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National Guard Regulation (AF) 40-1614
Volume II

Civilian Personnel

CIVILIAN DISCRIMINATION COMPLAINT PROCESSING AND ADJUDICATION

Summary. This regulation establishes procedures for filing, processing, investigating, settling, and adjudicating complaints of discrimination in the National Guard. It implements Federal statutes and regulations and Defense Department directives prohibiting discrimination based on race, color, religion, sex (hereinafter gender), national origin, age, or handicap. The authority for the maintenance of the system of records required by this regulation is 42 U.S.C. 2000e-16(b) and (c); 29 U.S.C. 204(f) and 206(d); 29 U.S.C. 633(a); 29 U.S.C. 791; Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978); and Executive Order No. 12106, 44 FR 1053 (January 3, 1979).

Summary of Changes. This is a complete revision of the National Guard Civilian Discrimination Complaint System and reflects changes enacted by the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and Title 29 Code of Federal Regulations Part 1614. Policies and responsibilities are in volume I; complaint procedures and implementation of specific provisions of Federal laws and regulations are in this volume. Other changes:

a. New time limits and dismissal rules.

b. Emphasis on resolution and a new dispute resolution process.

c. Elimination of proposed dispositions and introduction of adverse inference procedures.

Applicability. This regulation applies to National Guard technician personnel, applicants for technician employment, and to all personnel who supervise, manage, or regulate the National Guard technician workforce.

Internal Control System. This regulation is not subject to the requirements of AR 11-2. It does not contain internal control provisions.

Impact on New Manning System. This regulation does not contain information that affects the New Manning System.

Supplementation. Supplementation of this regulation and establishment of forms other than NGB forms are prohibited without prior approval from NGB-HRE-C.

Interim Changes. Interim changes to this regulation are not official unless authenticated by the Director, Administrative Services. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. The proponent agency of this regulation is the National Guard Bureau Complaints Management and Support Activity. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to NGB-HRE-C, 4501 Ford Avenue, Alexandria, VA 22302-1454.

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*This regulation supersedes NGR 690-600/ANGR 40-1613, 5 May 1989

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Chapter 1
General

1-1. Purpose

a. This regulation explains the National Guard Civilian Discrimination Complaint System and establishes procedures for the processing, management, and adjudication of discrimination complaints. It explains the avenue of redress available to complainants and tells how to file, process, investigate, settle, and adjudicate complaints of discrimination.

b. This regulation implements Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16); the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a); the Rehabilitation Act of 1973, as amended (29 U.S.C. 791 and 794a); the Equal Pay Act of 1963 (29 U.S.C. 206(d)); Title 29 of the Code of Federal Regulations, Parts 1613 and 1614 (29 CFR 1613 and 1614); Equal Employment Opportunity Commission Management Directive 110; Department of Defense Directive 1440.1, the DoD Civilian Equal Employment Opportunity Program, as changed; and related case law and decisions and interpretation of EEOC.

c. The changes enacted by the Americans with Disabilities Act of 1990 (P.L. 101-336) and the Civil Rights Act of 1991 (P.L. 102-166) have been included in this regulation insofar as they apply to National Guard personnel and have been promulgated by 29 CFR 1614.

1-2. Explanation of abbreviations and terms

This regulation uses many special terms whose exact definitions are vital to the understanding of this regulation. Users of this regulation must read the explanation of these special terms and abbreviations, found in the glossary, in order to be able to understand and comply with the provisions of this regulation.

1-3. Organization and use of this regulation

This regulation has been organized to assist the user in following the complaint process and understanding the complaint system and to facilitate references to other parts of this regulation. To minimize cross references, some information may be repeated in more than one paragraph. If the information is not repeated, the paragraph(s) of this regulation that contains related or additional information is shown in brackets, e.g., [1-4g, 3-7]. References so listed refer solely to paragraphs within volume II of this regulation.

a. General information applicable to the complaint system is included in this chapter, while chapter 2 covers the specifics of the Discrimination Complaint System.

b. The processing of individual discrimination complaints is in chapters 3 through 6, grouped by stages: informal, formal, investigation, and adjudication. Alternative resolution methods are discussed in appendix B.

c. Procedures for settling and withdrawing complaints are in chapter 7 with additional guidance from the EEOC in appendix A.

d. Chapters 8 through 11 cover civil actions, witnesses and representation, related provisions, and class complaints.

e. Information on complaint case files is in chapter 12.

f. Appendix B explains alternative forms of dispute resolution that include the dispute resolution panel and mediation.

g. Appendix C is a listing of EEOC district offices.

h. Appendix D, is designed primarily for complainants and EEO officials. It contains a flow chart of the complaint process and a summary of time limits. Because of the importance of time limits throughout the complaint system, a summary is included in appendix D. The paragraph(s) that provide the explanation and requirements for these time limits are shown in brackets.

i. Appendix E reflects the reports required by EEOC and NGB while all formats and form letters are now in one appendix: F.

j. Appendix G is a glossary listing many definitions, abbreviations, and acronyms used throughout this regulation.

1-4. Implementation

Transfer of the discrimination complaints functions from Regional Centers to the NGB Complaints Management and Support Activity (CMSA) will be announced by an All States Memorandum. 29 CFR 1614 went into effect 1 Oct 92 and, as of that date, all discrimination complaints, including those filed before 1 Oct 92, became subject to the time limits and processing rules of 29 CFR 1614, as explained in this regulation. However, for formal complaints that had been filed prior to 1 Oct 92, the following provisions apply:

a. No proposed disposition will be issued after 1 Oct 92. If the complainant has received a Report of Investigation (ROI), but a proposed disposition has not been issued, the complainant has a right to an immediate final decision by the Chief, NGB, or to a final decision by the Chief, NGB, which includes a hearing by an Administrative Judge of the EEOC. The complainant has 30 days

from the receipt of the ROI or until 30 Oct 92, whichever is longer, to request such a decision or NGB will issue a decision without a request.

b. The time limit for issuing a notice of investigation completion, provided for in chapter 5, is extended to 30 Sep 93. Likewise, the right of the complainant to a hearing in the absence of such notice, does not begin till after 30 Sep 93.

1-5. Policies
Policies applicable to the Civilian Discrimination Complaint System are in volume I of this regulation and are designed to meet the challenges of the next century and to ensure that the National Guard is a leader in equal employment opportunity. Equal opportunity being a premier goal, these policies reflect the goals announced by the Chief of the National Guard Bureau. These policies require:

a. Managers, commanders, and supervisors to provide equal opportunity for all civilian employees and military members of the National Guard and an atmosphere free of sexual harassment.

b. Fair and rapid resolution of discrimination complaints.

c. That a just and effective avenue of redress is provided to aggrieved persons when complaints are not resolved.

1-6. Responsibilities
Responsibilities applicable to the Civilian Discrimination Complaint System are in volume I of this regulation.

1-7. Interpretation and Exemption
Requests for any interpretation of or exemption to any policy or provision of this regulation will be forwarded, in writing, through command channels, to the Chief, Complaints Management and Support Activity, National Guard Bureau, 4501 Ford Ave., Alexandria, VA 22302-1454.

Chapter 2
The Civilian Discrimination Complaint System

2-1. System components
a. The complaints processing and adjudication procedures of this regulation are part of the National Guard Civilian Discrimination Complaint System. The basis and purpose of this system are explained in volume I of this regulation.

b. To support this system, this regulation establishes reviews and controls over the complaint process and requires documentation to provide a paper trail of all actions related to discrimination complaints. Management of the complaint process is enhanced by use of an automated National Guard Status of Complaints Management (NG STATCOM) system that is based on the NGB case numbering system.

c. The Civilian Discrimination Complaint System recognizes education and training of managers and supervisors, the civilian workforce, and National Guard military personnel as an important component in achieving equal opportunity and resolution of complaints. The policies and responsibilities established in volume I of this regulation reflect this concept.

2-2. Discrimination complaints
a. Discrimination complaints processed and adjudicated under this regulation are those individual and class complaints of employment discrimination and retaliation prohibited by:

(1) Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16), based on race, color, religion, sex (referred to as gender in this regulation) and sexual harassment, and national origin.

(2) The Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a), based on age when the aggrieved individual is at least 40 years of age.

(3) The Rehabilitation Act of 1973, as amended (29 U.S.C. 791 and 794a), based on physical or mental handicap.

(4) The Equal Pay Act of 1963 (29 U.S.C. 206(d)), involving sex-based wage discrimination.

b. Complaints must be filed with the agency that allegedly discriminated against the complainant. That means that to be filed with the National Guard, the complaint must involve an employment matter subject to the control of the National Guard.

c. Members or former members of the National Guard alleging illegal discrimination that relates to their service as military members and applicants for membership in the National Guard or for duty as Active Guard Reserve (AGR) are not covered by the provisions of this regulation. Such discrimination complaints are governed by NGR (AR) 600-22/NGR (AF) 30-3.

2-3. Time limits
Time limits for filing and processing complaints are summarized in appendix D. Unless explicitly stated in this regulation, no authority exists to extend or waive any time limits. Failure by complainants and their attorneys [9-5b] to adhere to the time limits may result in the dismissal of a complaint. Failure by NG officials to adhere to the time limits may result in adverse inference and may cause NGB to issue a decision in favor of the complainant.

a. The computation of time limits established in this regulation is based on calendar days unless specifically stated otherwise. The first day counted is the day after the event from which the time limit begins to run and the last day of the period will be included unless it falls on a Saturday, Sunday, or Federal Holiday, in which case the time limit will be extended to include the next business day.

b. A document will be deemed timely if it is delivered in person or postmarked before the expiration of the applicable time limit. In the absence of a legible postmark, the document will be deemed timely if it is received by mail within five days of the expiration of the applicable time limit. Complainants may use facsimile to transmit documents which will be deemed timely if received before the expiration of the applicable time limit.

c. A discrimination complaint is deemed filed on the day the formal complaint is delivered in

person, received by facsimile, or on the day it is postmarked. In the absence of a legible postmark, the complaint is deemed filed 5 days prior to the date of receipt.

d. For the purposes of calculating time, a document addressed to the proper Federal or National Guard official is deemed received by that official on the date that the document is received in the mail room of that official's organization.

e. An informal complaint is deemed filed when the matters which gave rise to the complaint are brought to the attention of an EEO Counselor, the SEEM, or other appropriate official.

2-4. Allegations of discrimination received by NGB
When NGB receives allegations of discrimination from a complainant or from a third party on behalf of the complainant, such allegations will be processed as specified in this paragraph. Third parties may include inspectors general or other members of the Defense Department who refer allegations of discrimination to NGB; members of a State or local government; members of Congress or the Executive Branch; organizations writing on behalf of the complainant; or any other individual writing on behalf of the complainant.

a. All such allegations of discrimination will be assigned an "Inquiry" case number by NGB [chapter 12] and referred by NGB CMSA to NG officials for inquiry and processing as prescribed in this chapter and in accordance with the policies established in volume I of this regulation.

b. To ensure that the time limits established for pre-complaint processing can be met, complainants will be immediately assisted in presenting their grievances to an EEO counselor. NG officials are encouraged to work with the counselor for an early resolution of the complaint.

c. If it is determined that the allegations do not fall within the purview of this regulation, the complainant will be advised of the proper channels to seek redress [3-6h].

d. The Adjutant General or an officer acting for the Adjutant General, will provide appropriate response(s) to any third party who brought the allegation of discrimination to the attention of NGB. A copy of the response will be furnished to the CMSA.

e. NGB CMSA will be advised when one of the following actions has occurred so that the case may be administratively closed:

(1) The complaint has been resolved to the satisfaction of the complainant. A signed settlement agreement or written statement from the complainant is required.

(2) The allegations of discrimination have been referred for processing under another regulation or the complainant has been advised of other appropriate channels for seeking redress [3-6h].

(3) The complainant has chosen not to participate in the pre-complaint process or has chosen not to file a formal complaint after counselling.

(4) The complainant has filed a formal complaint in accordance with paragraph 4-2. In such instance the processing of the allegations of discrimination will be discontinued under this paragraph and will be processed as a formal complaint of discrimination in accordance this regulation.

(5) A final response has been provided to any general allegations of discrimination that do not fall within the scope of individual or class complaints [2-2a].

2-5. Documentation
To provide evidence of timely processing by both NG officials and complainants and to ensure that the official discrimination complaint case file contains all material relevant to the complaint, all actions involving discrimination complaints will be thoroughly documented. All complaints correspondence will be receipted, if hand delivered, or will be mailed by certified mail with return receipt. Envelopes showing postmark, or lack thereof, will be retained with the document that was contained therein and made part of the case file. Use of facsimile transmission is authorized except for transmission of documents to complainants that require receipt or certification; proof of transmission must be retained. Telephone or in person conversations will be summarized in writing and included in the case file.

2-6. Posting requirements
To comply with the requirements of paragraphs 9h(7) and 11 of volume I of this regulation, the following information will be regularly publicized and permanently posted on bulletin boards, with easy access to all technicians, former technicians, and to applicants for technician employment with the National Guard:

a. The name, duty address, and telephone number of the State Equal Employment Manager.

b. The name, duty address, telephone number, and photograph of each EEO counselor.

c. The name, duty address, and telephone number of any installation EEO official.

d. Where applicable, a list of organizations that each EEO counselor services.

e. A statement that an EEO counselor must be contacted before a formal discrimination complaint is filed under this regulation. Where applicable, technicians will be advised that discrimination may be grieved under the negotiated grievance procedure.

f. The time limits to start action and to file a complaint under this regulation. When applicable, technicians will be advised of time limits for filing allegations of discrimination under the negotiated grievance procedure.

Chapter 3
Pre-complaint Processing

3-1. General
The pre-complaint period begins when the matters which gave rise to the complaint are brought to the attention of an EEO counselor or the SEEM. It ends with resolution or filing of a formal complaint.

Appendix D contains a summary of time limits applicable to this chapter.

3-2. Purpose of pre-complaint processing
The purpose of pre-complaint processing (the informal complaint procedure) is to resolve the complaint, to provide advice to the complainant and NG officials concerning the issues raised in the complaint, and to avoid the need for protracted formal complaint procedures. The National Guard emphasis is on complaint resolution and complainants and NG officials should make full use of dispute resolution panels and mediation provided for as part of the Dispute Resolution Process (DRP).

3-3. Filing an informal complaint
Before filing a formal complaint, complainants must first present an informal complaint to an EEO counselor within 45 days of the alleged discrimination (see paragraph 4-11 for extensions). The complainant must meet and cooperate with the counselor. The informal complaint may be presented to the counselor either orally or in writing, but the complainant is required to consult with the counselor in order to try to informally resolve the complaint.

3-4. Assignment of an EEO counselor
An EEO counselor must be available and appointed to conduct an initial counselling session on the day when the matters giving rise to the complaint are brought to the attention of the counselor or the SEEM or within a few days following, such delay not to exceed 5 days.

a. When a complainant contacts an EEO counselor and that counselor is able to perform the pre-complaint counselling and to timely conduct the initial counselling, the counselor will notify the SEEM that he or she has initiated pre-complaint counselling.

b. If the counselor is unable to perform the required pre-complaint counselling, or if the matters giving rise to the complaint are first brought to the attention of the SEEM, or another appropriate official, the SEEM will appoint a counselor who is readily available.

3-5. Initial counselling session
When the complainant first presents the matters giving rise to the complaint to an EEO counselor or to the SEEM, an initial counselling is held or an appointment for an initial counselling is set [3-4]. Normally, the SEEM should not conduct the initial counselling or the inquiry; these functions should be performed by an EEO counselor. During the initial counselling session, the EEO counselor advises the complainant:

a. In writing of rights and responsibilities, explains these rights and responsibilities [3-6], and identifies with the complainant the issues of the complaint [3-7].

b. Of the availability of the DRP and provides the complainant with the letter of agreement in figure F-6.

3-6. Rights and responsibilities of the complainant
The complainant's rights and obligations in the discrimination complaints process will be provided in writing using figure F-2 and explained to him or her by the EEO counselor, to include the complainant's responsibilities of proving discrimination by a preponderance of evidence, if the complaint is not resolved in the informal, pre-complaint processing stage.

a. The complainant may be accompanied, represented, and advised at all counselling interviews and at any stage of the complaint process by a representative; such a representative must be designated in writing. Chapter 9 and the definitions in the glossary explain the use of official time by complainants and their representatives and how correspondence is routed when the complainant has a representative or is represented by an attorney. See chapter 7 regarding limitations on attorney fees in the pre-complaint process.

b. In certain instances, the complainant may make an election of procedures for filing the discrimination complaint. A section of the Civil Service Reform Act of 1978 (5 U.S.C. 7121(d)) allows allegations of discrimination to be raised under negotiated grievance procedures in these instances. The complainant is provided with a written explanation of these procedures using figure F-3, whether or not the complainant is a member of a bargaining unit. The EEO counselor explains the possible applicability of election procedures and of mixed case complaints [chapter 10].

c. When a complainant files an informal complaint under this regulation, the complainant has not waived the right to file a grievance on the same allegations of discrimination under a negotiated grievance procedure. An election is indicated only through filing of a formal complaint in writing [chapters 4, 10, and 11].

d. If the complaint is based on age discrimination, the complainant has a right to file a lawsuit under the Age Discrimination in Employment Act as an alternative to the administrative procedures of this regulation. Figure F-4 and Chapter 10 explain this alternative and associated requirements.

e. The complainant must identify for the counselor the specific matters that gave rise to the complaint and the dates of the actions involved. Only issues raised in pre-complaint counselling, or like or related issues, may be included in a subsequent formal complaint. Paragraph 3-7 explains the importance of clear issues.

f. The complainant has the duty of keeping the State Equal Employment Manager informed of his or her current address. If the complainant later files a formal complaint, the complainant must also keep NGB CMSA informed of his or her current address. If the complainant then files an appeal with EEOC, the current address must also be provided to EEOC. Failure to locate a complainant can result in dismissal of a complaint [4-10].

g. If the complainant has contacted the EEO counselor or the SEEM after the 45 day time limit, the complainant can request a waiver of this time limit as provided in paragraph 4-11. Notwithstanding such waivers, the complainant has a

right to have his or her informal complaint processed by the EEO counselor even if the 45-day time limit has gone by, though a formal complaint may be later dismissed for untimeliness.

h. EEO counselors will advise complainants of other channels of redress [3-7e] when a complaint does not appear to meet the criteria of this regulation and will explain the procedural reasons in paragraph 4-10 under which formal complaints must be dismissed. However, EEO counselors are not authorized to make determinations or decisions on either procedural or merit grounds. If a complainant desires, he or she will be counselled, though a formal complaint may be later dismissed.

i. The complainant has a right not to have his or her identity revealed during the pre-complaint process; however, the complainant must be advised that this may make it difficult to achieve resolution. The counselor will not reveal the complainant's name unless the complainant authorizes it, in writing, or after a formal complaint is filed. If the complainant's name may be revealed during the counselor's inquiry, the counselor will obtain a written authorization from the complainant.

j. If the complainant indicates that he or she wishes to file a class complaint or if the complainant's issues appear to indicate that the complainant is raising a class complaint, the EEO counselor will explain the difference between individual and class complaints and the procedures for class complaints [chapter 11].

k. The complainant has an obligation to be counselled and such counselling can continue for 30 days from the day the matters giving rise to the complaint were brought to the attention of the counselor or SEEM, unless:

(1) The complaint is resolved before that time or the complainant voluntarily chooses not to pursue his or her complaint; or

(2) The counselor has completed the inquiry prior to that time and has been unable to resolve the complaint; or

(3) The complainant agrees to an extension of the inquiry period [3-9]; or

(4) The complainant agrees to participate in the DRP [3-10 and appendix B].

3-7. Issues, bases, and supporting material

a. Complainants, EEO counselors, SEEMs, JAs, and others involved in the complaints process must understand the importance of identifying and clarifying issues and distinguishing between issues raised, the bases on which the alleged discrimination took place, and supporting material. The complainant must clearly define the matters that gave rise to the complaint and list all the elements of each issue. Complainants will be advised that--

(1) Only with this information is the EEO counselor able to counsel the complainant and management officials and to try to resolve the complaint.

(2) Issues that have not been counselled may not be raised in the formal complaint and if they are raised, may be dismissed.

(3) This information is necessary to determine whether issues can be accepted or dismissed, if filed as a formal complaint.

(4) An investigation of the facts and circumstances can only be made if the complainant has clearly defined the issues.

b. The elements of an issue consist of:

(1) A brief and clear statement of the act or personnel action that the complainant believes was discriminatory. Explanations or descriptions of circumstances leading up to or surrounding the act or personnel action, discussion of the complainant's feelings, statements regarding the complainant's duties, justifications concerning any actions taken or not taken, or similar material may be included in supporting statements, but such supporting material does not constitute an issue.

(2) The date on which the alleged discriminatory act took place or the effective date of the alleged discriminatory personnel action.

(3) The basis or bases on which the complainant believes that he or she was discriminated. The authorized bases under this regulation are race, color, religion, gender (including sexual harassment), national origin, age, physical or mental handicap, and retaliation due to EEO related actions.

(4) The organization or individual believed by the complainant to have discriminated against him or her. While the complaint is filed against the agency, the complainant may name a specific organizational element or an individual as being responsible for the alleged discriminatory act or personnel action.

c. Issues must be specific. General allegations of, for example, sexual harassment or retaliation are not issues. The specific act of sexual harassment or act of retaliation must be cited. More than one act can be combined into one issue, but such acts must be related and include the date(s) of occurrence. Circumstances surrounding each act or related events that may have occurred prior to or after the act of discrimination may be listed as supporting material, not as issues [4-6].

d. During the initial counselling session, the EEO counselor, in conjunction with the complainant, defines and records the specifics of the complaint and identifies the issues. Since clear issues are so important to the whole complaint process, counselors must help complainants to frame acceptable issues. Complainants will be encouraged to number issues and state each as follows: "I was discriminated on the basis of (race, color, religion, age, gender, sexual harassment, national origin, physical or mental handicap, retaliation) on (date) when (list the discriminatory act or personnel action)."

e. Either during the initial counselling session, or at a subsequent meeting with the complainant, the counselor reviews the complaint to determine if any allegations or issues are not within the purview of the Civilian Discrimination Complaint System and this regulation. This includes issues and allegations that involve the complainant's National Guard military status, rather than technician employment matters. It may also involve a basis other than one on which a discrimination complaint may be filed under this regulation. For example, a complainant may believe that the incident or personnel action was motivated by a personality conflict, was the result of harassment (not sexual harassment), was based on improper personnel actions, or stemmed from retali-

ation not related to an EEO activity. In such cases, the EEO counselor will advise the complainant of the proper forum to seek redress (e.g., Inspector General or personnel channels). For military matters, the EEO counselor will advise the complainant to use the National Guard Military Discrimination Complaint System of NGR (AR) 600-22/NGR (AF) 30-3.

3-8. EEO counselor's inquiry
By definition (see glossary), an inquiry is not intended to be formal or to have the same scope as the investigation under chapter 5, nor is it meant to be a substitute for that investigation.

a. The EEO counselor inquires about the specific incidents and actions identified in the initial counselling session with the complainant. The EEO counselor interviews persons who can give direct information on these allegations, and reviews personnel or other related records. If the complainant has named specific individuals as having discriminated against the complainant, the EEO counselor must interview such named individuals unless the EEO counselor can achieve resolution of the complaint without such interviews.

b. At each step of the inquiry, the EEO counselor's aim is to reach an informal resolution to the issues of the complaint. The EEO counselor's inquiry need not be concerned with whether or not enough facts exist to support discrimination or the complaint.

c. The EEO counselor will use Technician Personnel Pamphlet (TPP) 1613, or its successor, as a guide in conducting the inquiry and in fulfilling his or her responsibilities. Where TPP 1613 or its successor conflicts with the instruction in this regulation, the last dated document will take precedence.

d. The EEO counselor will not make any findings or determination on procedural grounds or the merits of the complaint or on whether discrimination has occurred. Rather, the EEO counselor will provide advice to the complainant and to NG officials in terms of attempts at resolution, the information obtained during the inquiry, and what has occurred during the counselling process.

e. If, during the course of the EEO counselor's inquiry, NG officials and the complainant agree to an informal resolution, the terms of the resolution will be reduced to writing and signed by both parties to help ensure that they have the same understanding of the terms of the resolution.

3-9. Extending the inquiry
An inquiry will not be extended for the convenience of NG officials, the EEO counselor, or the complainant. The sole purpose of such an extension is to provide additional time for the EEO counselor to resolve the complaint.

a. Actions to extend the inquiry and counselling period, as provided for in this paragraph, must be completed before the end of 30 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. Otherwise, a final interview will be held [3-11].

b. If the complaint has not been resolved and the inquiry has not been completed within the 30 day period, and if the complainant and the EEO counselor believe that an informal resolution is imminent, the complainant can agree to an extension of the counselling period for another 30 days.

c. The counselor will first obtain permission from the SEEM to extend counselling and then will ask the complainant to execute the letter of agreement in figure F-5.

3-10. Dispute resolution process (DRP)
The primary purpose of the DRP is to resolve complaints of discrimination during the pre-complaint processing stage. Some forms of DRP are also available after a formal complaint has been filed [chapters 4, 5, appendix B]. The DRP supplements the informal attempts of the EEO counselor by a more structured process that includes involvement of top management and decision makers who have the authority to remedy grievances raised by the complainant and who can direct the necessary changes to resolve issues of discrimination within the National Guard.

a. Complainants may elect to use the DRP at any time prior to the end of 30 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. If at the end of 30 calendar days, the complainant has not elected to use DRP or to extend the counselling [3-9], a final interview will be held [3-11].

b. The DRP provides for an extension of the pre-complaint counselling period for an additional 60 days. Therefore, a complainant can not elect to both extend the inquiry of the EEO counselor [3-9] and the DRP.

c. Election of the DRP is made by execution of the letter of agreement in figure F-6, provided to the complainant during the initial counselling session.

d. If the complainant elects to use the DRP, the procedures in appendix B are mandatory.

3-11. Final interview and right to file a complaint
Unless an agreement to participate in the DRP or to extend the inquiry has been executed, if the complaint is not resolved within 30 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or SEEM, the EEO counselor will stop the inquiry and resolution attempts and conduct a final interview with the complainant and his or her representative, if one has been designated. Informal resolution attempts should be continued by the SEEM and other NG officials, but they will not delay the final interview and notice of the right to file a formal complaint. During this interview, the EEO counselor:

a. Reviews with the complainant the results of the inquiry and resolution attempts to date.

b. Advises the complainant of the policy of the AG and NGB to take all steps possible to

resolve a complaint before it proceeds to the formal stage. To that effect, the EEO counselor again will offer the complainant an opportunity participate in the DRP [appendix B].

c. Explains that the complainant does not forfeit the right of filing a formal complaint by participation in the DRP and that, if the complaint remains unresolved, the final interview and notice of right to file a formal complaint will be held at that time. If the complainant elects the DRP, the interview is concluded and the pre-complaint process continues.

d. Tells the complainant that he or she has a right to file a formal complaint within 15 days after this interview.

e. Gives the complainant a letter [figure F-7] that serves as a notice of final interview and the right to file a complaint. The counselor will not try in any way to stop the complainant from filing a formal complaint and will make it clear that this is the complainant's decision.

f. Provides the complainant with copies of NGB Form 713-5 (Complaint of Discrimination in the National Guard) and instructions for their use and explains how to use this form to file a formal complaint. The EEO counselor offers to assist the complainant in the preparation of this form and in definition of issues [3-15].

g. Stresses that a formal complaint, if filed, must give specific information on the alleged acts of discrimination and must be limited to the issues that were discussed with the counselor during pre-complaint counseling. The EEO Counselor explains the differences between bases, issues, and any statement by the complainant provided as supporting material to the issues raised.

h. Advises the complainant that a formal complaint which does not contain clearly defined, specific issues that include dates of the alleged discrimination and state a proper basis will be returned for clarification or may be dismissed.

i. Tells the complainant that he or she must immediately inform NGB CMSA and the SEEM, in writing, if legal counsel, or any other representative, is retained at any time after a formal complaint is filed.

j. If the complainant refuses or is unable to participate in the final interview, the EEO counselor will mail the complainant a notice of final interview and right to file a complaint [figure F-8].

3-12. Final interview after extension or DRP

a. If the complainant agreed to an extension [3-9] and the complaint has not been resolved, a final interview will be held not later than 60 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. The EEO counselor will provide the same information to the complainant listed in paragraph 3-11, except for references to the DRP (paragraphs 3-11b and c).

b. If the complainant agreed to participate in the DRP [3-10] and the complaint has not been resolved, a final interview will be held not later than 90 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. The final interview will be held by the EEO counselor or a member of the DRP panel. That individual will review the resolution attempts during the DRP and provide the same information to the complainant as listed in paragraph 3-11, except for references to the DRP (paragraphs 3-11b and c).

3-13. EEO counselor's report

a. Submission. The EEO counselor's report is submitted only to the SEEM. The report will become part of the complaint file if a formal complaint is filed. Copies to the complainant and other officials will be provided only as specified in paragraph 4-5b and appendix B.

(1) Whether the inquiry has been completed or not, the EEO counselor will prepare a written report summarizing actions taken during the inquiry. The EEO counselor will provide the original of the report to the SEEM not later than 3 calendar days after the date of the final interview [3-11, 3-12a].

(2) If the complainant has elected to participate in the DRP, the counsellor will provide the report within 30 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM or within 3 calendar days of the completion of the inquiry, whichever comes first.

b. Content. The report will:

(1) Be presented in neutral and dispassionate language. It must reflect the EEO counselor's unbiased and objective approach.

(2) Include information provided by the EEO counselor to the complainant and information obtained from the complainant during counselling, to include the date of the initial counselling session and the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM (the initial contact).

(3) List the specific incidents and actions in the complaint and provide an accurate reflection of all aspects of the inquiry conducted. The report will reflect with whom the EEO counselor spoke, the date the discussion was held, and a summary of that discussion. Verbatim transcripts or excessive detail are neither required nor desired.

(4) Contain as enclosures any notes of interviews, document reviews, and copies of documents obtained by the EEO counselor. The EEO counselor will not retain any copies of these notes.

(5) Summarize all resolution efforts and the advice given to the complainant and to National Guard officials.

c. Notices. Along with the report, the EEO counselor will provide the SEEM copies of all letters and notices given to the complainant, including proof of their receipt by the complainant [figures F-2 through F-8], authorization to reveal complainant's name, if given; and designation of representative, if made.

3-14. Resolution during pre-complaint processing
In keeping with the purpose of pre-complaint processing, EEO counselors and NG officials are encouraged to seek compromise and to use a wide range of resolution techniques, to include the DRP. To assist in resolution, settlements during pre-complaint processing are informal in nature and NG officials may use a wide range of remedies and corrective actions to achieve resolution.

a. Except for enforcement of settlement agreements [7-12], settlements during pre-complaint processing are not governed by the provisions of chapter 7. Nevertheless, remedies or corrective actions agreed upon must be in compliance with applicable personnel management and other regulations. NGR (AR) 690-600/NGR (AF) 40-1614 will not be cited or used as authority for remedies or corrective actions during pre-complaint processing.

b. The terms of any settlement will be contained in an informal agreement signed by both the complainant and an authorized NG official. The sole purpose of such an agreement is to insure that both parties mutually understand the resolution terms. The agreement must identify the allegations that had been resolved in the agreement.

3-15. Assisting the complainant in filing
To expedite evaluation of the complaint for proper procedural acceptance or dismissal, EEO counselors and SEEMs will assist complainants who wish to file a formal complaint.

a. In providing assistance to a complainant, the EEO counselor or SEEM will make it clear that they are not making any judgement of the merits of the complaint.

b. As part of this assistance, the EEO counselor or SEEM will review the issues counselled and help the complainant to number and frame issues as described in paragraph 3-7d. In so doing, the counselor or SEEM will not attempt to dissuade the complainant from raising any issue, but rather will advise the complainant on:

(1) How to separate or combine issues so that each contains only similar or related allegations.

(2) Including as part of each issue the date(s) of the occurrences of the alleged acts of discrimination.

(3) Stating the basis or bases for each issue.

c. The EEO counselor or SEEM will also explain to the complainant how waivers of time limits are granted if it appears that the informal complaint was not filed within 45 days. If the complainant indicates a reason for the delay, he or she will be assisted in preparing a request for waiver.

Chapter 4
Formal Complaint Processing

4-1. General
This chapter covers the period from the beginning of the formal complaint process, when the formal complaint is filed until the beginning of the investigation phase. Appendix D contains a summary of the time limits applicable to this chapter.

4-2. Filing a formal complaint
A formal complaint of discrimination may only be filed after completion of pre-complaint processing [chapter 3]. See paragraph 4-5 for actions required for complaints that have not been so processed or that do not contain all of the required information. The formal complaint must be filed:

a. By the complainant, in writing, and must be signed by the complainant. The complaint may also be filed and signed on behalf of the complainant by an attorney whom the complainant has designated in writing.

b. On NGB Form 713-5, Complaint of Discrimination in the National Guard, which was provided by the EEO counselor with the notice of final interview and right to file the complaint. Additional copies of NGB Form 713-5 may be obtained from any EEO counselor or the SEEM.

c. With clearly defined issues. Each issue should be numbered so that it is readily set off from other issues and so that its scope is clear [3-7]. EEO counselors and SEEMs are available to assist complainants in preparing formal complaints.

d. With the SEEM or the AG, in person, by facsimile transmission, or by mail [2-3].

e. Within 15 calendar days after the receipt by the complainant of the notice of final interview and the right to file a complaint.

4-3. Conflicts of interest
If the AG, SPMO, SEEM, JA, or other NG official is named by the complainant as being responsible for the alleged discriminatory act or personnel action listed in the complainant's issue(s) he or she will not participate in the processing of such a complaint, providing that such individuals are named based on actions that they have personally taken against the complainant. If they are named merely by virtue of their position they may continue to process or adjudicate the complaint. When the provisions of this paragraph apply, the AG will designate in writing another individual to perform the functions for the named individual. Such designation will be made part of the official discrimination complaint case file and a copy will be provided to the complainant.

4-4. Receipt of formal complaint
a. The complaint shall be deemed filed on the date it is delivered or sent by facsimile to the SEEM or the AG. If the complaint is mailed, it will be deemed filed on the date postmarked, if it is addressed to the SEEM or the AG. In the absence of a legible postmark, it will be deemed filed 5 days prior to the date of receipt [2-3].

b. Upon receiving the formal complaint, the SEEM will:

(1) Note the date of receipt [2-3] in block 17, NGB Form 713-5. If the complaint was mailed, the envelope will be attached to the complaint form so that it may become part of the official complaint case file.

(2) Immediately contact NGB CMSA by telephone or facsimile and obtain an NGB Case Number [chapter 12].

(3) Conduct an initial review as required by paragraph 4-5.

c. Within 3 calendar days after receipt of a formally filed discrimination complaint, the SEEM will acknowledge receipt using figure F-9, and include the review, appeal, and civil suit rights and associated time limits in figure F-1.

4-5. Initial review of the formal complaint
The purpose of the initial review is to ensure that all required documents are present, that the formal complaint has been correctly filed, and that it contains properly framed issues that can be reviewed for procedural acceptance or dismissal.

a. If the SEEM receives a formal complaint that has not been processed through pre-complaint counselling [chapter 3], the SEEM will treat it as an informal complaint under paragraph 3-3, and will assign an EEO counselor [3-4]. However, if only some of the issues have not been counselled, see paragraphs 4-5d and 4-10d.

b. Upon receipt of the formal complaint, the SEEM will:

(1) Establish the official complaint file in accordance with chapter 12 unless a file has already been established in conjunction with the DRP of appendix B.

(2) Ensure that the EEO counselor's written report and other documents generated during counselling [3-5 through 3-13] are available and made part of the complaint file. If the complainant participated in the DRP [appendix B] all documents generated during that process will be included in the official complaint file.

(3) Provide the complainant a copy of the EEO counselor's report.

c. The SEEM will review the complaint to determine if all issues have been counselled, to ensure that issues are clearly defined and that all necessary information has been included, and to establish whether issues should be accepted or dismissed [4-10]. In conducting the review, the SEEM should seek the assistance and advice of the legal staff. The SEEM may also contact NGB CMSA for advice.

d. If the formal complaint contains issues that have not been counselled during the pre-complaint processing, the SEEM will determine whether these issues are like or related to those that had been counselled.

e. A complaint that contains issues that are not clearly defined or lack specificity, bases, or dates of the alleged acts of discrimination, or a complaint that is not clear enough to permit meaningful investigation will be returned by NGB to be clarified. To preclude delay, the SEEM will obtain any required clarification before the complaint is accepted or dismissed and forwarded to NGB [4-6].

f. Within 5 calendar days after the receipt of the complaint or within 5 calendar days after the completion of the clarification process [4-6], the SEEM will recommend to the AG whether the complaint is to be accepted or dismissed, in whole or in part.

4-6. Clarification of issues
The provisions of the pre-complaint processing established in chapter 3 should preclude the need for clarifying formally filed issues. However, if the issues filed do not contain the elements listed in paragraph 3-7b, additional clarification may be required. Clarification under paragraphs 4-6a through d must be completed within 10 calendar days after receipt of the complaint.

a. The SEEM will personally meet with the complainant and/or representative to obtain the needed information and to assist the complainant [3-15]. The complainant may prepare a list of revised issues, clearly identifying them as superseding issues listed in the formal complaint, or may provide additional information to be added to the already filed issues, specifying the issue to which the information pertains.

b. If the above is not possible, the SEEM may obtain such information from the complainant or representative by telephone. The SEEM will then make a memorandum for record of such conversation, include it as part of the case file, and provide a copy to the complainant and complainant's representative.

c. If the above efforts are not successful, the SEEM will determine if the needed information is available in the EEO counselor's report or from organizational files, such as personnel records. If so, the needed information can be extracted (indicating the source) and included as part of the case file with a copy to the complainant and complainant's representative.

d. At times, a complainant may not submit clear and concise issues [3-7b], but may provide, instead, a narrative description of the events and circumstances of the matters that gave rise to the complaint. The SEEM will attempt, by personal contact with the complainant and/or the complainant's representative, to identify specific issues and have the complainant list them in the formal complaint. The narrative may be retained as a supporting document. If such efforts are not successful, the SEEM will review the narrative in conjunction with the EEO counselor's report and other documents in the file to determine if the narrative contains information that can be viewed as specific and distinct issues. If so, the issues will be framed by the SEEM [4-7f(1)].

e. If the issues can not be identified and clarified as discussed in subparagraphs a through d and the complainant refuses to meet or provide the requested information in person or by telephone, a written request will be prepared [4-10i]. If such a request is necessary, it must be sent to the complainant within 5 calendar days after the receipt of the complaint.

(1) The request must be specific as to the information required. The complainant will be advised that he/she must provide the required information within 15 calendar days after receipt of the request, the reason for providing the information, and the consequences of failing to provide the information [figure F-10].

(2) If the complainant does not furnish the required information within 15 days after the

date of receipt of the request, the SEEM will wait another 5 days (to allow for mail time) and then will recommend to the AG that the vague or general issues be dismissed [4-7, 4-10].

4-7. Acceptance and dismissal process
Formal discrimination complaints are accepted or dismissed by the Agency (NGB). To ensure expeditious processing of complaints, AGs are authorized to initially accept or dismiss complaints, as described herein, subject to review by NGB.

a. Complaints will be accepted or dismissed at State National Guard level by the AG, a Deputy or Assistant AG, or the Chief of Staff. Prior to accepting or dismissing a complaint, they will obtain recommendations of their SEEM and JA.

b. The AG will accept or dismiss the formal complaint within 10 calendar days of its receipt by the State National Guard or within 10 calendar days of completion of clarification actions. Issuance of notices of acceptance or dismissal will not be delayed because settlement or withdrawal of a complaint is imminent.

c. Acceptance or dismissal does not signify agreement or disagreement with the issues raised. It is based solely on the procedural criteria cited in paragraph 4-10, not on the merits of the complaint.

(1) Initial acceptance or dismissal of all or part of a formally filed complaint will be based only on the criteria listed in paragraphs 4-10a through h and m. In some instances [4-6e], initial dismissal may also be based on failure to cooperate under the criteria of paragraph 4-10i.

(2) Dismissal during administrative processing of an initially accepted complaint will be made only with concurrence or by direction of NGB.

d. If the AG accepts the complaint, the complainant will be notified in writing.

e. If the AG determines that the complaint, in whole or in part, does not meet the criteria for acceptance [4-10], the complaint will be dismissed, in whole or in part, as appropriate. The complainant will be notified in writing, of the reason for the dismissal. Dismissal of a complaint constitutes an agency decision with appeal rights; therefore, it is particularly important that the dismissal notice and case file be transmitted to NGB without delay [4-8].

f. Acceptance or dismissal will be made using the format in figures F-11 through F-16, as applicable.

(1) When the complaint contains issues that do not require clarification, the issues will be cited verbatim and figures F-11, F-12, or F-13 will be used. When it is necessary to frame the issues for the complainant from a narrative, these figures will be modified as provided in the notes for these figures. In these cases, the SEEM will frame the issues ensuring that all matters raised within the narrative by the complainant are addressed in one or more issues.

(2) When the complainant provides clarification for the issues, figures F-14, F-15, or F-16 will be used.

4-8. Request for NGB review and investigation
Within 3 calendar days after the AG issues a notice of acceptance or dismissal [4-7f], the SEEM will request that NGB review the acceptance or dismissal and assign an investigator, if appropriate. The request for NGB review and transmittal of the case file will not be delayed because a settlement is being negotiated, withdrawal of a complaint may appear to be imminent, or for any other reason.

a. The official discrimination complaint case file, prepared and assembled as prescribed in chapter 12, will be transmitted in original and two copies. The SEEM is responsible for ensuring that all copies of the file are complete and identical.

(1) At this point, custody of the case file passes from the State National Guard to NGB. Originals of any correspondence received by the State from the complainant or complainant's representative after this date will be forwarded to NGB together with any responses [chapter 12]. The SEEM is responsible for ensuring that any documents contained in or added to the copy of the case file retained at state level are included in the official discrimination complaint case file now maintained at NGB.

(2) The official discrimination complaint case file will include all documents generated during the pre-complaint processing, including any documents resulting from the dispute resolution process. If clarification of issues took place, all documents and memorandums for record dealing with clarification will be included in the case file.

b. The SEEM's request for NGB review will be in the format described in figure F-19. The original request will be the topmost tabbed document in the original complaint file. Copies of the request will be sent to the complainant and representative, if designated. The request for review will contain:

(1) Separate listings of all issues that were accepted and of all issues that were dismissed. The actual letter of acceptance/dismissal must be included in the case file.

(2) The complainant's home and work mailing addresses, and home and work telephone numbers, commercial and, if appropriate, DSN.

(3) The name of the complainant's designated representative, if any, including the representative's work mailing address and telephone numbers, commercial and, if appropriate, DSN. Indicate if the representative is an attorney.

c. Requests containing accepted issues will also contain:

(1) Designated location for the on-site investigation.

(2) The name, title, address, and commercial telephone number of the State National Guard official with whom the investigator is to make contact to schedule the investigation, normally the SEEM. An alternate point of contact will also be provided.

(3) The name, title, address, and commercial telephone number of the State National Guard JA or other legal officer who will represent the NG during the investigative fact finding hearing.

d. Requests containing dismissed issues will also contain the following information:

(1) If the notice of dismissal was personally delivered to the complainant or representative, the date of such delivery.

(2) If the notice was not personally delivered, the date the notice was mailed by certified mail with return receipt requested. Proof of receipt of the notice by the complainant will be forwarded to NGB, in original and two copies, immediately upon receipt by the State National Guard. Transmittal of the case file and request for review will not be delayed pending the receipt of such proof of delivery.

e. If a complaint is settled or withdrawn after it is formally filed, but before a notice of acceptance or dismissal is issued, the complete case file, in original and two copies, will be immediately forwarded to NGB for review and administrative closure of the case.

4-9. Review of acceptance or dismissal by NGB
NGB will review the acceptance and dismissal of complaints for compliance with statutory and regulatory requirements, applicable case law, and administrative correctness. Upon completion of the review, NGB will notify the State National Guard, the complainant and complainant's representative, if any.

a. The State National Guard will be advised if a complaint has been properly accepted or dismissed, either initially or after corrections. For properly accepted complaints, the State National Guard will also be advised whether an investigation or other fact finding method will be used. Thereafter, any named individuals will be advised of allegations made against them [9-2].

b. Complaints containing issues that have been improperly accepted or improperly dismissed will be returned to the State National Guard for issuance of a revised notice of acceptance, a notice of dismissal, or notice of partial acceptance/dismissal.

c. Complaints containing issues that are not clear or specific will be returned to the State National Guard for clarification [4-6].

d. Complaints containing administrative errors may be returned to the State National Guard for correction, depending on the nature of the error and its effect on the processing of the complaint.

e. In the interest of expediting complaint processing or for other good and sufficient reasons, NGB reserves the right to issue notices of acceptance/dismissal directly to the complainant, with copies to the AG, in lieu of the above procedures.

f. Unwarranted delays by the State National Guard in processing the complaint, obstruction of complainant's rights to file, or other violations of the policies in volume I or the procedures in volume II of this regulation may result in adverse inferences as explained in paragraph 6-3.

4-10. Criteria for acceptance or dismissal
Acceptance or dismissal of a formal complaint of discrimination is not based on the merits or the validity of the complaint or of the issues raised therein. The veracity of any alleged act(s) of discrimination or the facts in support of or in opposition to any issues raised have a role in the resolution and final decision process, but are not a determining factor in the acceptance and dismissal process. The criteria for accepting or dismissing issues raised in individual and class complaints of discrimination are established by statutes and Federal rules and are the same for all Federal agencies. Reasons authorized by 29 CFR 1614 for dismissing a complaint, in whole or in part, are limited to the procedural grounds below. When dismissing a complaint or issue, the specific paragraphs of this regulation and of 29 CFR 1614 must be cited. The 29 CFR 1614 citation is listed at the end of the following paragraphs.

a. Failure to state a claim of discrimination under paragraph 2-2. This includes any claim that:

(1) Is not within the purview of the State National Guard or the NGB to remedy. This refers to a situation over which neither the State National Guard nor the NGB has jurisdiction. Among claims falling in this category are actions that the National Guard is required to take in compliance with the Technician Personnel Act of 1968 (32 U.S.C. 709). Federal regulations provide that the complaint must be filed with the agency that allegedly discriminated against the complainant. Therefore, complaints dealing with personnel policies and employment practices imposed on the National Guard by statutes, directives of the Department of Defense, or the Departments of the Army or the Air Force, or rules of the Federal Agencies, such as OPM, cannot be filed with the National Guard. 29 CFR 1614.106(a) and 107a

(2) Is not based on the complainant's race, color, religion, gender (to include sexual harassment), national origin, age, physical or mental handicap, or retaliation. Complaints of discrimination because of age are accepted only if the complainant was at least 40 years of age when the action complained of took place. 29 CFR 1614.103(a) and 107(a)

(3) Involves a military complaint of discrimination. The statutes and Federal rules implemented by this regulation do not apply to uniformed members of the military services, which include a member performing duty in a military status such as weekend drill, annual training, AGR, etc. It also includes military personnel actions; for example, those involving military promotions, applications for National Guard membership, or applications for AGR positions. 29 CFR 1614.103(d)(1) and 107(a)

b. Complaints or issues that have been previously filed and that are now pending or that have already been decided in the administrative discrimination complaint process. 29 CFR 1614.107(a)

c. Failure to comply with the time limits, unless a waiver of time limits is granted [4-11]:

(1) For raising the matter as an informal complaint [chapter 3]; 29 CFR 1614.105(a)(1) and 107(b) or

(2) To timely file the formal complaint [4-2]. 29 CFR 1614.105(a) or 204(c) and 29 CFR 1614.107(b)

d. Issues or matters raised in the formal complaint that have not been brought to the attention of the EEO counselor during the pre-complaint counselling or that are not like or related to

issues or matters that had been brought to the attention of the EEO counselor. 29 CFR 1614.107(b)

e. If the complainant has raised the matter under negotiated grievance procedures [chapter 10]. 29 CFR 1614.107(d)

Complaints or issues may be dismissed under this paragraph provided that:

(1) The collective bargaining agreement permits allegations of discrimination to be raised in a negotiated grievance procedure; and

(2) The complainant has filed a timely written grievance under the negotiated grievance procedure; and

(3) The matter filed under the negotiated grievance procedure is the same as the matter raised in the complaint filed under this regulation.

f. If the complainant has raised the matter as a mixed case appeal with the Merit Systems Protection Board, dismissals will be made in accordance with paragraph 10-7. 29 CFR 1614.107(d)

g. Allegations that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory. Preliminary steps under this paragraph must be of a nature that do not, without further action, affect the complainant. 29 CFR 1614.107(e)

h. A complaint or an issue that is moot. 29 CFR 1614.107(e)

i. Failure of the complainant to cooperate. 29 CFR 1614.107(g)

Dismissal under this paragraph requires that:

(1) The complainant be given a written request to provide specific information or to take specific action to proceed with the complaint and the reason for the request [figure F-18]. The request must be very specific as to the information or action that is required to minimize misunderstanding.

(2) The complainant will be advised that if he or she fails to respond within 15 calendar days after the receipt of the request or if the complainant's response does not address the request, the complaint or the issue(s) will be dismissed or adjudicated.

(3) If the complainant does not furnish the required information within 15 days after the date of receipt of the request, plus another 5 days to allow for return mail time, the complaint or the issue(s) will be dismissed using figure F-21 or will be forwarded to NGB for adjudication if the failure to cooperate occurs at some stage after the formal complaint has been accepted [6-13].

j. When a complainant cannot be located. 29 CFR 1614.107(f)

This would not normally be a basis for initial dismissal of a complaint. Dismissal under this paragraph requires that:

(1) Reasonable efforts have been made to locate the complainant; and

(2) A notice of the proposed dismissal [figure F-19] has been mailed to the complainant's last known address and the complainant has not responded within 15 days.

k. Failure to accept full relief. Dismissal under this paragraph may only be made during the period between the time that the complaint is accepted and the notice of investigation completion is issued [5-15, 7-6]. 29 CFR 1614.107(h)

l. A claim that is the basis of a pending civil action in a United States District Court in which the complainant is a party, providing that at least 180 days have passed since the complaint was administratively filed under paragraph 4-2. 29 CFR 1614.107(c)

m. The same matter was the basis of a civil action decided by a United States District Court in which the complainant was a party [chapter 8]. 29 CFR 1614.107(c)

4-11. Extension of time limits

The time limits imposed on the complainant are subject to waiver, estoppel, and equitable tolling. NGB or EEOC may extend these time limits based on the reasons cited in subparagraphs 4-11b and c, or for other good and sufficient reasons. Except as specifically provided for in this regulation, no authority exists, to extend time limits imposed on the State National Guard.

a. The AG, upon advice of the SEEM and/or JA, may extend the 45 day and 15 day time limits of paragraphs 3-3, 4-2e, or 11-5e, if the complainant can show that such a waiver is warranted. A complainant's request for a waiver will be considered in deciding whether a complaint will dismissed under paragraph 4-10c.

(1) The documentation or statements by the complainant in support of an extension of time limits will be made part of the official discrimination complaint case file.

(2) Granting or denial of any waiver will be made formally, in writing, to the complainant and complainant's representative, and will include specific rationale and documentation to support or rebut the claims made by the complainant. All documentation will become part of the official complaint file.

(3) All waivers granted or denied by the State National Guard are subject to review and approval by NGB.

b. Waivers will be considered when a complainant:

(1) Claims that he or she was not notified of the 45 day time limit for filing an informal complaint or that he or she was not otherwise aware of this time limit [3-6g, 3-15c].

(a) For a waiver to be granted, the discrimination complaint case file must contain information to show that provisions of paragraphs 11, volume I and 2-6, volume II of this regulation were not followed or that despite adherence to paragraphs 11, volume I and 2-6, volume II of this regulation the complainant was not notified or was not aware of the time limits.

(b) For a waiver to be denied, the discrimination complaint case file must contain information to show that provisions of paragraphs 11, volume I and 2-6, volume II of this regulation were followed and that, despite complainant's claims, he or she was aware of or reasonably should have been aware of the time limits.

(2) Claims that he or she was not notified of the 15 day time limit for filing a formal complaint or that he or she was not otherwise aware of this time limit. Granting or denial of the waiver will be based on whether the complainant received the notice of final interview and right to file a complaint. The record will contain documentation regarding the presence or absence of this required notice and proof regarding the receipt or non-receipt by the complainant of the notice.

(3) Shows that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action had occurred.

(4) Shows that, despite due diligence, he or she was prevented by circumstances beyond his or her control from contacting an EEO counselor within the 45 day time limit or from filing a formal complaint within the 15 day time limit. Consideration will be given to equitable tolling and estoppel.

c. Apparently untimely issues within a complaint may also be accepted when two or more issues raised in the complaint indicate a pattern of continuing violations and at least one of these issues is timely. In such cases, a separate waiver is not required; however, the notice of acceptance will indicate the specific reason why one or more of the apparently untimely issues were accepted.

4-12. Consolidation and joining of complaints

a. Complaints of discrimination filed by two or more complainants which make substantially similar allegations of discrimination or which relate to the same matter, may be consolidated for joint processing by the State National Guard, NGB, or EEOC, after notifying the complainants. If the complaints have not been filed at the same time, the date of the first filed complaint is controlling of the time limits established in this regulation. Complaints will not be consolidated if this will prevent the timely processing of one or more complaints.

b. Two or more complaints of discrimination from the same complainant may be consolidated for joint processing by the State National Guard, NGB, or EEOC, after notifying the complainant. The date of the first filed complaint is controlling of the time limits established by this regulation. Complaints will not be consolidated if this will prevent timely processing of one or more complaints.

c. When two or more complaints have been consolidated for joint processing, the following rules apply:

(1) When there is more than one complainant, separate notices of acceptance or dismissal will be issued.

(2) Only one investigation will be conducted. However, if there is more than one complainant, each will receive a copy of the ROI.

(3) If a hearing is held prior to a final decision, the hearing will include all the complaints that have been joined for processing.

(4) When there is more than one complainant, withdrawal or settlement of the complaint by one complainant will not affect processing of the remaining complaints that have been consolidated.

(5) The final decision will address all complaints joined for processing when only one complainant is involved.

(6) When there is more than one complainant, separate final decisions will be issued for each complainant.

(7) Correspondence that relates to more than one complainant or complaint will be titled to reflect the names and case numbers of all involved [chapter 12].

Chapter 5
Fact Finding and Investigation

5-1. General

The fact finding and investigation period covered in this chapter extends from the time that NGB approves the acceptance of issues until the issuance of the notice of investigation completion. Appendix D contains a summary of time limits applicable to this chapter.

5-2. Purpose of fact finding and investigation

a. The purpose of fact finding and investigation of a discrimination complaint filed under this regulation is to uncover and develop a sufficient amount of factual information to determine:

(1) Whether a violation of the statutes and directives, cited in paragraph 1-1 of this regulation, has occurred.

(2) If any or all of the issues accepted in the complaint have validity and merit.

(3) An appropriate resolution of the complaint.

(4) What remedy and corrective action are appropriate.

(5) How the case should be adjudicated in the final decision.

b. Upon completion of fact finding or investigation, the official discrimination complaint case file must contain sufficient documentation to support by a preponderance of evidence a finding of discrimination or no discrimination on each accepted issue.

5-3. Fact finding

a. As noted in the glossary, an investigation is a formal process that includes a detailed examination to uncover facts. As part of its review, NGB will evaluate the extent of fact finding and investigation required to develop a complete and impartial factual record that can be used for settlement and adjudication of the complaint. In some instances, sufficient factual data is available in the official discrimination complaint case file so that a complete investigation is not required to achieve the desired results. In such cases, fact finding, short of a complete investigation, may suffice to develop a factual record on which to make findings on the matters raised in the formal complaint.

b. If fact finding is appropriate, NGB may supplement the existing record by an exchange of letters, memorandums, or interrogatories with the complainant and NG officials instead of an on-site investigation. This will be done only when the record already contains sufficient data so that an adjudication of the case may be made with only limited supplementary material.

c. The authority assigned to an investigator in paragraph 5-4 is inherent in any correspondence from NGB that requests information as part of complaint fact finding under this paragraph.

5-4. Dispute resolution
In keeping with the policy of seeking resolution throughout the complaint process, the fact finding and investigative stages of the complaint process also incorporate procedures for resolution.

a. As part of evaluation under paragraph 4-9, NGB will review whether dispute resolution procedures should be applied prior to assignment of an investigator [appendix B]. NGB will consider:

(1) The complainant's willingness to participate in dispute resolution, as evidenced in the pre-complaint process [3-6k(4), 3-10, 3-11b].

(2) The results of any DRP in which the complainant may have participated [3-10].

(3) The likelihood of success of dispute resolution at this point based on other documentation in the case file.

b. On-site investigative fact finding hearings are conducted so as to encourage dispute resolution. To this effect, investigative hearings are non-adversarial and permit both parties, the State National Guard and the complainant, to be present throughout all testimony so that both are aware of all of the material presented and of the position of each side. If at any time during the on-site investigation it appears that there is a willingness or possibility for resolution of the issues, the investigator may suspend the investigative hearing so that dispute resolution may be attempted.

c. If a settlement is reached or the complaint is withdrawn, the provisions of chapter 7 apply and will be adhered to. The investigator may not cancel an investigation, based on a settlement or withdrawal of the complaint, until authorized by NGB [7-2e(3), 7-5e(3)].

5-5. Assignment of an investigator
When NGB determines that the matters raised in the formal complaint require an investigation, an investigator will be assigned.

a. The investigator is independent of control by any of the parties (the State National Guard, the complainant, and/or their representatives). The investigator reports to the NGB CMSA and represents neither the complainant nor the State National Guard.

b. Any individual designated by NGB to investigate a complaint of discrimination may not occupy a position in the National Guard that is directly or indirectly under the jurisdiction of the AG of the State in which the complaint arose.

c. Contract investigators may not be hired by or obligated to any NG official in the State in which the complaint arose.

d. When an investigator is assigned, NGB will transmit a copy of the official discrimination complaint case file to the investigator together with a letter of authorization and any pertinent instructions for the conduct of the investigation. The investigator's 45 day time limit to submit a Report of Investigation (ROI) starts with the receipt of these documents.

e. The SEEM and the complainant will also be notified of the assignment of the investigator, so that they can begin to prepare for the investigation. The SEEM will notify the State JA and assist the JA in preparation of the National Guard position to be presented during the investigative fact finding hearing.

5-6. Authority of the investigator
On behalf of the Chief, National Guard Bureau, investigators will be provided written authorization signed by the Chief, CMSA or a designee. The complainant, National Guard officials, and all National Guard personnel are required to produce such documentary and testimonial evidence as the investigator deems necessary.

a. Investigators are authorized to:

(1) Investigate all aspects of the complaint of discrimination, to include reviewing and copying records judged by the investigator to be pertinent to the investigation.

(2) Require National Guard personnel to cooperate with the investigator in conducting the investigation.

(3) Require National Guard personnel who have any knowledge of the matter in the complaint to furnish testimony, unless such testimony would result in self-incrimination.

(4) Administer oaths and require that statements of witnesses be under oath or affirmation or by written statement, under penalty of perjury. Statements of witnesses are made without any pledge of confidentiality.

b. The investigator has the power to regulate the conduct of the investigative fact finding hearing, limit the number of witnesses where testimony would be repetitious, and exclude any persons from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

c. When the complainant, State National Guard officials, or any National Guard personnel fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, the investigator will note this in the ROI and will, when appropriate, recommend that adverse inference be drawn by NGB [6-3].

5-7. Scheduling the on-site investigation
To ensure timely completion of the investigation and submission of the ROI, the investigation will begin as soon as possible after assignment of an investigator, but in any event, not later than 20 days after the receipt of the case file by the investigator.

a. Planning for the on-site investigation by the State National Guard and by the complainant must commence upon receipt of the notification from NGB that the issues have been properly accepted and an investigation will be scheduled [4-9]. Planning will include the identification of witnesses and other participants in the investigative fact finding hearing and assuring their availability.

b. Upon initial review of the case file received from NGB, the investigator will contact the individual designated by the State National Guard, normally the SEEM [4-8c(2)].

(1) The investigator may request additional documents or information to supplement the record in the official case file.

(2) The investigator will request a list of witnesses proposed by the National Guard and the complainant. The investigator may also indicate what witnesses he or she wishes to have testify.

(3) Within the time constraints imposed by this regulation, the investigator will schedule the on-site investigation.

c. Within 5 days after the receipt of a copy of the official discrimination complaint case file, the investigator will provide an initial report to NGB that outlines the proposed investigation and provides the dates of the on-site investigation and fact finding hearing.

5-8. State National Guard support requirements

The SEEM or other designated individual will make the necessary arrangements for the investigator's visit [4-8c(2)]. This may include information on local hotel accommodations, public transportation, access to the investigative site, and assistance to the investigator required to conduct an efficient investigation. The State National Guard is also responsible for the following support:

a. An appropriate location for conducting the investigative fact finding hearing and private office space for the investigator with telephone access.

b. Services of a certified court reporter to provide verbatim transcripts of testimony. The transcripts will be provided, in four copies, exclusively to the investigator. Whenever possible, transcripts will be provided prior to the investigator's departure from the site. Otherwise, the court reporter must send them by express mail to the investigator within 3 working days after the testimony has been taken.

c. Ensuring that the complainant and all witnesses for the complainant and for the National Guard, to include any witnesses requested by the investigator, are available at one designated location at the specified and agreed on time and date.

d. Making available all personnel and other records, statistical data, and other documents required by the investigator and assuring that necessary copies are provided to the investigator prior to the investigator's departure.

5-9. Conduct of the investigation

The investigator is required to make a fair and impartial investigation of the facts and circumstances surrounding the case and to ensure that sufficient evidence is available for NGB to reach conclusions and findings based on the preponderance of evidence (see glossary for definitions). Unless otherwise instructed by NGB CMSA, the investigator will use the NGB Investigators Procedural Manual in the conduct of the investigation, to include subsequent analysis and preparation of the ROI. Where provisions of that manual conflict with the provisions of this regulation, the last dated document will take precedence. The investigator will:

a. Make a thorough review of the official discrimination complaint case file provided to the investigator by the NGB.

b. Request and obtain additional documentary information needed to supplement the case file prior to the on-site visit [5-7b(1)].

c. Schedule and conduct an on-site investigation which will include obtaining documentary evidence and interviewing witnesses [5-10, 5-11]. During this on-site visit, the investigator will:

(1) Collect facts and develop information to determine the merits of each accepted issue in the complaint and review the circumstances under which the discrimination is alleged to have taken place. This does not lessen the responsibility of the complainant and the NG representative to prepare, present, and explain their positions as to the disputes and to provide supporting evidence.

(2) Collect and analyze information on how members of the complainant's group are treated compared to other personnel in the organization where discrimination is alleged to have occurred. This information may include, statistical data on promotions, disciplinary actions, awards, or other personnel actions.

(3) Investigate work policies and practices, relevant to the complaint, that seem to constitute discrimination, even though they may not have been specifically cited by the complainant [5-9d].

(4) Determine how much evidence is needed. In obtaining evidence, documentary or testimonial, the investigator will consider that enough evidence has been obtained when all evidence, likely to support both parties, has been examined and the evidence obtained on each issue raised by the complaint supports, by a preponderance of evidence, a finding of discrimination or no discrimination. The investigator need not be concerned in balancing the amount of evidence supporting the complainant as compared with the amount of evidence supporting the National Guard. To ensure a balanced record, it is necessary only to exhaust all sources likely to support the complainant and the NG.

d. Refrain from expanding the scope of the investigation beyond the issues accepted and the charges or allegations that were accepted in the formal complaint. Bases of discrimination, however, can be changed or added.

e. Prepare and submit an ROI.

5-10. Investigative fact finding hearing

The purpose of the investigative fact finding hearing is to obtain evidence bearing on the issues in the case from personal testimony of individuals. It is an administrative, rather than a judicial process; therefore, the rules of evidence used in a judicial process are not strictly applied. The fact finding nature of this process is designed to provide both parties to the complaint with access to all testimony so as to bring out all relevant facts and to foster resolution.

a. Unless otherwise directed by NGB CMSA, investigative fact finding hearings will be conducted as established herein and in the NGB Investigators Procedural Manual.

(1) Testimony will be obtained by personal interview and completed during on-site visits. The investigator will make use of the National Guard

provided certified court reporter to obtain sworn, verbatim transcripts. Such transcripts will not be reviewed or signed by the individual providing testimony.

(2) There may be rare occasions when it is impossible to obtain transcribed testimony in person or when some follow-up information is required. In that case, evidence may be obtained in a variety of ways, including written questions and answers (interrogatories); recorded telephonic interviews, using either handwritten notes or verbatim transcription; an exchange of letters or memoranda; or affidavits.

(3) The process of obtaining testimony will be non-adversarial and will be conducted in an orderly and dignified fashion. The NG representative and any witness, to include the complainant, will be permitted to make a statement; however, the investigator will determine what questions are asked of the witness and the investigator may exclude or curtail long, repetitive, or irrelevant testimony.

(4) All questions of the witnesses are to be asked by the investigator and there will be no examination or cross-examination of the witness by either the complainant or the NG representative. At the end of the testimony, the investigator will excuse the witness and, off the record, ask the complainant and the NG representative whether any part of the witness' testimony requires clarification. If the investigator deems it appropriate, the investigator may, but is not required to, recall the witness, go back on the record, and ask the witness to answer additional questions posed by the investigator. The investigator will provide witnesses with information stated in paragraph 5-11.

b. The fact finding hearing is a part of the investigative process and is closed to the public. Attendance will be limited to persons with direct knowledge relating to the complaint. The following individuals will be present during testimony:

(1) The investigator, whose role is to elicit information in a fair and impartial manner and to ensure that the record of the proceeding is clear and complete.

(2) The State National Guard provided court reporter, who will prepare verbatim transcripts of the testimony.

(3) The witness providing testimony. This may include the complainant, an individual named by the complainant as being responsible for alleged acts of discrimination, NG officials, individuals requested to provide testimony by the complainant or the NG representative, or other individuals asked by the investigator to testify. The witness testifying and the witness' representative are present only during the time that the witness is testifying.

(4) An attorney or representative for the witness, if requested by the witness to be present, during that witness' testimony only.

(5) The complainant who may be accompanied by an attorney or representative. The complainant and the complainant's attorney or representative will be present during the testimony of all witnesses, unless the complainant personally elects not to be present. Since the burden of proof rests on the complainant, the complainant's absence and failure to be aware of the testimony being presented may make it difficult for him or her to show that discrimination has occurred or to demonstrate pretext of management actions.

(6) The NG legal representative, normally the State National Guard JA. This individual represents the NG, not any individual NG official nor any individual named by the complainant as being responsible for alleged acts of discrimination. This representative will be present during the testimony of all witnesses. Although the representative will not cross examine any witness, he or she may make a statement to the investigator addressing or summarizing the case from the State National Guard perspective.

(7) An observer, such as an EEO or NGB official, may be permitted by the investigator to sit in on the proceeding with the consent of the complainant or by direction of the Chief, NGB.

5-11. Witnesses and testimony

The National Guard and the complainant will provide the investigator with a list of witnesses they wish to have interviewed [5-7b(2)]. The investigator may require the National Guard or the complainant to indicate what testimony is expected from each witness.

a. The investigator will determine the witnesses whose testimony is necessary to the investigation and will interview and obtain testimony from only these witnesses. Testimony will be included in the investigative file only if the investigator deems the testimony relevant and necessary. The investigator will document in the ROI why any witness identified by the complainant or by the State National Guard was not interviewed and why any evidence that was offered was not accepted.

b. The complainant and the NG representative will be advised that witnesses have been selected based on those proposed by the complainant, the National Guard, and those added by the investigator and that the final decision on which witnesses are interviewed rests with the investigator. If any witnesses proposed by the complainant or the State National Guard are not interviewed, the reason will be noted in the ROI. The complainant will also be advised that if the complainant raises new issues that have not been accepted, the investigator will stop the testimony and advise the complainant to contact an EEO counselor on these issues.

c. The investigator will advise each witness about the conduct of the hearing and will explain the fact finding process. Witnesses will be advised that:

(1) They have a right to be represented at their own expense.

(2) The testimony that they provide will be under oath or affirmation. It will be transcribed verbatim by the court reporter and this verbatim transcript constitutes the only official record of this fact finding hearing and no other record is authorized or may be made.

(3) Their testimony will be part of the ROI to be included in the official complaint file and that the NGB, the State National Guard, and the complainant will receive a copy.

(4) The purpose of the investigative hearing is to obtain facts concerning the discrimination complaint so that the investigator may provide sufficient evidence for the NGB to make conclusions and findings on whether discrimination has occurred. It is not the purpose of the fact

finding hearing to determine the culpability of any individual who may have been named by the complainant. The investigator will not make any finding on whether any individual is or is not guilty of discrimination.

(5) The testimony and exhibits must pertain to the issues raised that have been accepted. The investigator may exclude irrelevant or repetitious testimony or exhibits or testimony pertaining to any dismissed issues.

d. Any individuals named by the complainant as being responsible for alleged acts of discrimination will be advised of the details of such allegations by the investigator and the accepted issues in which they are named will be read to them verbatim.

5-12. Problems and delays

Every effort will be made to resolve problems that may cause delay in the investigation since it must be completed within 45 days. For contract investigators, that time limit also constitutes a contractual obligation.

a. Delay in scheduling of an on-site investigation, delay while the investigator is on site, or delay in submission of the ROI must be authorized by NGB CMSA and, for contract investigators, concurred in by NGB-CS. Whether a delay is authorized will depend on the reasons for the delay, on how many days have passed since the complaint was filed, and whether the complainant agrees to an extension.

b. By voluntary written agreement with the complainant, the investigation and issuance of the investigation completion notice may be extended for not more than an additional 90 days [figure F-22]. Normally, extensions will be for lesser periods, sufficient to cover the delay encountered. Such extension agreements will generally be appropriate for dispute resolution under paragraph 5-4 and when unavoidable delays are encountered.

c. Delays for the convenience of the complainant, the investigator, or National Guard officials are not authorized. Vacation or leave time will not constitute a valid reason for delaying an investigation. Absence of witnesses due to annual training or temporary duty will not be grounds for delay; appropriate arrangements will be made to return such individuals to provide necessary testimony or to use other means to obtain needed testimony [5-10a(2)]. Investigations will not be delayed or cancelled because settlement or complaint withdrawal is in progress or imminent [5-12b].

d. When either party, the State National Guard or the complainant, cause an unjustified delay in the investigation, the investigator may recommend that adverse inference be drawn [5-6c].

e. When the investigator or National Guard officials believe that there is sufficient reason to justify a delay in the investigative process, they will provide specific details and justification for the delay and indicate by how many days the investigation will be delayed. This information will be provided in writing to NGB CMSA and the investigator. To avoid delay, the information will be transmitted by facsimile or priority message. Such delay may entail additional investigative costs to the State National Guard or NGB and may result in the action described in paragraph 5-17.

f. When a complainant believes that good and sufficient reasons exist to delay an investigation, he or she will request the delay in writing, providing a copy to the SEEM and the investigator. The SEEM will transmit the information to NGB CMSA by facsimile or priority message.

g. If a complaint is settled or withdrawn before the start of the on-site investigation, the State National Guard will immediately notify NGB CMSA by facsimile or overnight mail service requesting that the investigation be cancelled [chapter 7].

h. The JA or the SEEM will notify NGB CMSA, in writing, of any actions or demands by the investigator that clearly violate EEOC or NGB guidelines. When time is of essence and the circumstances are sufficiently serious to require immediate corrective action, the report will be sent by facsimile or priority message.

5-13. Report of investigation

a. Within 45 days and any extension authorized as described in paragraph 5-12, above, the investigator will prepare a ROI and submit it to NGB CMSA. Unless otherwise instructed by NGB CMSA, the content and format of the ROI will be in accordance with the guidance of the NGB Investigators Procedural Manual.

(1) The investigator will provide a detailed narrative report of the investigation as part of the ROI. The report will include a description of the issues, testimony, documentation, and other exhibits and their relationship to the case and the issues that had been accepted for investigation; and a factual analysis of the complainant's case on each accepted issue.

(2) The investigator will include copies of all documentation relevant to the complaint. The evidence gathered will be clearly marked and placed as exhibits in the ROI.

(3) The investigator will prepare an executive summary of the narrative report to summarize key aspects of the case, the investigation, and the factual analysis of the ROI. The executive summary will not exceed two pages.

b. The ROI will be reviewed by NGB for legal and administrative sufficiency, to determine that it contains information to meet the requirements of paragraph 5-2, to verify that the analysis is consistent with the evidence in the entire official discrimination complaint case file, and to ensure that the information is sufficient to make necessary conclusions, findings, and recommendations.

c. The ROI is an NGB investigative document and NGB reserves the right to correct, amend, or rewrite narrative parts of the ROI. NGB will not change or alter any documentary evidence, exhibits, testimony, or other evidence in the ROI. NGB CMSA may remand deficient ROIs to the investigator for additional analysis or corrections.

d. If the ROI is deficient, biased, or otherwise so flawed that it is insufficient to meet the requirements of paragraph 5-2, NGB may order a

new or supplemental investigation or use other fact finding methods to obtain necessary information.

e. Completion of NGB review of the ROI, acceptance of the ROI from the investigator, or the transmittal of the ROI to the complainant and the State National Guard do not indicate NGB agreement with the merits of the case or indicate findings of discrimination or no discrimination. Such determination is only made with the issuance of a final decision on the merits of the complaint.

5-14. Purpose and use of the ROI

a. The ROI supplements the official discrimination complaint case file so that the objectives listed in paragraph 5-2 can be achieved.

b. The ROI will be used by State National Guard officials, NGB, and EEOC to resolve complaints, determine appropriate remedial and corrective actions, and to adjudicate complaints by issuing decisions on the merits of the complaint and rulings on appeals.

c. The ROI is also provided to the complainant [5-15]. The ROI is covered by the Privacy Act and may not be released to unauthorized persons [12-7].

5-15. Notice of investigation completion

After NGB CMSA has completed the review of the ROI and ensured that all deficiencies have been corrected, the NGB CMSA will issue a notice of investigation completion to the complainant with a copy to the SEEM [figure F-23]. The notice will be accompanied by a copy of the ROI to both the complainant and the State National Guard. One copy of the ROI is retained by the SEEM to be used by the State National Guard, and to be included in the complaint file. The other copy is for the exclusive use of the complainant and his or her representative, if designated. The notice of investigation completion will advise the complainant:

a. Of the right to request an immediate final decision from the Chief, NGB. This request must be submitted within 30 days [6-6].

b. Of the right to request a final decision by the Chief, NGB in conjunction with a hearing by an EEOC Administrative Judge (AJ). This request must be submitted within 30 days [6-7].

c. That if the complainant fails to submit a request for a final decision within 30 days, the NGB will issue a decision without a request [6-11b].

d. That the complainant may be contacted by State National Guard officials to attempt settlement of the complaint, but that any settlement attempts do not modify or extend the time limits listed above.

5-16. Settlement before a decision

In addition to the dispute resolution discussed in paragraph 5-4, State National Guard officials and the complainant have additional opportunities to resolve the complaint prior to issuance of a final decision by the NGB.

a. After completion of an investigative fact finding hearing, both the complainant and the State National Guard representative are aware of all testimony that has been presented in the case. As a result, they can use this information to seek resolution and settlement of the complaint.

b. Upon receipt of copies of the ROI, the complainant and State National Guard officials should review that document and again attempt resolution and settlement. They may also choose the use of the dispute resolution process listed in appendix B to facilitate such resolution.

5-17. Failure to issue a notice of investigation completion

NGB is required to issue a notice of investigation completion within 180 days after the filing of the formal complaint or within the time limit established by EEOC on an appeal from dismissal [chapter 8]. These time limits are extended upon agreement with the complainant as indicated in paragraph 5-12b. See paragraph 1-4 regarding complaints filed prior to 1 Oct 92. In the absence of such notice, the complainant may:

a. Request a hearing before an EEOC AJ by sending a request to the appropriate EEOC district office listed in appendix C. A copy of the request must be sent to NGB CMSA.

b. File a civil action in an appropriate U.S. District Court as specified in chapter 8.

Chapter 6
Hearings, Adjudications, and Decisions

6-1. General

This chapter covers the period from the receipt by the complainant of the notice of investigation completion until the issuance of the final decision by NGB. Appendix D contains a summary of time limits applicable to this chapter.

6-2. Adjudication and decision procedures

On behalf of the Chief, NGB, the CMSA in coordination with NGB JA and other NGB staff activities, as appropriate, will review the entire official discrimination complaint file before issuing decisions and determinations on discrimination complaints. This includes final decisions on the merits of accepted issues, decisions on procedural grounds, or dismissals subsequent to the acceptance of a complaint. The decisions or determinations will be made by the Director, EEO or by the Chief, CMSA as delegated by the Director, EEO.

a. In conducting the review and adjudication of the case, NGB will take into consideration all attempts at resolution; results of any fact finding or investigation; any written statements or briefs included in the complaint file from either party (the complainant or the State National Guard); the findings and conclusions of the AJ, if a hearing was held; and any other documentation in the official discrimination complaint case file. CMSA will also consider the manner in which the complaint was processed and investigated and whether any adverse inferences should be drawn [6-3].

b. The decisions and determinations made by NGB include:

(1) Propriety of the initial acceptance and dismissal and [4-9 and 4-11].

(2) Final decisions on the merits of the issues [6-11, 11-14, and 11-17].

(3) Decisions on subsequent dismissals of accepted complaints [6-13].

(4) Closures of complaint cases [6-14].

(5) Certifications of full relief [7-6].

(6) Determinations and final decisions on attorney's fees and costs [7-10 and 7-11].

(7) Compliance and enforcement of settlements and final decisions [7-12 and 7-13].

(8) Determinations to have EEOC reconsider its appeal decisions [8-6].

(9) Appeals of denial of representative [9-4].

(10) Acceptance or dismissal of class complaints [11-8].

(11) Decision on petitions to vacate a resolution [11-11].

6-3. Adverse inference

a. When the complainant, National Guard officials, or any National Guard personnel fail without good cause shown to timely process the complaint, respond fully and in timely fashion to requests of CMSA, investigator, or the EEOC AJ, or otherwise obstruct or delay processing of a complaint of discrimination, NGB or EEOC may draw adverse inference in adjudicating the complaint.

b. In appropriate circumstances, EEOC or NGB may:

(1) Draw an adverse inference that the requested information or testimony of the requested witness would have reflected unfavorably on the party refusing to provide such information.

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

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

(4) Issue a decision fully or partially in favor of the opposing party.

(5) Take other appropriate actions.

6-4. Input from the Adjutant General

Within 15 days after receipt of the notice of the investigation completion and the ROI or the results of the fact finding, the AG may provide input for NGB consideration in issuing a final decision.

a. A synopsis of the State National Guard position on the merits of the issues should be provided to CMSA. This is not intended to be a rebuttal to any testimony or information that was gathered during the investigation, nor should it restate the analysis contained in the ROI. Rather, this is an opportunity for the State National Guard to either agree with the analysis of the ROI or to present a brief statement of why the preponderance of evidence on a given issue should result in a particular decision on the merits of that issue.

b. If any resolution attempts have been made in accordance with paragraph 5-16, such attempts and the terms of any proposed settlement that were offered to the complainant should be forwarded to CMSA to be made part of the record.

c. TAG's input to NGB should also include recommendations for what would constitute full relief in each issue if the final decision determines that discrimination has occurred (including any mitigation of damages) [7-7b]. Absent such recommendations, an NGB final decision which favors a complainant, will require full relief based on the provisions of chapter 7 and evidence in the case file.

6-5. Request for an immediate final decision

a. When the complainant receives the notice of investigation completion and the ROI or the results of the fact finding [5-15a], he or she may ask for an immediate final decision by the Chief, NGB. This request must be made in writing within 30 calendar days after the receipt of the notice. It must be addressed to NGB CMSA at the address provided in the notice with a copy to the SEEM.

b. The NGB final decision will be based on the record [6-2, 6-3]. The complainant may provide a synopsis of his or her position in the same manner as stated in paragraph 6-4. However, any new issues raised by the complainant will be returned for processing IAW chapter 3.

6-6. Request for a final decision with a hearing

a. When the complainant receives the notice of investigation completion and the ROI or the results of the fact finding [5-15a], he or she may ask for a final decision by the Chief, NGB, preceded by a hearing from an EEOC AJ [6-8 through 6-10]. This request must be made in writing within 30 calendar days after the receipt of the notice. It must be addressed to NGB CMSA at the address provided in the notice with a copy to the SEEM.

b. Within 5 calendar days after receiving a copy of the complainant's request, or a notification from NGB that the complainant has requested a hearing, the SEEM will provide NGB the following information:

(1) The name, title, address, and telephone number of the official (normally the SEEM) who will arrange for the conduct of the hearing and the certification of funds.

(2) The name, title, address, and telephone number of the official (normally the JA) who will represent the National Guard during the hearing.

(3) The location of the hearing and the EEOC district office that has geographic jurisdiction over that location [appendix C]. The hearing will usually be held at the activity or unit where the complainant is permanently assigned or where the complaint originated. If another location is preferred, the SEEM will indicate where and why such location is proposed. However, EEOC has the final say on where a hearing is to be held.

(4) The original and two copies of any documents in the State National Guard copy of the official complaint file that have not been previously sent to NGB, to include any documents showing delivery or proof of receipt.

6-7. Arranging for a hearing

a. When the complainant asks for a decision by the Chief, NGB, with a hearing, CMSA will request assignment of an AJ from the EEOC district office that has geographic jurisdiction [appendix C]. The request will be made within 14 calendar days of the receipt of the information from the SEEM [6-6].

b. The written request to EEOC will:

(1) Provide the information furnished by the SEEM in paragraphs 6-6b(1), (2), and (3).

(2) Include a copy of the complaint file, prepared as described in chapter 12, to include a copy of the ROI or fact finding.

(3) Request that the AJ provide 4 copies of the hearing record, to include the transcripts of testimony and the AJ's findings and conclusions to NGB CMSA. When there is more than one complainant, an additional copy of the hearing record, the transcripts, and the findings and conclusions will be requested for each additional complainant.

c. A copy of the request to EEOC will be provided to the State National Guard and the complainant.

d. The SEEM will:

(1) Make necessary arrangements for the hearing, to include the services of a court reporter. The court reporter must provide the required number of copies of the transcript to the AJ within 21 calendar days after the close of the hearing.

(2) Coordinate with the State National Guard legal representative all aspects of the State National Guard position regarding the presentation of the complaint case at the hearing.

(3) Ensure that any documents received by the State National Guard from the complainant, the complainant's representatives, EEOC, or anyone else involved in the hearing, are promptly forwarded to CMSA, to include copies of any replies to these documents.

6-8. The hearing process

A hearing is not an appeal [chapter 8]. A hearing is held prior to and as a part of the issuance of the final decision by NGB. The hearing is conducted by an EEOC AJ under EEOC regulations and procedures. See paragraph 6-9, regarding the authority of the AJ.

a. The hearing will deal only with the issues accepted in the formal complaint (bases of discrimination may be changed or added). Where the AJ determines that the complainant is raising or intends to pursue new issues or issues like or related to those raised in the complaint, but which the National Guard has not had an opportunity to address, the AJ will remand such issues for counselling in accordance with chapter 3 of this regulation (and 29 CFR 1614.105) and for such other processing as ordered by the AJ. If not addressed to NGB CMSA, any such remand or order will be immediately transmitted to NGB CMSA.

b. The AJ will notify the parties of the right to seek discovery prior to the hearing and may issue appropriate discovery orders.

(1) Unless the complainant and the State National Guard agree in writing concerning the methods and scope of discovery, the party seeking discovery must request authorization from the AJ prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues accepted in the complaint, but the AJ may limit the quantity and timing of discovery.

(2) Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations, or production of documents.

(3) Asking either party to produce evidence that is irrelevant, overburdensome, repetitious, or privileged may be grounds for objection by the opposing party.

c. Hearings are part of the investigative process and are closed to the public. Attendance will be limited to persons determined by the AJ to have direct knowledge relating to the complaint. The State National Guard will provide for the attendance at the hearing of all NG personnel approved as witnesses by the AJ.

d. The AJ will receive into evidence any information or testimony that the AJ deems relevant to the complaint. Rules of evidence will not be applied strictly and the AJ may exclude irrelevant or repetitious evidence.

e. The verbatim transcript and all documents submitted to and accepted by the AJ at the hearing will be made part of the record of the hearing.

(1) If the State National Guard submits a document that is accepted, it will provide a copy of the document to the complainant.

(2) If the complainant submits a document that is accepted, the AJ will make the document available to the State National Guard representative for reproduction.

6-9. Authority of the AJ

The AJ has the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any persons from the hearing for contumacious conduct or misbehavior that obstructs the hearing. In addition, the AJ is authorized to:

a. Require the NGB, State National Guard, the complainant, or any employee of a Federal agency to produce such documentary and testimonial evidence as the AJ deems necessary.

b. Administer oaths and require that statements of witnesses be under oath or affirmation or by written statement under penalty of perjury.

c. When the complainant, National Guard officials, or any National Guard personnel fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, the AJ may:

(1) Draw an adverse inference that the requested information or testimony of the requested witness would have reflected unfavorably on the party refusing to provide such information.

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

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

(4) Issue a decision fully or partially in favor of the opposing party.

(5) Take other appropriate actions.

d. Refer to the Disciplinary Committee of the appropriate Bar Association any attorney who refuses to follow orders of the AJ or otherwise engages in improper conduct.

e. After reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or the National Guard any representative who refuses to follow orders of the AJ or otherwise engages in improper conduct.

6-10. Findings and Conclusions of the AJ
The AJ will issue findings of fact and conclusions of law on the merits of the complaint within 180 days of the receipt of the hearing request by EEOC [6-7a], unless the AJ makes a written determination that good cause for an extension exists. The AJ will also order appropriate relief if discrimination is found with regard to the matters that gave rise to the complaint. The AJ may issue findings and conclusions without a hearing or with a limited hearing under conditions explained in subparagraphs a or b.

a. If the complainant or the State National Guard believes that some or all of the material facts are not in genuine dispute and there is no genuine issue of credibility, the following procedures apply:

(1) At least 15 days prior to the hearing, or at an earlier time required by the AJ, the complainant or the State National Guard representative will file a statement with the AJ that must:

(a) Set forth the facts and refer to the record that supports these facts.

(b) Demonstrate that there is no genuine issue as to any such material fact or facts.

(c) Be served on the opposing party.

(2) The other party may file an opposition within 15 days of the receipt of the statement. This opposition may refer to the record to rebut the statement or may consist of an affidavit stating reasons why facts cannot be presented to oppose the request.

(3) The AJ may then order that discovery be permitted or may limit the hearing to the issues remaining in dispute or issue findings and conclusions without holding a hearing.

b. If the AJ determines on his or her own initiative that some or all the facts are not in genuine dispute, the AJ may limit the hearing to the issues remaining in dispute or issue findings and conclusions without holding a hearing. In such a case, the AJ will give notice to the parties and provide them an opportunity to respond in writing within 15 days.

c. The AJ will send copies of the entire hearing record, including the transcripts of the testimony and the findings and conclusions, to the complainant and NGB CMSA. If the AJ sends these documents to the State National Guard rather than to NGB CMSA, the SEEM will immediately:

(1) Mark the package to clearly show the date and time that the package was received.

(2) Ensure that the entire package (including the box or wrapper in which it was received) is transmitted to NGB CMSA without delay and in its entirety by express mail or equivalent. Since EEOC time limits for decisions start as soon as the package is received by the National Guard at any location, any delay in transmittal could result in the inability to render a timely NGB decision.

(3) By telephone, notify CMSA of the receipt of the hearing record and of the transmittal schedule.

(4) Make sure that no part of the file is copied or kept locally and that no part of the file is provided to any individual.

6-11. The National Guard Bureau final decision
On behalf of the Chief, NGB, the Director, EEO, or the Chief, NGB CMSA, will issue the final decision, in writing, on the merits of the complaint [figure F-24]. The final decision will provide a finding on the merits of each issue in the complaint and set forth the reasons for the decision. The decision will direct appropriate relief in accordance with chapter 7, if discrimination is found. The decision may also direct other remedial or corrective actions, even if no discrimination is found.

a. The final decision will be issued within 60 days of the receipt of the complainant's request for an immediate decision or within 60 days of the receipt of the hearing record and the findings and conclusions of the AJ [6-10].

b. If the complainant has not requested an immediate final decision or a decision with a hearing [6-5 and 6-6], a final decision will be issued within 60 days of the end of the 30 day period during which the complainant can request one of these decisions.

c. The decision will be sent to the complainant and his or her representative [9-5] by certified mail, return receipt requested, and a copy will be sent to the AG. The decision may also be personally delivered to the complainant and the representative by an official of the National Guard. If so, the complainant and the representative will acknowledge receipt by signing and dating the official copy of the notice of decision. If they decline to sign the copy, the server will sign it and indicate on the copy to whom and when the decision was served. The receipt or the signed copy will be filed in the complaint file.

d. If a hearing was conducted, the complainant and the State National Guard will receive a copy of the hearing record, to include the findings and conclusions of the AJ. The NGB decision may adopt, reject, or modify the findings and conclusions of the AJ. If the NGB decision modifies or rejects the recommended decision, the decision letter will give the specific reasons for the rejection or modification.

e. The NGB final decision will require any remedial action authorized by law that is judged to be necessary or desirable to resolve issues of discrimination and promote the policy of equal opportunity, whether or not discrimination is found.

f. If discrimination or retaliation is found, the NGB decision will require full relief. In addition, State National Guard officials will review the record, determine whether culpability should be assigned, and decide if disciplinary action should be taken against culpable individuals [7-14].

g. If discrimination or retaliation is found, the decision will advise the complainant and his/her representative that the attorney's fees and costs may be awarded and that any request for this award must be documented and filed as described in chapter 7 of this regulation. In situations when

the NGB determines not to award attorney's fees and costs to a prevailing complainant, the decision will state the specific reasons for denying the award. A finding or admission of discrimination or retaliation raises a presumption of entitlement to attorney's fees and costs [chapter 7].

h. The NGB final decision will inform the complainant of the right to appeal the decision to the EEOC, or the right to file a civil action, and of the applicable time limits. [chapter 8]

6-12. Failure to issue a final decision

a. If within 60 calendar days after the receipt of the hearing record NGB has not issued a final decision rejecting or modifying the AJ's findings and conclusions, such findings and conclusions and the relief ordered will become the final decision.

b. If within 180 days after the filing of the formal complaint, NGB has not issued a final decision, the complainant may file a civil action in an appropriate U.S. District Court under conditions specified in chapter 8. These time limits are extended upon agreement with the complainant as indicated in paragraph 5-12b, [1-4].

6-13. Other final decisions and determinations

When the provisions of paragraph 4-10 apply subsequent to the acceptance of a formal complaint, NGB will determine whether a complaint should be dismissed or whether a final decision in lieu of dismissal is appropriate.

a. If at some stage after the formal complaint has been accepted, a complainant fails to provide relevant information or to otherwise proceed with the complaint, the State National Guard will, after following procedures of paragraph 4-10i, request that NGB adjudicate the complaint. NGB may issue a final decision on the merits of the complaint if sufficient information is available to do so or NGB may determine that the complaint will be dismissed.

b. Upon being advised by EEOC that a complainant has failed to cooperate, such as by failing to appear at a scheduled hearing or by failing to provide information requested by EEOC, NGB may issue a final decision on the merits of the complaint or determine that the complaint will be dismissed [4-10i].

c. When, during the administrative processing of the discrimination complaint, the complainant files a civil action on the same matter, a copy of that civil action will be forwarded to NGB CMSA. Upon coordination with NGB JA, a determination will be made whether the complaint should be dismissed.

6-14. Closure of formal complaints

When the complaint is administratively closed, the SEEM will submit a report of the disposition of the discrimination complaint case [appendix E]. Notwithstanding administrative closure of a complaint, the complaint will be considered as an open case during the time that any civil action is ongoing. A complaint will be considered administratively closed when:

a. NGB has reviewed the initial dismissal of a complaint and has determined that the dismissal was proper, providing that an appeal has not been filed. To allow for the period of time for filing an appeal and its receipt by the National Guard, a dismissed complaint will not be closed until at least 35 days have passed after the complainant has received the notice of dismissal.

b. It has been dismissed at some stage after it has been initially properly accepted, providing that an appeal has not been filed. To allow for the period of time for filing an appeal and its receipt by the National Guard, a dismissed complaint will not be closed until at least 35 days have passed after the complainant has received the notice of dismissal.

c. NGB notifies the State National Guard of the administrative closure of the complaint subsequent to NGB review of a withdrawal or executed settlement agreement.

d. NGB has issued a final decision, providing that an appeal has not been filed. To allow for the period of time for filing an appeal and its receipt by the National Guard, the complaint will not be closed until at least 35 days have passed after the complainant has received the final decision.

e. NGB notifies the State National Guard of the administrative closure of the complaint subsequent to EEOC issuing a decision that upholds an NGB dismissal or final decision, providing that a request for reconsideration has not been filed. To allow for the period of time for filing a request for reconsideration and its receipt by the National Guard, the complaint will not be closed until at least 35 days have passed after the complainant has received the EEOC decision.

f. NGB advises the State National Guard that a complaint is closed under conditions not listed above.

Chapter 7
Withdrawals, Settlements, Remedies, and Compliance

7-1. General

This chapter describes how complaints are withdrawn or settled. It supplements the procedures prescribed in other parts of this regulation. Appendix D contains a summary of time limits applicable to this chapter.

7-2. Withdrawal of a complaint

A complainant has the right to voluntarily withdraw a complaint of discrimination at any time during the process. However, complainants will not be coerced into any withdrawal action. Withdrawal of a complaint terminates the administrative processing of the complaint and no further settlement is required. Note, however, the policy in paragraph 7g of volume I of this regulation. Administrative processing of a formally filed complaint will not be terminated until authorized by NGB [6-14]. For such authorization to be received the withdrawal must be:

a. In writing, signed and dated by the complainant.

b. Voluntarily tendered by the complainant.

c. Clear as to the issues or discrimination complaint(s) that are being withdrawn. Whenever possible, the complainant should indicate the NGB Case Number of the complaint being withdrawn.

d. Unconditional. Conditional withdrawals or withdrawals containing reservations stated by the complainant will not terminate the administrative processing of the complaint.

e. Forwarded to NGB CMSA for review and administrative closure of the complaint.

(1) If the withdrawal of a formal complaint occurs before the official discrimination complaint case file has been forwarded to NGB, the withdrawal will be accompanied by the complaint case file, in original and two copies, prepared as described in chapter 12.

(2) If the withdrawal of a formal complaint occurs after an investigation has been requested but before the start of the on-site investigation, the withdrawal will be transmitted to NGB by facsimile or overnight mail service so that the investigation may be cancelled.

(3) If the withdrawal of a formal complaint occurs during the on-site investigation, the investigator may not cancel the investigation until authorized by NGB. Therefore, the withdrawal will be immediately transmitted by facsimile so that it can be reviewed and, if appropriate, the investigation cancelled.

7-3. Settlement opportunities

In accordance with the policies in volume I of this regulation, National Guard officials will make reasonable efforts to voluntarily settle complaints of discrimination as early as possible and throughout the administrative processing of complaints, including the pre-complaint counselling stage.

a. This regulation specifically provides for dispute resolution procedures to assist in the settlement of complaints and includes specific opportunities for settlement attempts [3-9, 3-10, 3-14, 5-4, 5-16, appendix B].

b. To provide the widest possible latitude for settling complaints before they are filed formally, the requirements of this chapter do not govern the settlement of complaints during pre-complaint processing described in chapter 3, except for the enforcement provisions listed in paragraph 7-12.

7-4. Requirements for settlement agreements

Settlement agreements, including those that provide full relief, are legally binding on both parties. The provisions of this paragraph are designed to ensure that such settlements meet the intent of Federal and National Guard regulations and are legally sufficient.

a. Settlement agreements will be in writing using the format of figure F-25. Settlement agreements will be executed between the State National Guard on one part and the complainant on the other part [9-1].

b. All settlement agreements, to include offers of full relief, will contain the following statement: "This is a final resolution of all issues in the discrimination complaint NGB Case Number T-XXX-XX-X-XX-XX-X and any further administrative or legal proceedings, in any forum whatsoever, are waived except for enforcement of this settlement or attorney's fees appeals under chapters 7 and 8, volume II, NGR (AR) 690-600/NGR (AF) 40-1614 and 29 CFR 1614.401(a) and 1614.501(e)(2)." The last sentence dealing with attorney's fees will be omitted when there is no attorney or when no attorney's fees are to be paid as part of the settlement.

c. When attorney fees are to be awarded as part of the settlement, the settlement will contain one of the following provisions:

(1) After a specific monetary sum has been negotiated, and, if required by paragraph 7-5d, approved by NGB: "The _____ National Guard agrees to pay the amount of _____ dollars ($____) to Mr./Mrs./Ms._____, attorney for the complainant, as reasonable fees and costs incurred in the processing of the complaint. Such payment will be made within _____ days (XX) after the date of the execution of this settlement agreement."

(2) In the case of offers of full relief, if no specific monetary sum has been negotiated: "The _____ National Guard agrees to pay Mr./Mrs./Ms. _____, attorney for the complainant, reasonable fees and costs incurred in the processing of the complaint. Such payment will be made as provided in chapter 7 of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614. The receipt of a copy of that chapter is hereby acknowledged."

d. The statement in subparagraph b, above, suffices to indicate termination of the complaint. Therefore, a settlement will not contain provisions for the withdrawal of the complaint. It may contain provisions for the withdrawal of any civil action filed. If any administrative appeals or actions are pending with EEOC, NGB will advise EEOC to terminate such actions based upon the execution of a settlement agreement.

e. Punitive and compensatory damages are not authorized in settlement during the administrative processing of discrimination complaints. Compensatory damages may only be awarded in civil actions filed under the Civil Rights Act of 1991.

f. Only technician remedies may be awarded as settlement of technician discrimination complaints.

g. Settlement agreements may not award to the complainant remedies or benefits beyond those that the complainant would be entitled to under full relief [7-6].

h. Proposed settlements may indicate conditional terms; however, contingent and conditional clauses will not be included in final, executed settlement agreements. A complaint cannot be administratively closed until a complete unconditional settlement is executed.

i. Offers of full relief and settlements made prior to an NGB final decision will contain the following statement: "The National Guard Bureau (Agency) has not issued a final decision on the merits of the issues in this discrimination complaint and nothing in this settlement agreement constitutes a decision or a finding on the merits

of the issues in this complaint." Other discaimers of fault, wrongdoing, or discrimination will not be used.

j. Terms of settlements will be as specific as possible. Dollar amounts should either be specified or the basis of computation listed. Words such as "never," "all," or "appropriate" should be replaced by quantifiable, specific terminology.

k. Formal apologies or the taking of disciplinary or adverse personnel actions will not be made a part of any settlement agreement.

l. Settlement agreements will not contain provisions that deny complainants the rights guaranteed by statutes, Federal rules or this regulation; for example, the right to file a complaint, to oppose discrimination, or to participate in any process established by the National Guard Civilian Discrimination Complaint System. Likewise, a complainant may not settle rights or claims that arise after the date of the settlement.

m. Lump sum payments of money which are unrelated to back pay or attorney's fees or costs are not authorized.

n. Complainants will be advised of their right to consult with an attorney before executing a settlement agreement.

7-5. Settlements of complaints

The provisions of this paragraph apply to settlements that do not involve a certified offer of full relief [7-6]. Settlements of individual complaints may be reached though management need not admit fault, wrongdoing, or discrimination [7-4i].

a. Settlement conditions under this paragraph may include:

(1) Retroactive appointment or promotion with back pay, or an opportunity for the complainant to have the benefit that had been denied, such as training, overtime scheduling, detailing, or other employment benefits.

(2) Action to change or do away with personnel policies or practices.

(3) Attorney's fees or costs [7-10 and 7-11].

(4) All terms that would constitute full relief except for the certification and dismissal provisions of paragraph 7-6. Such settlements can save valuable time and resources as the procedures involved in full relief offers are not required and, if the settlement is accepted by the complainant, the complaint is considered resolved and can be appropriately closed [6-14]. However, negotiated settlements may not go beyond terms that would constitute full and complete relief [7-4g and 7-6].

b. Settlement agreements between the State National Guard and a complainant will be reviewed by the SEEM, the JA, and the SPMO to ensure that the settlement is in accordance with the provisions of this chapter and does not violate laws and regulations, equal opportunity policies, or technician personnel rules. Unless a settlement requires approval by NGB [7-5d] it will be approved and signed at the State National Guard level.

c. When a DRP [appendix B] is used to achieve a settlement for a formal complaint, the settlement must meet the requirements stated in this chapter.

d. NGB approval of a settlement is required when the payment to the complainant or to the attorney for the complainant will exceed $5,000. A proposed, unsigned settlement agreement will be forwarded to NGB CMSA for review and coordination with the NGB JA. Upon approval of the settlement, it will be returned to the State National Guard for execution and submission as described in paragraph 7-5e.

e. The administrative processing of a formally filed complaint will not be terminated until authorized by the NGB. The executed, signed, and dated settlement agreement will be forwarded to NGB for review and administrative closure of the complaint.

(1) If the settlement of a formal complaint occurs before the official discrimination complaint case file has been forwarded to NGB, the settlement will be accompanied by the complaint case file, in original and two copies, prepared as described in chapter 12 [4-8e].

(2) If the settlement of a formal complaint occurs after an investigation has been requested but before the start of the on-site investigation, the settlement will be transmitted to NGB by facsimile or overnight mail service so that the investigation may be cancelled.

(3) If the settlement of a formal complaint occurs during the on-site investigation, the investigator may not cancel the investigation until authorized by NGB. Therefore, the settlement will be immediately transmitted by facsimile so that it can be reviewed and, if appropriate, the investigation cancelled.

7-6. Certified offer of full relief

The provisions of this paragraph apply to offers of full relief made prior to issuance of the notice of investigation completion [5-15]. An offer of full relief will be prepared in the form of a settlement agreement [7-4]. That settlement agreement will contain all the applicable elements of full relief to which the individual would have been entitled if there had been a finding of discrimination on each issue that has been accepted [7-7 through 7-9 and appendix A].

a. When the State National Guard proposes to offer full relief to a complainant, the offer should be informally discussed with the complainant and his or her representative. However, a formal offer will not be made until receipt of the certification described in paragraph 7-6c.

b. After the full relief offer has been discussed with the complainant, it will be forwarded to NGB CMSA for certification along with a copy of the notice required by paragraph 7-7a(1).

c. The offer will be coordinated with appropriate members of the NGB staff to ensure compliance with applicable legal and personnel requirements. If found sufficient, the offer of full relief will be certified as constituting the full

relief authorized and required by law and returned to the State National Guard for execution.

d. After such certification has been received from NGB, the complainant will be advised in writing of the offer of full relief [figure F-20]. The complainant will also be advised that failure to accept the settlement offer within 30 calendar days will result in the dismissal of the complaint.

e. The offer will either be delivered in person with a signed and dated acknowledgment of receipt or sent by certified mail with return receipt requested. The complainant then has 30 calendar days after receipt to accept the offer.

f. If the complainant fails, within 30 calendar days of the receipt of the offer of settlement, to accept the offer of full relief, the AG will dismiss the complaint on behalf of the NBG using the notice in figure F-21, unless the complainant can show that circumstances beyond his or her control precluded a response within the 30 day time limit [4-11].

g. If the complainant accepts the offer of full relief, the executed, signed, and dated settlement agreement, to include a copy of the notice required by paragraph 7-7a(1), will be forwarded to NGB CMSA, so that the complaint case may be administratively closed.

7-7. Remedies and full relief

a. When NGB, EEOC, or a Federal court finds that an applicant, a technician, or a former technician has been discriminated against, the National Guard must provide full relief [7-7 through 7-9 and appendix A]. If NGB issues a final decision that includes a finding of discrimination, it will require full relief which will include the following elements, as appropriate:

(1) Notification to all employees of the State National Guard in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur [figure F-26].

(2) Commitment that corrective, curative, or preventive action will be taken, or measures adopted, to ensure that violations of the law, similar to those found, will not recur.

(3) An unconditional offer to each identified victim of discrimination of placement in the position that person would have occupied if the discrimination had not occurred, even if this results in the displacement of another employee (nondiscriminatory placement). However, the need to accomplish this objective in the least disruptive manner is recognized and offer of a substantially equivalent position, as a preferred alternative by the State National Guard, is acceptable.

(4) Payment to each identified victim of discrimination, on a make whole basis, for any loss of earnings that person may have suffered as a result of discrimination.

(5) Commitment that the State National Guard will cease from engaging in the specific unlawful employment practice found in the case.

b. Specific relief for applicants, technicians, and former technicians is addressed in paragraphs 7-8 and 7-9. Where the State National Guard believes that the complainant has failed to mitigate his or her damages, it is the responsibility of the State National Guard to prove this by a preponderance of evidence and to ensure that this information is made part of the complaint case file prior to the issuance of the NGB final decision.

c. A finding of discrimination or retaliation raises a presumption of entitlement to attorney's fees and costs [7-10, 7-11].

7-8. Relief for an applicant

If NGB or EEOC finds that an applicant for technician employment has been discriminated against, the applicant will be offered the position he or she would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position, unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination.

a. The NGB final decision will advise the AG whether the applicant must be offered a position, as explained above. If required, the State National Guard will make the offer of employment, as described below.

(1) The offer will be in writing and will indicate whether the applicant is being offered the position for which he or she had applied or a substantially equivalent position (with an explanation of how this position is like the one for which the applicant had applied). The applicant will also be informed of his or her right to the award of back pay [7-8c] if the offer of employment is declined.

(2) The offer will either be delivered in person with a signed and dated acknowledgment of receipt or sent by certified mail with return receipt requested. The complainant then has 15 calendar days from receipt to accept or decline the offer.

(3) Failure by the complainant to accept the offer within 15 calendar days of the receipt will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control precluded a response within the 15 day time limit [4-11].

b. If the offer of employment is accepted, appointment will be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, will be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty. Interest on back pay will be included in the back pay computation. The individual will be deemed to have performed service for the National Guard during this period for all purposes except for meeting service requirements for completion of a probationary or trial period that may be required.

c. If the offer of employment is declined, the State National Guard will award the individual a sum of money equal to the back pay that he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the

offer was declined, subject to the limitations of paragraph 7-8f. Interest on back pay will be included in the back pay computation.

d. When NGB or EEOC finds that discrimination existed at the time the applicant was considered for employment but also finds clear and convincing evidence that the applicant would not have been hired even absent discrimination, the National Guard will, nevertheless, take all steps necessary to eliminate the discriminatory practice and to ensure that it does not recur.

e. This paragraph and 29 CFR 1614.501(b) will be cited as the authority under which the above described appointments and awards of back pay will be made.

f. Back pay under paragraphs 7-8 and 7-9 for complaints under Title VII of the Civil Rights Act or the Rehabilitation Act may not extend from a date earlier than 2 years prior to the date on which the complaint was initially formally filed by the complainant.

7-9. Relief for a technician
If NGB or EEOC finds that a National Guard technician or former technician has been discriminated against, the NGB final decision will require the State National Guard to provide full relief [7-7 and appendix A]. The final decision will require remedial action that will include, but need not be limited to, one or more of the following actions:

a. Nondiscriminatory placement with back pay, computed in the manner prescribed by 5 CFR 550.805, unless the record contains clear and convincing evidence that the personnel action that had been taken would have been taken even in the absence of discrimination. Interest on back pay will be included in the back pay computation. The back pay is subject to limitation of paragraph 7-8f. For promotions, the back pay may not exceed the date on which the employee would have been promoted.

b. If the record contains clear and convincing evidence that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the State National Guard will, nevertheless, take all steps necessary to eliminate the discriminatory practice and to ensure that it does not recur.

c. Cancellation of an unwarranted personnel action and restoration of the employee.

d. Deletion from National Guard records of any adverse materials relating to the discriminatory personnel practice.

e. Full opportunity to participate in the benefits denied the technician, such as training, preferential work assignments, or scheduled overtime.

7-10. Fees, costs, and monetary awards
All fees, costs, and monetary awards available as remedies for or in the settlement of discrimination complaints are only applicable to complaints involving discrimination prohibited by Title VII of the Civil Rights Act and the Rehabilitation Act. Any fees, costs, or monetary awards under this regulation will be paid by the State National Guard allegedly responsible for the discrimination.

a. If discrimination or retaliation is found, the NGB final decision will advise the complainant, the complainant's representative, and the AG that the attorney's fees and costs may be awarded as prescribed in this chapter of the regulation.

b. Attorney's fees and costs in negotiated settlements will only be paid if it is determined that the complainant has substantially prevailed throughout the negotiated settlement. A certified full relief offer raises the presumption of entitlement to an award of attorney's fees and costs even though a finding on the merits of the complaint has not been made.

c. The following restrictions apply to attorney' fees:

(1) No fees will be paid for the services of any employee of the Federal Government.

(2) Fees are authorized only for services performed after the filing of a formal written complaint under paragraph 4-2, and only after the complainant has notified the State National Guard or the NGB that he or she is represented by an attorney (to include the name and address of that attorney). However, fees are allowable for a reasonable time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the NGB or the State National Guard that are signed by the representative, will constitute notice of such representation.

(3) Fees are allowable only for the services of members of the Bar and for the services of law clerks, paralegals, or law students under the supervision of members of the Bar.

d. Reasonable expert witness fees may be paid as part of the attorney's fees and costs incurred in the processing of a complaint. Witness fees will be awarded in accordance with the provision of 28 U.S.C. 1821, except that no award will be made for a Federal employee who is in a duty status when made available as a witness.

e. Monetary awards of back pay are subject to the conditions and restriction of paragraphs 7-8b, 7-8c, 7-8f, and 7-9a. Interest on back pay will be included when the award of back pay is authorized.

f. Compensatory damages may be awarded as a result of civil action in discrimination complaint cases in cases of unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact). Compensatory damages are not available in the administrative complaint process.

7-11. Awarding attorney's fees and costs
This paragraph describes the procedures and requirements when attorney's fees and costs are to be awarded based on a NGB final decision, an offer of full relief, or a negotiated settlement.

a. The complainant's attorney must submit to the State National Guard representative a verified

statement [7-11e] of costs and attorney's fees, including expert witness fees as appropriate, within 30 calendar days of:

(1) The receipt of the NGB final decision, unless an appeal or request for reconsideration is filed.

(2) The date of the execution of a certified offer of full relief, if the amount to be awarded was not specified therein.

b. Based on the above submission and the guidance in this chapter, the amount of the fees and costs to be awarded will be made by mutual written agreement of the complainant, the complainant's representative and the State National Guard. Such agreement must be reached within 10 days of the receipt by the State National Guard representative of the attorney's statement of fees and costs. Any such agreement will be immediately reduced to writing. The amount agreed upon is subject to approval by NGB if:

(1) It exceeds the amount specified in the final decision or $5,000 if an amount is not specified in the final decision.

(2) It exceeds $5,000 as part of an offer of full relief under paragraph 7-6.

c. If agreement is not reached within 10 calendar days after receiving the certified statement, the State National Guard representative will forward to NGB CMSA the original and two (2) copies of:

(1) The documentation submitted by the complainant's attorney, to include proof of when it was received by the State National Guard.

(2) The recommendation of the State National Guard on the amount to be awarded, to include specific rationale and explanation of differences between the position of the complainant's attorney and the State National Guard.

d. After coordination with NGB JA, CMSA will either approve the amount requested by the complainant's attorney or issue a final decision on the amount of attorney's fees and costs.

(1) The decision must be issued within 30 calendar days after the receipt of the attorney's statement by the State National Guard.

(2) The decision will give the specific reasons for the amount of the award and provide a notice of right to appeal [figure F-24].

e. The complainant's attorney must submit a verified statement of costs and attorney's fees accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The amount of attorneys fees shall be calculated in accordance with existing case law using the following standards:

(1) The starting point will be the number of hours reasonably expended multiplied by a reasonable hourly rate.

(2) The above amount may be reduced or increased in considerations of the following factors, although ordinarily many of these factors are subsumed within the calculations set forth above. Only in cases of exceptional success will these factors be used to enhance the award. These factors are: The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, whether the handling of this case prevented other employment, the customary fee, whether the fee for the case was fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the reputation, ability, and experience of the attorney requesting the fees, the undesirability of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

f. To support the above calculations, the attorney should provide:

(1) The number of hours spent in preparing and presenting the case, as well as the time spent in preparing the fee request. This must specifically include the dates and a statement of exactly what was done. It must also describe the training and experience of each person who worked on the case and the number of hours spent by each.

(2) A sworn statement of the attorney's usual and customary hourly charge and the usual fee for each person who worked on the case. Other expenses that may be claimed include all telephone charges, photo copying, postage, and local transportation in connection with the processing or preparation of the complaint case.

(3) A sworn statement explaining if and how any other factors affect the amount of the award.

(4) Sworn statements by other attorneys in the relevant geographic area, who work in employment discrimination.

g. The costs that may be awarded are those authorized by 28 U.S.C. 1920, to include:

(1) Fees for the reporter for all or any of the stenographic transcripts necessarily obtained for the use in the case.

(2) Fees and disbursements for printing and witnesses.

(3) Fees for exemplification and copies of papers necessarily obtained for use in the case.

h. In situations when the NGB determines not to award attorney's fees and costs to a prevailing complainant, the final decision will state the specific reasons for denying the award.

7-12. Compliance with and enforcement of settlements

Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, will be binding on both parties.

a. If the complainant believes that the State National Guard has failed to comply with the terms of the settlement agreement, the complainant will notify NGB CMSA. The notification must be in writing with a copy furnished to the AG. The notification of the alleged noncompliance with the settlement agreement must be postmarked within 30 calendar days of when the complainant knew, or should have known, of the alleged non-compliance.

b. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased when the settlement was executed.

c. Within 7 calendar days after the receipt of the copy of the complainant's allegations, the State National Guard will furnish NGB CMSA with appropriate comments regarding such allegations. If the complainant's allegations that the settlement agreement is not being adhered to are supported, the State National Guard will indicate what actions it is taking to comply with the terms of the settlement.

d. Upon receipt of the comments from the State National Guard, NGB will review the case, obtain additional information, as needed, and respond to the complainant. The response will either indicate how the allegations are to be resolved or will direct that the complaint processing be reinstated. NGB will make the determination within 30 calendar days of the receipt of the complainant's allegations. A copy of the NGB determination will be provided to the complainant and the State National Guard.

e. If the complainant is not satisfied with NGB's determination on the matter, the complainant may appeal to EEOC within 30 days of the receipt of the NGB determination. A copy of the appeal must be provided to NGB CMSA and the SEEM.

f. If NGB has not responded to the complainant with a determination regarding the allegations of noncompliance, the complainant may file an appeal with EEOC 35 calendar days after NGB has received the written allegations of noncompliance. A copy of the appeal must be provided to NGB CMSA and the SEEM.

g. NGB may submit a response to EEOC within 30 days after receiving a notice of the appeal.

h. If an appeal is made to EEOC, EEOC will determine whether the settlement agreement has been breached. Prior to rendering its determination, EEOC may request that the parties submit whatever additional information or documentation it may deem necessary or it may direct that an investigation or hearing on the matter be conducted. If EEOC determines that the agreement has been breached and the noncompliance is not attributable to acts or conduct of the complainant, EEOC may order compliance or it may order that the complaint be reinstated.

i. Allegations that retaliation or further discrimination violate a settlement agreement will be processed as specified in chapters 3, 4, and 5.

7-13. Compliance with and enforcement of decisions
Relief ordered in a final decision by NGB is mandatory and binding on the National Guard, unless it is appealed by the complainant to EEOC or to a Federal court. Relief ordered in a final decision on appeal to EEOC is mandatory and binding on the National Guard unless it is subject to reconsideration by EEOC.

a. If the complainant believes that the State National Guard is not complying with a final decision by NGB, the complainant will notify NGB CMSA. The notification must be in writing and will specifically set forth the reasons that led the complainant to believe that the State National Guard is not complying with the decision. A copy will be furnished to the AG. The notification of the alleged noncompliance with the final decision must be postmarked within 30 calendar days of when the complainant knew, or reasonably should have known, of the alleged noncompliance.

b. Processing of noncompliance with an NGB final decision will be the same as for processing of noncompliance with a settlement agreement under paragraphs 7-12c through i.

c. A complainant may petition EEOC for enforcement of an EEOC appeal decision. The petition must be submitted to the EEOC Office of Federal Operations (OFO). The petition will specifically set forth the reasons that led the complainant to believe that NGB or the State National Guard is not complying with the decision.

d. On behalf of EEOC, OFO will take all necessary action to determine whether the EEOC decision is being implemented and will make efforts to ensure that it is implemented.

e. If necessary, OFO may issue a clarification of the decision. The clarification will not change the result of the decision or enlarge or diminish the relief ordered, but may further explain the meaning or intent of the decision.

f. If OFO cannot obtain satisfactory compliance, appropriate findings and recommendations may be made to EEOC or the matter may be referred to another appropriate agency.

g. EEOC may issue a notice to the Chief, NGB, to show cause or to appear before EEOC or it may refer the matter to the Office of Special Counsel for enforcement action.

h. If EEOC determines that there is noncompliance and refusal to submit any required action for compliance, EEOC may notify the complainant of the right to file a civil action for enforcement and to seek judicial review.

7-14. Disciplinary or adverse personnel actions
a. The National Guard Bureau final decision will require any remedial action authorized by law that is judged to be necessary or desirable to resolve issues of discrimination and promote the policy of equal opportunity, whether or not discrimination is found. However, neither the ROI nor the final decision make a determination as to the culpability of any individuals who may have been involved in the matters that gave rise to the complaint. Such determination is to be made by the AG and appropriate State National Guard officials.

b. Disciplinary action is not a remedy that may be personally demanded by a complainant. It is, therefore, not an issue for discussion in a hearing or fact finding on the complaint and is not made a part of a final decision or any settlement.

c. When discrimination is found or when a complaint is settled or withdrawn and it appears that discrimination may have occurred, the AG will direct appropriate inquiry or investigation to determine whether any culpability exists and whether to take any disciplinary or adverse personnel action against appropriate individuals.

Discipline or adverse action against technician personnel is taken in accordance with TPR 752.

d. When discipline or adverse action is not warranted, other corrective action may be taken, if proper. For example, EEO training may be required for specific persons or specific authority, such as selection of personnel or leave approval, may be withdrawn.

e. The basis for the decision to take or not take disciplinary action will be made a matter of written record and included in a report of corrective action taken. This report of corrective action, signed by the Adjutant General, is attached to the report of disposition [6-14 and chapter 13] and sent to NGB CMSA. The report will not be made a part of the complaint file.

Chapter 8
Appeals and Civil Actions

8-1. General
This chapter covers actions involving appeals and reconsiderations and the filing of civil actions. Some special provisions on appeals are also contained in chapters 7 and 10. Appendix D contains a summary of time limits applicable to this chapter.

8-2. The right to appeal and to file civil action
a. If a complainant wishes to pursue the discrimination complaint beyond NGB, the complainant may appeal to the Equal Employment Opportunity Commission or may file a civil action in an appropriate United States District Court.

b. Civil action may be filed when a complainant has exhausted administrative remedies [8-8, 8-9]. In addition, a complainant is entitled, in certain cases, to file civil actions regardless of whether he or she pursued any administrative complaint processing or in lieu of such administrative processing [8-10, 8-11].

8-3. Appellate procedures
EEOC makes determinations on appeals based on the documentation in the official discrimination complaint case file and all written statements and briefs submitted with the appeal. EEOC may supplement the record by an exchange of letters or memorandums, by investigation, by remand to NGB, or other procedures.

a. A complainant may appeal a dismissal of all or a portion of a complaint.

(1) When such a dismissal is made after a formal complaint is initially filed in accordance with paragraph 4-2, NGB automatically reviews the dismissal to ensure that the dismissal was proper [4-9].

(2) A dismissal made under the provisions of paragraph 4-10f is not appealable to EEOC unless the complainant alleges that the dismissed complaint or issues were not a mixed case matter.

b. A complainant may appeal the NGB final decision on the merits of the complaint.

c. An agent in a class complaint may appeal the NGB decision to accept or dismiss all or a portion of a class complaint or a final decision on a class complaint.

d. A class member may appeal the NGB final decision on a claim for individual relief under a class complaint.

e. Both the agent in a class complaint and a class member may appeal the NGB final decision on a petition regarding the resolution of a class complaint [chapter 11].

f. A grievant may appeal the final decision of NGB, the arbitrator, or the Federal Labor Relations Authority (FLRA) on a grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal to EEOC if the matter initially raised in the negotiated grievance procedure is:

(1) Still ongoing in that process.
(2) In arbitration.
(3) Before the FLRA.
(4) Appealable to the MSPB.

g. A complainant, agent, or individual class member may appeal alleged noncompliance with a settlement agreement or a final decision [7-12, 7-13].

h. A complainant may appeal the NGB final decision on attorney's fees and costs [7-11].

8-4. Filing an appeal
a. Appeals must be filed by mail, personal delivery, or facsimile with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. EEOC Form 573, Notice of Appeal/Petition should be used and should indicate what is being appealed.

b. A copy of the appeal will be furnished to NGB CMSA and the SEEM or as indicated in the notice of dismissal or NGB final decision. In or attached to the appeal to EEOC, the complainant must certify the date and method by which service was made to NGB CMSA and the SEEM.

c. A complainant may appeal allegations of noncompliance with settlements and final decisions 35 days after serving the notice of noncompliance on NGB.

d. An appeal of NGB determination on allegations of noncompliance must be filed within 30 days after the receipt of the NGB determination [7-12 and 7-13]. If the complainant is represented by an attorney of record, the appeal must be filed within 30 days after the receipt of the NGB determination by the attorney.

e. For mixed case complaints, see paragraphs 10-5 through 10-9.

f. For all other appeals, the complainant must file the appeal within 30 days after the receipt of the dismissal notice or the NGB final decision by the complainant. If the complainant is represented by an attorney of record, the appeal must be filed within 30 days after the receipt by the attorney of the dismissal or final decision.

g. Any statement or brief in support of the appeal must be submitted to EEOC within 30 days after filing the appeal. A copy of the supporting statement or brief must be provided to NGB CMSA and to the SEEM.

8-5. National Guard actions on appeal

a. When NGB receives the complainant's appeal and supporting statement, NGB will review the basis for the appeal and the matters presented by the complainant, the complaint case file, and the dismissal or final decision that is being appealed. Based on this review, NGB may decide to vacate or modify the dismissal or decision, submit a statement regarding the appeal, to oppose the appeal, or to take no action.

b. If NGB decides to submit a statement or brief regarding or in opposition to the complainant's appeal, NGB may request input from the State National Guard. To ensure that the statement or brief is provided to EEOC within the established time limit, any submission by the State National Guard will:

(1) Be prepared as representing an NGB position rather than a local State National Guard view and be typed on plain bond paper so that the document can be enclosed with the NGB submission to EEOC without revision or retyping.

(2) Make appropriate references to evidence in the complaint file and to citations of 29 CFR 1614, case law, or prior EEOC decisions in providing rationale to oppose the granting of the appeal.

(3) Be transmitted to NGB CMSA by facsimile or overnight mail delivery within 7 days after receiving the NGB request for input unless NGB CMSA has established a different submission requirement.

c. Within 30 days of the receipt of a request from EEOC, NGB CMSA will provide to EEOC a copy of the complaint file and any statement or brief regarding or in opposition to the appeal, after coordinating such statement or brief with NGB JA. A copy of the NGB letter to EEOC, to include any comments made regarding or in opposition to the appeal, will be provided to the complainant and the State National Guard.

8-6. Decisions on appeal

EEOC will issue written appeal decisions to NGB and the complainant, setting forth the reasons for the decisions. Decisions will be based on the preponderance of evidence. If the decision contains a finding of discrimination, it will include the appropriate remedies and, where applicable, entitlements to interest and attorney's fees and costs.

a. EEOC will dismiss appeals that are not timely, if a civil action has been filed, as indicated in paragraph 8-14, or if the appeal is procedurally defective [4-10].

b. Upon receipt of the decision, NGB will review the rationale relied upon by EEOC in reaching its decision and the conclusions and findings in the decision. Depending on the outcome of this review, issues involved, and time constraints, NGB may file for reconsideration or determine that a request for reconsideration is not appropriate. NGB may request information or input from the State National Guard in reaching its decision or in the filing of a reconsideration request [8-7d].

c. Based on the above, NGB will transmit the EEOC appeal decision to the SEEM with instructions for the implementation of the decision or request for State National Guard input or additional information, as appropriate.

d. Decisions issued by EEOC are final unless a request for reconsideration is filed in accordance with paragraph 8-7, or EEOC on its own motion reconsiders the decision.

8-7. Reconsideration of EEOC appeal decision

a. A request for reconsideration can be filed by either party (the complainant or NGB). The request or the statement or brief in support of the request will contain arguments or evidence to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law, regulation, or material fact or involved a misapplication of established policy; or

(3) The decision is of such exceptional nature as to have substantial precedential implications.

b. Reconsideration must be requested within 30 days of the receipt of the EEOC appeal decision. Any statement or brief in support of the request for reconsideration will be submitted with the request. Such request, along with any supporting statement or brief, must be served on the opposing party. The request for reconsideration must certify the date and method by which such service was made.

c. Within 20 days after the receipt of another party's request for reconsideration, the opposing party may file its own request for reconsideration or submit any statement or brief in opposition to the request. Such statement or brief will be served on the opposing party.

d. NGB may request the State National Guard to provide input in support of reconsideration or in opposition of a complainant's reconsideration request. Such input will:

(1) Be prepared as representing an NGB position rather than a local State National Guard view and be typed on plain bond paper so that the document can be enclosed with the NGB submission to EEOC without revision or retyping.

(2) Contain arguments or evidence to establish the criteria listed in paragraph 8-7a, to support the NGB request for reconsideration, or to establish that the complainant's request for reconsideration does not meet these criteria.

(3) Make appropriate references to evidence in the complaint file and to citations of 29 CFR 1614, case law, or prior EEOC decisions in providing rationale to support or oppose a request for reconsideration.

(4) Be transmitted to NGB CMSA by facsimile or overnight mail delivery within 7 days after receiving the NGB request for input unless

NGB CMSA has established a different submission requirement.

e. An EEOC decision on a request for reconsideration by either party is final and there is no further right by either party to a further reconsideration of the EEOC decision.

8-8. Civil actions in Civil Rights, Rehabilitation and Age Discrimination Acts complaints
The provisions of this paragraph apply to individual discrimination complaints, filed in accordance with paragraph 4-2, or class discrimination complaints, filed in accordance with paragraph 11, under Title VII of the Civil Rights Act, the Rehabilitation Act, or the Age Discrimination in Employment Act. A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief in a class complaint may file a civil action in an appropriate United States District Court:

a. Within 90 days after the receipt of the NGB final decision in an individual or class complaint, unless an appeal has been filed.

b. After 180 days from the date of filing of an individual or class complaint if NGB has not issued a final decision, unless an appeal has been filed.

c. Within 90 days after the receipt of the EEOC final decision on an appeal.

d. After 180 days from the date of filing an appeal with EEOC if EEOC has not issued a final decision on that appeal [8-6d].

8-9. Civil action in mixed case complaints
A complainant who has a complaint processed as a mixed case complaint under chapter 10, pursuant to 5 CFR 1201.151 et seq. or 29 CFR 1614.302 et seq., is authorized by 5 U.S.C. 7702 to file civil action in an appropriate United States District Court:

a. Within 30 days after the receipt of a final decision by NGB, unless an appeal is filed with the MSPB; or

b. Within 30 days after the receipt of the notice of final decision or action taken by the MSPB, unless the complainant files a petition for consideration with EEOC; or

c. Within 30 days after the receipt of the notice that EEOC has determined not to consider the decision of the MSPB; or

d. Within 30 days after the receipt of the notice that EEOC concurs with the decision of the MSPB; or

e. If EEOC issues a decision different from the MSPB decision, within 30 days after the receipt of the notice that the MSPB concurs in and adopts in whole the decision of EEOC; or

f. If MSPB does not concur with EEOC and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days after the receipt of the notice of the decision of the Special Panel; or

g. After 120 days after the date of filing a formal complaint under paragraph 4-2, if there is no final action or appeal to the MSPB; or

h. After 120 days after the date of filing of an appeal with the MSPB if the MSPB has not issued a decision; or

i. After 180 days after the date of filing of a petition for consideration with EEOC if the EEOC has not issued a decision, MSPB has not made a reconsideration of the decision, or the Special Panel has not issued a decision.

8-10. Civil action in Equal Pay Act complaints
a. Under section 16(b) of the Fair Labor Standards Act, a complainant is authorized to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, within three years after the date of the alleged violation of the Equal Pay Act regardless of whether the complainant pursued any administrative complaint processing in accordance with this regulation.

b. Recovery of back wages is limited to two years prior to the date of filing the suit or to three years if the violation is deemed willful. Liquidated damages in an equal amount may also be awarded.

c. The filing of an administrative complaint in accordance with this regulation and 29 CFR 1614 will not toll the time for the filing of a civil action.

8-11. Civil action in Age Discrimination in Employment Act complaints
Under the Age Discrimination in Employment Act, a complainant is authorized to file a civil action in a United States District Court as an alternative to filing an administrative complaint in accordance with this regulation and 29 CFR 1614. Within 30 calendar days before filing a civil action, the complainant must give notice to EEOC of the intent to file such action. The notice must be in writing, addressed to the Equal Employment Opportunity Commission, Federal Sector Programs, 1801 L Street, N.W., Washington, D.C. 20507. A copy of the notice will be sent to the NGB CMSA. The notice must be filed within 180 days of the alleged discrimination.

8-12. Damages in intentional discrimination
a. Section 102 of the Civil Rights Act of 1991 makes compensatory damages available in cases of intentional discrimination (not an employment practice that is unlawful because of its disparate impact). Such compensatory damages are only available in violations of Title VII of the Civil Rights Act, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973.

b. Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

c. The compensatory damages are available in civil action involving intentional discriminatory conduct that occurred on or after the effective date of the Civil Rights Act of 1991, i.e., 21 November 1991. Compensatory damages are not available in the administrative process and punitive damages involving NGB or other government agencies are not available in either the administrative process or by civil action.

d. If a complainant files civil action seeking compensatory damages, either the complainant or the opposing party may demand a trial by jury.

8-13. Coordination of civil actions

a. NGB-JA will coordinate any actions required by NGB or the State National Guard in connection with civil actions filed by complainants. NGB-JA will coordinate with the Litigation Offices of the Department of the Army or the Department of the Air Force Judge Advocate General and with the Justice Department, if required. NGB-JA will advise the State National Guard what legal support or actions may be required in the case. NGB-JA will notify NGB CMSA of any action on the case and provide NGB CMSA with a copy of the court's decision and any instructions for implementing the court decision.

b. If the SEEM or the State National Guard JA become aware that a complainant has filed a civil action on a pending or administratively closed complaint, he or she will immediately notify NGB CMSA, in writing, including a copy of any available documentation regarding the civil action.

c. CMSA will provide the information to NGB-JA and will make the official discrimination complaint case file available to NGB JA or the appropriate government representative. Requests for the complaint file, or for any documents therein, received by the State National Guard will be promptly referred to NGB CMSA, who is the official custodian of the discrimination complaint file.

d. If any action on a complaint is pending before EEOC when a civil action is filed by the complainant, CMSA will notify EEOC and request that EEOC terminate any administrative processing.

8-14. Effect of filing a civil action

a. When a complainant files civil action under paragraph 8-8 or 8-10, EEOC will terminate processing of any appeal pending before the Commission, ater being advised as indicated in paragraph 8-13d.

b. When a civil action is filed before NGB has issued a final decision on the complaint, NGB will dismiss the complaint, providing that 180 days have passed since the formal filing of the complaint [4-101].

Chapter 9
Representation and Witnesses

9-1. Parties to the complaint

A complaint of discrimination raised under the statutes implemented by this regulation and 29 CFR 1614 is filed against the Federal Agency that allegedly discriminated against the complainant. Thus, the two parties to the complaint are the Agency and the complainant.

a. As noted in volume I of this regulation, NGB is the Agency during administrative processing of the complaint and is considered a party to the complaint in administrative appeals and other actions before EEOC.

b. The State National Guard represents and acts for the agency (NGB) in the initial acceptance or dismissal of complaints, during investigative fact finding hearings, during hearings that precede a final decision by NGB, and in settlements of complaints. The State National Guard may be termed a party to the complaint in these specific instances.

c. For purposes of civil actions, the proper parties to the complaint are the complainant and the Secretary of the Army or the Air Force.

9-2. Named individuals

A discrimination complaint is filed against the Federal Agency, not against any individuals named by the complainant as being responsible for alleged acts of discrimination. The concept of an "Alleged Discriminating Official (ADO)" or a "Responsible Management Official (RMO)" is not included in either 29 CFR 1614 or this regulation. Since 1 Nov 87, EEOC has taken the position that "the discrimination complaint process does not determine the rights of those who have taken the actions [of discrimination], and therefore, it is wasteful to build in regulatory rights in that process for these individuals. All references to the concept of an 'alleged discriminating official' have been eliminated."

a. Individuals named by the complainant as being responsible for alleged acts of discrimination have no special standing in the complaint process and are not a party to the complaint. However, such individuals usually have information that has a bearing on the matters raised in the complaint, should provide testimony during hearings and may have a role in settlement of complaints. In addition they are entitled to be apprised of the specifics of any allegations made against them [7-13]. During the administrative complaint process such individuals will be made aware of allegations against them, as indicated below.

b. During the pre-complaint processing stage and the DRP [chapter 3], the EEO counselor and members of the DRP panel may interview such named individuals in attempts to resolve the complaint in the informal stage. At such times they may be apprised of the concerns and allegations voiced by the complainant.

c. After issues filed by the complainant have been determined to be properly accepted in accordance with paragraph 4-9a, the SEEM will advise any named individuals of accepted issues which refer to them. There is no requirement to inform them of any allegations against them that were contained in issues that have been dismissed.

d. In preparing the case for the investigative fact finding hearing [chapter 5] or the hearing by the AJ [chapter 6], the National Guard legal representative will normally consult with such named individuals and review with them the allegations made against them.

e. During the investigative fact finding hearing, the investigator will advise any named individual providing testimony of the allegations against him or her [5-11d].

9-3. Witnesses

a. National Guard military and technician personnel needed as witnesses during pre-complaint processing under chapter 3, during the investigation under chapter 5, or during the hearing under chapter 6, will be made available unless there is sufficient justification why the individual cannot appear in person. In such cases their testimony may be obtained by other means [5-10a(2)]. Adverse inference may be drawn if a witness is not made available.

b. If a needed witness is employed by another Federal agency, National Guard officials will coordinate with that agency to secure the witness' testimony.

c. Witnesses who are not Federal employees may be requested to appear and provide testimony. The investigator or AJ will be advised if such witness chooses not to appear or provide testimony.

d. Witnesses, to include any individuals named by the complainant as being responsible for alleged acts of discrimination, are not entitled to be represented at government expense. During investigative hearings, they may be represented at their own expense.

9-4. Representative of the complainant or agent

a. A complainant or an agent in a class complaint has the right to be accompanied by a representative of his or her own choice at any stage of the complaint process, including the pre-complaint counselling stage.

b. The complainant or the agent will designate the representative in writing [3-6a, 3-11i, and chapter 11]. That notification must indicate if the representative is an attorney so as to establish the attorney's eligibility to claim fees and costs and to determine the proper service of documents.

c. The following individuals will not serve as representatives of a complainant or of an agent in a class complaint:

(1) Attorneys in the Office of the Judge Advocate, NGB and National Guard judge advocates.

(2) Members of the Directorate for Human Resources, NGB, and members of the Support Personnel Management Office of a State National Guard.

(3) Inspectors General and members of their staff at NGB and State National Guard levels.

(4) NGB and State National Guard EEO, EO, HR/EO, or SL officials, including members of NGB Equal Opportunity Division and CMSA, SEEMs, EEO counselors, and special emphasis program managers.

(5) Any National Guard technician or military member who declines to serve as a representative.

d. The AG may deny permission to a National Guard technician or military member to serve as a representative if this would constitute a conflict with the official or collateral duties of the representative. The denial will be made in writing to the complainant, giving the reasons for denial. The denial must advise the complainant that an appeal of the denial may be filed with NGB CMSA within 7 calendar days after receiving the denial.

9-5. Corresponding with representatives

a. Unless the complainant states otherwise in writing, after the NGB or the State National Guard has received written notice of the name, address, and telephone number of a representative, all official correspondence will be with that representative with copies to the complainant.

b. When the complainant has designated an attorney as a representative, service of documents and decisions on the complaint will be made on the attorney and not on the complainant. The time limits of this regulation that are based on receipt of materials or notices by the complainant will be computed from the time of their receipt by the attorney.

c. Unless otherwise instructed in correspondence from NGB or State National Guard officials, the complainant must serve all official correspondence on the designated agency representative.

9-6. Representative of the agency

a. For civil actions, NGB-JA will coordinate with the Litigation Offices of the Departments of the Army and the Air Force Judge Advocate General and, as appropriate, with the Department of Justice. NGB-JA will advise the State National Guard and the CMSA who will represent the agency in such civil action.

b. In class complaints, NGB-JA will designate the agency representative.

c. During the investigation and hearings of individual discrimination complaints, the State National Guard JA, or another State National Guard attorney designated by the AG will represent the interests of the National Guard. He or she will be responsible for making sure that the National Guard's position is based on sound legal theory and supported by competent evidence at both the investigative and hearing stages. He or she does not represent any witnesses or individuals named by the complainant [9-2] and may not serve as their representative during investigative hearings.

d. Individuals listed in paragraphs 9-4c(2), (3), and (4), will not represent the National Guard in discrimination complaint cases filed under this regulation.

e. If permitted by the AJ, State National Guard representative may have a SPMO technical advisor at hearings conducted in connection with final decisions. The technical advisor may be designated as a co-representative.

9-7. Using official time

a. If the complainant is a technician employed by the National Guard, he or she has the right to a reasonable amount of official time, if otherwise on duty, to prepare and present a complaint filed under this regulation and to respond to requests for information from EEOC, NGB, or the State National Guard. Attendance at hearings and time spent preparing testimony or meeting with the

investigator are also charged to official duty time if the individual is otherwise in a duty status. Both technicians and military personnel must arrange in advance with their supervisors or commanders to use this duty time. Disagreements as to what is "reasonable" are resolved by the supervisor, commander, or a designee. See glossary for additional guidance.

b. The National Guard is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the National Guard and if otherwise in a pay status, will be on official time, regardless of their tour of duty, when their presence is authorized or required by EEOC, NGB, or the State National Guard during the investigation, hearing, dispute resolution, or other settlement of the complaint.

c. Witnesses who are Federal employees, to include technicians and National Guard military personnel will be in a duty status when their presence is authorized or required by EEOC, NGB, or the State National Guard in connection with a discrimination complaint. They will be in a duty status regardless of their actual tour of duty and regardless of whether they are employed by the National Guard, NGB, or another Federal agency.

Chapter 10
Related Processes and Special Provisions

10-1. General
There are several procedures that apply only to certain cases. These procedures include use of negotiated grievances, mixed cases, and the Rehabilitation Act. The provisions for these special cases are contained in this chapter. Appendix D contains a summary of time limits applicable to this chapter.

10-2. Conditions for using grievance procedures
a. Under the conditions described in this paragraph, a complainant may have an option of how to file a complaint of discrimination. A section of the Civil Service Reform Act of 1978, 5 U.S.C. 7121(d), permits raising of allegations of discrimination in a negotiated grievance procedure when the matter is subject to the negotiated grievance system. The following conditions must be met in order to have an option of how to file a discrimination complaint:

(1) The complainant must be covered by a collective bargaining agreement with a labor organization; and

(2) The collective bargaining agreement must not exclude the acceptance of grievances that allege discrimination or the negotiated grievance procedures in that agreement must not prohibit the raising of allegations of discrimination.

b. If both of the conditions stated above do not exist, any complaint of discrimination will be processed in accordance with the administrative complaint procedures of this regulation.

10-3. Election of negotiated grievance procedures
The election to use the negotiated grievance procedure or the administrative discrimination complaint procedure of this regulation is made by the filing of a written complaint. Only one option may be selected; election of one automatically eliminates the availability of the other.

a. The election to use the administrative discrimination complaint procedure of this regulation is made by filing a formal complaint in accordance with paragraphs 4-2 or 11-5. If the complainant files a formal complaint, the complainant may not thereafter file a grievance on the same matter.

b. An election to use the negotiated grievance procedure is made by filing of a timely written grievance. If the complainant files a grievance and if provisions of paragraph 10-2a apply, then the complainant may not thereafter file a complaint under paragraphs 4-2 or 11-5 on the same matter.

c. If a complainant files a complaint under paragraph 4-2, after filing a grievance on the same matter, that complaint will be dismissed under the provision and subject to the conditions of paragraph 4-10e. Such dismissal is without prejudice to the rights of the complainant to proceed through the negotiated grievance procedure.

10-4. Final decision under the grievance procedure
When using the negotiated grievance procedure, a complainant is bound by the negotiated agreement. However, in this case, the complainant still has the right to appeal to EEOC the final decision given under the negotiated grievance procedure [8-3f]. The final decision is considered to be one of the following:

a. The final grievance decision by the AG, if the union fails to invoke arbitration; note that a technician cannot individually invoke arbitration.

b. The decision rendered by an arbitrator, if neither the union nor the management appeals that decision to the Federal Labor Relations Authority (FLRA); note that a technician cannot individually appeal an arbitration award to the FLRA.

c. The decision rendered by the FLRA on appeal of an arbitration award.

10-5. Mixed case complaints and appeals
A mixed case involves an action that may be appealed to the Merit Systems Protection Board (MSPB) and which is alleged to have been the result of employment discrimination based on race, color, religion, gender (including sexual harassment), national origin, age, or handicap. Within the technician personnel system only a limited number of actions may be appealed to the MSPB, such as failure to properly restore after military service, failure to properly restore after injury, and denial of within grade increase. Adverse personnel actions are not appealable to MSPB.

a. A mixed case complaint is a discrimination complaint, filed under the provisions of this regulation, that stems from an action appealable to the MSPB.

b. A mixed case appeal is an appeal that is filed with the MSPB that alleges that an appealable action was due, in whole or in part, because of discrimination.

10-6. Election of mixed case procedures
When an individual who is the subject of an action that is appealable to the MSPB, raises an issue of discrimination, either orally or in writing, he or she will be advised of the right to select either procedure. The EEO counselor, during the initial counselling session [3-5 and 3-6b], will advise complainants that they may not initially file both a mixed case complaint and a mixed case appeal on the same matter.

a. The initial election of procedures in mixed cases is made by filing a mixed case complaint under paragraph 4-2 or by filing a mixed case appeal with the MSPB. The filing of an informal complaint under the pre-complaint processing procedures of chapter 3, does not constitute an election of procedures. Whichever is filed first, will be considered as an election to proceed in that forum.

b. If the complainant files a mixed case appeal with the MSPB first and the MSPB dismisses the appeal for jurisdictional reasons, the SEEM will, within 5 calendar days, notify the complainant in writing of the right to contact an EEO counselor within 45 days of the receipt of the notice. For the purposes of determining timeliness [4-10c], the date of initial contact with the counselor will be considered as the date on which the complainant filed the appeal with the MSPB.

c. If the complainant also meets the requirements of paragraph 10-2a, the complainant may have three options in a mixed case. Only one of these options may be selected; election of one automatically eliminates the availability of the others, except as provided in 10-6b. The complainant may:

(1) Follow the EEO discrimination complaint procedures of this regulation.

(2) Follow the negotiated grievance procedure. In this case, the complainant may ask EEOC to review the final decision on the grievance procedure.

(3) File an appeal directly with the MSPB. In this case, the complainant may ask EEOC to review the MSPB final decision, as provided in paragraph 10-9.

10-7. Dismissals of mixed case complaints
Dismissal is made as prescribed in paragraph 4-10. Where dismissal is made on the basis of the complainant's prior election of the MSPB procedures [4-10f], it will be made as follows:

a. If neither the State National Guard, NGB, nor the MSPB AJ questions MSPB's jurisdiction over the appeal, the dismissal will advise the complainant that he or she must bring the allegations of discrimination in the dismissed complaint to the attention of the MSPB in accordance with 5 CFR 1201.155. This dismissal is not appealable to EEOC, unless the complainant claims that the complaint or issue dismissed was not a mixed case matter. The complainant will also be advised of the right to petition EEOC to review the MSPB final decision on the discrimination issue.

b. If either the State National Guard, NGB, or the MSPB AJ questions MSPB's jurisdiction over the appeal, acceptance or dismissal of the complaint will be held in abeyance until the MSPB AJ determines whether or not MSPB has jurisdiction. During this period of time all time limitations for the processing and filing of complaints under this regulation are tolled [4-11], and the following procedures apply:

(1) The SEEM will, within the time limits established for acceptance or dismissal of complaints [4-7], advise the complainant in writing to bring the allegations of discrimination to the attention of MSPB and will inform the complainant that the complaint is being held in abeyance. The complainant will also be advised that this decision is not appealable to EEOC but will be reviewed by NGB.

(2) Within time limits specified [4-8 and appendix D], the SEEM will forward the official discrimination complaint case file for review by NGB.

(3) If the MSPB AJ finds that the MSPB has jurisdiction over the matter, the complaint will be dismissed [10-7a].

(4) If the MSPB AJ finds that MSPB does not have jurisdiction over the matter, processing of the complaint will resume as a non-mixed case discrimination complaint.

10-8. Special provisions for mixed case complaints
For mixed case complaints filed and processed under the provisions of this regulation, the following special provisions apply.

a. NGB will issue a final decision without a hearing within 45 days after the receipt of the complainant's request [6-5] rather than 60 days. The notice of investigation completion will advise the complainant of this time limit.

b. Upon issuing a final decision, the complainant will be advised of the appeal rights and time limits, as provided in this subparagraph. If the complainant is not satisfied with a final NGB decision issued in accordance with chapter 6, then in lieu of the provisions of paragraph 6-11h, the complainant may, within 20 days after the receipt of the final decision:

(1) Appeal the matter to the MSPB, rather than EEOC; or

(2) File a civil action [8-9a].

c. Upon issuing a notice of acceptance, the complainant will be advised of the appeal rights and time limits, as provided in this subparagraph. If within 120 days after the date of the filing of the formal complaint, NGB has not issued a final decision in accordance with chapter 6, the complainant may, at any time thereafter:

(1) File an appeal with the MSPB as specified in 5 CFR 1201.154(a); or

(2) File a civil action [8-9g].

10-9. Petitions to EEOC from MSPB decisions
Individuals who have received a final decision from the MSPB on a mixed case appeal [10-6] or who have received a final decision from the MSPB on appeal of the NGB final decision [10-8] of a mixed case complaint under 5 CFR 1201 subpart E and 5 U.S.C. 7702, may petition EEOC to review that MSPB decision. EEOC will not accept appeals from MSPB dismissals without prejudice. The petition for review must be:

a. Filed with EEOC's Office of Federal Operations, P.O Box 19848, Washington, D.C. 20036, by certified mail with return receipt requested.

b. Filed either within 30 days after the receipt of the final decision of the MSPB or within 30 days after the decision of a MSPB field office becomes final.

c. Served on all individuals and parties on the MSPB's service list by certified mail on or before the filing with EEOC and the MSPB (addressed to the Clerk of the MSPB, 1120 Vermont Avenue, N.W., Washington, D.C. 20419). The petitioner must certify the method and date of service.

d. Written or typed and should use EEOC Form 573, Notice of Appeal/Petition, but may also use any other format, including a letter. Details concerning contents of petitions, their consideration and adjudication by EEOC, and the procedures of the EEOC Special Panel are contained in 29 CFR 1614.304 through .309. Complainants who wish to file a petition on a mixed case appeal or complaint should refer to that regulation or contact their SEEM for assistance.

10-10. Age Discrimination in Employment Act complaints

a. As an alternative to the administrative procedures of this regulation, a complainant may file civil action [8-11]. With implementation of 29 CFR 1614, regulatory provisions governing the exhaustion of administrative remedies requirements under ADEA are now the same as those under Title VII of the Civil Rights Act. Civil action can be brought under ADEA after administrative remedies are exhausted [8-8].

b. Complaints under ADEA require that an individual be 40 years of age at the time of the alleged act of discrimination. However, EEOC may exempt positions from the provisions of ADEA if EEOC establishes a maximum age requirement for a position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

10-11. Drug use and the Rehabilitation Act

a. Definitions of a handicapped person are in the glossary. Excluded from the definition of a handicapped person is any individual who is currently engaging in the illegal use of drugs, as defined in the glossary.

b. This exclusion does not apply to individuals who are in or have completed a rehabilitation program and are not currently using illegal drugs. It is not a violation of this regulation to adopt and administer reasonable policies and procedures, to include drug testing, to ensure that such individuals are, in fact, no longer using illegal drugs.

10-12. Employment criteria and reasonable accommodations

The provisions of this paragraph apply to both competitive and military technicians. However, nothing in this regulation prescribes the medical requirements for National Guard military personnel. Where a technician is required, as a condition of employment by the Technician Personnel Act, 32 U.S.C. 709, to be a military member of the National Guard, the technician or applicant for technician employment may be required to meet the physical standards, employment criteria, and reasonable accommodations of the ARNG or ANG. Likewise, compatibility requirements of the Technician Personnel Act may limit reassignment availability under subparagraphs 10-12e and f.

a. Except as provided in 10-12b, an applicant for technician employment may not be subject to preemployment medical examination or a preemployment inquiry to determine a handicap or the severity of such handicap. This does not preclude making preemployment inquiries into an applicant's ability to meet the essential functions of the job or the medical qualification requirements, with or without reasonable accommodation; that is, to determine if the applicant possesses the minimum abilities necessary for safe and efficient performance of duties of the position in question.

b. An offer of employment may be conditioned on the results of a medical examination prior to commencement of employment, provided:

(1) All entering employees are subjected to such an examination regardless of handicap; or

(2) A preemployment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job related nature of the condition and the results of such an examination are used only in accordance with the requirements of 29 CFR 1614.

c. In the filling of positions that do not require military membership in the National Guard, the NG may not use any employment test or other selection criteria that screens out or tends to screen out qualified individuals with handicaps unless the tests meet criteria of 29 CFR 1614.203(d)(1). Tests given to applicants or employees with a handicap that impairs sensory, manual, or speaking skills must accurately reflect the ability to perform the position or type of positions in question rather than reflecting the impaired skills, except where those skills are a factor that the test purports to measure.

d. Reasonable accommodations will be offered unless it can be demonstrated that this would impose an undue hardship on the operation of the program involved. Reasonable accommodations to the known physical or mental limitation of an employee who is a qualified handicapped person may include, but will not be limited to:

(1) Making facilities readily accessible to and usable to handicapped persons. For the purposes of this regulation, a facility is deemed to be accessible if it is in compliance with the Architectural Barriers Act of 1968 (42 U.S.C 4151 et seq.) and the American with Disabilities Act of 1990 (42 U.S.C. 12183 and 12204).

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers and interpreters, and other similar actions.

e. When, due to a handicap, a nonprobationary employee becomes unable to perform the essential

functions of his or her position even with reasonable accommodation the individual will be offered reassignment:

(1) To a funded vacant position, if available, located in the same commuting area, serviced by the same appointing authority, and at the same grade or level. The individual must be able to perform the essential function of that position, with reasonable accommodations, if necessary. The reassignment will be offered unless it can be demonstrated that this would impose an undue hardship on the operation of the program involved.

(2) If such a position is not available, then to a vacant position at the highest available grade or level below the employee's current grade or level. Availability of such a vacancy will not affect the employee's entitlement, if any, to disability retirement under 5 U.S.C. 8451.

f. If an announcement seeking applications for a vacant position has already been posted at the time it is determined that a nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then a reassignment obligation under 10-12e, does not exist. However, the employee will be considered for that position on an equal basis with those who applied for such a position.

10-13. Equal Pay Act complaints

The administrative processing of discrimination complaints involving violations of the Equal Pay Act are the same as for other discrimination complaints filed under this regulation. In order to determine compliance with the provisions of the Equal Pay Act, EEOC may at any time investigate the employment practices of NGB or a State National Guard. EEOC will provide notice if it will be initiating an investigation.

Chapter 11
Class Complaints

11-1. General

This chapter covers class complaints of discrimination. Because many procedures for class complaints are the same as for individual complaints of discrimination, they are not duplicated in this chapter. Appendix D contains the summary of time limits applicable to this chapter.

11-2. Guidance for class complaints

a. The provisions of paragraph 4-3, regarding conflict of interests in individual complaints, also apply to class complaints.

b. Each State National Guard will designate at least one individual to serve as a counselor for class complaints.

c. Agents and potential agents must be thoroughly familiar with the criteria of this chapter, before they file a class complaint.

d. Class complaints will be processed promptly. The parties must cooperate and proceed at all times without undue delay.

11-3. Requirements and criteria

A class complaint is filed by an agent of the class on behalf of that class (see the glossary for the definition of terms used here). Paragraph 4, volume I and paragraph 2-2 of this volume explain who may file a complaint and the bases of a complaint. In addition, to be considered and accepted as a class complaint, the complaint must allege that:

a. The class is so numerous that a consolidated complaint filed by individual members of the class under provisions of chapter 4 is impractical.

b. There are questions of fact common to the class.

c. The claims of the agent of the class are typical of the claims of the class. The agent must allege that he or she has been personally harmed by a personnel policy or practice that the National Guard has the authority to change or abolish.

d. The agent for the class or, if represented, the representative, will fairly and adequately protect the interests of the class.

11-4. Pre-complaint processing

a. A technician, former technician, or applicant for technician employment who wishes to be an agent in a class complaint and who believes that he or she has been discriminated against, must contact an EEO counselor or the SEEM within 45 calendar days of the matter giving rise to the allegation of discrimination, the effective date of a personnel action, or the date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

b. Assignment of a counselor and pre-complaint counselling procedures in class complaints are the same as those prescribed by chapter 3.

11-5. Filing a class complaint

A formal class complaint of discrimination may only be filed after completion of the pre-complaint processing [chapter 3]. If the agent is not satisfied with the result of that informal process, the agent has a right to file a formal class complaint. The formal class complaint must be filed:

a. By the class agent in writing, signed by the agent. The complaint may also be filed and signed on behalf of the class agent by a representative designated by the class agent in writing.

b. On NGB Form 713-5, Complaint of Discrimination in the National Guard, provided by the EEO counselor with the notice of final interview and right to file the complaint. Additional copies of NGB Form 713-5 may be obtained from any EEO counselor or the SEEM.

c. With clearly defined issues [3-7]. Each issue should be numbered so that it is readily set off from other issues and so that its scope is clear. The issues must identify the policy or practice that adversely affect the class, as well as the specific action or matter that is adversely affecting the class agent. EEO counselors and SEEMs are available to assist class agents in preparing a formal complaint [3-15].

d. With the SEEM or AG in person or by mail.

e. Within 15 calendar days after the receipt by the class agent of the notice of final interview and the right to file a complaint.

11-6. Receipt, review, and transmittal of a class complaint

The provisions of paragraphs 4-4 and 4-5a through d also apply to the processing of class complaints. The SEEM will obtain an NGB case number, acknowledge receipt of the complaint, and review the complaint as provided in those paragraphs. Because of the time frame for forwarding the complaint to EEOC and the role of the AJ in the acceptance and dismissal process, any clarification that is needed will be accomplished within 5 calendar days after receipt of the complaint using only procedures of paragraph 4-6a through c. Any issues that have not been clarified within that time will be addressed in comments enclosed with the transmittal memorandum, as described below.

a. Immediately upon receiving the formal class complaint, the SEEM will review it, along with the EEO counselor's report and all other available data relevant to the acceptance of the class status of the complaint. The SEEM will coordinate with the JA and with the SPMO the comments to be forwarded regarding the issues, their specificity, timeliness, and acceptability as a class complaint [4-10, 11-3].

b. Within 10 calendar days after receiving the class complaint, the SEEM will transmit to NGB CMSA the official discrimination complaint case file in original and two (2) copies [chapter 12]. The SEEM is responsible for ensuring that all copies of the file are complete and identical.

(1) At this point, the official custody of the complaint file passes from the State National Guard to NGB. Originals of any correspondence received by the State National Guard from the class agent or the agent's representative after this date will be forwarded to NGB together with any State National Guard responses [chapter 12]. The SEEM will ensure that any documents in or added to the copy of the case file retained by the State National Guard are also included in the discrimination complaint case files now maintained at NGB.

(2) The discrimination complaint case file will include all documents generated during the pre-complaint processing, including documents and memorandums for record dealing with clarification.

c. The transmittal memorandum to NGB will contain, as an enclosure, the comments as a result of the review of the complaint, including comments and recommendations on accepting or dismissing the complaint with supporting rationale [4-10, 11-3], and any other information to help NGB and EEOC determine acceptance or dismissal of the complaint. The comments will be prepared to represent an NGB position rather than a local State National Guard view so that they can be enclosed with the NGB submission to EEOC without retyping. The original of the transmittal memorandum and comments will be the topmost tabbed document in the original discrimination complaint case file. The transmittal memorandum will contain:

(1) The name, title, address, and telephone number of the official (normally the State National Guard JA) whom the NGB JA may designate as the NGB representative or who will assist the NGB representative in the class complaint.

(2) The class agent's home and work mailing addresses, and home and work telephone numbers (commercial and, if appropriate, DSN).

(3) The name of the class agent's representative, if any, including his or her work mailing address and telephone number (commercial and, if appropriate, DSN). Indicate if the reresentative is an attorney.

11-7. NGB review and designation of representative

a. NGB CMSA will coordinate with NGB-JA and prepare any comments to be forwarded to EEOC.

b. NGB-JA will designate the National Guard representative for the class complaint. This may be the legal officer designated by the State National Guard, a member of the NGB-JA, or another representative appointed by NGB-JA.

c. Within 30 days after the receipt of the class complaint by the State National Guard, NGB will forward a copy of the complaint file to the appropriate EEOC district office that has geographical jurisdiction.

11-8. Acceptance and dismissal process

Before NGB issues an acceptance or dismissal notice of a class complaint, an EEOC AJ or complaints examiner will review the case and make a recommendation to NGB.

a. The AJ may require the class agent or the National Guard to submit any additional information relevant to the complaint.

b. If an issue raised in the formal class complaint is not included in the EEO counselor's report, the AJ will give the class agent 15 calendar days to explain if the matter was discussed with the counselor and, if not, to explain why it was not discussed. If the explanation is not satisfactory, the AJ will recommend that NGB dismiss the issue. If the explanation is satisfactory, the AJ will refer the issue for further counselling of the class agent. After counselling, the issue will be consolidated with the class complaint.

c. If an issue raised in the formal class complaint lacks specificity and detail, the AJ will give the class agent 15 calendar days to provide specific and detailed information. If the class agent does not provide the required information within the time limit, the AJ will recommend that NGB dismiss the complaint. If the information provided contains new issues outside the scope of the complaint, the AJ will advise the agent how to proceed on an individual or class basis concerning these issues.

d. The AJ will recommend that NGB extend time limits for filing a complaint and for consulting with a counselor, when waiver, estoppel, or equitable tolling are appropriate [4-11b(1) through (4)].

e. When appropriate, the AJ may recommend that a class be divided into subclasses and that each subclass be treated as a class. If NGB accepts this recommendation, the provisions of this chapter will be construed and applied accordingly.

f. The AJ may recommend that NGB dismiss all or part of a complaint based on the criteria listed in paragraph 4-10 or paragraph 11-3.

g. The AJ's recommendation to accept or dismiss a class complaint will be sent in writing to NGB along with the complaint file. A notification of the AJ's transmittal of the recommendation is sent to the class agent.

(1) On receiving the AJ's recommendation, NGB CMSA will prepare and coordinate a decision to accept or dismiss the complaint. NGB may accept, reject, or modify the recommendation of the AJ.

(2) NGB will send its decision to accept or dismiss the complaint, along with a copy of the official discrimination complaint case file and the AJ's recommendation to the agent within 30 days after receiving the AJ's recommendation. The dismissal of a class complaint will also inform the agent either that the complaint is being filed on that date as an individual complaint under paragraph 4-2, or that the agent's complaint is also being dismissed as an individual complaint [4-10]. The NGB decision will also provide the appropriate appeal rights for dismissal of complaints.

(3) A copy of the NGB decision will be sent to the AJ, to the AG, and to the SEEM.

(4) If NGB fails to issue a decision within 30 days after the receipt of the AJ's recommendation and the complaint file, the AJ's recommendation to accept or dismiss the complaint will become the NGB decision.

11-9. Notification of existence of class complaint

a. Prior to issuing a decision to accept a class complaint, NGB CMSA, in consultation with NGB JA, will determine reasonable means for notifying all class members, e.g., delivery, mailing to last known address, distribution, or posting and will alert the SEEM to the notification requirement. Within 15 calendar days after issuance of the NGB decision to accept the class complaint, the SEEM will make reasonable efforts to notify all class members of the existence of the class complaint.

b. The notice will contain:

(1) The name and location of the appropriate State National Guard organizational element involved and the date of the acceptance of the complaint.

(2) A description of issues accepted as part of the class complaint.

(3) An explanation of the binding nature of the final decision or resolution of the complaint on class members.

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

11-10. Developing evidence

a. The AJ will provide the National Guard representative and the agent 60 calendar days to prepare their cases. This time period may be extended upon the request of either party.

b. In developing evidence, the National Guard representative may assign tasks to the SEEM, SPMO, or other appropriate offices in the State National Guard. Both parties are entitled to reasonable development of evidence on matters relevant to the issue raised in the complaint. Evidence may be developed through interrogatories, depositions, requests for admissions, stipulations, or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overly burdensome, repetitious, or privileged.

c. During the time allowed to develop the evidence, the AJ may, at his or her discretion, direct an investigation of facts relevant to the complaint or to any portion thereof.

d. Both parties will give the AJ copies of all materials that they wish him or her to examine and other material as the AJ may request.

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

(1) Draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information.

(2) Consider the matters to which the requested information pertains to be established in favor of the opposing party.

(3) Exclude other evidence offered by the party failing to produce the requested information.

(4) Recommend that a decision be entered in favor of the opposing party.

(5) Take such other actions as the AJ may consider appropriate.

11-11. Opportunities for, vacating of, and complying with settlements

a. The AJ will furnish the agent and the representative of the National Guard a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the National Guard representative and attempt settlement of the complaint.

b. At any time after acceptance of a complaint, it may be resolved by agreement of the National Guard and the agent as long as the agreement is fair and reasonable.

c. If the complaint is resolved, the terms of any settlement will be reduced to writing and signed by the agent and the National Guard representative after coordination with NGB CMSA and NGB-JA [chapter 7].

d. Notice of the resolution will be given to all class members in the same manner as notification of the acceptance of the class complaint and will state the relief, if any, to be granted by the National Guard. A resolution will bind all members of the class.

e. Within 30 days of the date of the notice of resolution, any member of the class may petition the Director, EEO, to vacate the resolution because it benefits only the class agent or is otherwise not fair or reasonable. Such a petition will be processed in the same manner as acceptance or dismissal of complaints under paragraphs 11-6 and -7.

(1) If the AJ finds that a resolution is not fair and reasonable, the AJ will recommend that the resolution be vacated and that the original class agent be replaced by the petitioner or some other class member who is eligible to be the class agent. The new class agent will act for the class during further processing of the class complaint.

(2) A NGB decision that the resolution is not fair and reasonable, vacates any agreement between the former class agent and the National Guard.

(3) A National Guard decision on such a petition will inform the agent or the petitioner of the right to appeal the decision to the Office of Federal Operations.

e. Any settlement agreement reached at any stage of the complaint process will be binding on both parties. If the agent believes that the National Guard has failed to comply with the terms of a settlement agreement for reasons not attributable to acts or conduct of the agent, his or her representative, or class members, the procedures described in paragraph 7-12 apply.

11-12. Hearing

On the expiration of the period allowed to prepare the case, the AJ will set a date for a hearing. The hearing will be conducted in accordance with paragraphs 6-8 and 6-9. Only persons directly connected to the complaint, as determined by the AJ, may attend the hearing.

11-13. Findings and recommendations of the AJ

a. The AJ will transmit to NGB a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class, and any individual relief, where appropriate, with regard to any personnel action or matter that gave rise to the complaint.

b. If the AJ finds no class relief appropriate, the AJ will determine if a finding of individual discrimination is warranted and, if so, will recommend appropriate relief.

c. The AJ will notify the agent of the date on which the report of findings and recommendations was forwarded to NGB.

11-14. The National Guard Bureau final decision

a. Within 60 calendar days after receiving the AJ's report, NGB CMSA will, in consultation with NGB-JA, develop and issue a decision to accept, reject, or modify the findings and recommendations of the AJ.

b. The NGB final decision will be sent to the class agent and the AG with a copy of the findings and recommendations of the AJ.

c. If the NGB final decision rejects or modifies the findings and recommendations of the AJ, it will state the specific reasons for the NGB action.

d. The final decision will direct any remedial action authorized by law and determined to be necessary or desirable to resolve the complaint and to promote the policy of equal opportunity, whether or not there is a finding of discrimination.

e. The final decision will inform the agent of the right of appeal or to file a civil action, and of the applicable time limits [chapter 8].

f. A final NGB decision on a class complaint filed under this regulation is binding on the National Guard and all members of the class, subject to the provisions of chapter 8.

11-15. Failure to issue final decision

If NGB has not issued a final decision within 60 calendar days after receiving the AJ's report, the findings and recommendations of the AJ will become the final NGB decision. This decision must then be sent by NGB to the class agent within 5 calendar days after the end of the 60-day period.

11-16. Notification of NGB decision

a. Class members will be notified of:

(1) The NGB final decision and of the relief awarded, if any.

(2) The right of class members to seek individual relief, where appropriate, and of the procedures to be followed [11-17c].

b. The notification will be made in the same manner as the notification of the existence of a class complaint under paragraph 11-8. Prior to issuing the final decision on a class complaint, NGB CMSA will alert the SEEM to be prepared to accomplish the notification requirement. Within 10 calendar days after issuance of the NGB final decision, the SEEM will make reasonable efforts to notify all class members of the NGB final decision.

11-17. Relief for individual class members

a. If discrimination is found, the National Guard must do away with or change the personnel policy or practice that gave rise to the complaint, so that the policy or practice will no longer cause such discrimination. Also, the National Guard must provide individual remedial action to the agent, including an award of attorney's fees and costs [chapter 7]. The National Guard must fulfill obligations to consult or negotiate, as applicable, with the unions that have exclusive recognition, before doing away with or changing personnel policies or practices.

b. If the NGB decision does not find classwide discrimination, the State National Guard will:

(1) Issue a notice of receipt for any individual complaint subsumed into the class complaint. The notice of receipt will be issued within 60 days after issuance of the NGB final decision. Thereafter, such complaints will be processed as individual complaints [chapters 4, 5, and 6].

(2) Provide the class agent full relief if it is determined that the class agent was a victim of discrimination [chapter 7].

c. If the NGB decision finds discrimination and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with a person designated in the notice [11-14]. The claim must:

(1) Be submitted within 30 calendar days after receipt of the notification.

(2) Include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice and that this discriminatory action took place within the period

of time for which NGB found class-wide discrimination in its final decision. The period of time for which NGB finds class-wide discrimination begins not more than 45 days prior to the class agent's initial contact with the EEO counselor and ends not later than the date when the National Guard eliminates the policy or practice found to be discriminatory, as stated in the final decision.

(3) Be ruled on by NGB with a final decision issued on the claim within 90 days after the filing of the claim. The decision will include the rights to appeal [chapter 8].

Chapter 12
Official Discrimination Complaint Case Files

12-1. General guidance

a. Official discrimination complaint case files and related correspondence will be prepared, organized, and assembled as prescribed in this chapter.

b. Official discrimination complaint case files and other documentation submitted to NGB or EEOC must be complete and appropriately indexed, tabbed, and assembled. NGB and EEOC may remand official discrimination complaint case files to the State National Guard for correction if they do not meet requirements, as explained herein.

12-2. Assignment and use of case numbers

a. When a complaint is formally filed, the SEEM will immediately obtain a case number from NGB CMSA [12-8]. This case number will be used in all correspondence pertaining to the complaint.

b. For complaints referred from NGB, a case number will be assigned by NGB [12-9]. This number will be used on all correspondence pertaining to this complaint until and unless the complaint is formally filed in accordance with chapter 4 or 11. At that time, the NGB assigned "Inquiry" number will be replaced by the NGB case number, obtained as described in paragraph 12-2a.

c. The complete NGB case number will be used in the titling of complaints and in any correspondence with complainants, their representatives, and EEOC. In the body of correspondence between NGB and the State National Guard and in telephone conversations, the Key Number, part of the NGB case number, is sufficient to identify a complaint.

12-3. Titling of Complaints.

a. For purposes of identifying the proper party defendant in case of a civil action, the Secretary of the Army or the Air Force will be listed, by name in the complaint caption or the subject of any letter or memorandum concerning a complaint case.

b. To facilitate identification and reference, the following information will be included in the subject line of any correspondence pertaining to formally filed discrimination complaints:

(1) The complainant's or class agent's full name, followed by the name of the State and "Army National Guard" or "Air National Guard."

(2) The full name of the Secretary of the Army or the Air Force.

(3) The NGB case number [12-8].

c. For complaints referred from NGB, the subject of correspondence will contain the following information:

(1) The NGB case number [12-9].

(2) The complainant's full name, followed by the name of the State and "Army National Guard" or "Air National Guard," as appropriate.

d. Complaint titles or subjects of correspondence would appear as shown in following examples:

(1) Complaint of Joe T. Doe, Maryland Army National Guard, and (Full name), Secretary of the Army, NGB Case No. T-323-MD-A-02-93-RL.

(2) Class complaint by Janet A. Rowe, Ohio Air National Guard, and (Full name), Secretary of the Air Force, NGB Case No. T-043-OH-F-01-93-CGS.

(3) Inquiry No. I-213-DC-A-02-93-RO Regarding Technician Discrimination Complaint by Peter J. Alexander.

12-4. Establishment and maintenance of the official complaint file

a. The official discrimination complaint case file is initially established by the SEEM. It will contain the documents and be organized as prescribed in paragraphs 12-5 and 12-6. The official discrimination complaint case file is established:

(1) When the complainant elects to use the dispute resolution process during the pre-complaint processing stage [chapter 3 and appendix B]. That official discrimination complaint case file will contain all the documents generated during the counselling, including the EEO counselor's report. A copy of the complaint file will be made available to the DRP panel for use in the dispute resolution process. The original is retained by the SEEM.

(2) When a formal complaint is filed.

b. The original of the official discrimination complaint case file is retained by the SEEM until a review of acceptance or dismissal of the formal complaint is requested from NGB [4-8]. At that time the official custody of the complaint file passes from the SEEM to NGB CMSA. Upon receipt of the official discrimination complaint case file from the SEEM, NGB CMSA will maintain the original of the complaint file.

c. The SEEM will send the original and two copies of the complete official discrimination complaint case file to NGB. One complete copy of the complaint file is retained by the SEEM. The SEEM is responsible for ensuring that all copies of the official discrimination complaint case file are identical. If additional documents are placed in the complaint file by the SEEM and these documents have not been made available to NGB CMSA, an original (if there is one) and two copies of such documents will be forwarded to NGB CMSA.

d. If an investigator is assigned in [5-5], one copy of the complete official discrimination complaint case file will be forwarded by NGB to him or her. The investigator will return all documents in that file along with the ROI to NGB CMSA.

e. If the complainant requests a hearing in conjunction with a final decision by NGB [6-6] or makes an appeal to EEOC [8-4], one copy of the official discrimination complaint case file will be forwarded by NGB to EEOC. After completion of the

hearing, EEOC will return the official complaint file to NGB along with a record of the hearing and EEOC conclusions and findings.

f. When a complaint is closed administratively or following any judicial proceedings, the official discrimination complaint case file is closed by NGB. It is maintained as a closed file for 4 fiscal years following its closure (6 years for cases involving age discrimination) and then destroyed.

12-5. Content of the official complaint file

a. The official discrimination complaint case file will include all documents pertinent to the complaint. The file will not contain:

(1) Any document that has not been made available to the complainant or to his or her representative.

(2) Any National Guard decision to take or not to take action against any official accused of discrimination [7-14].

(3) Any internal copies of legal memorandums or opinions, internal staffing and coordination actions, or other internal management documents not available to the complainant.

b. The most frequently found documents in an official discrimination complaint case file are listed below. The specific documents in a file depend on the particular case. The documents that are required to be in the official discrimination complaint case file are indicated by the word "(required)." The documents will be organized in the order specified in paragraph 12-6.

(1) Rights and responsibilities of complainants (required).

(2) Written authorization by the complainant to reveal his or her name during pre-complaint processing or his or her statement that he or she does not want the name revealed (required).

(3) The complainant's written designation of a representative.

(4) Agreement to extend counselling.

(5) DRP agreement.

(6) Any documents generated during the DRP.

(7) Notice of final interview and right to file a complaint (required).

(8) EEO counselor's report, to include the inquiry and all relevant exhibits (required).

(9) The formal complaint (required).

(10) Notice of receipt of the formal complaint (required).

(11) Notice of acceptance/dismissal of the complaint (required).

(12) Documentation to support dismissal, such as copies of collective bargaining agreements, previously filed complaints, documentation of military status, etc.

(13) Correspondence regarding clarification of issues.

(14) If a waiver of time limits for filing or for providing any other response is granted, all documentation to justify the waiver and the written notification to the complainant of this waiver.

(15) Request for NGB review/investigation (required).

(16) Deficiency notices concerning accepted or dismissed complaints.

(17) Notification from NGB of properly accepted or dismissed complaints.

(18) Designation of an individual to process a complaint in place of an individual named by the complainant (to avoid a conflict of interest).

(19) NGB's notification of the appointment of an investigator.

(20) NGB's letter to the investigator transmitting the official complaint file.

(21) NGB's letter of authorization for the investigator.

(22) Any correspondence between the investigator and the National Guard or the complainant.

(23) Any correspondence that is part of the fact finding process.

(24) Any correspondence dealing with problems or delays during the investigation.

(25) Agreement to extend investigation.

(26) Notice of investigation completion and transmittal of the ROI.

(27) A complete copy of the ROI.

(28) Any letters from the State National Guard to the complainant offering resolution meetings and providing terms of settlements.

(29) If a resolution is not reached, a memorandum for the record documenting the meeting, any offers made by the State National Guard, and the complainant's response.

(30) If a resolution is reached, the written, signed, and dated settlement agreement.

(31) If full relief is provided, NGB certification of full relief, the executed settlement agreement, and a copy of the required notice to employees.

(32) Any other correspondence between the State National Guard and the complainant regarding settlements, or memorandums of any telephone or in person conversations on this subject.

(33) If the complaint is withdrawn, a written, signed, and dated statement of the complainant or the representative to that effect.

(34) Notification that failure to cooperate may be cause for dismissal of the complaint and the notice to the complainant of the dismissal and advising him or her of the rights of appeal.

(35) Input from the AG and the complainant prior to NGB issuance of a final decision.

(36) The complainant's request for a final decision.

(37) If the complainant has requested a hearing, all correspondence from the complainant, the State National Guard, NGB, or EEOC relative to that hearing.

(38) If a hearing was held, a complete record of that hearing.

(39) The final NGB decision.

(40) Copies of any appeal by the complainant, supporting and opposing statements, and any other correspondence regarding the appeal or subsequent reconsideration.

(41) Copies of any civil action filed by the complainant and any correspondence between the State National Guard, NGB, and any other parties involved in the civil action. Note that internal documents concerning legal advice or the processing of the civil action are not part of the official discrimination complaint case file.

(42) Any other correspondence from or to the complainant and his or her representative relative to the complaint.

(43) A copy of all certified receipts and other documentation showing notification of delivery of materials to the complainant and/or his or her representative, or other parties to the complaint. Envelopes showing postmark or lack of

postmark and any proof of receipt, such as certified mail return receipt cards, are filed with the document to which they pertain (required).

12-6. Organization of the official complaint file
Official discrimination complaint case files will be assembled and organized with an index (NGB Form 690-R), tabbed index sheets, and a hard backing. All documents and index sheets will be fastened together with appropriate paper fasteners.

a. NGB Form 690-R (National Guard Official Discrimination Complaint File Index), shown in figure F-27, will be placed as the top document over the complaint case file. A copy of this form is located at the back of this regulation. It will be locally reproduced on 8 1/2- by 11- inch paper. The index will be updated each time a document is added to the complaint file. It will contain:

(1) The name of the complainant (last name, first name, middle initial).

(2) The NGB case number, constructed as described in paragraph 12-8.

(3) To whom each document was sent and the originator of the document, entered in the "TO/FROM" column.

(4) The date on which the document was mailed, sent by facsimile, or delivered in person, or the date on which a document was received by the holder of the official complaint file (not the date of the document) entered in the "ON: DATE" column. Dates will be shown as YY/MM/DD (year/month/day).

(5) A brief description of the document, entered in the "DESCRIPTION OF DOCUMENT" column.

(6) The date of the document, entered in the "DOC DATE" column. For outgoing documents it may be the same as the date the document was sent or delivered. The date the document was actually mailed, sent by facsimile, or delivered in person, may be later than the date of the document. In some cases it may also be the same date as the date the document was received, e.g., when the document was received by facsimile or by personal delivery. Dates will be shown as YY/MM/DD (year/month/day).

(7) A letter indicating under which tab the document is to be found, in the "TAB" column.

b. Alphabetical tabs will be used to separate documents listed in paragraph 12-5. A full set of alphabetical index sheets (containing tabs A through Z) will be included, even if documents existing at a point in time use only a portion of these tabs. The remaining tabs will be included to be used for the addition of future documents.

c. Documents will be arranged in chronological order with the earliest document at the bottom and the last document on top. As an exception, reports (such as the ROI or the EEO counselor's report of inquiry) and enclosures to documents may contain material that is not chronologically organized.

d. Index sheets with alphabetical tabs will be placed over each document, or set of documents in the file, starting with tab A at the bottom, over the first document in the file.

e. When multiple documents are placed under one alphabetical tab (such as the EEO counselor's inquiry or the DRP panel report), the enclosures, appendixes, or other appropriate parts of such reports will be sub-tabbed using numerical tabs (i.e., 1, 2, 3, etc.) or alphanumeric tabs (e.g., C1, C2, C3, etc.). There will be an index listing the specific document to be found under each sub-tab. For example, the EEO counselor's report of inquiry will be organized as follows:

(1) The counselor's written report (dated and signed) summarizing the counselor's inquiry [3-13] will be the top document below the index.

(2) Enclosures to the report such as notes of interviews, a summary of documents reviewed by the counselor, or copies of documents obtained by the counselor or provided to the counselor by the complainant and witnesses, will be listed in an index and will be tabbed, as described above.

(3) The index to the documents in the EEO counselor's report, the report itself, and tabbed enclosures to the report, will all be placed under one main tab of the complaint case file.

(4) Notices issued to the complainant by the counselor, the complainant's authorization to reveal his or her name and designation of a representative will not be attached to the counselor's report but will be included in the discrimination complaint case file under separate tabs.

f. Tabs or sub-tabs will not be affixed to documents. They will be attached to or be a part of blank pages to form index sheets [figure F-27].

g. More than one set of index tabs may be used if warranted by the number of documents in the complaint file. In such cases, the NGB Form(s) 690-R, attached to a given set of tabbed documents, will be annotated as "Part I," "Part II," etc.

12-7. Safeguarding, use, and release of the official complaint file
Official discrimination complaint case files, including the EEO counselor's report, the ROI, and other documents listed above, contain information subject to the Privacy Act. The files will be maintained and safeguarded in the same manner as other sensitive, personnel files.

a. Release of any part of the official discrimination complaint case file, including the ROI, is subject to the Privacy and Freedom of Information Acts. Case files may contain nonreleasable information; therefore, any request for their release will be referred to NGB-AD. Each request will be reviewed to determine what material is releasable. ROI's are investigative documents and are not considered completed and final until such time as they are accepted by NGB as part of the adjudication process in the issuance of a final decision.

b. The official discrimination complaint case file is a management document. It will be used by officials of the State National Guard, NGB, and EEOC to make recommendations and decisions regarding the complaint. Providing the official discrimination complaint case file (including the ROI) to a State National Guard, NGB, or EEOC official in connection with their official duties, as explained below, does not constitute release of information.

c. Because of the sensitive nature of the official discrimination complaint case file, only those individuals who are directly involved in the processing, management, or adjudication of discrimination complaints will have access to the official

discrimination complaint case file, including the ROI. This includes the AG, the SPMO, the SEEM, State National Guard or NGB legal officers, the investigator, members of NGB CMSA, etc.

(1) All documents in the file will also be made available to the complainant and his or her representative. However, this does not include internal management documents listed in paragraphs 12-5a(2) and (3); these documents will not be included in the official discrimination complaint case file.

(2) Officials who have been disqualified from participation in the processing or adjudication of a complaint under paragraph 4-3, and other individuals named by the complainant as allegedly responsible for acts of discrimination against the complainant, will not have access to the official discrimination complaint case file.

12-8. NGB case number

Each formal complaint will be assigned an NGB case number on the day that the formal complaint is filed. The number will be entered on NGB Form 713-5 (Complaint of Discrimination in the National Guard), on NGB Form 690-R, and in the subject line of any correspondence pertaining to discrimination complaints. The case number is composed of the following elements:

T - - - - - - - -
{a} {b} {c} {d} {e} {f} {g}

a. The letter "T" identifies the type of complaint, i.e., a technician complaint of discrimination filed under the provisions of this regulation.

b. The first three digits, following the letter "T" are assigned by NGB on the date the complaint is filed. The first two digits represent a sequential number and the last digit represents the fiscal year in which the formal complaint was filed. Together with the letter T, they form the Key Number, a unique identifier for any discrimination complaint case.

c. The two letter State abbreviation immediately follows the dash after the Key Number.

d. An A is used to for an ARNG or F an ANG technician, former technician, or applicant for a technician position. The letter A or F immediately follows the dash after the State abbreviation.

e. A two digit number is used for each formal technician complaint filed with that State National Guard, starting with 01 for the first formal complaint received during a fiscal year. This number immediately follows the dash after the letter A or F.

f. A two digit number representing the last two digits of the fiscal year, based on the date the formal complaint is filed. The fiscal year immediately follows the dash after the State's case number.

g. One or more letters representing the basis of the complaint. The letter or letters immediately follow the dash after the fiscal year. The authorized bases of complaints are:

(1) R for Race.
(2) C for Color.
(3) L for reLigion.
(4) G for Gender (not involving sexual harassment).
(5) S for Sexual harassment.
(6) N for National origin.
(7) A for Age.
(8) H for Handicap.
(9) O for retaliatiOn.

12-9. NGB inquiry case number

When NGB receives an allegation of discrimination from a complainant or from a third party on behalf of the complainant, NGB will assign it a number and refer it for inquiry and processing to the State National Guard in accordance with paragraph 2-4. This number will be used in the subject line of any correspondence pertaining to such discrimination complaints. This inquiry number will continue to be used until and unless a formal complaint is filed, in which case a new number will be assigned [12-2, 12-8]. The inquiry case number is composed of the same elements shown in paragraph 12-8, except that:

a. This number will begin with an "I" rather than "T" to indicate that this is an allegation referred by NGB to the State National Guard for inquiry.

b. The first three digits, following the letter "I" are assigned by NGB on the date the complaint received by NGB CMSA. Together with the letter I, they form the Key Number, a unique identifier for any discrimination complaint case.

c. The two digit number following the dash after A or F represents the number of inquiries referred to a State National Guard, starting with 01 for each fiscal year

d. A two digit number representing the last two digits of the fiscal year, based on the date the inquiry is received by NGB CMSA. The fiscal year immediately follows the dash after the State's case number.

APPENDIX A

REMEDIES AND RELIEF FOR INDIVIDUAL COMPLAINTS OF DISCRIMINATION

The information in this Appendix is a reprint of Appendix A to 29 CFR 1613. This information should be used to supplement the guidance in chapter 7 of this regulation.

"On September 11, 1984, the Equal Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices. Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation, pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit or has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned from the wide range of remedial measures available to this law enforcement agency which has broad authority under the statutes it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

(1) A requirement that all employees of respondent in the affected facility be notified of their right to be free from unlawful discrimination and be assured that the particular type of discrimination found or conciliated will not recur;

(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The component of these remedial elements are as follows:

(1) Notice Requirement.

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or union members if respondent is a labor organization), prepared by the agency on E.E.O.C. forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there be no discrimination against any employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).

(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred.[1]

(e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court.[2]

(2) Corrective, Curative or Preventive Provisions.

In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where those measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practice must be changed.

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[1] For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case:

'XYZ, Inc. will not refuse to hire employees on the basis of their sex;

'XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and

'XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission.'

[2] For example, employees could be notified of the relief obtained in the following way:

'XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses

Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatee or similarly situated employees not be subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by insulating employees from that individual for a period of time, or by requiring the respondent to discipline or remove the offending individual from personnel authority, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices.

These and any other appropriate measure, or any combination thereof, designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) Nondiscriminatory Placement.

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of respondent's employees ('Nondiscriminatory Placement'). The Nondiscriminatory placement may take place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment-related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employement for which the discriminatee is qualified must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and that respondents not gain by their misconduct. Accordingly, the contention by a respondent that a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the respondent to demonstrate a contention that the postdiscrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job placement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondicriminatory Placement can be accomplished.

(4) Backpay.

Each identified victim of discimination is entitled to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrmination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the disciminatee in the employment lost through discrimination ('Gross Backpay') less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment ('Net Interim Earnings'). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Net Backpay accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuation in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) Cessation Provisions.

All respondents must agree to be ordered to cease from engaging in the specific unlawful employment practices in volved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement

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they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to promote them to that position.

'XYZ, Inc. has adopted an equal employment opportunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race.'

responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of prelitigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be resonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, conciliation must be actively pursued by the agency. In this regard, all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law."

APPENDIX B

DISPUTE RESOLUTION PROCESS (DRP)

B-1. Authority for DRP
This appendix is divided into sections, each section containing a dispute resolution process authorized for use within the National Guard. The Dispute Resolution Process established by this regulation is in accordance with the authority and requirements contained in 5 U.S.C. 581 et seq., the Administrative Dispute Resolution Act of 1990 (P.L. 101-552), and 29 CFR 1614.

B-2. Use of DRP

a. The DRP is designed primarily for use during the pre-complaint processing stage (chapter 3 of this regulation). Use of procedures described in section I, is restricted to the pre-complaint processing stage. However, the mediation procedures, described in section II, may be invoked and used throughout the administrative processing of the discrimination complaint, informal and formal.

b. Use of other methods of alternative dispute resolution techniques throughout the complaint process is encouraged. National Guard officials who develop a DRP not currently included in this appendix, will provide the details of the process to NGB CMSA for approval, inclusion in this appendix, and use as a National Guard DRP.

B-3. Purpose and rules for DRP
The primary purpose of the DRP is to provide a prompt, expert, and inexpensive means of resolving employee complaints as an alternative to the costly and protracted formal administrative proceedings or litigation in the Federal courts. Because the focus of the DRP is on resolution and voluntary settlement, the following rules apply to any DRP used by the National Guard.

a. The dispute resolution process will not produce or result in any finding of discrimination or no discrimination and will not determine the culpability of any individual who has been named by the complainant as being responsible for the alleged acts of discrimination. By definition of 5 U.S.C. 581, dispute resolution is any procedure to resolve issues, used in lieu of adjudication. Findings on the merits and adjudication of discrimination complaints are conducted as described in chapter 6 of this regulation.

b. Before DRP can be used, a complainant must agree to participate in the process. During the pre-complaint processing stage, this requires that the complainant execute the agreement at figure F-6. The DRP under section I only requires the consent of the complainant, while the DRP under section II must be agreed to by both the complainant and the State National Guard.

c. Settlements arrived at during a DRP are binding on both parties. Such settlements must meet the requirements of paragraph 3-14 if arrived at during the pre-complaint processing stage and the requirements of chapter 7 if arrived at after a formal complaint has been filed.

Section I
Dispute Resolution Panel

B-4. Procedures and time constraints
The dispute resolution process under this section consists of two tiers.

a. The first tier begins 30 days after the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. It involves top State National Guard officials who may use a variety of techniques, as discussed below, to gather information and to attempt to resolve the complaint. If a settlement has not been arrived at after 40 days (i.e., 70 days after the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM), then the matter is elevated to the AG. If the DRP panel completes its work prior to the expiration of that time, without reaching a settlement, the matter will be elevated to the AG at that time.

b. The second tier involves resolution at the AG's level. If a settlement has not been arrived at within 90 days after the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM, then the complainant will be issued a notice of final interview and right to file a formal complaint, as provided in paragraph 3-12b. This interview and notice will not be delayed because a settlement or the withdrawal of a complaint is imminent.

B-5. Membership in the DRP panel
The DRP panel will be composed of senior National Guard officials who should normally be at least GS/GM 14 or Lieutenant Colonel. Officials on the panel must have the authority to effect changes or make the decisions required to resolve the complaint being considered. The DRP panel will normally consist of not more than three members. The panel may have a limited number of advisors to assist it in its resolution efforts. The panel will include:

a. A senior member in the chain of command in the organization where the matters giving rise to the complaint took place. This may be a commander of an installation, brigade, wing, or equivalent organization, or a similarly placed member of the staff.

b. The Support Personnel Management Officer if the matter involves a personnel action.

c. A senior National Guard official who has subject matter knowledge regarding the matters giving rise to the complaint.

d. Following individuals may provide advice and assistance to the DRP panel:

(1) An officer, noncomissioned officer, or technician of the same gender as the complainant if the DRP panel does not already have a member of the same gender.

(2) A minority member corresponding to the basis on which the complaint is raised.

(3) The SEEM, EEO specialist, or EEO counselor.

(4) The State National Guard JA or other legal advisor.

e. Individuals named by the complainant as being responsible for the alleged acts of discrimination will not be members or advisors to a DRP panel.

B-6. Function of the DRP panel
The DRP has but one purpose: to achieve settlement of the complaint. The panel may not in any way coerce or intimidate the complainant. If a resolution is not achieved, the complainant retains the right to file a formal complaint. The DRP panel may use a variety of means to achieve resolution.

a. As provided in paragraphs 3-13a(2) and 12-4a(1), the official discrimination complaint case file is established and the EEO counselor's report is made part of that file when a complainant elects to use the DRP. The complaint file will be established and provided to the DRP panel within 5 days after the end of the 30 day period following the date on which the complainant first brought the matters giving rise to the complaint to the attention of the EEO counselor or the SEEM or within 5 days after the completion of the EEO counselor's inquiry, whichever comes first.

b. The DRP panel may use a variety of techniques to gather sufficient information to determine how to resolve the complaint, such as one or more of the following:

(1) Make a decision to resolve the complaint on the basis of the official discrimination complaint case file and the guidance of DRP panel members and advisors.

(2) Meet with and interview the complainant, any individuals named by the complainant as being responsible for the alleged acts of discrimination, or any other witnesses.

(3) Obtain any documentary or statistical evidence.

(4) Appoint a disinterested and impartial officer to conduct an inquiry into the matter and present his or her findings to the panel (note that the panel only has 35 days from the date of the receipt of the official discrimination complaint case file from the SEEM to resolve the complaint).

c. If the complaint is resolved to the satisfaction of the complainant, provisions of paragraph B-3c apply.

d. If the complaint is not resolved within 70 days after the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM, then the DRP will make a written report of its efforts to the AG.

B-7. Role of the Adjutant General in the DRP

a. The AG will review the allegations and issues raised by the complainant, the EEO counselor's inquiry, and all resolution attempts to date. The AG may use the advice and recommendaions of any staff members, as appropriate, and may require additional inquiries or information concerning the matter or the circumstances surrounding the complaint. The AG may direct a resolution of the complaint that satisfies the complainant under the authority vested in the AG or determine that a resolution is not possible.

b. If a settlement is not reached, the AG will direct that the EEO counselor or a member of the DRP panel hold a final interview with the complainant, as provided in paragraphs 3-11 and 3-12 of this regulation, and issue the complainant a notice of right to file a formal complaint. The interview and issuance of the right to file notice will take place not later than 90 days after the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. This interview and notice will not be delayed because settlement or withdrawal of a complaint is imminent.

B-8. Results of the DRP
If the complaint is resolved, the settlement agreement will be included in the official discrimination complaint case file, a copy will be provided to the complainant, and the case will be closed. If the complaint is not resolved any documentation generated during the DRP will be made part of the official discrimination complaint case file. This includes any fact finding or inquiries conducted, the report of the DRP panel, and the determination of the AG.

Section II
The Mediation Process

B-9. Procedures and time constraints
The DRP under this section consists of a confidential process of reconciling the differences between the complainant and management officials by the use of a neutral third party. Both the complainant and the management official(s) (see paragraph B-10) must agree to participate in the mediation process. Mediation may be invoked in lieu of the DRP panel procedures of section I, above; as part of the procedures of section I above; or at any time after a formal complaint has been filed. This regulation specifically provides for settlement opportunities; mediation may be invoked at any of these times.

a. During the pre-complaint processing stage, agreement by the complainant to participate in mediation requires the execution of a DRP extension agreement. Whether mediation is used separately or as part of the DRP under section I, resolution efforts must be completed within 90 days after the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. If mediation is not successful, a final interview will be held and the complainant will be issued a notice of the right to file a formal complaint [3-11 and 3-12].

b. If mediation is elected after the formal complaint is filed but before a notice of investigation completion is issued, the complainant may execute an agreement for an extension not to exceed 90 days [5-12b].

c. Except as provided above, the time limits of this regulation are not tolled during mediation.

B-10. Parties to the mediation process
The mediation process is confidential [B-13] and is best served by a limited number of participants, as indicated below.

a. The mediator who is a neutral third party selected as described in paragraph B-11, below. The mediator's role is discussed in paragraph B-13.

b. The complainant who may be accompanied by a representative.

c. A management official who has the authority to enter into an agreement on behalf of the State National Guard such that the complaint may be resolved.

(1) Mediation during pre-complaint processing may include the individual named by the complainant as being responsible for the alleged acts of discrimination if this individual has the authority to make decisions about the issues raised and to authorize the necessary remedies.

(2) After a formal complaint is filed the AG will designate the management official.

B-11. Selection of the mediator

Only National Guard Bureau certified mediators or contract mediators approved by NGB will be used. NGB will maintain a list of mediators. When a complainant and the State National Guard agree to mediate a discrimination complaint, the SEEM will notify the appropriate NGB-HR Regional Center (and NGB CMSA if the complaint has been formally filed). The Regional Center will arrange for the services of a mediator who is available to conduct mediation within the time limits imposed by the administrative complaint process. To ensure that the mediator is a neutral third party and will not be involved in any other processing or adjudication of the complaint being mediated, the mediator will not be a member of--

a. The State National Guard that is a party to the complaint.

b. A National Guard Bureau Regional Center in the region in which the complaint originated, as long as such Regional Center is involved in the processing, management, or adjudication of the complaint.

B-12. Actions prior to mediation

a. The SEEM will coordinate with the mediator and the two parties to the mediation on a suitable date and the specific participants in the mediation. The SEEM will arrange for a suitable physical location, to include a private area for the mediation, a waiting area, and access for the mediator to a copier and typist who can type any handwritten settlement agreement, if required.

b. The mediator will confirm the participation of the parties with them by telephone and by letter (see figure F-28). If time is of the essence, the letter may be sent by facsimile to the SEEM who will ensure its delivery to the parties concerned.

B-13. The process and confidentiality of mediation

A typical mediation process begins with introduction of the parties present and opening remarks by the mediator who explains the procedures to be followed, the role of the mediator, and the confidentiality of the process.

a. The mediator has neither the power nor the authority to decide on the terms of any settlement nor does the mediator have any decision making role in the complaint process. The mediator acts as a facilitator to bring out the facts and disputed areas and to encourage the two opposing parties to reach common grounds of agreement.

b. Mediation is not a legal proceeding and is not bound by formal rules of evidence. It is not an adversary proceeding and there will be no cross examination.

c. The proceedings will be strictly confidential. The matters discussed or divulged by either party will not be revealed outside the mediation process. The mediator is not authorized to provide any such information during any investigation, fact finding, or other administrative proceeding under this regulation and the mediator will not willingly testify in court regarding the information obtained in the mediation session. The only exceptions to the confidentiality rules are:

(1) Settlement agreements reached between the two parties may have to be submitted for review, approval, or inclusion in official discrimination complaint case files, as provided in chapters 3 and 7 of this regulation.

(2) The mediator will make a record of the fact that the mediation took place and indicate the date, time spent, the participants involved, and whether a resolution was reached. This record will not contain any information about the matters discussed during the mediation.

(3) Matters that are required to be reported by law will not be kept confidential if such matters are brought to the attention of the mediator.

d. Both parties, starting with the complainant, will have an opportunity make a statement and to bring out the issues and concerns bearing on the complaint. The mediator will assist both parties in identifying facts and issues, in focusing on the underlying concerns, and in developing options for resolution. The mediator may meet privately and separately with each of the two parties to gain a better insight into the problems and to assist in the mediation process.

e. If any or all matters in dispute are resolved to the mutual satisfaction of both parties, the mediator will reduce the terms of the settlement to writing, make three copies, and have each party sign and date each copy of the settlement with the mediator serving as a witness. The mediator will provide each party with a copy of the executed settlement agreement. To ensure that settlements in formal complaints comply with the requirement of chapter 7 of this regulation, the mediator will use figure F-29 for such agreements.

APPENDIX C

EEOC DISTRICT OFFICES

Atlanta District Office

District Director
Atlanta District Office
Equal Employment Opportunity Commission
Citizens Trust Building
75 Piedmont Avenue, N.E.
Atlanta, Georgia 30303

Geographic Jurisdiction:
States of Georgia and South Carolina

Baltimore District Office

District Office
Baltimore District Office
Equal Employment Opportunity Commission
111 Market Place, Suite 4000
Baltimore, Maryland 21201

Geographic Jurisdiction:
States of Maryland and Virginia (except for those Virginia cities and counties under the jurisdiction of the Washington Field Office)

Birmingham District Office

District Director
Birmingham District Office
Equal Employment Opportunity Commission
1900 3rd Avenue, North, Suite 101
Birmingham, Alabama 35203

Geographic Jurisdiction:
States of Alabama and Mississippi

Charlotte District Office

District Director
Charlotte District Office
Equal Employment Opportunity Commission
5500 Central Avenue
Charlotte, North Carolina 28212

Geographic Jurisdiction:
State of North Carolina

Chicago District Office

District Director
Chicago District Office
Equal Employment Opportunity Commission
Federal Building, Room 930A
536 S. Clark Street
Chicago, Illinois 60605

Geographic Jurisdiction:
State of Illinois, except counties of:
Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perry, Pulaski, Randolph, St. Clair, Union, and Washington (which are under the jurisdiction of St. Louis District Office)

Cleveland District Office

District Director
Cleveland District Office
Equal Employment Opportunity Commission
One Playhouse Square
1375 Euclid Avenue, Room 600
Cleveland, Ohio 44115

Geographic Jurisdiction:
State of Ohio

Dallas District Office

District Director
Dallas District Office
Equal Employment Opportunity Commission
8303 Elmbrook Drive, 2nd FLoor
Dallas, Texas 75247

Geographic Jurisdiction:
State of Oklahoma, and Texas counties of:
Anderson, Archer, Baylor, Bell, Bosque, Bowie, Brown, Callahan, Camp, Cass, Cherokee, Clay, Coleman, Collin, Comanche, Cooke, Coryell, Dallas, Delta, Denton, Eastland, Erath, Ellis, Falls, Fannin, Fisher, Franklin, Freestone, Gregg, Grayson, Hamilton, Harrison, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jack, Johnson, Jones, Kaufman, Lamar, Lampass, Leon, Limestone, Madison, Marion, McLennan, Milam, Mills, Montague, Morris, Nacogdoches, Navarro, Nolan, Palo Pinto, Panola, Parker, Rains, Red River, Robertson, Rockwell, Runnels, Rusk, Shackelford, Shelby, Smith, Somerville, Stephens, Tarrant, Taylor, Throckmorton, Titus, Upshur, Van Zandt, Wichita, Wilbarger, Wise, Wood, Young.

Denver District Office

District Director
Denver District Office
Equal Employment Opportunity Commission
1845 Sherman Street, 2nd Floor
Denver, Colorado 80203

Geographic Jurisdiction:
States of Colorado, Montana, North Dakota, South Dakota, Nebraska, and Wyoming.

Detroit District Office

District Director
Detroit District Office
Equal Employment Opportunity Commission
McNamara Federal Building
477 Michigan Avenue, Room 1540
Detroit, Michigan 48226

Geographic Jurisdiction:
State of Michigan

Houston District Office

District Director
Houston District Office
Equal Employment Opportunity Commission
1919 Smith Street, 7th Floor
Houston, Texas 77002

Geographic Jurisdiction:

State of Texas, counties of: Angelina, Austin, Brazoria, Chambers, Colorado, Fort Bend, Galverson, Grimes, Hardin, Harris, Jasper, Jefferson, Liberty, Matagorda, Montgomery, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Waller, Wharton.

Indianapolis District Office

District Director
Indianapolis District Office
Equal Employment Opportunity Commission
Federal Building, U.S. Courthouse
6 E. Ohio Street, Room 456
Indianapolis, Indiana 46204

Geographic Jurisdiction:
States of Indiana and Kentucky

Los Angeles District Office

District Director
Los Angeles District Office
Equal Employment Opportunity Commission
3660 Wilshire Blvd., 5th Floor
Los Angeles, California 90010

Geographic Jurisdiction:
State of Nevada and California counties of: Imperial, Los Angeles, Orange, Riverside, San Bernadino, Santa Barbars, San Diego, San Luis Obispo, Ventura.

Memphis District Office

District Office
Memphis District Office
Equal Employment Opportunity Commission
1407 Union Avenue, Suite 502
Memphis, Tennessee 38104

Geographic Jurisdiction:
States of Arkansas and Tennessee

Miami District Office

District Director
Miami District Office
Equal Employment Opportunity Commission
Metro - Mall Building
1 NE First Street, 6th Floor
Miami, Florida 33132

Geographic Jurisdiction:
State of Florida and Panama Canal Zone

Milwaukee District Office

District Director
Milwaukee District Office
Equal Employment Opportunity Commission
Henry S. Reuss Federal Plaza
310 West Wisconsin Avenue, Suite 800
Milwaukee, Wisconsin 53203

Geographic Jurisdiction:
States of Iowa, Minnesota, and Wisconsin

New Orleans District Office

District Director
New Orleans District Office
Equal Employment Opportunity Commission
701 Loyola Ave., Suite 600
New Orleans, Louisiana 70113

Geographic Jurisdiction:
State of Louisiana

New York District Office

District Director
New York District Office
Equal Employment Opportunity Commission
90 Church Street, Room 1501
New York, New York 10007

Geographic Jurisdiction:
States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands

Philadelphia District Office

District Director
Philadelphia District Office
Equal Employment Opportunity Commission
1421 Cherry Street, 10th Floor
Philadelphia, Pennsylvania 19102

Geographic Jurisdiction:
States of Delaware, New Jersey, Pennsylvania, and West Virginia

Phoenix District Office

District Director
Phoenix District Office
Equal Employment Opportunity Commission
4520 N. Central Avenue, Suite 300
Phoenix, Arizona 85012-1848

Geographic Jurisdiction:
States of Arizona, New Mexico, and Utah

San Antonio District Office

District Director
San Antonio District Office
Equal Employment Opportunity Commission
5410 Fredericksburg Road, Suite 200
Mockingbird Plaza, Plaza II
San Antonio, Texas 78229

Geographic Jurisdiction:
State of Texas, counties of: Andrews, Aransan, Arkansas, Armstrong, Atascosa, Bailey, Bandera, Bastrop, Bee, Bexar, Blanco, Borden, Brazos, Brewster, Brisco, Brooks, Burleson, Burnet, Caldwell, Calhoun, Cameron, Carson, Castro, Childress, Cochran, Coke, Collingsworth, Comal, Concho, Corsby, Crockett, Cottle, Crane, Culberson, Dallam, Dawson, Deaf Smith, De Witt, Dickens, Dimmit, Donley, Ector, Edwards, El Paso, Fayetee, Floyd, Forad, Frio, Gaines, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Guadalupe, Hale, Hall, Hansford, Hardeman, Hartley, Haskell, Hays, Hemphill, Hidalgo, Hockley, Howard, Hudspeth, Hutchinson, Irion, Jackson, Jeff Davis, Jim Hogg, Jim Wells, Karnes, Kendall, Kennedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, Lamb, La Salle, Lavaca, Lee, Lipscomb, Live Oak, Llano, Loving, Lynn, Lubbock, McCulloch, McMullen, Martin, Mason, Maverick, Medina, Menard, Midland, Mitchell,

Moore, Motley, Nueces, Ochiltree, Oldham, Parmer, Pecos, Potter, Presidio, Randall, Reagan, Real, Refuigo, Roberts, San Particio, San Saba, Schleicher, Scurry, Sherman, Starr, Sterling, Stonewall, Sutton, Swisher, Terrell, Terry, Tom Green, Travis, Upton, Uvalde, Val Verde, Victoria, Ward, Washington, Webb, Wheeler, Willacy, Williamson, Wilson, Winkler, Yoakum, Zapata, and Zavala.

San Francisco District Office

District Director
San Francisco District Office
Equal Employment Opportunity Commission
901 Market Street, Suite 500
San Francisco, California 94103

Geographical Jurisdiction:
State of Hawaii, Pacific Far East (the U.S. Possessions of American Somoa, Guam, Northern Mariana Islands, and Wake Island) and California counties of: Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Inyo, Kern, Kings, Lake, Lassen, Madera, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Crz, Shasta, Sierra, Siskiyou, Solana, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, Yuba.

(Hearings in Far East)

Seattle District Office

District Director
Seattle District Office
Equal Employment Opportunity Commission
Arcade Plaza Building, 7th Floor
2815 Second Avenue, Suite 500
Seattle, Washington 98101

Geographic Jurisdiction:
States of Alaska, Idaho, Oregon, and Washington

St. Louis District Office

District Director
St. Louis District Office
Equal Employment Opportunity Commission
Central West Plaza Building, 5th Floor
625 N. Euclid Street
St. Louis, Missouri 63108

Geographic Jurisdiction:
States of Kansas, Missouri, and Illinois counties of: Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perry, Pulaski, Randolph, St. Clair, Union, Washington.

Washington Field Office

Washington Field Office
Equal Employment Opportunity Commission
1400 L Street, N.W. Suite 200
Washington, D.C. 20005

Geographic Juristiction:
Hearings in Europe, the District of Columbia and Virginia counties of: Arlington, Clarke, Fairfax, Fauquier, Frederick, Loudoun, Prince William, Stafford, Warren, and Virginia independent cities of Alexandria, Fairfax City, Falls Church, Manassas, Manassas Park and Winchester.

APPENDIX D

THE COMPLAINT PROCESS AND TIME LIMITS

D-1. Content
This appendix is designed for use by EEO counselors and State Equal Employment Managers in discussing the complaint process with complainants and as a quick reference guide to the time limits established by this regulation. This appendix contains:

a. A summary of time limits corresponding to the applicable chapter of the regulation. This is a summary only and the paragraphs of the regulation that contain more detailed information and an explanation of the associated requirements are shown in brackets following the specified time limit.

b. A flow diagram of the complaint process. This is also a summary and contains only the major steps of the process.

D-2. Use
The flow diagram of the process and the summary of time limits should be reproduced and used as handouts to assist complainants or in training sessions on discrimination complaints processing.

D-3. Time Limits for pre-complaint processing
a. The complainant must bring allegations of discrimination to the attention of an EEO counselor or the SEEM within 45 calendar days after the date of the alleged act of discrimination, the effective date of the alleged discriminatory personnel action or the date the complainant knew or reasonably should have known of the discriminatory act or personnel action. [3-3]

b. The initial counselling session with the EEO counselor should take place on the same day the matters giving rise to the complaint are first brought to the attention of the EEO counselor or the SEEM. If that is not possible, that initial counselling session will be scheduled within the next 5 days. [3-4]

c. For an extension of the inquiry for an additional 30 days to be authorized, such extension must be agreed to by the complainant not later than 30 calendar days after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. [3-9]

d. Participation in the dispute resolution process (DRP) must be agreed to by the complainant not later than 30 calendar days after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. [3-10]

e. If the complaint is not resolved during counselling, a final interview and notice of right to file a formal complaint will be issued by the EEO counselor to the complainant not later than 30 calendar days (60 calendar days if the complainant has agreed to an extension of the inquiry) after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. [3-11, 3-12]

f. If the complaint is not resolved during DRP, a final interview and notice of right to file a formal complaint will be issued to the complainant not later than 90 calendar days after the date on which the matters which gave rise to the complaint were first brought to the attention of the EEO counselor or the SEEM. [3-12]

g. The written report of the EEO counselor's inquiry will be provided to the SEEM as follows: [3-13]

(1) 3 calendar days after the issuance of the notice under paragraph 3-1e.

(2) If the complainant has elected to participate in the DRP, the counsellor will provide the report within 30 calendar days after the date on which the matters giving rise to the complaint were first brought to the attention of the EEO counselor or the SEEM or within 3 calendar days of the completion of the inquiry, whichever comes first.

D-4. Time limits during filing of formal complaint
a. Formal complaints must be filed within 15 calendar days after the day the complainant receives the notice of final interview and right to file. [4-2]

b. The SEEM will obtain an NGB Case Number for a formal complaint on the same day that the complaint is received by the SEEM. [4-4]

c. The notice of receipt of the formal complaint will be issued within 3 calendar days after the day that the formal complaint is received by the SEEM. [4-4]

d. The SEEM will recommend to the AG whether the complaint is to be accepted or dismissed within 5 calendar days after the receipt of the complaint or within 5 calendar days after the completion of the clarification process. [4-5, 4-6]

e. The clarification process will be completed within 10 calendar days after the receipt of the complaint, unless a written request for clarification is sent to the complainant. [4-6]

f. Any written request for clarification must be sent to the complainant within 5 calendar days after the receipt of the formal complaint. [4-6]

g. The complainant must provide any required clarification of issues within 15 calendar days after the receipt of the request for clarification. [4-10]

h. The AG will accept or dismiss the complaint within 10 calendar days after its receipt or within 10 calendar days after the completion of the clarification process. [4-7]

i. The complaint case file will be forwarded to NGB within 3 calendar days after the acceptance or dismissal after the complaint. [4-8]

D-5. Time limits during investigation
a. The investigator and the State National Guard will decide on the time for the on-site in-

vestigation within 5 days after the investigator's receipt of the complaint case file. [5-7]

b. The investigator will submit an initial report to NGB within 5 days after the investigator's receipt of the complaint case file. [5-7]

c. The on-site investigation will begin not later than 20 days after the investigator's receipt of the complaint case file. [5-7]

d. The State National Guard provided court reporter will provide transcripts of the investigative fact finding hearing to the investigator prior to the investigator's departure from the site. Otherwise, the court reporter will send them by express mail to the investigator within 3 working days after the testimony has been taken. [5-8]

e. The investigator will submit a Report of Investigation to NGB not later than 45 days after the receipt of the case file, unless an extension has been granted by NGB. [5-5, 5-12, 5-13]

f. NGB will be advised of unresolved problems or unavoidable delays encountered during the investigation within two days. [5-12]

g. The investigation or the time for issuance of the investigation completion notice may be extended for not more than 90 days upon agreement by the complainant. [5-12]

h. The notice of investigation completion will be issued within 180 days after the filing of the formal complaint or within the time specified by EEOC on appeal of a dismissal and any extension agreed upon by the complainant. [5-15, 5-17]

i. The complainant can request a hearing from EEOC if the notice of investigation completion is not issued within 180 days after the filing of the formal complaint or within the time specified by EEOC on appeal of a dismissal and any extension agreed upon by the complainant. [5-17]

D-6. Time limits for adjudication

a. Within 15 days after the receipt of the notice of investigation completion, the AG can provide input to NGB prior to the issuance of the final decision. [6-4]

b. Within 30 days after the receipt of the notice of investigation completion, the complainant must request an immediate final decision or a final decision with a hearing. [6-5, 6-6]

c. Within 5 days after the receipt of the complainant's request for a final decision with a hearing, the SEEM will forward to NGB information needed to request assignment of an AJ. [6-6]

d. Within 14 days after the receipt of the needed information from the SEEM, NGB will request EEOC to assign an AJ and will provide EEOC a copy of the case file. [6-7]

e. Not later than 15 days prior to the hearing, the complainant or the National Guard may file a statement with the AJ asserting that some or all facts in the case are not in genuine dispute. [6-10]

f. Within 15 days after the receipt of the statement referred to in subparagraph e, above, the other party may file a statement in opposition. [6-10]

g. The complainant and the National Guard have 15 days to respond to a notice by the AJ to limit the scope of the hearing or to issue findings and conclusions without a hearing. [6-10]

h. Within 180 days after the receipt of a request for a hearing by EEOC, the AJ will issue findings of fact and conclusions of law. This time limit can be extended if the AJ makes a written determination that good cause exists for the extension. [6-10]

i. Within 60 days after the receipt of the complainant's request for an immediate final decision or the receipt of the AJ's findings and conclusions, NGB will issue a final decision on the merits of the complaint. [6-11]

j. Within 60 days after the end of the 30 day period for the complainant to request a hearing or an immediate final decision, where the complainant has failed to make such a request, NGB will issue a final decision on the merits of the complaint. [6-11]

k. If within 60 calendar days after the receipt of the hearing record NGB has not issued a final decision rejecting or modifying the AJ's findings and conclusions, such findings and conclusions and the relief ordered will become the final decision. [6-12]

l. If within 180 days after the filing of the formal complaint, NGB has not issued a final decision, the complainant may file a civil action in an appropriate U.S. District Court under conditions specified in chapter 8. [6-12]

D-7. Time limits in withdrawal and settlement actions

a. The submission to NGB of a withdrawal or settlement of a complaint during on-site investigation will be done on the same day that the withdrawal or settlement occurred. [7-2, 7-5]

b. Within 30 days after the receipt of a certified offer of full relief, the complainant must accept that offer or the complaint may be dismissed. [7-6]

c. Within 15 days after the receipt of an offer of employment, the complainant who was an applicant for employment, must accept or decline that offer. [7-8]

d. Back pay may not be given for more than 2 years prior to the date on which the complaint was formally filed. [7-8, 7-9]

e. Request for attorney's fees and costs will be submitted within 30 days of the receipt of a final decision or the execution of a settlement agreement. [7-4]

f. Agreement on attorney's fees and costs must be reached within 10 days after the receipt of the request for the fees and costs. [7-11]

g. A final decision on attorney's fees and costs must be issued within 30 days after the receipt of the request for the fees and costs. [7-11]

h. Allegations of noncompliance with settlements or final decisions must be submitted within 30 days after the date the complainant knew or reasonably should have known of the noncompliance. [7-12, 7-13]

i. State National Guard comments regarding a complainant's allegation of noncompliance will be submitted to NGB within 7 days after the receipt of the allegations of noncompliance. [7-12, 7-13]

j. NGB determination on the allegations of noncompliance must be issued within 30 days after the receipt of the allegations. [7-12, 7-14]

k. The complainant may appeal the NGB determination within 30 days after the receipt of the determination. [7-12, 7-13]

l. If NGB fails to issue a determination, the complainant may appeal to EEOC within 35 days after serving the noncompliance allegations on NGB. [7-12, 7-13]

D-8. Time limits in appeals and civil actions

a. An appeal of noncompliance may be filed within 35 days after serving a notice of alleged noncompliance with a settlement or final decision. [8-4]

b. If NGB issues a timely determination on the allegation of noncompliance, an appeal of that determination must be filed within 30 days after its receipt. [8-4]

c. An appeal of the dismissal of all or part of a complaint and an appeal of any NGB final decision must be filed within 30 days after the receipt of that dismissal or decision. [8-4]

d. Any statement or brief in support of a complainant's appeal must be filed within 30 days after the filing of the appeal. [8-4]

e. State National Guard input in opposition to an appeal or in conjunction with a reconsideration of an appeal will be submitted to NGB within 7 days after the receipt of NGB's request for the input. [8-5, 8-7]

f. The complaint file and any statement or brief in opposition to an appeal will be submitted to EEOC by NGB within 30 days after the receipt of the request from EEOC. [8-5]

g. A request for reconsideration of an appeal must be submitted within 30 days after the receipt of the appeal or within 20 days after the receipt of the opposing party's request of reconsideration. [8-7]

h. Any statement or brief in support of a request for reconsideration will be submitted with that request. [8-7]

i. Any statement or brief in opposition to a request for reconsideration will be submitted within 20 days of the receipt of the opposing party's request for reconsideration. [8-7]

j. A complainant can file a civil action:

(1) Within 90 days (30 days in mixed case complaints) after receipt of a final NGB decision or a final EEOC appeal decision. [8-8, 8-9]

(2) After 180 days (120 days in mixed case complaints) from the date the complaint was filed if there has been no final decision or appeal. [8-8, 8-9]

(3) After 180 days (120 days in mixed case complaints) from the date an appeal was filed if there has been no decision on the appeal. [8-8, 8-9]

(4) Within 30 days of specified actions in mixed case complaints. [8-9]

(5) After 180 days of filing a petition in a mixed case complaint. [8-9]

(6) Within 2 year of alleged violation (3 years if the violation is willful) under the Equal Pay Act. [8-10]

k. A complainant must give notice of intent to file civil action at least 30 days prior to filing such action in lieu of an administrative complaint under ADEA. [8-11]

l. The notice under subparagraph 1, above, must be filed within 180 days of the alleged discrimination. [8-11]

D-9. Time limits for special procedures and processes

a. If the MSPB dismisses a mixed case appeal for jurisdictional reasons, the SEEM will within 5 calendar days notify the complainant in writing of the right to contact an EEO counselor. [10-6]

b. The EEO counselor must be contacted within 45 days of the receipt of the notice in a, above. [10-6]

c. If the MSPB dismisses a mixed case appeal for jurisdictional reasons, the date of initial contact with the counselor shall be considered the date on which the complainant filed his or her appeal with the MSPB. [10-6]

d. If there is a question of the MSPB's jurisdiction over a mixed case appeal, the complaint will be held in abeyance with time limitations tolled until jurisdiction is resolved. [10-7]

e. In a mixed case complaint, NGB will issue a final decision without a hearing within 45 days after the receipt of the complainant's request. [10-8]

f. A complainant may appeal a final NGB decision on a mixed case complaint to the MSPB within 20 days after its receipt or may file a civil action. [10-8]

g. If 120 days after the date of the filing of a mixed case complaint, NGB has not issued a final decision, the complainant may, at any time there-

after appeal to the MSPB or file a civil action. [10-8]

h. A petition to EEOC from an MSPB decisions must be filed within 30 days after its receipt or after the decision of a MSPB field office becomes final. [10-9]

D-10. Time limits in class complaints

a. The time limits in paragraph D-3, above, for pre-complaint counselling under chapter 3, apply to class complaints filed under chapter 11. [11-4]

b. Formal class complaints must be filed within 15 calendar days after the class agent receives the notice of final interview and right to file. [11-5]

c. Within 5 days after the receipt of the class complaint, the SEEM will complete any clarification of issues in the class complaint. [11-6]

d. Within 10 days after the receipt of the class complaint, the SEEM will send the case file to NGB along with comments on the acceptability of the complaint. [11-6]

e. Within 30 days after the receipt of the class complaint by the State National Guard, NGB will forward a copy of the complaint file to EEOC. [11-7]

f. The class agent will be given 15 days by EEOC to explain why any issue raised in the formal complaint was not counselled or to provide specificity and detail regarding any issue. [11-8]

g. Within 30 days after the receipt of the recommendation from EEOC, NGB will issue a decision to accept or dismiss the complaint or the recommendation will become the NGB decision. [11-8]

h. Within 15 calendar days after issuance of the NGB decision to accept the class complaint, the SEEM will make reasonable efforts to notify all class members of the existence of the class complaint. [11-9]

i. The National Guard representative and the class agent will have 60 days to develop evidence and prepare their case for presentation to EEOC. [11-10]

j. Within 30 days of the date of the notice of resolution any member of the class may petition the Director, EEO, to vacate the resolution because it benefits only the class agent or is otherwise not fair or reasonable. [11-11]

k. Within 60 calendar days after receiving the recommendations of the AJ, NGB will issue a final decision on the class complaint. [11-14]

l. If NGB has not issued a final decision within 60 calendar days, the findings and recommendations of the AJ become the final decision which must be sent to the agent within 5 days after the end of the 60-day period. [11-15]

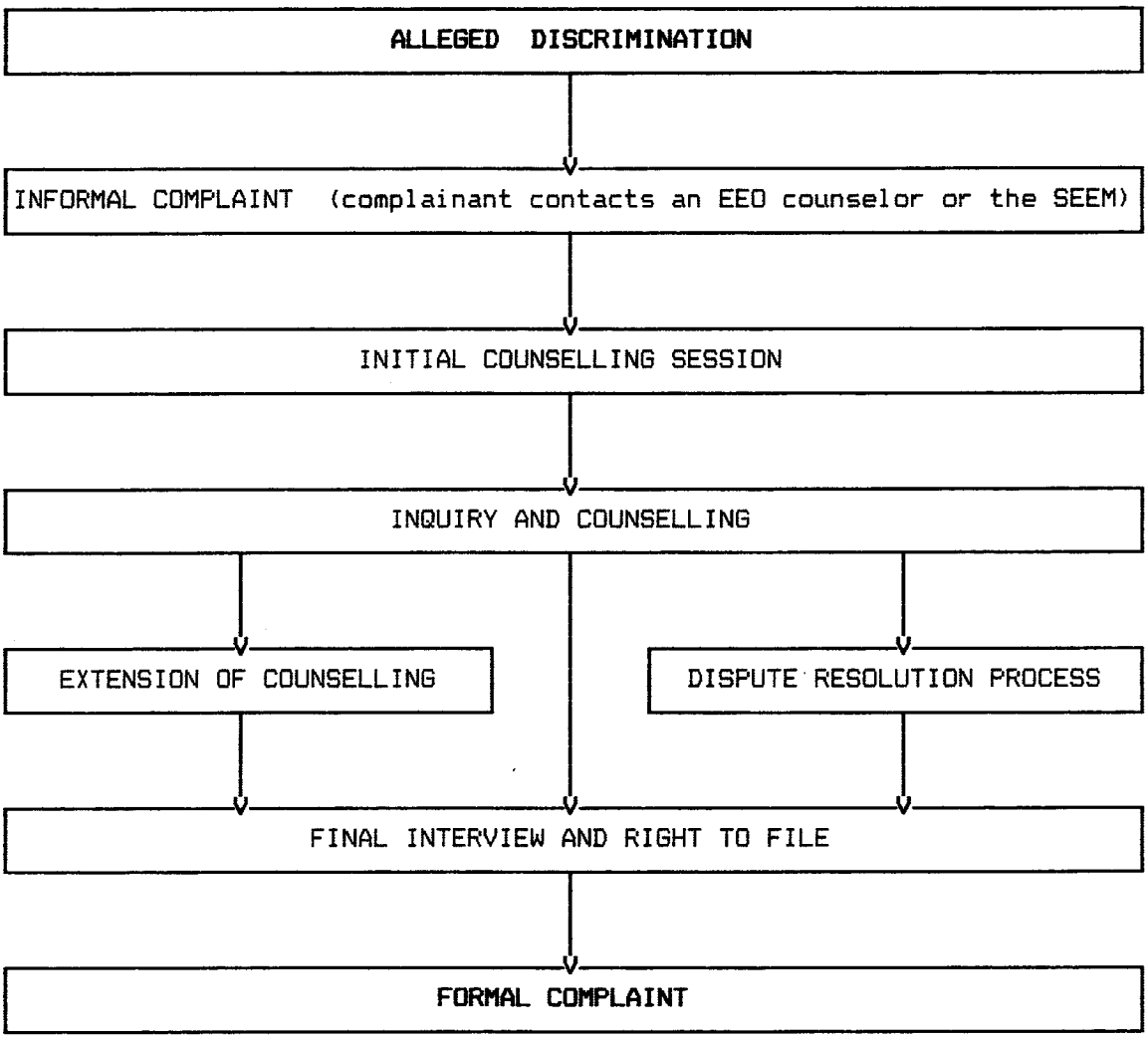
m. Within 10 calendar days after issuance of the NGB final decision, the SEEM will make reasonable efforts to notify all class members of the NGB final decision. [11-16]

n. Within 60 days after issuing a final decision, the State National Guard will issue a notice of receipt for any individual complaint that was subsumed into the class complaint. [11-17]

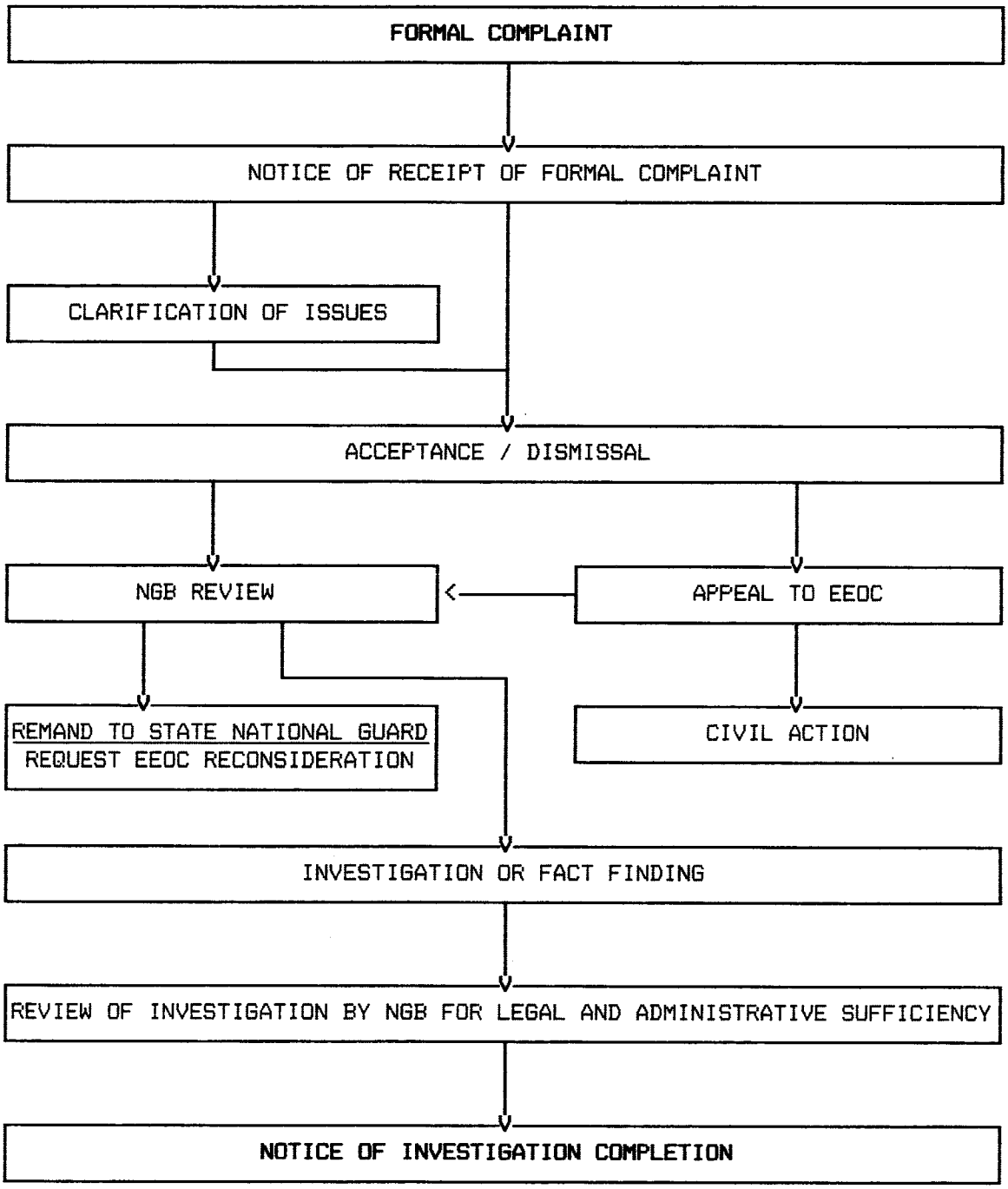
o. A claim for individual relief by a class member must be submitted within 30 calendar days after receipt of the notification of the NGB decision. [11-17]

p. Within 90 days after filing the claim for individual relief, NGB will issue a final decision on the claim. [11-17]

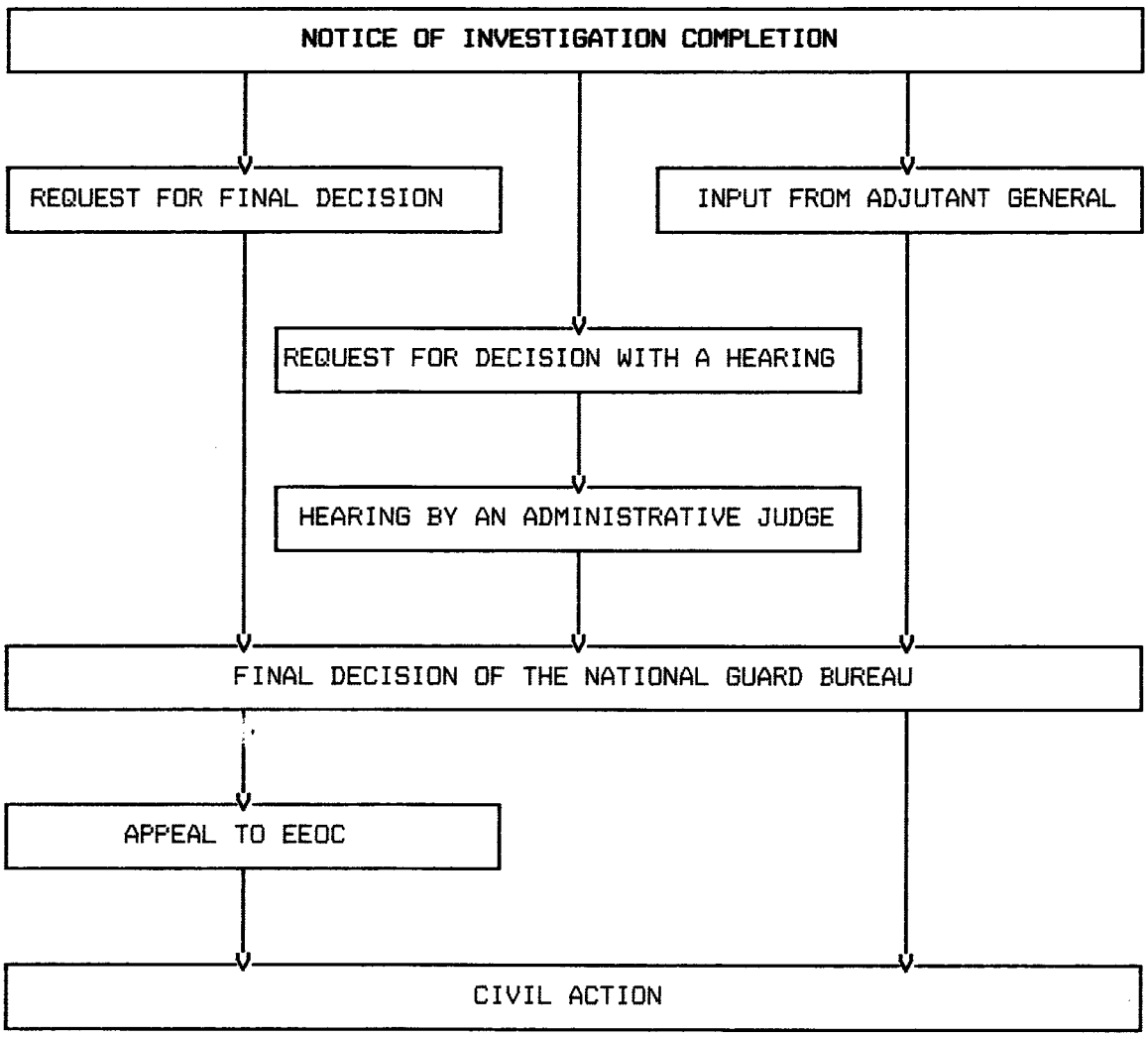
D-11. PRE-COMPLAINT PROCESS FLOW CHART



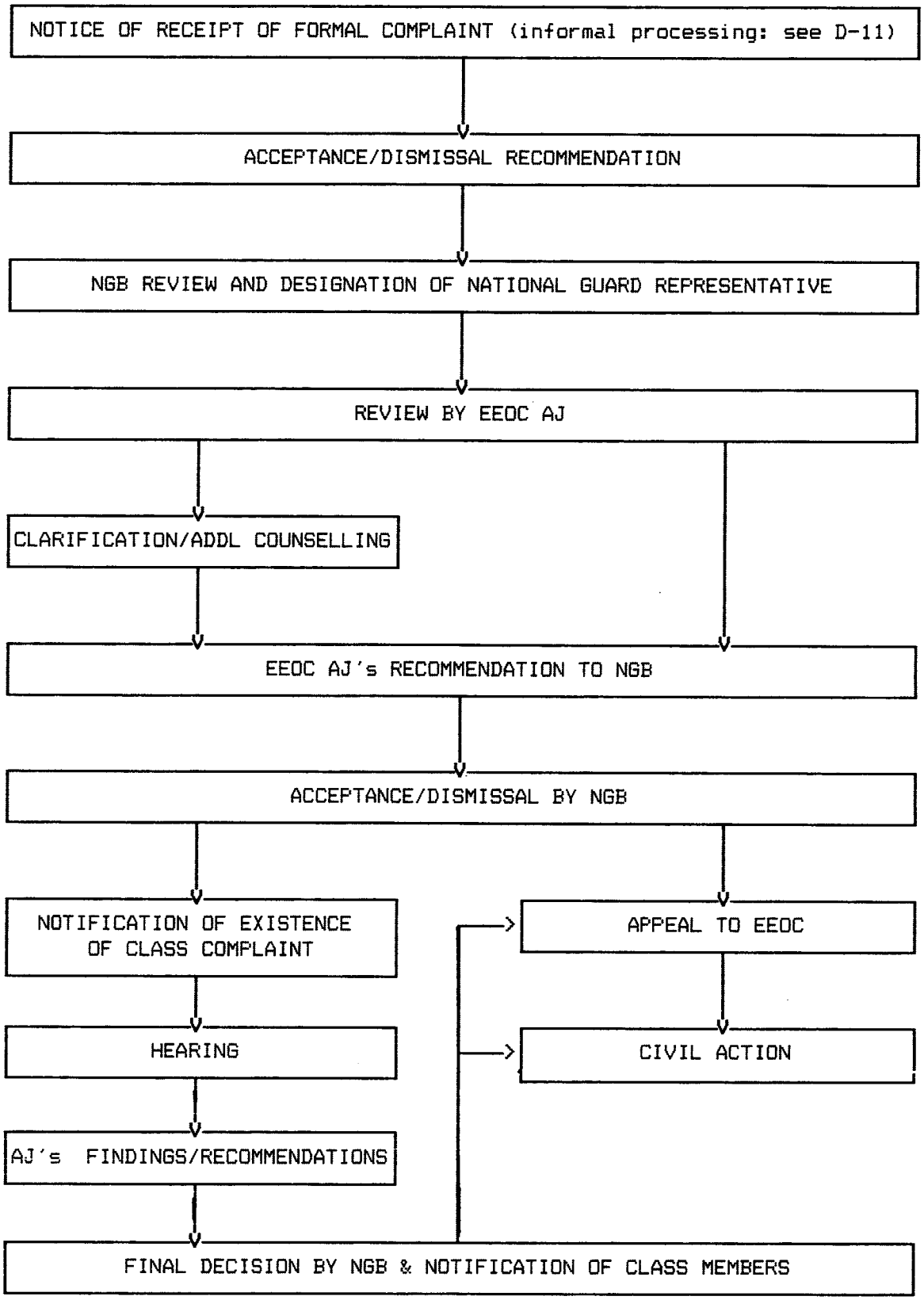
D-12. FORMAL COMPLAINT AND INVESTIGATION FLOW CHART



D-13. ADJUDICATION AND APPEAL FLOW CHART



D-14. CLASS COMPLAINT FLOW CHART



APPENDIX E

COMPLAINT REPORTING REQUIREMENTS

TO BE PUBLISHED

APPENDIX F

FORM LETTERS AND FORMATS

This appendix contains the form letters and formats that are to be used in conjunction with the notification procedures, offers and decisions made during the administrative processing of discrimination complaints under this regulation. A listing of the form letters and formats in this appendix is found in the table of content. Information contained in brackets [ ] is to be filled in by the preparer of the form letter or format. Form letters may be modified to comport to local correspondence formats. The following notes are common to more than one form letter and are referred to in the note section of a form letter.

NOTES:

1. This notice is given to the complainant during the initial counselling session with the EEO counselor.

2. The complainant will acknowledge receipt by signing and dating the official file copy of this notice. If he/she declines to sign the copy, the EEO counselor will sign it and indicate to whom and when the notice was given.

3. A copy of this notice will be forwarded to the SEEM together with the EEO counselor's report.

4. If the complainant has designated a representative, this form letter will be addressed to the representative with a copy to the complainant, unless the complainant has stated otherwise in writing. If the complainant has designated an attorney as his or her representative, service of documents will be made on the attorney and not the complainant. The complainant will be sent a copy of the document.

5. The notice is sent by certified mail, return receipt requested, or personally delivered. If the notice is personally delivered, the complainant and his/her representative will acknowledge receipt by signing and dating the official file copy of the notice. If he/she declines to sign the copy, the server will sign it and indicate to whom and when the notice was served.

6. A copy of the notice and evidence of receipt will be filed in the official discrimination complaint case file.

7. Figure F-1 will be attached as an enclosure to this form letter.

8. The EEO counselor indicates on the original of this form letter the date when he or she has received it. A copy is then given to the complainant.

9. Where a complainant has provided a narrative statement in lieu of separate and specific issues, and the issues are framed as provided in paragraph 4-6d, the following sentence will be added to paragraph 1: "Since the formal complaint did not list separate, clear, and specific issues, the issues cited in this notice were extracted from the narrative statement that was part of the formal complaint."

REVIEW, HEARING, APPEAL, AND CIVIL ACTION RIGHTS

1. Review
The acceptance or dismissal of your complaint will be automatically reviewed by the National Guard Bureau. If the decision to accept or dismiss all or part of your complaint is reversed by the National Guard Bureau you and the State National Guard will be notified. However, if you plan to appeal the dismissal of your complaint, you must do so within 30 calendar days after the receipt of the dismissal.

2. Hearing
If within 180 calendar days after the filing of a formal complaint and any extension agreed on, but not to exceed 90 days, the National Guard Bureau has not issued a notice of investigation completion, you have a right to request a hearing by an Equal Employment Opportunity Commission Administrative Judge by writing to the EEOC District Office for your area. You may obtain that address from any EEO counselor, the State Equal Employment Manager or appendix C of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614.

3. Appeal
If all or a part of your complaint is dismissed and you are dissatisfied with the dismissal, or if you are dissatisfied with a final decision issued by the National Guard Bureau, you may file an appeal and a statement or brief in support of the appeal with:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

The appeal must be in writing and should use EEOC Form 573, Notice of Appeal/Petition, indicating what is being appealed. The appeal may be filed by mail, personal delivery, or facsimile. A copy of the appeal and a copy of any statement or brief in support of the appeal must be provided to your State Equal Employment Manager and to:

Complaints Management and Support Activity
National Guard Bureau (NGB-HRE-C)
4501 Ford Avenue
Alexandria, VA 22302-1454

4. Time limit for an appeal
The appeal must be filed within 30 calendar days after the receipt of the dismissal notice or final decision. If the complainant is represented by an attorney of record, then the 30 day time period will be based from the date of the receipt of the dismissal notice or final decision by the attorney. Any statement or brief in support of the appeal must be submitted within 30 calendar days of filing the appeal.

5. Civil action
In accordance with 29 CFR 1614.408, a complainant is authorized to file a civil action in an appropriate U.S. District Court under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or the Rehabilitation Act, as follows:

"**(a)** Within 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed;
(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final decision has not been issued;
(c) Within 90 days of receipt of the Commission's final decision on appeal; or
(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission"

6. Representation in civil action
If you do not have, or are unable to obtain the services of a lawyer, you may request the court to appoint a lawyer to represent you. In such circumstances as the court may deem just, the court may appoint a lawyer and may authorize the commencement of the action without the payment of fees, costs, or security. Any such request must be made within the time limits for filing the civil action and in such form and manner as the court may require.

7. Proper defendant
If you file a civil action, you must name the Secretary of the Army or the Air Force, as listed in the subject of this notice, as the defendant. Failure to name Secretary of the Army or the Air Force, as appropriate, may result in the loss of any judicial redress to which you may be entitled.

8. Mixed case complaints
If your complaint includes an action that is also appealable to the Merit Systems Protection Board (MSPB), you have the following rights:

a. If your complaint is dismissed because you filed an appeal to the MSPB, you may not file an appeal with the EEOC unless you claim that the complaint or issue dismissed was not a mixed case matter. However, you will have the right to petition the EEOC to review the MSPB final decision on the discrimination issue.

b. If you are dissatisfied with a final decision issued by the National Guard Bureau, you may file an appeal with the MSPB, rather than the EEOC, and your appeal must be filed within 20 calendar days after the receipt of the final decision.

c. If you have not received a National Guard Bureau final decision within 120 days after filing your complaint, you may at any time thereafter file an appeal with the MSPB as specified 5 CFR 1201.154(a) or you may file a civil action.

Figure F-1. Review, hearing, appeal, and civil action rights

RIGHTS AND RESPONSIBILITIES IN DISCRIMINATION COMPLAINTS

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

[DATE]

SUBJECT: Rights and Responsibilities for Complaints of Discrimination

TO: [Name of person counselled]

1. If you believe that you have been discriminated against, you have certain rights and responsibilities under the National Guard Civilian Discrimination Complaint System of National Guard Regulation (AR) 690-600/ National Guard Regulation (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614. Complaints under these regulations must:

a. Involve an employment matter subject to the control of the National Guard; and

b. Be based on race, color, religion, gender (to include sexual harassment), age, national origin, physical or mental handicap; or

c. Be based on retaliation, restraint, interference, or coercion in connection with an equal employment opportunity matter or opposition to an unlawful employment practice under the anti-discrimination laws.

2. If you wish to pursue a complaint of discrimination, you must first participate in pre-complaint counselling so that the EEO counselor may attempt to informally resolve your complaint.

a. You must meet and cooperate with the EEO counselor. Such counselling may continue for 30 days after the day you brought the matters giving rise to your complaint to the attention of the EEO counselor or the State Equal Employment Manager (SEEM).

b. The EEO counselor will not reveal your identity unless you authorize it or unless you file a formal complaint after completing counselling. However, it may be difficult to achieve a resolution if your identity is not revealed.

c. The National Guard has a Dispute Resolution Process; this process will be explained to you and you will have an opportunity to participate in it.

d. If your complaint is not resolved in the pre-complaint stage, you will be issued a right to file a formal complaint. You will not be restrained or discouraged from filing a formal complaint; the EEO counselor or the SEEM will help you to fill out NGB Form 713-5, Complaint of Discrimination in the National Guard.

3. You may file a formal complaint only on the matters raised in pre-complaint counselling and discussed with your EEO counselor or on like or related matters. Together with the EEO counselor you must define these matters so they can be listed as clear and specific issues identifying in each issue the act or personnel action that you believe was discriminatory, the date when the discrimination took place, and what you believe was the basis of the discrimination.

4. If your complaint is accepted, it will be investigated. The burden of proof rest with you to show by a preponderance of evidence that discrimination took place. You will receive a copy of the Report of Investigation. You can then request an immediate final decision from the Chief, National Guard Bureau, or request a decision after a hearing by an Administrative Judge of the Equal Employment Opportunity Commission. These and the other rights and responsibilities in this notice will be explained to you by the EEO counselor during the initial counselling session.

5. If you are a member of a bargaining unit, if your complaint involves matters that can be appealed to the Merit Systems Protection Board, or if your complaint is based on age, you may have options in processing your complaint as explained in the enclosures to this notice. Your rights to appeal dismissals and decisions and to file civil action in a Federal court are also explained in an enclosure. During the EEO complaint process, if you choose to pursue it, you will again be advised of your rights and responsibilities.

6. You have a right to be represented at any step of the complaint process. You must advise the EEO counselor and, if you file a formal complaint, the State Equal Employment Manager and the National Guard Bureau Complaints Management and Support Activity of the name, address, and telephone number of your representative and whether your representative is an attorney. Unless you specify otherwise in writing, all correspondence will be with your representative, with copies to you. If your representative is an attorney, decisions and other documents will be served on the attorney.

7. If you file a formal complaint, you must keep the State Equal Employment Manager and the National Guard Bureau Complaints Management and Support Activity informed of your current address. If you file an appeal,

you must also keep the Equal Employment Opportunity Commission informed of your current address. If you cannot be located, your complaint may be dismissed. Any appeals, statements, or briefs must also be served on your State National Guard and the National Guard Bureau at the address that will be provided to you.

8. The EEO counselor will explain to you the remedies to which you may be entitled if you file a formal complaint and if discrimination is found. If you are granted relief that involves back pay, it is your duty to mitigate damages.

[Signature]
EEO Counselor

3 Enclosures
1. Election of Procedures
2. Age Discrimination
3. Review and Appeal Rights

I have read and understand my rights and responsibilities in this notice and the enclosures and have had them explained to me by the EEO counselor or the State Equal Employment Manager.

[Signature of person counselled] [Date signed]

Notes for figure F-2:
Notes 1, 2, 3, and 7 apply.

Figure F-2. Rights and responsibilities in discrimination complaints

ELECTION OF PROCEDURES FOR DISCRIMINATION COMPLAINTS

1. If you believe that you have been discriminated against because of race, color, religion, gender (to include sexual harassment), age, national origin, physical or mental handicap, or have been subjected to retaliation, restraint, interference, or coercion in connection with an equal employment opportunity matter and if the discrimination involves an employment matter subject to the control of the National Guard, you may have a choice of how to file your complaint and to have it resolved.

2. Your options are as follows:

a. If you are not a member of a bargaining unit covered by a union contract you must follow the EEO complaint procedures established by the Equal Employment Opportunity Commission (EEOC) as outlined in National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614 and governed by Title 29 Code of Federal Regulations Part 1614.

b. If you are a member of a bargaining unit covered by a union contract and if the negotiated grievance procedures in that contract do not prohibit the raising of allegations of discrimination, you may:

(1) Follow the discrimination complaint procedures in paragraph 2a, above; or

(2) Follow the negotiated grievance procedure in your union contract. If you elect this option, you have the right to appeal to the EEOC the final decision of the Adjutant General, the arbitrator, or the Federal Labor Relations Authority.

3. If your complaint is a mixed case, that is, if it is the result of alleged discrimination or retaliation and involves an action which is appealable to the Merit Systems Protection Board (MSPB) you may have a third option. (National Guard Technicians have appeal rights to the MSPB in cases of: (1) failure to properly restore from military service, (2) failure to properly restore from injury, and (3) denial of within-grade increase for General Schedule personnel.) You may:

a. Follow the discrimination complaint procedures in paragraph 2a, above; or

b. Use the negotiated grievance procedure if you are a member of a collective bargaining unit, as outlined in paragraph 2b, above; or

c. Appeal directly to the MSPB. If you chose this route, you may ask the EEOC to review the MSPB final decision.

4. Initially, you may choose only one of the above options; election of one automatically eliminates the availability of the others. Your election is made simply by filing in writing a formal EEO complaint after completing counselling, filing a written grievance through a negotiated grievance procedure, or filing an appeal with the MSPB. However, if the MSPB dismisses your appeal for jurisdictional reasons, you may then file the complaint under the EEO procedures.

5. The EEO counselor will explain each of these options to you. You may also review chapters 3 and 10 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614 that provide more details on your options. You may review that regulation by visiting your EEO counselor or State Equal Employment Manager.

6. If you have any other questions on this matter you may contact the State Equal Employment Manager, the Labor Management Relations Specialist in the Support Personnel Management Office, or your union representative.

Notes for figure F-3:
This is an enclosure to Figure F-2. Notes 1 and 3 apply.

Figure F-3. Election of procedures for discrimination complaints

AGE DISCRIMINATION PROCEDURES FOR DISCRIMINATION COMPLAINTS

1. To file an age discrimination complaint you must have been at least 40 years of age when the alleged discrimination took place. If you believe that you have been discriminated against because of your age or have been subjected to reprisal, restraint, interference, or coercion in connection with an equal employment opportunity matter involving your age and if the discrimination involves a matter that is subject to the control of the National Guard, you may have an additional choice of filing your complaint. You may:

a. File a complaint as described in the "Election of Procedures for Discrimination Complaints" that was provided to you by the EEO counselor; or

b. Elect to bypass the administrative procedure and file a civil action directly in an appropriate U.S. District Court, after first filing a written notice of intent to file a civil action with the EEOC within 180 calendar days of the date of the alleged discriminatory action. Once a timely notice of intent to sue is filed with the EEOC, you must wait at least 30 calendar days before filing a civil action.

2. If you bypass the administrative procedure and file a civil action, your notice of intent to sue should be dated and must contain the following information:

a. Statement of intent to file a civil action under Section 15(d) of the Age Discrimination in Employment Act of 1967 (ADEA), as amended.

b. Your name, address, and telephone number.

c. Name, address, and telephone number of your representative, if any.

d. Name and location of the federal agency or installation where the alleged discriminatory action occurred.

e. Statement of the nature of the alleged discriminatory action(s).

f. Date(s) the alleged discriminatory action occurred.

g. Your signature or the signature of your representative.

3. Notices of Intent to Sue under the ADEA must be submitted to:

Federal Sector Programs
Equal Employment Opportunity Commission
1801 L Street, NW
Washington, D.C. 20507

4. If you elect to file an administrative complaint rather than filing directly in federal court, as described above, you must exhaust your administrative remedies before filing a civil action. These remedies are exhausted--

a. After the National Guard Bureau has issued a final decision or 180 days after filing your complaint, if NGB has not issued a final decision.

b. After the EEOC has issued a decision on an appeal or 180 days after filing your appeal if there has been no decision.

5. Because the courts have issued different decisions on what is the correct statute of limitations in the Age Discrimination in Employment Act as it applies to Federal employees, if you elect to file a civil action instead of using the administrative process, you should file as soon as possible after the expiration of the 30 day waiting period. You may also wish to seek competent legal advice regarding the facts of your particular case and the jurisdiction involved before making your election of procedures.

6. If you have any other questions, contact the EEO counselor or State Equal Employment Manager.

Notes for figure F-4:
This is an enclosure to Figure F-2. Notes 1 and 3 apply.

Figure F-4. Age discrimination procedures for discrimination complaints

AGREEMENT TO EXTEND COUNSELLING

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

[DATE]

SUBJECT: Agreement to Extend Counselling for 30 Days

TO: [Name of EEO counselor], EEO Counselor

1. On [DATE] I brought the matters giving rise to my complaint to the attention of [an EEO counselor/the State Equal Employment Manager] and had my initial counselling session on [DATE]. You have advised me that although your inquiry into my complaint cannot be completed within the required 30 days from the date I first brought the matters giving rise to my complaint to the attention of an EEO counselor or the SEEM, with some additional time you may be able to resolve my complaint. You have also informed me that the SEEM agrees with this assessment and has approved an extension of the inquiry and counselling not to exceed 30 (thirty) calendar days, for a total of 60 (sixty) days from the date I first brought the matters giving rise to my complaint to the attention of an EEO counselor or the SEEM.

2. I agree to the extension. I understand that if by the end of that extension my complaint has not been resolved, you will hold a final interview with me and will issue me a notice of right to file a formal complaint. I understand that this will take place not later than 60 calendar days from the date I first brought the matters giving rise to my complaint to the attention of an EEO counselor or the SEEM.

[Signature]
Complainant

Notes for figure F-5:
Notes 3 and 8 apply.

Figure F-5. Agreement to extend counselling

DISPUTE RESOLUTION PROCESS AGREEMENT

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

[DATE]

SUBJECT: Agreement to Participate in the Dispute Resolution Process

TO: [Name of EEO counselor], EEO Counselor

1. On [DATE] I brought the matters giving rise to my complaint to the attention of [an EEO counselor/the State Equal Employment Manager] and had my initial counselling session on [DATE]. You have advised me that the National Guard has a dispute resolution process and I understand that:

a. The purpose of the dispute resolution process is to help resolve discrimination complaints before they filed as formal complaints. You have reviewed with me appendix B of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614 which explains how the dispute resolution process works.

b. In participating in the dispute resolution process I do not forfeit my right to file a formal complaint if my complaint is not resolved.

c. If my complaint is resolved, any settlement agreement that is reached will be reduced to writing and I will be provided a copy of the agreement.

d. By participating in the dispute resolution process I agree to extend the pre-complaint process not to exceed 60 (sixty) calendar days, for a total of 90 (ninety) days from the date I first brought the matters giving rise to my complaint to the attention of an EEO counselor or the SEEM.

e. If by the end of that extension my complaint has not been resolved, a final interview will be held with me and I will receive a notice of right to file a formal complaint. I understand that this will take place not later than 90 calendar days from the date I first brought the matters giving rise to my complaint to the attention of an EEO counselor or the SEEM.

2. I agree to participate in the dispute resolution process established in appendix B of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614. In addition to the dispute resolution panel procedure with a review by the Adjutant General, I do/do not (delete one option and initial) want to participate in the confidential mediation process.

[Signature]
Complainant

Notes for figure F-6:
Notes 3 and 8 apply.

Figure F-6. Dispute resolution process agreement

NOTICE OF FINAL INTERVIEW AND RIGHT TO FILE A COMPLAINT (IN PERSON)

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

[DATE]

SUBJECT: Notice of Final Interview and Right to File a Complaint for [Full name of complainant], [State] [Army or Air] National Guard,

TO: [Name of person counselled]

1. This is notice that on the above date the final counselling interview was held in connection with the matter you presented to me as an EEO counselor. You initially brought this matter to the attention of an EEO counselor or the SEEM on [DATE] and had an initial counselling session on [DATE]. You stated that you believed that you were discriminated on the basis of [basis of discrimination].

2. If you believe you have been discriminated against on the basis of race, color, religion, gender (to include sexual harassment), national origin, age, physical or mental handicap, retaliation for participating in an EEO activity, or for opposing an unlawful employment practice under the anti-discrimination laws, you have the right to file a complaint of discrimination WITHIN 15 CALENDAR DAYS AFTER RECEIPT OF THIS NOTICE.

3. The complaint must be in writing on NGB Form 713-5 which is enclosed with this notice. It must be filed in person, by facsimile, or by mail with the State Equal Employment Manager (SEEM) or the Adjutant General at the following address:

a. [Name, address, and facsimile number of the SEEM]

b. [Name, address, and facsimile number of the Adjutant General]

4. Your formal complaint must state clear and specific issues which form the basis of your complaint. If you include issues on which you have not been counselled, such issues may be dismissed. Each issue must contain the specific act or personnel action that you believe was discriminatory, the date of the occurrence, and the basis of the discrimination. If your issues are not clear or specific or do not contain this information, you will have to clarify your issues before the complaint can be processed. To avoid any delay, your EEO counselor or the SEEM are ready to assist you in completing NGB Form 713-5 and in preparing your formal complaint, should you choose to proceed.

5. The complaint must also state whether you have filed a grievance under a negotiated grievance procedure or an appeal to the Merit System Protection Board on the same subject matter and if so, the date it was filed.

6. If you retain a representative you must provide his or her name, address, and telephone number to the SEEM at the above address. If your representative is an attorney, you must so indicate. You and your representative will receive a written notice of receipt of your discrimination complaint.

[Signature]
EEO Counselor

Enclosure
NGB Form 713-5

Notes for figure F-7:
This notice is given to the complainant at the final interview. Notes 2 and 3 apply.

Figure F-7. Notice of final interview (in person)

NOTICE OF FINAL INTERVIEW AND RIGHT TO FILE A COMPLAINT (BY MAIL)

LETTERHEAD OF STATE NATIONAL GUARD OR LOCAL ORGANIZATION

[DATE]

SUBJECT: Notice of Final Interview and Right to File a Complaint for [Full name of complainant], [State] [Army or Air] National Guard,

TO: [Name and address of person counselled]

1. A final counselling interview was not held person because [explain efforts to schedule the interview within the required time limit and the complainant's refusal or inability to participate]. I have, therefore, summarized the items I would have discussed with you in the final interview and enclosed this summary to this notice.

2. You initially brought this matter to the attention of an EEO counselor or the SEEM on [DATE] and had an initial counselling session on [DATE]. You stated that you believed that you were discriminated on the basis of [basis of discrimination].

3. If you believe you have been discriminated against on the basis of race, color, religion, gender (to include sexual harassment), national origin, age, physical or mental handicap, retaliation for participating in an EEO activity, or for opposing an unlawful employment practice under the anti-discrimination laws, you have the right to file a complaint of discrimination WITHIN 15 CALENDAR DAYS AFTER RECEIPT OF THIS NOTICE.

4. The complaint must be in writing on NGB Form 713-5 which is enclosed with this notice. It must be filed in person, by facsimile, or by mail with the State Equal Employment Manager (SEEM) or the Adjutant General at the following address:

a. [Name, address, and facsimile number of the SEEM]

b. [Name, address, and facsimile number of the Adjutant General]

5. Your formal complaint must state clear and specific issues which form the basis of your complaint. If you include issues on which you have not been counselled, such issues may be dismissed. Each issue must contain the specific act or personnel action that you believe was discriminatory, the date of the occurrence, and the basis of the discrimination. If your issues are not clear or specific or do not contain this information, you will have to clarify your issues before the complaint can be processed. To avoid any delay, your EEO counselor or the SEEM are ready to assist you in completing NGB Form 713-5 and in preparing your formal complaint, should you choose to proceed.

6. The complaint must also state whether you have filed a grievance under a negotiated grievance procedure or an appeal to the Merit System Protection Board on the same subject matter and if so, the date it was filed.

7. If you retain a representative you must provide his or her name, address, and telephone number to the SEEM at the above address. If your representative is an attorney, you must so indicate. You and your representative will receive a written notice of receipt of your discrimination complaint.

[Signature]
EEO Counselor

Enclosures
1. NGB Form 713-5
2. Summary of Final Interview

Notes for figure F-8:
Notes number 3, 4, and 5 apply.

Figure F-8. Notice of final interview (by mail)

NOTICE OF RECEIPT OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Receipt of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This notice acknowledges receipt on [DATE], of [your/your client's] discrimination complaint, dated [DATE]. Based on [personal delivery/postmark/lack of legible postmark] the complaint is deemed filed on [DATE]. Unless the issues in the complaint require clarification, a notice of the acceptance or dismissal of the complaint will be mailed to you within 10 days after the date that the complaint was received.

2. If the complaint, or any issue contained in it, is dismissed you will be able to appeal, as explained in the enclosure.

3. If the complaint is accepted, it will be investigated. You will be advised if an investigator will be assigned or if other fact finding procedures will be used. The State Equal Employment Manager will contact you to schedule an investigation and will explain to you the procedures used in the investigation. You will be notified when the investigation or fact finding is completed and you will receive a copy of the Report of Investigation or fact finding. At that time you will have an opportunity to ask for a decision by the Chief, National Guard Bureau, with or without a hearing by an Equal Employment Opportunity Commission Administrative Judge.

4. If you are dissatisfied with the final decision from the National Guard Bureau, you will be able to file an appeal as explained in the enclosure.

5. Within 180 days after the filing date of the complaint, the National Guard must issue you a notice of acceptance or dismissal and conduct a complete and fair investigation of the complaint. You may agree to extend the time of investigation for up to 90 days. If within 180 days and any extension agreed upon, the National Guard Bureau has not issued a notification that the investigation or fact finding was completed, you may request a hearing on the complaint as explained in the enclosure.

6. If you have further questions, contact your EEO counselor or me.

[Signature]
State Equal Employment Manager

Enclosure
Review and Appeal Rights

Notes for figure F-9:
Notes numbers 4, 5, 6, and 7 apply.

Figure F-9. Notice of receipt of discrimination complaint

REQUEST FOR CLARIFICATION OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Request for Clarification of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This refers to [your/your client's] discrimination complaint filed on [DATE]. Receipt of the complaint was acknowledged by letter to you dated [DATE]. In order to determine if the issues in the complaint should be accepted or dismissed and in order to be able to investigate any accepted issues, each issue must be clear and specific identifying in each issue the act or personnel action that you believe was discriminatory, the date when the discrimination took place, and what you believe was the basis of the discrimination. A description of the events and circumstances surrounding the allegations of discrimination can be included as a supporting statement but should not take the place of listing of the issues you wish to have considered as part of your formal complaint.

2. Attempts to clarify the issues in person have not been successful [explain the attempts made to clarify issues in person or by telephone].

3. In order to process your complaint, please provide the following information:

a. [List specific information that is needed that is not already available from the EEO counselor's report, personnel records, or other available documents. General statements such as "clarify the issues," will not be used.]

b. etc.

4. This information must be provided within 15 calendar days after you receive this request. If you fail to respond or if your response does not provide the information requested, the complaint or the portions of the complaint that require clarification will be dismissed. In that case you will be provided a notice of dismissal and rights of appeal.

[Signature]
State Equal Employment Manager

Notes for figure F-10:
Notes numbers 4, 5, and 6 apply.

Figure F-10. Request for clarification of discrimination complaint

NOTICE OF ACCEPTANCE OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Acceptance of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This refers to [your/your client's] discrimination complaint filed on [DATE]. Receipt of the complaint was acknowledged by letter to you dated [DATE]. The complaint was based on [basis of the complaint] discrimination in the following action(s): [summarize the matter that gave rise to the complaint, as listed in the issues].

2. Based on the criteria of Title 29 Code of Federal Regulations part 1614.107, as implemented in chapter 4 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614, the following issues raised in the complaint are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

a. [Each issue will be cited verbatim].

b. etc.

3. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

[Signature]
The Adjutant General

Notes for figure F-11:
Notes 4, 5, 6,and 9 apply.

Figure F-11. Notice of acceptance of discrimination complaint

NOTICE OF DISMISSAL OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Dismissal of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This refers to [your/your client's] discrimination complaint filed on [DATE]. Receipt of the complaint was acknowledged by letter to you dated [DATE]. The complaint was based on [basis of the complaint] discrimination in the following action(s): [summarize the matter that gave rise to the complaint, as listed in the issues].

2. Based on the criteria of Title 29 Code of Federal Regulations part 1614.107, as implemented in chapter 4 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614, the following issues raised in the complaint are dismissed, subject to review and approval of the dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. [Each issue will be cited verbatim]. [Cite the regulatory reason of dismissal from paragraph 4-10, volume II, NGR (AR)690-600/NGR (AF)40-1614 and 29 CFR 1614. Explain how and why this particular reason applies to the issue raised by the complainant].

b. etc.

3. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1, 3, 4, and 8 of the enclosed Review and Appeal Rights.

[Signature]
The Adjutant General

Enclosure
Review and Appeal Rights

Notes for figure F-12:
Notes 4, 5, 6, 7, and 9 apply.

Figure F-12. Notice of dismissal of discrimination complaint

NOTICE OF PARTIAL ACCEPTANCE/DISMISSAL OF DISCRIMINATION COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Partial Acceptance/Dismissal of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This refers to [your/your client's] discrimination complaint filed on [DATE]. Receipt of the complaint was acknowledged by letter to you dated [DATE]. The complaint was based on [basis of the complaint] discrimination in the following action(s): [summarize the matter that gave rise to the complaint, as listed in the issues].

2. Based on the criteria of Title 29 Code of Federal Regulations part 1614.107, as implemented in chapter 4 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614, the following issues raised in the complaint are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

a. [Each issue will be cited verbatim].

b. etc.

3. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

4. Based on the criteria in the regulations cited in paragraph 2, above, the following issues raised in the complaint are dismissed, subject to review and approval of the dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. [Each issue will be cited verbatim]. [Cite the regulatory reason of dismissal from paragraph 4-10, volume II, NGR (AR)690-600/NGR (AF)40-1614 and 29 CFR 1614. Explain how and why this particular reason applies to the issue raised by the complainant].

b. etc.

5. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1, 3, 4, and 8 of the enclosed Review and Appeal Rights.

[Signature]
The Adjutant General

Enclosure
Review and Appeal Rights

Notes for figure F-13:
Notes 4, 5, 6, 7, and 9 apply.

Figure F-13. Notice of partial acceptance/dismissal of discrimination complaint

NOTICE OF ACCEPTANCE OF DISCRIMINATION COMPLAINT (AFTER CLARIFICATION)

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Acceptance of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This refers to [your/your client's] discrimination complaint filed on [DATE]. Receipt of the complaint was acknowledged by letter to you dated [DATE]. The complaint was based on [basis of the complaint] discrimination in the following action(s): [summarize the matter that gave rise to the complaint, as listed in the issues].

2. You have clarified the issues raised in the complaint [in person with the SEEM on ____/by telephone with the SEEM on _____/by letter, dated _____]

3. Based on the criteria of Title 29 Code of Federal Regulations part 1614.107, as implemented in chapter 4 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614, the following issues raised in the complaint and clarified by you are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

a. [Cite each issue as it now reads after completion of the clarification].

b. etc.

4. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

[Signature]
The Adjutant General

Notes for figure F-14:
Notes 4, 5, and 6 apply.

Figure F-14. Notice of acceptance of discrimination complaint (after clarification)

NOTICE OF DISMISSAL OF DISCRIMINATION COMPLAINT (AFTER CLARIFICATION)

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Dismissal of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This refers to [your/your client's] discrimination complaint filed on [DATE]. Receipt of the complaint was acknowledged by letter to you dated [DATE]. The complaint was based on [basis of the complaint] discrimination in the following action(s): [summarize the matter that gave rise to the complaint, as listed in the issues].

2. You have clarified the issues raised in the complaint [in person with the SEEM on ____/by telephone with the SEEM on _____/by letter, dated _____]

3. Based on the criteria of Title 29 Code of Federal Regulations part 1614.107, as implemented in chapter 4 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614, the following issues raised in the complaint and clarified by you are dismissed, subject to review and approval of the dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. [Cite each issue as it now reads after completion of the clarification. Cite the regulatory reason of dismissal from paragraph 4-10, volume II, NGR (AR) 690-600/NGR (AF) 40-1614 and 29 CFR 1614. Explain how and why this particular reason applies to the issue raised by the complainant].

b. etc.

4. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1, 3, 4, and 8 of the enclosed Review and Appeal Rights.

[Signature]
The Adjutant General

Enclosure
Review and Appeal Rights

Notes for figure F-15:
Notes 4, 5, 6, and 7 apply.

Figure F-15. Notice of dismissal of discrimination complaint (after clarification)

NOTICE OF PARTIAL ACCEPTANCE/DISMISSAL OF DISCRIMINATION COMPLAINT (AFTER CLARIFICATION)

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Partial Acceptance/Dismissal of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This refers to [your/your client's] discrimination complaint filed on [DATE]. Receipt of the complaint was acknowledged by letter to you dated [DATE]. The complaint was based on [basis of the complaint] discrimination in the following action(s): [summarize the matter that gave rise to the complaint, as listed in the issues].

2. You have clarified the issues raised in the complaint [in person with the SEEM on ____/by telephone with the SEEM on _____/by letter, dated _____]

3. Based on the criteria of Title 29 Code of Federal Regulations part 1614.107, as implemented in chapter 4 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614, the following issues raised in the complaint and clarified by you are accepted, subject to review and approval of the acceptance by the National Guard Bureau.

a. [Cite each issue as it now reads after completion of the clarification].

b. etc.

4. You will be advised if an investigation or other fact finding method will be used to obtain information concerning your complaint. If an investigator is assigned, you will be informed of the investigator's identity and the State Equal Employment Manager will notify you about the details and start of the investigation.

5. Based on the criteria in the regulations cited in paragraph 3, above, the following issues raised in the complaint and clarified by you are dismissed, subject to review and approval of the dismissal by the National Guard Bureau. The reason for the dismissal is stated for each issue.

a. [Cite each issue as it now reads after completion of the clarification. Cite the regulatory reason of dismissal from paragraph 4-10, volume II, NGR (AR) 690-600/NGR (AF) 40-1614 and 29 CFR 1614. Explain how and why this particular reason applies to the issue raised by the complainant].

b. etc.

6. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1, 3, 4, and 8 of the enclosed Review and Appeal Rights.

[Signature]
The Adjutant General

Enclosure
Review and Appeal Rights

Notes for figure F-16:
Notes 4, 5, 6, and 7 apply.

Figure F-16. Notice of partial acceptance/dismissal of discrimination complaint (after clarification)

REQUEST FOR NGB REVIEW/INVESTIGATION

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Request for Review of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

MEMORANDUM FOR CMSA (NGB-HRE-C), National Guard Bureau, 4501 Ford Avenue, Alexandria, VA 22302-1454

1. Request a review of the [acceptance/dismissal/partial acceptance/dismissal] of subject discrimination complaint. The official discrimination complaint case file in original and two copies, is enclosed.

2. The following issues were accepted:

a. [List each accepted issue. Omit this paragraph if no issues were accepted.]

b. etc.

3. The following issues were dismissed:

a. [List each dismissed issue. Omit this paragraph if no issues were dismissed.]

b. etc.

4. Information concerning complainant and representative:

a. [List complainant's work and home mailing addresses and telephone numbers.]

b. [List name, address, and telephone number of the complainant's representative. Indicate if the representative is an attorney. If there is no representative, so state.]

5. Information for investigation: [omit if no issues were accepted]

a. [Specific location of on-site investigation.]

b. [Primary and alternate point of contact for investigator.]

c. [State National Guard legal representative for investigation]

6. [Date the notice of dismissal was mailed or personally delivered to complainant.]

[Signature]
State Equal Employment Manager

Enclosure
Case file (3 cys)

Copy furnished:
[Complainant & representative]

Figure F-17. Request for NGB review/investigation

REQUEST FOR INFORMATION OR TO PROCEED WITH COMPLAINT

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Request for Information/Action in the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This request is submitted under the provisions of paragraph 4-10i, volume II, National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1613 and Title 29 Code of Federal Regulations Part 1614.107(g). In order to continue to process [your/your client's] discrimination complaint, please provide the following information or take following action:

a. [List specific information that is needed that cannot be obtained from the complaint file, personnel records, or other available documents or the specific action required of the complainant.]

b. etc.

2. The reason for requesting this information/action is [explain the specific reason why this information is needed or the action by complainant is required; cite regulatory authority or requirement imposed by NGB and EEOC].

3. This information must be provided/action must be taken within 15 calendar days after you receive this request. If you fail to respond or if your response does not address the request, all or part of the complaint may be dismissed for failure to cooperate or the National Guard Bureau may adjudicate your complaint. You will then receive a notice of dismissal or a decision and your rights of appeal.

[Signature]
State Equal Employment Manager

Notes for figure F-18:
Notes numbers 4, 5, and 6 apply.

Figure F-18. Request for information or to proceed with complaint

PROPOSED DISMISSAL IN FAILURE TO LOCATE

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Proposed Dismissal of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and last known address of complainant]

1. This notice is sent under the provisions of paragraph 4-10j, volume II, National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1613 and Title 29 Code of Federal Regulations Part 1614.107(f). In order to continue to process your discrimination complaint, please respond to this correspondence and provide your current address.

2. The following efforts have been made to locate you and to provide information concerning your complaint [cite the efforts made to locate complainant].

3. If you fail to respond to this notice within 15 calendar days your complaint will be considered dismissed and you have the appeal rights in the enclosed statement of rights.

[Signature]
The Adjutant General
or designee

Enclosure
Review and Appeal Rights

Notes for figure F-19:
This notice is sent by regular mail and by certified mail with return receipt requested to the complainant's last known address. Note number 7 applies.

Figure F-19. Proposed dismissal in failure to locate

OFFER OF FULL RELIEF

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Offer of Full Relief in the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. This offer is made under the provisions of paragraph 4-10k and chapter 7, volume II, National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1613 and Title 29 Code of Federal Regulations Parts 1614.107(h) and 1614.501. The attached settlement agreement is an offer of full relief certified by or on behalf of the Director, Equal Employment Opportunity, National Guard Bureau as constituting the full relief authorized by law and regulations.

2. You have 30 calendar days from the receipt of this notice to accept this offer. Failure to accept this offer within 30 days will result in the dismissal of your complaint.

3. If your complaint is dismissed because you refuse to accept this certified offer of full relief you will have the right to appeal to the Equal Employment Opportunity Commission (EEOC). If EEOC affirms the dismissal of your complaint, then you may not receive any relief in the administrative process. You may then seek a de novo review of your complaint by filing civil action in an appropriate Federal district court.

Enclosure
Full Relief Settlement

[Signature]
The Adjutant General
or official authorized to
tender full relief offer

Notes for figure F-20:
Notes numbers 4, 5, and 6, apply.

Figure F-20. Offer of full relief

DISMISSAL FOR FAILURE TO COOPERATE OR ACCEPT FULL RELIEF

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Notice of Dismissal of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: [Name and address of complainant or complainant's representative]

1. On [DATE] you were provided a notice [requesting information/action in order to continue to process your complaint] [with a certified offer of full relief]. You were advised that you had [15/30] calendar days from the receipt of the notice for your [response/action/acceptance]. Our records indicate that you received the notice on [DATE].

2. Since you did not [respond/take the requested action/accept the offer of full relief] within the specified period, your complaint is hereby dismissed. This dismissal is based on the criteria of Title 29 Code of Federal Regulations part 1614.107, as implemented in chapter 4 of volume II of National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614.

3. Your rights to have the dismissal reviewed by the National Guard Bureau and your rights to appeal the dismissal are detailed in paragraphs 1, 3, 4, and 8 of the enclosed Review and Appeal Rights.

[Signature]
The Adjutant General

Enclosure
Review and Appeal Rights

Notes for figure F-21:
Notes 4, 5, 6, and 7 apply.

Figure F-21. Dismissal for failure to cooperate or accept full relief

AGREEMENT TO EXTEND INVESTIGATION

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

SUBJECT: Agreement to Extend Investigation of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

TO: Complaints Management and Support Activity (NGB-HRE-C)
National Guard Bureau
4501 Ford Avenue
Alexandria, VA 22302-1454

1. I/my client agree(s) to extend the investigation of subject complaint by ____ days in order to participate in a dispute resolution process/in order to try to settle the complaint/because of the following unavoidable delay: [explain the reason for the delay]. I understand that this delay has been coordinated with and agreed to by the investigator, State Equal Employment Manager, and Complaints Management and Support Activity, NGB [omit reference to the investigator if an investigator has not been assigned or has completed the on-site investigation].

2. Subject complaint was formally filed on [DATE]. I understand that the issuance of the notice of investigation completion may be delayed by ____ days, the period of the above extension.

[Signature]
Complainant or representative

Concur: [Signature]
State Equal Employment Manager

Notes for figure F-22.

1. This notice is given to the SEEM who will transmit it to NGB CMSA by facsimile and then mail the original to NGB CMSA.
2. The investigation may not be extended beyond 270 days after the date of the filing of the formal complaint.
3. If the extension occurs during the investigative fact finding hearing, coordination of the State National Guard legal representative at the investigative hearing is required.

Figure F-22. Agreement to extend investigation

NOTICE OF INVESTIGATION COMPLETION

NGB LETTERHEAD

[DATE]

Directorate for Human Resources

SUBJECT: Completion of Investigation/Fact-Finding of the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

[Name and address of complainant
or representative]

Dear [Title and name]:

This is to advise you that the investigation/fact-finding of the subject complaint has been completed. A copy of the Report of Investigation/Fact-Finding and copy of the official discrimination complaint case file are enclosed.

In accordance with National Guard Regulation (AR) 690-600/National Guard Regualation (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614, you have the following rights:

a. You may request an immediate final decision from the National Guard Bureau (NGB) within 30 calendar days after receiving this notice. Your request must be in writing and addressed to the Complaints Management and Support Activity (NGB-HRE-C), National Guard Bureau, 4501 Ford Avenue, Alexandria, VA 22302-1454. Within 60 days after the receipt of your request a final decision will be issued on behalf of the Chief, NGB. The decision on the merits of the complaint will be based on a preponderance of evidence.

b. You may request a final decision from NGB preceded by a hearing by an Equal Employment Opportunity Commission Administrative Judge (EEOC AJ). Your request must be made in writing, within 30 calendar days after receiving this notice, and addressed to the Complaints Management and Support Activity at the above address. A copy of the request must be sent to the State Equal Employment Manager at the address previously provided. The EEOC AJ will send recommended findings and conclusions to NGB within 180 days after receiving the hearing request, unless good cause exists for extending this time. Within 60 days after the receipt of the recommendation of the EEOC AJ, a final decision will be issued on behalf of the Chief, NGB. The decision on the merits of the complaint will be based on a preponderance of evidence.

If you are not satisfied with the NGB final decision, you will have the right to appeal or to file civil action. These rights have been previously explained to you and will be again provided with the final decision.

You may also be contacted by National Guard representatives to resolve your complaint. You are encouraged to seek a resolution of your complaint. Please be advised, however, that such resolution attempts do not serve to extend the 30 day time limit for requesting a final decision. If you plan to ask for a NGB decision, with or without a hearing, you must still do so within 30 calendar days after the receipt of this notice.

If you choose to voluntarily and unconditionally withdraw your complaint, you must send a written withdrawal to the Complaints Management and Support Activity at the above address.

[Signature]
Chief, CMSA or designee

Enclosure

Copies furnished:
Complainant or representative
The Adjutant General [State]
State Equal Employment Manager [State]

Figure 23. Notice of investigation completion

NGB FINAL DECISION

NGB LETTERHEAD

[DATE]

Directorate for Human Resources

SUBJECT: Final Decision in the Discrimination Complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

[Name and address of complainant
or representative]

Dear [Title and name]:

This letter constitutes the final decision of the National Guard Bureau (NGB) on subject discrimination complaint and the rights of further appeal.

You were issued a notice of investigation completion[1] and advised of your rights in connection with that action. You have requested an immediate decision by NGB.

It is the National Guard Bureau's decision to adopt the finding of (no)[2] discrimination on the issue(s) raised in your complaint. This decision is based on a review and analysis[3] of all evidence of record and a conclusion that the preponderance of the evidence supports this decision.

In accordance with chapter 8, volume II, National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614 and Title 29 Code of Federal Regulations Part 1614, Subpart D, you may appeal this decision within 30 calendar days of its receipt. You may file an appeal and a statement or brief in support of the appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The appeal must be in writing and should use the enclosed EEOC Form 573, Notice of Appeal/Petition, indicating what is being appealed. The appeal may be filed by mail, personal delivery, or facsimile. A copy of your appeal must be sent to the Complaints Management and Support Activity (NGB-HRE-C), National Guard Bureau, 4501 Ford Avenue, Alexandria, VA 22302-1454 and a copy to the State Equal Employment Manager at the address previously provided.

Under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or the Rehabilitation Act you may file a civil action in an appropriate U.S. District Court within 90 calendar days of receipt of this decision if no appeal has been filed; or within 90 calendar days of receipt of the decision on appeal; or after 180 calendar days from the date of filing an appeal if there has been no decision on the appeal. If you choose to file a civil action, and you do not have, or are unable to obtain the services of a lawyer, you may request the court to appoint a lawyer to represent you. In such circumstances as the court may deem just, the court may appoint a lawyer for you and may authorize the commencement of the action without the payment of fees, costs, or security. Any such request must be made within the above time limits and in such form and manner as the court may require.

If you file a civil action, you must name the Secretary shown in the subject of this letter as the defendant. Failure to name the Secretary may result in the loss of any judicial redress to which you may entitled.

Sincerely,

[Signature]
Director, EEO or designee

Enclosure[4]

Copies Furnished:
Complainant or representative
Adjutant General [State]
State Equal Employment Manager [State]

Figure 24. NGB final decision

Notes for figure 24:

1. This sentence may be replaced by one of the following, depending on the circumstances of the case:

" You had requested a decision by NGB with a hearing by an Equal Employment Opportunity Commission Administrative Judge (EEOC AJ). A transcript of that hearing is enclosed/has been sent to you by the EEOC AJ." or

"Our records show that you received this notice on [DATE] and you have not indicated your wishes within the prescribed 30-day period. Therefore, NGB is issuing the following decision."

2. If the NGB decision is for discrimination on one or more issues, the following will be included:

"The Adjutant General of (State) has been requested to take appropriate remedial action authorized by law and determined to be necessary to resolve your discrimination complaint. Such actions will constitute the full relief required in your case."

"Any request for attorney fees must be filed within 30 calendar days after receiving this decision in accordance with Chapter 7 (enclosed), volume II, National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614."

3. This sentence may be replaced by one of the following, depending on the circumstances of the case:

"This decision is based on the findings and recommendations of the EEOC AJ." or

"This decision is based on the findings and recommendations of the EEOC AJ, modified as follows: [modification]. This modification is based on [reason]." or

"This decision is based on the rejection of the findings and recommendations of the EEOC AJ for the following reason(s): [reason]."

4. When transcripts of hearing are enclosed.

SETTLEMENT AGREEMENT FORMAT

SETTLEMENT AGREEMENT

BETWEEN THE PARTIES OF:	)
	)
John J. Doe,	)
Complainant	)
	)
AND	)
	)
Ohio State National Guard	)
For the Agency	)

1. In support of the National Guard Equal Employment Opportunity Program and of the Agency policy of resolving discrimination complaints by negotiated settlements, the above-captioned parties agree to the following terms in full settlement of the discrimination complaint of [Full name of complainant], [State] [Army or Air] National Guard, and (Full name of Secretary), Secretary of the [Army or Air Force], NGB Case No. T-[number]

2. The National Guard Bureau (Agency) has not issued a final decision on the merits of this discrimination complaint and nothing in this settlement agreement constitutes a decision or finding on the merits of this complaint.

3.	)	
	)	
4.	)	[Specify the terms that form this agreement, ensuring
	)	that they meet the requirement of chapter 7, of this
5.	)	regulation]
	)	
etc.	)	

6. This is a final resolution of all issues in discrimination complaint NGB Case No. T-[Number] and any further administrative or legal proceeding, in any forum whatsoever, are waived except for the enforcement of this settlement or attorney's fees appeals under chapters 7 and 8, volume II, National Guard Regulation (AR) 690-600/National Guard Regulation (AF) 40-1614 and Title 29 of the Code of Federal Regulations Parts 1614.401(a) and 1614.501(e)(2).

If the complainant believes that the National Guard has failed to comply with the terms of this settlement agreement for any reason not attributable to acts, omissions, or conduct of the complainant, the complainant must notify, in writing, the National Guard Bureau Complaints Management and Support Activity (NGB-PRE-C), 4501 Ford Avenue, Alexandria, VA 22302-1454 within thirty (30) calendar days of when the complainant knew, or reasonably should have known of the alleged noncompliance.

7. The complainant acknowledges that he/she has read and understands this settlement agreement and knowingly and voluntarily accepts and agrees to its provisions. The complainant also acknowledges that he/she has had the opportunity to consult with an attorney, if he/she so desired.

FOR THE AGENCY: FOR THE COMPLAINANT:

Signatures, titles, and dates executed by authorized State National Guard representative(s) and the complainant and complainant's representative.

Notes for figure 25:

1. Paragraphs shown above are mandatory, except that the portion regarding attorney's fees is deleted if no attorney's fees are involved. Use appropriate number of paragraphs for the terms of settlement.

2. Original signatures are required on copies for the complainant, the State National Guard representative, and NGB CMSA.

Figure 25: Settlement agreement format

NOTICE TO EMPLOYEES

LETTERHEAD OF STATE NATIONAL GUARD

[DATE]

Notice to Employees

1. This notice is being posted as part of the remedy directed by [see note 2].

2. Federal law requires that there be no discrimination against any technician or applicant for technician employment because of race, color, religion, gender, national origin, age (between 40 and 70), or physical or mental handicap with respect to hiring, firing, compensation, or other terms, conditions, or privileges of employment.

3. The [State] National Guard supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

4. The [State] National Guard will not engage in (see note 3).

5. The [State] National Guard (will or has taken the required remedial action: see note 4).

[Signature]
The Adjutant General

Notes for figure F-26

1. This notice is posted in the affected facility for not less than 30 days.
2. In paragraph 1 of this notice, indicate the official or court that directed the remedy. If the notice is the result of a settlement agreement reached prior to a final decision, the official directing the remedy is the State Adjutant General. If the notice is the result of a final decison by NGB, the official directing the remedy is the Chief of the National Guard Bureau. If the notice is the result of a court order, indicate the particular Federal court that issued the order.
3. Indicate the specific conduct that has occurred and that has led to a finding of discrimination. See examples in footnote 1 of Appendix A of this regulation. The notice will not admit discrimination on the part of the National Guard if it is based on a settlement agreement made without a finding of discrimination or decision on the merits of the complaint.
4. Indicate the remedial actions that have been or will be taken in this case. See examples in footnote 2 of Appendix A of this regulation.

Figure F-26. Notice to employees

TABBED AND INDEXED COMPLAINT FILE

A B C D E F G H I J K L M Mc N O P Q R S T U V W XYZ

NATIONAL GUARD
OFFICIAL DISCRIMINATION COMPLAINT FILE
INDEX

(For use of this form, see NGR (AR) 690-600 / NGR (AF) 40-1614)
Show dates as YY / MM / DD : date sent to or received from in "ON: DATE" & document date in "DOC DATE"

NAME: Peter L. Alexander **CASE NO.** T-543-OH-A-04-93-LN

TO / FROM	ON: DATE	DESCRIPTION OF DOCUMENT	DOC DATE	TAB
Compl/EEO Couns	93/01/04	Rights & responsibilities	93/01/04	A
EEO Couns/Compl	93/01/06	Authorization to reveal name	93/01/06	B
EEO Couns/Compl	93/02/01	Agreement to extend counselling	93/02/01	C
Compl/EEO Couns	93/02/16	Final interview & right to file	93/02/16	D
SEEM/EEO Couns	93/02/18	EEO Counselors report	93/02/17	E
SEEM/Compl	93/03/01	Formal complaint	93/02/22	F
Compl/SEEM	93/03/02	Notice of receipt of formal complaint	93/03/02	G
Compl/SEEM	93/03/05	MFR re: telecon w/compl on clarification of complaint	93/03/05	H
SEEM/Compl	93/03/09	Request for waiver of time limits	93/03/06	I
Compl/AG	93/03/10	Granting of waiver for time limits	93/03/10	J
Compl/AG	93/03/12	Notice of acceptance of complaint	93/03/12	K
NGB/SEEM	93/03/19	Request for review/investigation	93/03/15	L
SEEM/NGB	93/03/29	Deficiencies in acceptance	93/03/24	M
Compl/AG	93/04/01	Revised notice of acceptance	93/04/01	Mc
NGB/SEEM	93/04/08	Correction of deficiencies	93/04/02	N
SEEM/NGB	93/04/15	Notification of properly accepted complaint	93/04/12	O
Inv/NGB	93/06/01	Ltr of authorization & case file	93/05/25	P
NGB/Compl	93/06/10	Designation of attorney	93/06/04	Q
NGB/Inv	93/07/19	Report of investigation (under separate cover)	93/07/15	-
Atty/NGB	93/07/30	Notice of investigation completion	93/07/26	R
NGB/AG	93/08/16	Input from AG	93/08/10	S
NGB/Compl	93/08/25	Request for immediate decision	93/08/20	T
Atty/NGB	93/09/15	NGB Final Decision	93/09/10	U

NGB FORM 1 OCT 92 **690-R** (Replaces NGB Form 690-R, 1 May 89, which is obsolete)

Figure F-27. Tabbed and indexed complaint file

Figure F-28. Mediator's letter of confirmation

TO BE PUBLISHED

Figure F-29. Mediated settlement agreement

TO BE PUBLISHED

GLOSSARY

Section I
Abbreviations

AG
Adjutant General

AGR
Active guard reserve

AJ
Administrative Judge

ANG
Air National Guard

ARNG
Army National Guard

CFR
Code of Federal Regulations

CMSA
Complaints Management and Support Activity, NGB

CNGB
Chief, National Guard Bureau

DOD
Department of Defense

DRP
Dispute resolution process

DSN
Defense Switched Network (formerly AUTOVON)

EO
Equal opportunity (military)

EEO
Equal employment opportunity (civilian)

EEOC
Equal Employment Opportunity Commission

FD
Final decision

FLRA
Federal Labor Relations Authority

FPM
Federal Personnel Manual

HR/EO
Human Resources/Equal Opportunity (ARNG)

JA
Judge Advocate

MSPB
Merit Systems Protections Board

OFO
Office of Federal Operations

OPM
Office of Personnel Management

NG
National Guard

NGB
National Guard Bureau

NGB-AQC
Acquisition Contracting Division, NGB

NGB-JA
Office of the Judge Advocate, NGB

NGB-HR
Directorate for Human Resources, NGB

NGB-HRE
Equal Opportunity Division, NGB

NGB-HRE-C
Complaints Management and Support Activity, NGB

NGR
National Guard Regulation

ROI
Report of investigation

SEEM
State equal employment manager

SL
Social actions (ANG)

SPMO
Support personnel management officer

STATCOM
Status of Complaints Management

TAG
The Adjutant General

TPP
Technician Personnel Pamphlet

TPR
Technician Personnel Regulation

U.S.C.
United States Code

Section II
Terms

1. **Agent (of the class).** A member of the class who acts for the class during the processing of the class complaint of discrimination.

2. **Allegation.** An assertion by a complainant that an act or personnel action has been discriminatory.

3. **Basis.** A reason, claimed by a complainant, for a discriminatory action; specifically, race, color, religion, gender (to include sexual harassment), national origin, age, physical or mental handicap, or retaliation.

4. **Case file.** See official discrimination complaint case file.

5. **Case number.** A number assigned when a formal complaint is filed or when allegations of discrimination received by NGB are referred to the State National Guard. It is used by the State National Guard, NGB, and EEOC for statistical and identification purposes.

6. **Civilian Discrimination Complaint System.** A compilation of policies, procedures, and responsibilities to ensure a just and effective avenue of redress for complainants and for the resolution, processing, management, and adjudication of discrimination complaints.

7. **Class.** A group of technicians, former technicians, or applicants for technician employment, on whose behalf it is alleged that they have been, are being or may be adversely affected by a State National Guard or National Guard Bureau personnel management policy or practice which either the State National Guard or the Bureau has authority to rescind or modify. The policy or practice allegedly discriminates against the group based on their common race, color, religion, gender, national origin, age, or handicap.

8. **Class complaint.** A written discrimination complaint alleging that a personnel policy or practice discriminates against a class and that the agent has been personally harmed by the policy or practices.

9. **Clear and convincing.** A standard of evidence that is higher than the preponderance of evidence standard but less than the standard of beyond a reasonable doubt.

10. **Complainant.** An aggrieved technician, former technician, or applicant for technician employment who alleges that he or she has been discriminated against by reason of race, color, religion, gender (including sexual harassment), national origin, age, physical or mental handicap, or retaliation and who files a complaint of discrimination under the provision of this regulation.

11. **Complaint.** One or more issues containing allegations by an individual that he or she has been illegally discriminated against. A formal complaint is in writing. See also definition of an informal complaint.

12. **Complaint case file or complaint file.** See official discrimination complaint case file.

13. **Conclusion (based on an ROI).** A clear and concise statement of fact that can be readily deduced from an analysis of the evidence and the record of the case.

14. **Discrimination.** Any act or failure to act, impermissibly based solely or in part on a person's race, color, religion, gender, national origin, age, or mental or physical handicap, that adversely affects privileges, benefits, or working conditions or results in disparate treatment.

15. **Discrimination complaint.** See complaint.

16. **Discrimination complaint case file or discrimination complaint file.** See official discrimination complaint case file.

17. **Dispute resolution process.** A structured process, including mediation, authorized by the National Guard Bureau, to promote early resolution of discrimination complaints.

18. **Drug.** A controlled substance as defined in schedules I through V of section 202 of the Controlled Substances Act, 21 U.S.C. 812.

19. **Duty status.** For the purposes of this regulation, "duty status" means the employee is present for duty during the employee's normal working hours. It is expected that State National Guard, NGB, and EEOC officials, as much as possible, will schedule meetings and hearing during the normal working hours of the employees involved. However, regardless of their normal working hours, employees will be on official time when their presence is authorized or required during pre-complaint counselling and inquiry, investigations, hearings, dispute resolution, or settlement meetings.

20. **EEO Counselor.** A person appointed to assist and advise complainants, make inquiries into discrimination complaints brought to their attention, and to seek resolution of complaints. Counselors report their counselling activities to the SEEM.

21. **Equal Employment Opportunity.** The condition under which the success of National Guard employees is based upon individual merit, fitness, achievement, and ability without regard to illegal considerations of race, color, religion, gender, national origin, age, or physical or mental handicap.

22. **Equal Employment Opportunity Commission (EEOC).** The Federal agency vested with the responsibility for administration and enforcement of equal opportunity in Federal employment, to include responsibility for issuing policy and regulations on the discrimination complaint system established by Federal Agencies. EEOC also renders decisions on discrimination complaint appeals.

23. **Equitable tolling.** The suspension of time limits in the interest of fairness and equity to the complainant.

24. **Estoppel.** Preventing the enforcement of time limits due to prior actions by agency officials.

25. **Federal Labor Relations Authority (FLRA).** The Federal agency responsible for deciding appeals of arbitration awards filed by a union or an agency regarding grievances filed under the negotiated grievance procedure.

26. **Final decision.** A decision on the merits of a discrimination complaint filed under this regulation, issued in the name of the Chief, NGB.

27. **Finding.** An explicit determination of discrimination or no discrimination on each allegation and basis raised in a formal discrimination complaint.

28. **Formal discrimination complaint or formal complaint.** See complaint.

29. **Full relief.** Those remedial actions which would make an individual whole if discrimination

were found. I.e., it is that relief that will place the individual in the same situation or position he or she would have been in had he or she not been discriminated against.

30. Handicapped person. An individual who has a physical or mental impairment that substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment. As part of this definition--

a. "Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardoivascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

b. "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

c. "Has a record of such an impairment" means has a history of, or has been classified (or mis-classified) as having a mental or physical impairment that substantially limits one or more major life activity.

d. "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in c, above, but is treated by an employer as having such an impairment.

31. Illegal Use of Drugs. The use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, but does not include the use of a drug taken under the supervision of a licensed health care professional , or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

32. Informal complaint. A complaint made to an EEO counselor during the pre-complaint processing under this regulation, which alleges that a specific act of discrimination has taken place that is personal to the individual making the complaint. Informal complaints are usually oral, but may also be made in writing.

33. Inquiry. An informal fact-finding process used in the pre-complaint processing stage to obtain sufficient information to resolve an informal complaint. It may involve the review of records and directives, examination of material evidence, and interview of persons who may have direct knowledge of the facts.

34. Investigation. A duly authorized, systematic, detailed examination to uncover facts and determine the truth. It is a formal process which must produce sufficient detail to support a finding of discrimination or no discrimination. Investigations of allegations of discrimination are conducted under the authority of this regulation. They are conducted in accordance with the provisions of the NGB Investigators Procedural Manual, chapter 5 of this regulation, 29 CFR 1614, and EEOC Management Directives.

35. Issue. A brief and clear statement of the act or personnel action that the complainant believes was discriminatory.

36. Mediation. One of the elements of the National Guard dispute resolution process. It is a confidential process of reconciling the differences between the complainant and management official(s) by the use of a neutral third party.

37. Merit Systems Protection Board (MSPB). The Federal agency responsible for holding hearings and issuing decisions on any action which is appealable to the Board under any law, rule, or regulation.

38. Mitigation of damages. The provision in law that interim earnings or amounts which an individual could have earned with reasonable diligence must be deducted from the back pay otherwise allowable. The burden is on the National Guard to prove by a preponderance of evidence that a complainant failed to mitigate damages.

39. Mixed case complaint. A complaint involving an action that may be appealed to the MSPB and that is alleged to have been the result of discrimination.

40. Moot. The term used to describe a complaint or an issue which presents a case such that when a determination is sought on a matter which, when rendered, can not have any practical effect on the existing controversy.

41. National Guard Civilian Discrimination Complaint System. See Civilian Discrimination Complaint System.

42. Negotiated grievance procedure. A grievance procedure contained in a collective bargaining agreement negotiated between an activity and a recognized labor organization. Unless otherwise excluded by such a grievance procedure, an allegation of discrimination may be processed under it or under this regulation, but not both.

43. NGB Case Number. See case number.

44. Nondiscriminatory placement. The placement of a victim of discrimination in a position the victim would have occupied had the discrimination not occurred, or a substantially equivalent position even if the placement results in the displacement of another of the agency's employees.

45. Official discrimination complaint case file. A management document containing all correspondence and other documentation relating to a formal complaint and used to make recommendations and decisions regarding the complaint.

46. Official time. See reasonable amount of official time.

47. Pre-complaint processing. The 30 to 90 day period provided for an inquiry, counselling, and resolution of allegations of discrimination before a formal complaint may be filed.

48. Preparation time. Since presentation of a complaint involves both preparation for meetings and hearings as well as attendance at such meetings and hearings, complainants and their representatives are also to be afforded a reasonable amount of official time, as defined below, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time, to prepare the formal complaint and any administrative appeal that may be filed, even though no meetings or hearings are involved.

49. Preponderance of evidence. The standard of proof used in discrimination complaint cases. This standard requires that the findings and conclusions be supported by greater evidence than contrary findings in conclusion. That is, considering all evidence, it is more likely than not that discrimination did or did not take place. This is a lesser standard than "substantial credible evidence," "clear and convincing evidence," or "beyond a reasonable doubt."

50. Qualified handicapped person. A handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of himself/herself or others and who, depending on the type of appointing authority being used:

a. Meets the experience or education requirements of the position in question; or

b. Meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

51. Reasonable amount of official time. "Reasonable" is defined as whatever is appropriate under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant and material information associated with the complaint, with the required specificity and detail, to the appropriate State National Guard, NGB, and EEOC officials.

a. The actual number of hours to which the complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint. Since most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with State National Guard officials, investigators, or EEOC Administrative Judges, and since complainants and their representatives generally have no control over the length of those meetings and hearings, whatever time is spent in such meetings and hearings is automatically deemed reasonable. I.e., whenever the presence of complainant and/or his/her representative is required by either State National Guard, National Guard Bureau, or EEOC officials in connection with a complaint, both the complainant and his/her representative are to be granted official time for the duration of such meetings or hearings, if they are otherwise in a duty status.

b. The only exception to the guidance provided above would be with respect to a representative who acts in a representational capacity in more than one complaint in a given time period. Both NGB and EEOC consider it reasonable for States to expect their personnel to spend most of their time doing the work for which they are employed. Therefore, it would be considered reasonable for the State National Guard to restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the State National Guard, and the degree of hardship imposed on the mission of the State National Guard by the representative's absence from his/her normal duties. The amount of official time to be afforded to an individual for representational activities in connection with more than one complaint will vary with the circumstances of the complaints involved. Overall restrictions of this type apply only where more than one complaint is involved and only to official time other than annual leave. National Guard decisions to grant or withhold approval of annual leave requests remain subject to normal personnel practices and policies.

52. Recommendation (based on an ROI). An investigator's proposal to the appointing authority for actions or remedies based on the facts and evidence gathered in the investigation.

53. Relief. See remedy.

54. Remedial action. Upon a finding of discrimination, a complainant is entitled to remedial action which makes him/her whole unless the evidence of record establishes by clear and convincing evidence that the action complained of would have occurred even absent the discrimination identified. This includes, as appropriate, retroactive appointment or promotion, back pay, attorney's fees, cancellation of an unwarranted personnel action, or expunction from the State National guard and NGB records of any reference to or any record of an unwarranted personnel action. Remedial action may also be taken in the settlement of a complaint without a finding of discrimination.

55. Remedy. Redress available under the law to a victim of illegal discrimination. See also remedial action.

56. Retaliation. An act of reprisal, restraint, interference, or coercion against an individual because of his or her opposition to any practice made unlawful by the statutes listed in paragraphs 1-1, volume I and 2-2, volume II of this regulation or the participation in the National Guard Civilian Discrimination Complaint System during any stage of presentation and processing of a discrimination complaint, including testifying, assisting, or participating in an inquiry or investigation.

57. Resolution (of a complaint). A voluntary, written agreement between the complainant and a representative of the State National Guard which

results in the settlement of the complaint to the satisfaction of both parties and terminates the administrative processing of the complaint.

58. **Sexual harassment.** Sexual harassment is a form of gender discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

a. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or

b. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

c. Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay or job of a military member or civilian employee is engaging in sexual harassment.

Similarly, any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

59. **Withdrawal (of the complaint).** A voluntary, written, signed and dated statement by the complainant indicating an unconditional willingness to stop further processing and pursuit of the complaint.

By Order of the Secretaries of the Army and the Air Force:

JOHN B. CONAWAY
Lieutenant General, USAF
Chief, National Guard Bureau

Official:

E. DARDEN BAINES
Director
Administrative Services

Distribution: ARNG: B
ANG: F

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(For use of this form, see NGR (AR) 690-600 / NGR (AF) 40-1614)

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NGB FORM
1 OCT 92 **690-R** (Replaces NGB Form 690-R, 1 May 89, which is obsolete)