CNGBM 9601.01

After filing a complaint. Within 180 days you should receive a redacted 15-6 and an NPR. The NPR may not be redacted.

NPR should also includes Complainant's right to file a FFR or Hearing Request if he deems the matter was not resolved satisfactorily. The state may also file a Hearing Request if it objects to this notice.

CNGBM 9601.01, Enclosure A, paragraph 3 requires a state to process an Informal Resolution Request within 180 days. It is in violation of the applicable regulation and statute to take more than 180 days to process an MEO complaint,

The Agency should conduct an AR 15-6 investigation in the allegations. The State will likely find complainant's allegations were unsubstantiated. The Agency then will likely mishandled the matter and otherwise failed to process the MEO complaint following its investigation

- File an Inspector General (IG) complaint, alleging that the State Equal Opportunity (EO) office mishandled his complaint. When the State IG concludes that the State had unreasonably delayed the MEO complaint. The matter should then be forwarded to NGB EI for processing.

Routine Failures

1. Aside from the unreasonable delay, failure to issue a Notice of Proposed Resolutions is a usual flaw
2. failure to investigate all the allegations of discrimination (e.g., harassment),
3. failure to interview all the Complainant's witnesses,
4. failure to interview the Complainant
5. failure to consider any statistical evidence of both MEO complaints filed in prior OCS classes and graduation statistics, especially where minorities are under represented
6. failed to fully consider the allegations made by neighboring state

Anything you disagree with in the npr should trigger a request for a hearing on that issue in accordance with CNGBM 9601.01, Enclosure C

NGB Remands to the State come with a request to remedy these errors and omissions in investigations. The State will be encouraged to expedite the new investigation. An investigation should not be remanded more than once, after two failed investigations adverse inferences should begin to acrue.

Legal Framework.

a. There are two traditional approaches to analyzing employment discrimination claims, historically referred to as the "pre-text' and "mixed motive" frameworks. Worden v. Suntrust Banks, Inc., 549 F.3d 334 (4th Cir. 2008).

b. Using the “pre-text” model involving a charge of employment discrimination, it is the burden of the Complainant initially to establish that there is some substance to his allegation of discrimination. To meet that burden, the Complainant must establish a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Water, 438 U.S. 567 (1978). The Agency must then articulate some legitimate, nondiscriminatory reason for its actions. If the Agency meets its burden, the Complainant then must demonstrate, by a preponderance of evidence that the reasons articulated are, in actuality, a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). At all times, the burden of persuasion remains with the Complainant to prove that unlawful discriminatory animus motivated the agency’s actions. St. Mary’s Honor Center Hicks, 509 U.S. 502 (1993).

c. Alternatively, under the "mixed-motive" framework, a Complainant must offer evidence that race, color, religion, sex or national origin was a motivating factor for an unlawful employment action, even though other factors also motivated the action to establish liability. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); 42 U.S.C. § 2000e-2(m). Once the Complainant has made out a case for liability, the Agency can avoid some liability by proving, as an affirmative defense, that it would have made the same decision in the absence of the discriminatory motivation. Price Waterhouse at 258 (plurality opinion); id., at 259-60 (White, J., concurring); id., at 276-77 O'Connor, J., concurring), 42 U.S.C. §2000e-5(g) (2) (B). Once the complainant sustains his or her burden in a mixed motive case, the Commission then examines the agency's purported reasons for acting on the merits. It no longer suffices for the agency simply to advance a legitimate reason for its actions. It must prove those reasons by a preponderance of the evidence. In many ways, the Commission's examination of the agency's defense resembles the factual examination it conducts during the pretext stage of circumstantial evidence cases. The agency's reasons will be examined in light of whether they make sense and whether they are contradicted by other evidence on the record. The difference is that, unlike cases involving pretext, it is the agency that bears the burden of proof. Nichols v. Postmaster General, EEOC Appeal No. 01941054, (1994). However, where the Complainant is forced to work in an environment charged with racial tension, the Commission will not engage in speculation about what might have been in the absence of such tension in assessing whether the agency has proven it would have taken the same action even absent discrimination. Johnson v. Secretary of Treasury, Internal Revenue Service, 01892853, 2370/E6 (1989). Although acknowledging that some of the employer's motives may have been legitimate, the Commission noted that some of the instances for which the complainant was terminated might never have occurred, but for the racial tension.

Pre-Text Analysis

Requirements to be satisfied - established by a preponderance of the evidence race/color was a motivating factor for the unlawful employment action, even though other factors also motivated the action and has established liability.

a. In all cases where discrimination is claimed, even when there are no similarly situated employees, a complainant may be able to establish a prima facie case of discrimination by showing:

(1) membership in a protected class,

(2) the occurrence of an adverse employment action, and

(3) some evidence of a causal relationship between membership in the protected class and the adverse action. Ward v. U.S. Postal Service, EEOC Request No. 05920219 (June 11, 1992), citing Potter v. Goodwill Industries of Cleveland, 518 F.2d 864 (6th Cir. 1975).

b. Harassment. In order to establish a claim of harassment, a complainant must show that:

(1) he belongs to the statutorily protected class;

(2) he was subjected to unwelcome conduct related to his membership in that class;

(3) the harassment complained of was based on membership in the class;

(4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and

(5) there is a basis for imputing liability to the employer. (Complainant) v. Postmaster General, Appeal No. 0120132144, November 1, 2013; see also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

c. Whether an objectively hostile or abusive work environment exists is based on whether a reasonable person in the complainant's circumstances would have found the alleged behavior to be hostile or abusive. The incidents must have been "sufficiently severe and pervasive to alter the conditions of complainant's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

d. A hostile work environment must be determined by looking at all the circumstances, including:

(1) whether the conduct was physically threatening or intimidating; (2) how frequently the conduct was repeated;

(3) whether the conduct was hostile and/or patently offensive;

(4) the context in which the harassment occurred; and

(5) whether management responded appropriately when it learned of the harassment.

Mixed-Motive Analysis.

Requirements to be satisfied - Complainant has established by a preponderance of the evidence race/color was a motivating factor for the unlawful employment action, even though other factors also motivated the action and has established liability. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); 42 U.S.C. § 2000e-2(m).

a. Generally, in disparate treatment cases the allocation of burdens and order of presentation of proof is a three-step process. McDonnell Douglas Corp. v. Green; see also Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 141 (2000) (applying McDonnell Douglas analysis to ADEA claim). The McDonnell Douglas test is inapplicable, however, where complainant presents direct evidence of discrimination. TWA v. Thurston, 469 U.S. Ill, 121 (1985); see also Terbovitz v. Fiscal Court of Adair County, Ky., 825 F.2d 111 (6th Cir. 1987) ("[d]irect evidence of discrimination, if credited by the fact

finder, removes the case from McDonnell Douglas because the plaintiff no longer needs the inference of discrimination that arises from the prima facie case [using indirect evidence]"); Siao v. Department of Justice, EEOC Request No 05950921 (September 12, 1997). Direct evidence of discrimination may include any action, or any written or verbal policy or statement made by an agency official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action. Jaakkola v. Department of Commerce, EEOC Request No. 05950390 (August 29, 1996); see, e.g., Grant v. Hazelett Strip Casting Corp., 880 F.2d 1564 (2d Cir. 1989).

A note on racial tension- where the Complainant is forced to work in an environment charged with racial tension, we will not engage in speculation about what might have been in the absence of such tension in assessing whether the agency has proven it would have taken the same action even absent discrimination. Johnson v. Secretary of Treasury, Internal Revenue Service, 01892853, 2370/E6 (1989).

Affirmative Defense- When the Complainant has established by a preponderance of evidence race as a motivating factor for an unlawful employment action, even though other factors also motivated the action to establish liability, the Agency can avoid some liability by proving, as an affirmative defense, that it would have made the same decision in the absence of the discriminatory motivation.

1. Does the evidence used support the proposition that Complainant performed poorly?
2. Is the justification to dismiss the allegation of discrimination based on conclusory statements? If so, this is bad
3. Absent a legitimate nondiscriminatory justification, once a prima facie case of discrimination is established, the Agency is presumed to have violated Complainant's Title VI rights.

While the inquiry nor the investigation may address the specific facts of a given allegation in terms of what was actually said to a Complainant. If neither the investigators specifically ask what was said. It is the state's responsibility to establish the factual predicate of an allegation. In cases where an report fails to clearly establish a factual basis, the agency may either remand the matter back to state or draw an adverse inference against the state and conclude that the evidence would have reflected unfavorably and or establish the basis of the facts alleged. In many cases, a remand would unreasonably lengthen the complaint process and sufficient evidence may exists in the record to conclude

Absent a legitimate justification absent discrimination, once a case of motivating factor discrimination is established, the Agency is presumed to have violated Complainant's Title VI rights.

It is the state's responsibility to establish the factual predicate of an allegation. In cases where an ROI fails to clearly establish a factual basis, NGB EI may either remand the matter back to state or draw an adverse inference against the state and conclude that the evidence would have reflected unfavorably and or establish the basis of the facts alleged. In this matter, a remand would unreasonably lengthen the complaint process and sufficient evidence exists in the record to conclude X

A complaint should be processed within 180 days.

- questions should not be designed to bolster the State's position that no discrimination occurred
- The Complainant should be allowed to provide sworn testimony
  on all the allegations.

- While the IO is certainly welcome to ask questions, the testimony collected should not be limited to very specific questions,
- the Complainant should be welcomed to provide testimony on all the allegations, discuss the processing of the complaint or address anything else the Complainant wanted to put into the record.

The state must Interview Complainant

Include statistical evidence - The decision by the State to ignore this evidence only highlights Complainant's argument

Review evidence in the record that suggests a history of allegations of discrimination. The relevancy of such information is clear. If true, Complainant's allegation are further bolstered.

The overall manner in which due process was applied in this case generally is troubling. every unusual instance just happened to occur in this matter.

Substantiated Complainant's discrimination claims are usually accompanied with a number of proposed remedies.

CNBGI 9601.01, Encl. A, para. 8. The instruction also provides that

the Chief of the National Guard Bureau is responsible for rectifying unjust personnel

actions or compensating persons wronged by unlawful discrimination, when appropriate,

and the Vice Chief of the National Guard Bureau will establish programs to ensure

compliance with the applicable laws and regulations and will enforce compliance

regarding discrimination in the National Guard. Id., para. 1 and 2.

In rejecting an argument in a case that Army National Guard's maximum age

regulations violate the Militia Clause of the U.S. Constitution, the district court in Oregon

found that that maximum age regulations apply only to federally recognized National

Guard officers, and they do not restrict the authority of States to appoint officers of their

militias. See Randelman v. Blum, 2006 U.S. Dist. LEXIS 799958, *10 (D. Or. Oct. 27,

2006).

As discussed above, the National Guard Discrimination Complaint Program requires that "leaders will take appropriate disciplinary action against any individual, employed or in service pursuant to Title 32 who engages in unlawful discriminatory practices." CNBGI 9601.01, Encl. A, para. 8(d).

CNGBI 9601.01 requirement that a State will take appropriate disciplinary action against an individual who engages in unlawful discrimination.

Do not focus on punishing offenders

NGB EI may er in proposing disciplinary action be taken against specific individuals because the proposal could be deemed as unfair and a denial of due process for the affected persons. This is in part, by reviewing the EEOC's approach under similar circumstances when it orders a federal agency to take disciplinary against a responsible management official. For example, in Miller v. Shinsecki, Appeal No. 0120093073, 2011 EEOPUB LEXIS 1656 (June 6, 2011), the EEOC reversed the Department of Veterans Affairs' final agency decision finding no discrimination and heldthat the complainant had been sexually harassed by a coworker and that his supervisors had failed to take appropriate action after he reported the harassment. In its order directing remedial relief, the EEOC, in part, stated:

The Agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the compliance officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any responsible management official has left the agency's employ, the Agency shall provide documentation of their departure date(s).Miller, 2011 EEOPUB LEXIS 1656 at *39. The language in this order appears to be the EEOC's standard formulation for directing an agency to take disciplinary action against a responsible management official. Given the entitlement of employees and service members to notice and opportunity to be heard in responding to most adverse actions, it is a better practice is to follow the EEOC's lead and to propose disciplinary without identifying the individual(s) in the proposed resolution.

The goal of the hearing is for the Complainant to substantiate that they were subjected to discrimination and harassment based upon their race as documented in the NPR, and that they should be afforded a remedy for the substantiated discrimination. In addition, the State has an obligation under CNGBI 9601.01 to take appropriate disciplinary action.

Additionally, To document its compliance with this decision, the State should file a written notice with NGB EI and the Complainant within 30 calendar days of receipt of this decision on its actions in response to the above recommended remedies. The State, thereafter, shall provide a periodic update on its

continuing remedial efforts every 30 calendar days to NGB EI and SGT Weaver, until it has completed its compliance actions.

If a remedial action goes against a policy The State should file an exception to policy application with NGB ARNG-HRH requesting waiver. In the event, NGB ARNG-HRH does not grant an exception to policy, the State should propose to NGB EI an alternative remedy that will rectify or compensate the Complainant for the discrimination substantiated in this case.

Background

CNGBM 9601.01 27 September 2015

Acceptable allegation recorded on NGB form 333 with NGB-EO-CMA coordination 180 c- days.

CNGBI 9601.01, National Guard Discrimination Complaint Program

- right, along with the right of NG members and people receiving services through NG programs, to file a discrimination complaint on the basis of race, color, national origin, religion, or sex-gender—including sexual harassment—and reprisal concerning prior engagement in protected discrimination process-related activity.
- The NGB prohibitsunlawful discrimination under its authority granted in references b, h, i, j, Sections 108 through 110 of reference k, and Sections 10501 through 10503 of reference l.
- Receipt of Title 32 funding, in whole or part, is contingent upon compliance with the policies and processes set forth within this instruction, under the authority granted in Section 108 of reference k, irrespective of whether the alleged discriminatory conduct falls within a specifically enumerated basis under reference j.

CNGBM 9601.01, National Guard Discrimination Complaint Process. 25 April 2017

COL Stephen Mizak USAF Director National Guard Equal Opportunity

COLONEL STEPHEN A. MIZAK

REFERENCES

a. CNGB Instruction 9601.01, 27 September 2015, “National Guard Discrimination Program”

b. CNGB Instruction 0402.01, 24 July 2015, “National Guard Alternative Dispute Resolution”

c. DoD Directive 1020.02E, 08 June 2015, “Diversity Management and Equal Opportunity in the DoD”

d. CNGB Manual 0402.01 04 January 2016, “Alternative Dispute Resolution Procedures”

e. NGR 600-23/ANGR 30-12, 30 December 1974 “Nondiscrimination inFederally Assisted Programs”

f. 32 U.S.C. §108, “Forfeiture of Federal Benefits”

g. 32 U.S.C. §709, “Technicians: Employment, Use, Status”

h. CNGB Instruction 9600.01 13 November 2013, “Alternative Dispute Resolution Policy and Guidance”

i. DoD Directive 1350.2, 18 August 1995, with change 01 dated 08 June 2015,

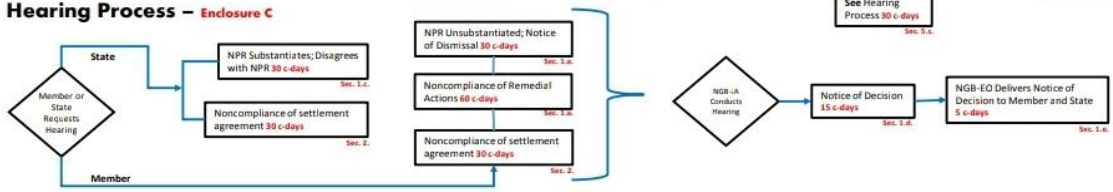
“Department of Defense Military Equal Opportunity (MEO) Program”

CNGBM 9601.01 Quick Reference Guide

Informal Resolution Request (IRR)– Enclosure A

Formal Resolution Request (FRR)– Enclosure B

Hearing Process – Enclosure C



Reviewing Official Process – Enclosure D