant events, the supervisor, as the decision-maker, will have to weigh each party's credibility. Factors to consider include:

- **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Opportunity to Observe**: Did the witness have enough information to make an informed observation?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

EEOC cautions that "None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility,

[17] NPR 3713.3, Sec. 2.2.1.
[18] Vicarious Liability Guidance, Sec. V.C.1.e.ii.

since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again."[19]

4.3.2 Statement of Facts

Fact-Finders should request that witnesses review their statements to help ensure the accuracy of witness statements. To this end, Fact-Finders may request witnesses interviewed during a fact-finding sign a Statement of Facts. (See ***Appendix J. Statement of Facts***). The purpose of this is solely to ensure the accuracy and completeness of the interview and not to bring in "new facts" that was not discussed with the fact-finder. If the fact-finder requests that the witnesses sign the statement, the witnesses should do so in a timely manner and should not hold up the fact-finding process. However, such statements will not be necessary in every case.

A good "rule-of-thumb" to use in making this decision is the complexity or severity of the case at hand. Some considerations in determining whether witnesses should sign statements are:

- Was the supervisor or supervisor present during the incident(s) that gave rise to the allegation?
- Does the allegation involve a single incident or a pattern of conduct?
- Are there witnesses (other than the parties themselves) to the incident(s) that gave rise to the allegation?
- Is there the potential for a factual dispute among the witnesses as to what happened?
- Did the alleged incident involve inappropriate physical contact? (see also Section 3.1 on responding and reporting in cases involving physical threats)

4.3.3 Retaliation Prohibition

In addition, ***Fact-Finders should be aware that the anti-harassment process prohibits retaliation against employees who report harassment or provide information related to such allegations***. Therefore, when conducting interviews during a fact-finding, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation.[20]

4.3.4 Allegations Beyond the Scope of the Fact-Finding

If a Fact-finder receives other allegations of harassment beyond the allegations into which the fact-finding is being conducted, the Fact-Finder should consult immediately with the supervisor or supervisor who appointed the Fact-Finder. The supervisor should consult with the CAHC and subject matter experts to determine whether the new incidents of alleged harassment are supporting evidence of the original allegations but do not raise a new allegation, whether the new incidents are like or related to the original allegations of harassing conduct, or whether the new incidents are not an allegation of harassment.

If the Fact-Finder receives *other allegations unrelated to harassment,* he or she shall refer such allegations to the appropriate office, i.e., EEO, HR. Such allegations shall not be part of the written report.[21]

4.4. Concluding Fact-Finding

There is no set formula to dictate when enough information has been gathered to ensure that a Fact-Finder has fully completed an inquiry. There are, however, some general concepts that can be followed in determining when enough testimony and evidence have been collected. ***Here are some tips to assist in making this determination:***

- When all evidence has been collected and all witnesses interviewed.

[19] Id.
[20] Vicarious Liability Guidance, Sec. V.C.1.b. Managers and supervisors should also look closely at employment decisions affecting the alleged harasee and witnesses, during and after the fact-finding to ensure that such decisions are not based on retaliatory motives.
[21] NPR 3713.3, Sec. 2.2.2

- When the preponderance of testimonial and physical evidence clearly indicate that the facts of the case in question are or are not substantiated.

- When the testimony is redundant, and it is unlikely that further testimony will discover new information essential to the fact-finding.

- When it is determined that all disputed facts are resolved and continuing the fact-finding will disrupt the normal operation of the facility.

4.5 Preparing the Fact-Finding Report

4.5.1 Purpose of the Report

Once the fact-finding is completed, the Fact-Finder must prepare a Fact-Finding Report and provide it to the supervisor.[22] A copy should also be provided to the CAHC and the Center Anti-Harassment Advisory Team. The Fact-Finding Report is the means through which supervisors evaluate the facts and make decisions regarding what corrective action, if any, should be taken. The Report is normally in memorandum format. ***Note also that it is essential for supervisors to consult with the CAHC and subject matter experts (e.g., Human Resources, EO, Chief Counsel) on the Report before implementing any corrective action.***

4.5.2 Tips for Developing the Fact-Finding Report

- Remember the audience - it may include individuals unfamiliar with functions, terminology, and organizations.

- Explain references, terminology, and acronyms as needed.

- Identify the specific evidence relied upon for each finding of fact.

- Ensure that all evidence relied upon is contained and referenced as an exhibit in the report and file.

- Identify how you resolved significant inconsistencies or conflicts in evidence with an objective analysis.

For additional information on the Fact-Finding Report, please see ***Appendix D. Fact-Finding Report Template***.

NOTE: Where the Fact-Finder is not the supervisor, the Fact-Finder shall return to the supervisor all draft copies, tapes, notes, working papers, etc., relevant to the allegations of harassment and/or used to formulate the final Fact-Finding Report. Nothing relating to the case should be retained by the Fact-Finder. The original copy of the completed report, all exhibits and the authority for conducting the fact-finding should be submitted to the CAHC, who will in turn provide the material to the supervisor and members of the Center AH Advisory Team in the manner specified in the letter authorizing the fact-finding. A copy of the report shall reside with the CAHC.

4.6 Actions to be Taken upon Completion of the Fact-Finding

4.6.1 Determining the Appropriate Remedy

Based on the Fact-Finding Report, the supervisor will determine, in consultation with the CAHC and subject matter experts (EEO, Human Resources, Legal, etc.) what action, if any, is recommended in the case and take action, as necessary. Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the Agency could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the Agency to claims such as wrongful discharge, and may simply be inappropriate. Nonetheless, at

[22] NPR 3713.3, Sec. 2.2.4.2

the very least, when faced with an allegation of harassment that cannot be immediately addressed, the Agency has an obligation to take preventative measures, such as training or monitoring.

Utilization of Conflict Management Techniques

Conflict management techniques may be utilized to remediate problem behavior shown to have occurred through an anti-harassment fact-finding. For example, conflict management one-on-one consultations with supervisors or employees may be an appropriate means to help address behavior that violates the Agency Anti-Harassment Policy. In the absence of a violation finding, conflict management may still be used to address behavior that is deemed inappropriate or otherwise unacceptable. To learn more about conflict management options view the Agency's Conflict Management Program brochure at http://www.hq.nasa.gov/office/nasaonly/odeo/CMP_Brochure.pdf and/or consult with the ODEO CMP Manager.

However, Centers are strongly cautioned AGAINST the use of conflict management as a means of replacing the anti-harassment fact-finding called for under the policy. This is because the Agency does not want alleged harassees to feel dissuaded from using the process as described Agency-wide in both policy, communications and technical assistance materials. Centers should NOT engage in either conflict management or alternative dispute resolution (ADR) without 1) conducting a fact-finding into the allegation(s) 2) consulting with the CAHC regarding ADR processes and 3) gaining the express agreement of all parties to participate in alternate processes as a means of addressing the allegation(s).

Remedial measures should not adversely affect the harassee. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the harassee prefers otherwise). Remedial responses that penalize the harassee could constitute unlawful retaliation and are not effective in correcting the harassment.[23]

4.6.2 Notifying the Alleged Harassee and Harasser

The supervisor shall notify the alleged harassee and harasser of the outcome of the process to the extent permitted under the Privacy Act.[24] A harassee does not need to know and may not be provided the outcome of any disciplinary action against a harasser. A harassee is not to be provided with a copy of the Fact-Finding report. The supervisor should consult with the CAHC and subject matter experts as to this notification. The same rules generally apply to the alleged harasser, who is not entitled to see the fact-finding report as a matter of course. However, if disciplinary action is to be taken against the alleged harasser, he or she is entitled to see that portion of the report that forms the basis for taking the action.

Decision (Close-Out) Memos to the Parties

Role of the Supervisor of Record

It is the role of the supervisor of record to issue decision memos to both the alleged harassee and the alleged harasser, or in cases in which a violation of the Agency anti-harassment policy has been found, the harassee and the harasser. Under the procedures, the supervisor has the option to ACT AS or DESIGNATE a Fact-Finder (FF). Generally speaking, it is expected that the supervisor will act as the FF in cases involving more minor incidents and will appoint a FF in more serious, or more complex matters, under the advice of the CAHC and subject matter experts. Regardless, the memos should always be signed by the supervisor (decision-maker) with a courtesy copy to the CAHC.

Developing Decision Memos

The action to be taken in terms of close-out recordation will vary from case to case, depending on the complexity

[23] Id. at V.C.1.f.
[24] NPR 3713.XX, Sec. 2.3.3.

of the case and whether further steps need to be taken. In relatively simple cases, that is, those involving a single incident, a simple fact-finding conducted by the supervisor him/herself and involving just the parties or one or two others, there may be a single close-out memo to the file, to be shared with the CAHC. The close-out memo in such cases should state what occurred, who was involved, and the supervisor's determination as to whether, and what, follow-up action is to be taken. [Note: Such memos to the file should only be prepared and serve as the primary form of case recordation where the supervisor handles the matter without recourse to disciplinary action, beyond verbal counseling.]

In more complex cases, generally those in which a FF has been designated to conduct the fact-finding on the supervisor's behalf, decision memos, one for the alleged (or actual) harasee and one for the alleged (or actual) harasser, should be developed in consultation with the CAHC and subject matter experts. It is important to note in this regard that, in developing the substance of decision memos, ***the most appropriate steps to be taken to address the situation should be the driving factor in the supervisor's deliberations***, as the policy is designed to be proactive and preventive. Managers also should ***take into consideration the definition of harassment*** in the NPR when conducting their post fact-finding deliberations in a given case. The definition refers to unwelcome conduct based on one or more of the policy's protected classifications, for example, national origin, when **either** 1) the behavior can reasonably be considered to adversely affect the work environment or (2) an employment decision affecting the employee is based upon the employee's acceptance or rejection of such conduct. Thus, with respect to the first prong of the definition, NASA supervisors are looking to see whether the conduct at issue can REASONABLY be said to adversely affect the work environment, based on the facts as set forth in the fact-finding report. ***Making this determination should be guided by common sense***. For example, how serious was the conduct? How frequent was it? Did it involve more than one harassee? If the conduct is already serious, what steps should be taken? If not, are there steps that can be taken now to address the conduct BEFORE it becomes severe and pervasive? As always, supervisors should consult with subject matter experts in making these determinations.

Generally, decision memos in such cases should include:

1. The **allegation**;
2. The **steps taken** regarding the allegation, e.g., fact-finding [Note: This does not need to be a detailed recitation; it is sufficient to state: "A fact-finding into the matter was conducted."]; and
3. The **determination** as to whether the conduct that was the subject of the allegation violated the NPR.

Decision memos should be developed in consultation with Legal and HR, and should ***clearly state the ultimate decision***.

Examples of Decision Memo Language

The following are examples of decisional language you may wish to consider, depending on the facts:

1. Where the policy is found to have been violated:

Ex. A: "I have found that your behavior/certain instances of your behavior constitutes harassment as defined by the NASA Anti-harassment Policy."

Ex. B: "I have found that the evidence supports the allegation(s) of harassment as it is defined by NASA's Anti-Harassment Policy."

2. Where the policy is NOT found to have been violated:

Ex. A: "I have found that the subject behavior does not constitute harassment as defined by the NASA Anti-harassment Policy."

Ex. B: "I have found no evidence to support the allegation(s) of harassment."

3. Where the policy is NOT found to have been violated, but poor judgment was found to have been exercised and additional action, e.g., training, is deemed appropriate:

Ex. A: “While I did not find that NASA’s Anti-harassment Policy was violated, I did find extremely poor judgment was exercised by Ms. X in the manner in which she interacted with Mr. Y. It is my goal, and the goal of the Agency, to ensure that all employees can work in a productive environment free of harassment. I request you to take appropriate action in addressing Ms. X’s poor judgment in this matter and to take any action(s) you believe necessary to ensure that all NASA supervisors at Center X understand their roles and responsibilities under NASA’s Anti-harassment Policy.”

Ex. B: “Although I did not find a violation of our anti-harassment policy, you exercised extremely poor judgment in [subject behavior]. This should never have occurred, and I expect NASA supervisors to exhibit better judgment. My intent is to address your behavior so you are aware how some of your communications and actions are perceived by others regardless of your intent, and to ensure you take appropriate steps to modify your behavior as appropriate. As you know harassing conduct of any nature will not be tolerated. This includes jokes, remarks (regardless of whether they are specifically directed at an employee), videos, gestures and any similar actions that unreasonably interfere with work performance or create an intimidating or hostile work environment.”

5. RECORDS MANAGEMENT

5.1 Tracking of Harassment Allegations

Each Center shall be responsible for ensuring the maintenance and tracking of information pertaining to allegations of harassment.[25] Tracking data about allegations of harassing conduct is necessary for record-keeping purposes. It also serves as a reference source for inquiries and responses on a need-to-know basis only.

To facilitate tracking of allegations of harassing conduct, please see ***Appendix E. Harassment Activity Reporting Tracking Form*****,** to be used by CAHCs to periodically gather data, to report on the number and bases of allegations over time, to conduct trends analysis, and to ensure that the fact-finding and other actions taken in response to allegations are in accordance with the requirements of NASA's Anti-Harassment Procedural Requirements.

5.2 Maintenance of Records

The CAHC will ensure the Center maintains case files pertaining to the anti-harassment process at their respective Centers.[26] The maintenance of records and any disclosure of information from these records must be in compliance with the Privacy Act, Title 5 United States Code (USC) 552a, NPR 1441.1, NASA Records Retention Schedules, and NPR 1382.1, NASA Privacy Procedural Requirements. Such information, however, may have to be disclosed to those officers and employees who have a need for the record in order to carry out the purpose and intent of the Anti-Harassment procedures. (See also Sec. 3.4)

Anti-Harassment System of Records

NASA has developed a System of Records Notification (SORN) to ensure that all records pertaining to the Agency's Anti-Harassment Program (AHP) are maintained in a manner consistent with Privacy Act requirements. The SORN may be accessed at https://www.nasa.gov/sites/default/files/files/NASA_10HRCF-2011.pdf The SORN defines and describes categories of individuals and records, routine uses of AHP records, and retention and disposal timeframes. It names the Agency Anti-Harassment Coordinator as System Manager and the CAHC at each Center as a Sub-system Manager. All CAHCs should familiarize themselves with the SORN.

[25] NPR 3713.XX, P.5, Verification/Measurement
[26] NPR 3713.XX, Sec. 1.6.1.5.

APPENDIX A. ANTI-HARRASSMENT QUESTIONNAIRE

National Aeronautics and Space Administration

Anti-Harassment Questionnaire

See Privacy Act Statement below.

NAME	TITLE	GRADE/SERIES

ORGANIZATION	ROOM NUMBER	PHONE

HOME MAILING ADDRESS	HOME PHONE *(Optional)*

I AM A *(Choose one)*:

- ☐ NASA EMPLOYEE
- ☐ CONTRACTOR
- ☐ OTHER

WHO IS THE PERSON(S) ENGAGING IN THE CONDUCT YOU WISH TO REPORT? *(If more than one individual is named, please attach an additional page.)*

NAME

JOB TITLE/OFFICE

WHAT IS THE CONDUCT YOU WISH TO REPORT? *(If more space is need, please attach an additional page.)*

WHEN DID THIS CONDUCT OCCUR, AND HOW OFTEN? IS IT STILL OCCURRING? *(If more space is need, please attach an additional page.)*

WHY DO YOU BELIEVE THE CONDUCT OCCURRED OR IS OCCURRING? *(If more space is need, please attach an additional page.)*

HAVE YOU FILED AN EEO COMPLAINT CONCERNING THIS MATTER? ☐ YES ☐ NO

HAVE YOU FILED AN ADMINISTRATIVE GRIEVANCE CONCERNING THIS MATTER? ☐ YES ☐ NO

THE STATEMENTS CONTAINED IN THIS QUESTIONNAIRE ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF. I AGREE TO COOPERATE FULLY WITH THE ANTI-HARASSMENT PROCESS (NPR 3713.3).

SIGNATURE	DATE

PRIVACY ACT STATEMENT (6 U.S.C. 552a)

Authority: Public Law 92-261; 42 U.S.C. 2000e-16; 29 U.S.C. 633a; 29 U.S.C. 791, 794 and 794a; 42 U.S.C. 12101, E.O. 13087, E.O. 13152; NPD 3713.2; NPR 3713.3.

Principle Purpose: This form and the information on this form may be used: (a) as a data source concerning information on harassing conduct allegations for production of summary descriptive statistics, and analytical studies of reports of harassment processing and resolution efforts and may be used to respond to general requests for information under the Freedom of Information Act: (b) to respond to requests from legitimate outside individuals or agencies (e.g. Members of Congress, The White House, Equal Employment Opportunity Commission, etc.), regarding the status of allegations of harassing conduct; and (c) to resolve allegations of harassing conduct.

Disclosure: Voluntary; however, failure to complete all appropriate portions of this form may lead to rejection of allegations of harassment on the basis of inadequate data on which to determine if allegations are acceptable.

FOR OFFICE USE ONLY
DATE OF INITIAL CONTACT WITH ANTI-HARASSMENT COORDINATION UNIT:
INTAKE INITIALS:

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APPENDIX B. CHECKLIST OF BASIC INFORMATION TO ALLEGED HARASSERS

1. As a person identified or alleged to be responsible for harassing conduct, the employee will be asked to provide information relating to the allegations. The alleged harasser is responsible for fully cooperating with the fact-finding process.

2. If there are individuals who can provide information concerning the allegations of harassment, the alleged harasser should be prepared to furnish the Supervisor, the CAHC, or the Fact-Finder, with their full name, position, and contact information. The Fact-Finder will determine what interviews and documentation are necessary.

3. The information in the Fact-Finding Report is protected by the Privacy Act, and the information contained therein may only be shared with those who have a need to know in the performance of their duties.

4. An alleged harasser may be an employee covered under a collective bargaining agreement and may be entitled to certain rights. It is recommended that the supervisor, or CAHC consult with your Legal Office or your Center Labor Relations Officer regarding these rights.

5. An alleged harasser is required to keep the Agency informed of his or her contact information.

6. An alleged harasser must notify the CAHC or the NASA Anti-Harassment Coordinator of any questions or concerns he or she may have about the Anti-Harassment Process.

[DATE]

To: Fact-Finder

From: Supervisor

Subject: Authorization of Fact-Finding for NASA's Anti-Harassment Process

_____, an employee at [NAME OF CENTER] has raised an allegation(s) of harassment. In accordance with NPR 3713.3, I hereby authorize [NAME OF FACT-FINDER] to conduct an independent fact-finding into this allegation(s).

NAME	TITLE
_____	Fact-Finder

Upon identification, the Fact-Finder will expect your complete cooperation in this matter. Pursuant to NPR 3713.3 Chapter 1.1.4, all NASA employees are expected to participate in the process and may be subject to disciplinary action for failing to do so.

Should you have any questions about this process, please contact xx, your Center Anti-Harassment Coordinator or me.

[Appointing AUTHORITY'S SIGNATURE BLOCK with name and official NASA Title]

cc:

The fact-finding report will vary from case to case. In simple cases, for example, an incident that occurs with the supervisor present, the "report" may consist of a supervisor's brief memorandum to the file describing the inappropriate conduct and what was done to address it. In more complex cases, the Fact-Finder will need to prepare a more in-depth document. However, the document should be as concise as possible, laying out only the needed information to make a decision as to whether prompt action should be taken to address the matter, and if so, what action is needed. The template below provides an outline of the information to be provided when it is determined that an in-depth report is appropriate.

I. Preliminary Statement

A. Identify the authority for conducting fact-finding.

The paragraph should generally read as follows: "This fact-finding was authorized by _____ (place) on (date) per Memorandum dated_____."

B. Identify the purpose and scope of the fact-finding.

1. The ***initial purpose of the fact-finding should be concisely stated***. As an example: "to conduct a fact-finding into whether harassment in violation of NASA policy occurred when . . ."

2. The fact-finding ***should always be limited in scope to just the allegation for which the fact-finding has been authorized***. However, if during the course of the fact-finding, information was provided to the Fact-Finder that goes beyond the scope of the current fact-finding, a note to the reader should be provided:

   a. Example: "Fact-finding was limited to the alleged incident. Two employees and one contractor found to have knowledge pertinent to the incident were interviewed."

   b. Example: "During the course of the fact-finding, two other employees made two additional allegations of harassment by Mr. Oxford."

C. List or summarize the witnesses interviewed.

II. Findings of Fact

A. Findings go to the ***when, who, what, why, where, and how***. Findings are the resolutions of the details.

B. The Findings should be ***set forth in a narrative addressing all the pertinent evidence***. In a good narrative, the issues are set out and resolved in an orderly way. The simplest way to organize the narrative is to ***describe the allegation and then describe what each witness or other evidence had to say about it.***

C. Keep in mind that there ***must be a reference to exhibits in support of every factual assertion***. Therefore, ***after every factual statement the exhibits supporting that statement should be identified in parentheses ( )***. The exhibits are not repeated in the narrative; they are described. This must be done correctly and fairly. It is not fair, for example to describe a witness as "admitting" a fact when he or she merely stated it and the fact doesn't bear on his or her culpability. In other words, watch the use of emotionally-charged language. Such language will impair credibility.

III. Signature

A. The ***Fact-Finder shall sign the Report***.

B. Signatures reflect the accuracy of the report and view of the Fact-Finder.

IV. Exhibits

A. This section of the Report includes ***an index of all exhibits supporting the findings and a descriptive heading of each***. The exhibits should be included in their entirety. The Report is incomplete if the exhibits are not part of the package.

B. This section includes ***any material referred to or considered in the findings of fact. e.g., emails, photographic images***.

C. Exhibits ***may also include signed statements from the parties and witnesses***, depending on the complexity and severity of the allegations (See Section 4.3.2, above).

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

CENTER: _____

HARASSMENT ACTIVITY REPORTING/TRACKING

National Aeronautics and Space Administration

Harassment Activity Reporting/Tracking

(NPR 3713.3, Anti-Harassment Procedures)

CENTER:

TO BE PREPARED AND MAINTAINED BY THE CENTER ANTI-HARASSMENT COORDINATOR (CAHC)

CASE NUMBER	DATE ALLEGATION REPORTED	BASIS(ES)	ISSUE(S) *(type no more than three lines)*	RELATIONSHIP OF ALLEGED HARASSER & ALLEGED HARASEE *(e.g., supervisor-employee)*	FACT-FINDER	CASE COMPLETION DATE	STATUS	TIME IN INVENTORY (DAYS)	FINDING OF HARASSMENT	DISCIPLINARY ACTION TAKEN	INFORMAL EEO COMPLAINT FILED	FORMAL EEO COMPLAINT FILED	
													+ -
													+ -
													+ -
													+ -
													+ -

NAME AND TITLE OF RESPONSIBLE OFFICIAL

DATE:

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*** To be prepared and maintained by the CAHC.**

I. Purpose of the Interview Questions

It is essential that Fact-Finders understand the purpose of interviews is to obtain relevant facts. Relevant facts are those that are important to deciding the previously identified ultimate issues. They are outcome determinative. Therefore, fact-finding questions must be designed to obtain the relevant facts. Also, remember that for every piece of disputed evidence, there should be a factual finding.

II. Interviewing Techniques

Interviewing techniques vary, depending upon the facts, circumstances, and witnesses. The following suggestions should be considered as techniques to elicit the best, most reliable information:

A. All questions asked during the interview must be directed toward discovering the answers to "who, what, when, where, why, and how."

B. Avoid beginning an interview with specific questions, as they may inhibit the witness. The witness may feel that only those items mentioned are pertinent.

C. The first set of questions should establish the witness' title, experience, education (where appropriate) and job-related duties for the record.

D. The second set of questions should establish the witness' knowledge of the event(s) under fact-finding. Elicit a description of the scene first; then the related action. Asking an open-ended question allows the witness to tell his or her rendition of events. Once the person has completely related his or her narrative, specific questions may be asked to clarify specific points and gather additional information.

E. Compound questions are confusing and should be avoided.

F. Leading questions are questions that suggest an answer. Examples: "This isn't the first time you've had performance issues, is it?" "You confronted your subordinate, didn't you?" The disadvantages inherent in leading questions are that they can lead to distortions of the statements made and can potentially lead to witness intimidation. Leading questions should be avoided.

G. Problems can also arise when asking questions that are answered by a simple yes or no. This limits the witness to answering only specific questions, and in many instances the witness has a tendency to answer affirmatively just to be agreeable. They are appropriate in limited situations, where a direct response is important.

H. Keep the format simple and carefully choose the language as word choice can affect an answer.

I. Actual interview – If fact-finding addresses specific events, inquire about all events during the relevant time frame in chronological blocks of time. For each block ask, who, what, when, where, why and how:

1. What was the alleged conduct?
2. Who was present?
3. What was said?
4. What exactly occurred?
5. When did it occur?
6. Where did it occur?
7. How did this affect you?
8. How did it occur?
9. Where did it happen?
10. Who else has information?

J. The Fact-Finder should also determine the following:

1. What was said?
2. Who said it?
3. When was it said?

K. The Fact-Finder should keep in mind the following:

1. Always ask if there is any other information they have about the situation that he or she believes could be significant.
2. Don't tell one witness what another specific witness said.
3. Always maintain control.
4. Don't discuss personal opinions or conclusions.
5. Don't make accusatory statements.
6. Have the witness explain terms and phrases.
7. Resolve contradictions.

III. Interview Closing Phase

At the end of every interview, bolster the witness, whether he or she is friendly or hostile. This can be accomplished by employing the following statements:

A. **"**Is there anything else I should ask you that I haven't?"

B. "Anything else I need to know?"

C. "If you have any doubts, is there anything else you think you should tell me?"

D. Remind the witness "it's for the record."

E. "Certainly you appreciate that this matter may go to a higher level. Is there anything you'd like to amend or supplement?"

F. Always give the witness the privilege of contacting the Fact-Finder if additional information is later recalled or comes to their attention. Not everyone can think of every detail on the spot, and the questioning may well trigger further search of memory and records.

APPENDIX G. NOTICE OF RIGHTS AND RESPONSIBILITIES OF NASA EMPLOYEES ALLEGING HARASSING CONDUCT

Employees who believe they have been subjected to harassing conduct have the right to:

1. Report the matter immediately to their first-line supervisor, the CAHC, or any other official designated by the Center Director/OIC. In the event that the employee's first-line supervisor is the alleged harasser, the employee shall contact the second-line supervisor, the CAHC, or any other official as designated.

2. Report the alleged incident of harassing conduct to the CAHC, or other official as designated by the Center Director/OIC when the person to whom the alleged harassment was reported failed to take prompt action.

3. Pursue the matter under the Agency's Anti-Harassment Procedures, the EEO complaint procedures, or both processes simultaneously. The process established under the Anti-Harassment Procedural Requirements is entirely separate and apart from the EEO complaints process. An employee who reports harassment in accordance with the Anti-Harassment Procedures has not filed an EEO complaint under 29 CFR 1614 and NPD 3713.6P. A consultation with a CAHC is not EEO counseling for purposes of filing an EEO complaint. An employee who wishes to file a complaint of discrimination shall contact his/her Center EEO Office within 45 days of the alleged harassment.

4. Present and pursue the allegation of harassing conduct free from restraint, interference, coercion, harassment and reprisal.

5. Prompt notification upon completion of the fact-finding. However, to the extent that disciplinary action is taken, the employee shall not be apprised of the disciplinary action taken against an alleged harasee.

Employees alleging harassment have the responsibility to:

1. Fully cooperate with the presentation of information, to include scheduling of interviews or meeting, responding to correspondence, and providing requested material or information, in the processing of their allegations of harassing conduct.

2. Keep the Agency informed of your contact information.

3. Notify the CAHC or the NASA Anti-Harassment Coordinator of any questions or concerns about the Anti-Harassment Process.

This is to acknowledge that a copy of this form was provided to me.

_____ _____
Employee Alleging Harassment Date

_____ _____
Supervisor or CAHC Date

APPENDIX H. QUESTIONS TO ASK PARTIES AND WITNESSES

The following are ***examples of questions that may be appropriate*** to ask the parties and potential witnesses. Any actual fact-finding should be tailored to the particular facts.

I. Questions to Ask the Alleged Harassee

A. Who, what, when, where, and how: *Who* engaged in the alleged conduct? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?

B. How did you react? What response did you make when the incident(s) occurred or afterwards?

C. Are there any persons who have relevant information? Was anyone present when the alleged conduct occurred? Did you tell anyone about it? Did anyone see you immediately after the alleged conduct?

D. Did the person who you believe harassed you engage in what you consider inappropriate conduct toward anyone else at that time? Do you know whether anyone complained about inappropriate conduct by that person?

E. Are there any notes, physical evidence, or other documentation regarding the incident(s)?

F. How would you like to see the situation resolved?

G. Do you know of any other relevant information?

II. Questions to Ask the Alleged Harasser

A. What is your response to the allegations? Give us your recollection of the 'who, what, when, where, and how' concerning the alleged event(s).

B. Are there any persons who have relevant information?

C. Are there any notes, physical evidence, or other documentation regarding the incident(s)?

D. Do you know of any other relevant information?

III. Questions to Ask Third Parties

A. What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the harassee and toward others in the workplace.

B. What did the harassee tell you? When did she/he tell you this?

C. Do you know of any other relevant information?

D. Are there other persons who have relevant information?

National Aeronautics and Space Administration

STOP Workplace Harassment

Causes Tension
Causes Emotional Distress
Undermines Productivity
Lowers Morale
Increases Employee Turnover Rates

Increases Absenteeism
Inhibits Growth and Creativity
Undermines Professionalism
Undermines Inclusion
Insults Dignity of Employees

Harassing conduct is any unwelcome conduct, verbal or physical, based on individual's race, color, gender, national origin, religion, age, disability, genetic information, sexual orientation, status as a parent, gender identity, or retaliation when:

(1) The behavior can reasonably be considered to adversely affect the work environment; or

(2) An employment decision affecting the employee is based upon the employee's acceptance or rejection of such conduct.

Examples of harassment that may adversely affect the work environment include but are not limited to making jokes or remarks or displaying images, pictures, other materials that may unreasonably interfere with work performance and/or create an intimidating, hostile, or offensive work environment **based on an individual's race, color, gender, national origin, religion, age, disability, genetic information, sexual orientation, status as a parent or gender identity**. Examples of harassment based upon an employee's acceptance or rejection of harassing conduct include, but are not limited to, a supervisor coercing an employee into an unwelcome sexual relationship and then rewarding the employee with a promotion, or a supervisor taking disciplinary action or denying a promotion to an employee because he or she rejected sexual advances from the supervisor.

Retaliation against an employee for alleging harassment or participating in a harassment fact-finding is also impermissible.

NASA employees who believe they have been subject of an incident of harassing conduct in violation of NASA Policy must not wait – tell the person that his or her behavior is a problem, report the matter immediately to his or her immediate supervisor, the Center Anti-Harassment Coordinator, or other official as designated by the Center Director.

Should you wish to receive additional information on NASA's Anti-Harassment Procedures, please contact:

Or visit:

APPENDIX J. STATEMENT OF FACTS

STATEMENT OF FACTS

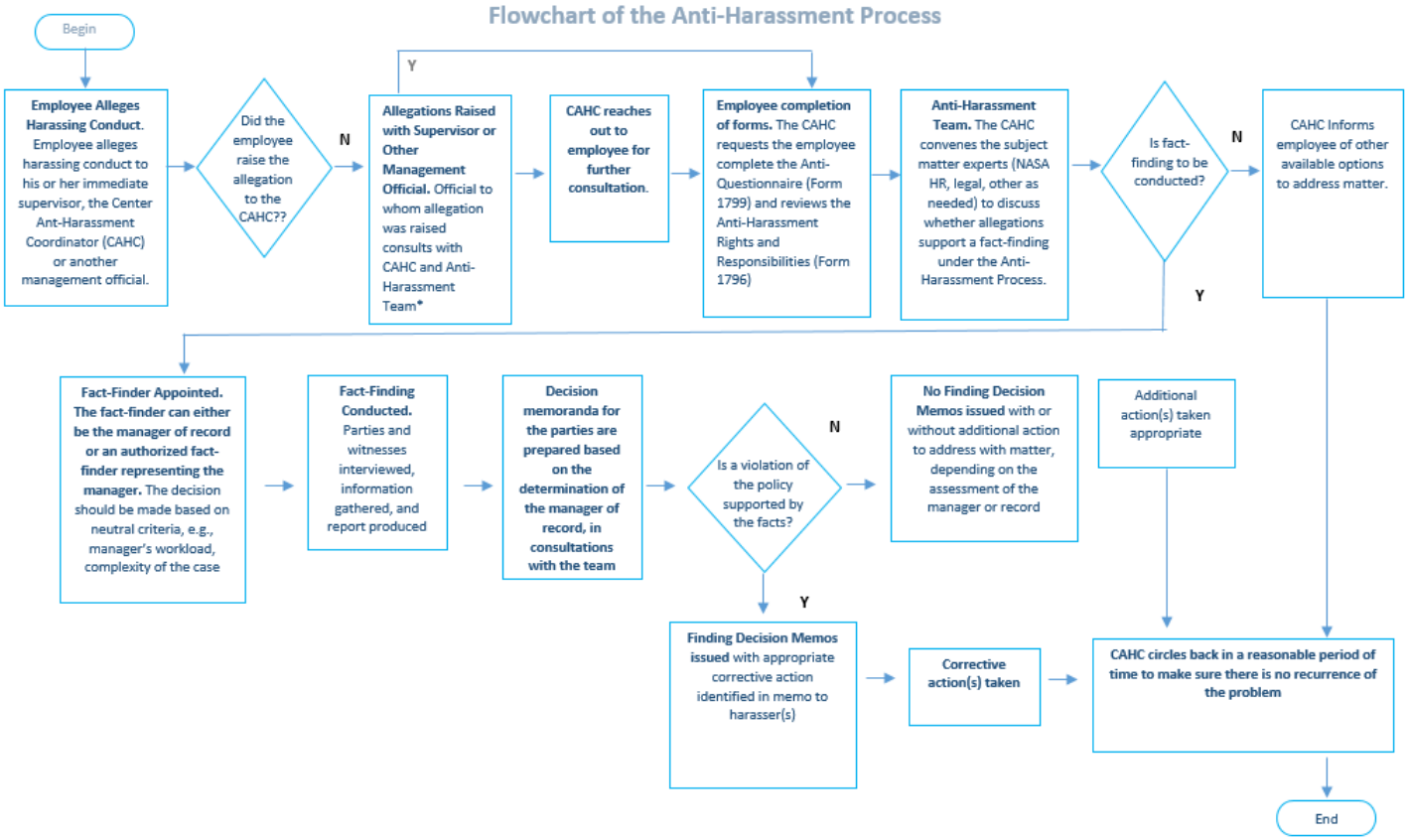
I, _____, (position title, grade and series), (location), NASA, make the following statement freely and voluntarily to _____, who has identified himself to me as a Fact Finder for the Agency, obtaining information and fact-finding in relation to an allegation(s) of harassment in violation of NASA policy. I have been informed that this statement may be used in evidence. I understand that this statement may be shown to the interested and relevant parties and those with a legal right to know.

[STATEMENT]

I have read the above statement, consisting of __ pages, and it is true and complete to the best of my knowledge.

_____
Witness Name and Date

Flowchart of the Anti-Harassment Process



*If any of the employees involved are members of a collective bargaining unit, the supervisor or CAHC should confer with the Center LRO.