

August 18, 1995

INSPECTOR GENERAL INSTRUCTION 1020.1

SUBJECT: Processing Complaints of Discrimination

References: See Appendix A.

A. Purpose. This instruction establishes the policies, procedures and responsibilities within the Office of the Inspector General, Department of Defense (OIG, DoD), for processing complaints of discrimination on the grounds of race, color, religion, sex, age, national origin, physical/mental disability or reprisal, in accordance with 29 Code of Federal Regulations (CFR), Part 1614.

B. Cancellation. Inspector General Instruction 1020.1, *Processing Complaints of Discrimination*, April 26, 1993.

C. Applicability. This instruction applies to all civilian employees, supervisors of civilian employees and civilian applicants seeking employment with the OIG, DoD. It does not apply to military personnel for whom equal opportunity is covered by DoD Directive 1350.2, *The Department of Defense Military Equal Opportunity Program*, April 29, 1987 (reference e, Appendix A).

D. Definitions. See Appendix B.

E. Policy. It is the OIG policy to:

1. Prohibit discrimination based on race, color, religion, sex, age, national origin, physical/mental disability or reprisal.

2. Provide prompt, fair and impartial consideration and disposition of complaints involving issues of discrimination on the grounds of race, color, religion, sex, age, national origin, physical/mental disability and reprisal. Complaints of discrimination based on age will be accepted only from current Federal employees and applicants who are at least 40 years of age at the time the alleged discriminatory action occurred.

F. Responsibilities

1. The **Inspector General** is the final decision authority for the agency on formal complaints of discrimination.

2. The **Director of Equal Employment Opportunity (EEO)** will:

(a) Manage the OIG EEO program to include affirmative action.

(b) Ensure fair, impartial and timely investigation and resolution of all complaints of discrimination.

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- (c) Accept, reject or dismiss a complaint based on the guidelines in 29 CFR, Section 1614.105.
- (d) Request appointment of investigator(s), as appropriate, to investigate all aspects of formal EEO complaints.
- (e) Ensure that all employees of the agency cooperate in the investigation.
- (f) Notify the Equal Employment Opportunity Commission (EEOC) if a hearing is requested.
- (g) Order corrective action when necessary.
- (h) Oversee the daily operations of the OIG, DoD EEO special emphasis and affirmative employment programs.
- (i) Select, train or arrange for EEO counselor training.
- (j) Supervise and rate performance of EEO counselors in the performance of their EEO duties.
- (k) Acknowledge receipt of formal complaints of discrimination.
- (l) Process all EEO complaints of discrimination, including class complaints.
- (m) Furnish investigators with appropriate letters of authority and provide the necessary logistical and administrative arrangements for investigations and hearings.
- (n) Assure correct documentation is provided to the complainant, principal agency witness (PAW), investigator and attorney(s) involved in the processing of a complaint.
- (o) Assure that the names, work addresses and telephone numbers of all EEO officials, including special emphasis program managers and EEO counselors, are current and conspicuously posted.
- (p) Ensure that this instruction is readily available to employees, their representatives and the public.
- (q) Ensure that persons named as PAWs are (1) informed regarding allegations made against them; (2) given a full and fair opportunity to respond for the record; and (3) kept informed as to the progress and outcome of cases.

3. **The EEO counselors will:**

- (a) Conduct counseling interviews and advise employees or applicants of EEO rights under the law. Attempt to resolve complaints by talking with employees, their representatives and management officials to obtain relevant facts.
- (b) Notify the Director, EEO, of contact by employee/applicant seeking counseling within 2 working days (a reportable contact is any contact with an EEO counselor by an employee/applicant who alleges discrimination on the basis of race, color, sex, religion, age, disability, national origin or reprisal).
- (c) Coordinate preparation of the counselor's report with the Director, EEO.
- (d) Prepare appropriate reports/correspondence (EEO Counselor's Report, Notice of Final Interview and Notice of Right to File) in accordance with applicable regulations.
- (e) Prepare, sign and deliver the Final Interview Letter, along with the Notice of Right to File a Formal Complaint, within 3 days after the final interview has been conducted.
- (f) Submit the EEO counselor's report, with copies of appropriate notification letters to the Director, EEO, on the first working day after the final interview is held.

4. The **Office of General Counsel** will provide legal advice and assistance in the processing of complaints of discrimination and in any other EEO program areas requiring such services.

G. Procedures

1. General

(a) Employees, former employees and applicants for employment who believe they have been discriminated against because of race, color, religion, sex, age, national origin, physical/mental disability or reprisal must bring the complaint to the attention of an EEO counselor within 45 days of the date of the matter giving rise to the complaint, or within 45 calendar days from the effective date of a personnel action. The OIG, DoD will extend the 45-day time limit where the individual shows that (1) he/she was not notified of the time limits or was otherwise unaware of them; (2) he/she did not know and reasonably should have known the discriminatory matter or personnel action occurred; (3) despite due diligence, the person was prevented by circumstances beyond his/her control from contacting an EEO counselor within the time limits. The EEO counselor will attempt to resolve the matter before a formal complaint is filed. Formal complaints will be filed on IG Form 1020.1-1, *Complaint of Discrimination Against the Secretary of Defense* (Appendix E).

(b) Employees and applicants for employment who believe they have been discriminated against because of age (40 years of age or older) need not go through administrative procedures for processing complaints. Instead, those complainants may go directly to U.S. District Court to seek relief through a civil action (see paragraph 3, Formal Complaint Processing). However, the complainant must file a "Notice of Intent to File" with the agency of his/her intent to file a civil action.

(c) Two or more complaints of discrimination filed by employees, former employees or applicants for employment consisting of substantially similar allegations of discrimination may, with written permission of the complainants, be consolidated. Two or more individual complaints of discrimination from the same employee, former employee or applicant may, at the discretion of the IG, be joined for processing after notifying the individual that the complaints will be processed jointly.

(d) A complainant has the right to be accompanied, represented and advised by a representative of his or her choosing at any stage in the processing of the complaint, including the counseling stage. The complainant's choice of representative may be disqualified on the basis of conflict or the appearance of conflict of interest or position. The complainant and his or her representative, if they are current employees of the OIG, DoD, will be given a reasonable amount of official time to present the complaint. The complainant will designate the representative in writing and/or report such change to the Director, EEO, with copies to the attorney(s), investigator or administrative judge, as appropriate.

(e) It is essential to the integrity of the complaint process that complainants, their representatives and witnesses be free from restraint, interference, coercion, discrimination or

reprisal at any phase of the complaint process. Likewise, EEO counselors shall be free from restraint, interference, coercion, discrimination or reprisal in the performance of their counseling duties. Supervisors are expected to comply with the spirit and intent of the regulatory provisions.

(f) The PAW has the right to be accompanied, represented and/or advised by a representative of his or her own choice at any stage of the complaint process. The PAW may not be represented by an attorney of the OIG or Washington Headquarters Services.

(g) Since complainants, representatives and PAWs receive copies (or portions thereof) of the investigative file, hearing transcript and other related documents, extreme discretion must be exercised with regard to their distribution and use. Privacy act restrictions against improper disclosure are binding on all employees covered by this Instruction.

2. **Pre-complaint Counseling**

(a) A person who believes he/she has been discriminated against because of race, color, religion, sex, national origin, age, disability or reprisal must contact an EEO counselor of the OIG within 45 calendar days of the date the alleged discriminatory event occurred or the effective date of the alleged discriminatory personnel action. The OIG, DoD will extend the 45-day time limit to permit timely contact when:

- (1) the aggrieved person shows that he/she was not notified of the time limits and was not otherwise aware of them; or
- (2) he/she did not know and reasonably should not have known that the matter or personnel action occurred; or
- (3) despite due diligence, he/she was prevented by circumstances beyond his/her control from contacting a counselor within the time limits; or
- (4) other reasons considered sufficient by the OIG, DoD or Commission as are found to exist.

(b) The EEO counselor must:

- (1) advise the aggrieved person about the EEO complaint process under 29 CFR Part 1614 and possible election requirements;
- (2) determine the issue(s) and basis(es) of the potential complaint;
- (3) conduct a limited inquiry for the purpose of furnishing information for settlement efforts and determining jurisdictional questions if a formal complaint is filed;
- (4) seek resolution of the matter at the lowest possible level;
- (5) document the resolution;
- (6) conduct a final interview with the aggrieved within 30 days of initial contact unless the aggrieved person and the OIG, DoD, through the EEO Director or his/her designee, agree in writing to an extension of counseling for up to an additional 60 days. Where the OIG, DoD or the unit of the OIG, DoD where the counseling occurs has an established alternative dispute resolution procedure and the aggrieved agrees to participate in the procedure, the precomplaint processing period shall not exceed 90 days;

(7) must provide the aggrieved person with a written notice of final interview at the conclusion of counseling. The notice will provide instructions on how to file a formal complaint (including a class complaint) and specify that such a complaint must be filed within 15 calendar days of receipt of a notice of final interview; if counseling continues beyond 30 days, the counselor must inform the complainant that he/she has the right to file a formal complaint after 30 days in counseling, regardless of whether counseling has been completed; and

(8) prepare a report sufficient to determine that required counseling actions have been taken and resolve any jurisdictional questions that may arise.

3. **Formal Complaint Processing**

(a) If the aggrieved decides to proceed with a formal complaint, it must be submitted in writing on IG Form 1020.1-1 (Appendix E) and delivered in person or by mail to one of the following officials:

- (1) Inspector General, DoD;
- (2) Deputy Inspector General, DoD; or
- (3) The Director, Equal Employment Opportunity, OIG, DoD.

(b) The formal complaint must be specific with regard to the matter or matters on which the aggrieved person received EEO counseling; the aggrieved person cannot expand the complaint to include additional issues or allegations on which he/she did not receive counseling.

(c) The formal complaint must be signed by the aggrieved or the aggrieved's attorney.

(d) The formal complaint must be filed within 15 calendar days from the date he/she receives the notice of right to file. A postmark dated within the requisite 15 days will be evidence of timely filing.

(e) Upon receipt of a formal complaint of discrimination, the official (if other than the Director, EEO) will immediately transmit the complaint to the Director, EEO.

(f) The Director, EEO, will acknowledge receipt of the complaint in writing (within 5 calendar days). The complainant will also be advised of acceptance or rejection of the formal complaint (in whole or in part).

(g) The Director, EEO, will review the EEO counselor's report to determine whether the aggrieved, in the formal complaint, has raised new allegations on which there has been no previous counseling and also to determine whether the counselor's report gives more specific information on any vague or general allegations included in the formal complaint.

(h) Complaints containing allegations that are so vague that specific issue(s) cannot be defined will not be accepted for investigation. However, the aggrieved will be given the opportunity to furnish more specific information regarding the issue(s). If the aggrieved is unable or refuses to supply more specific information within a stated period of time, the Director, EEO, will reject the complaint and advise the aggrieved of his/her right to appeal.

(i) The complaint will be reviewed to determine whether any issue(s) are appealable to the Merit Systems Protection Board (MSPB) because of the 120-day limit for processing complaints involving a personnel action appealable to the MSPB.

4. Processing Mixed Case Complaints and Appeals -- 29 CFR 1614.302

(a) Definitions

(1) A "mixed case complaint" is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age, disability or reprisal related to or stemming from an action that may be appealed to the MSPB. The complaint may contain only an allegation of employment discrimination or it may contain additional nondiscrimination allegations that the MSPB has jurisdiction to address.

(2) A "mixed case appeal" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability or age.

(b) Procedures. The EEOC regulations provide for processing discrimination complaints on matters that are otherwise appealable to the MSPB. Two determinations must be made to decide if mixed case regulations apply, i.e., (1) the employee must have standing to file such an appeal with the MSPB; and (2) the matter that forms the basis of the discrimination complaint must be appealable to the MSPB.

(1) Standing

a The following employees generally have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal:

1 competitive service employees not serving a probationary or trial period under an initial appointment;

2 career appointees to the Senior Executive Service;

3 noncompetitive service preference eligible employees with 1 or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and

4 nonpreference eligible excepted service employees who have completed their probationary period or with 2 or more years of current continuous service (e.g., attorneys).

b The following employees generally do not have a right to appeal to the MSPB:

1 probationary employees; however, see 5 CFR 315.806 -- under certain circumstances, discrimination based on party affiliation, marital status, procedural deficiencies;

2 nonappropriated fund activity employees;

3 employees serving under a temporary appointment limited to 1 year or less; and

4 excepted service employees with less than 2 years' current, continuous service.

(2) Appealable Matters. Most appealable matters fall into the following six categories:

a reduction in grade or removal for unacceptable performance;

- b removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service;
- c separation, reduction in grade or furlough for more than 30 days, when the action was effected because of a reduction in force;
- d reduction-in-force action affecting a career appointee in the Senior Executive Service;
- e reconsideration decision sustaining a negative determination of competence for a general schedule employee; and
- f disqualification of an employee or applicant because of a suitability determination.

(3) Appealable Actions

- a denial of restoration after recovery from compensable injury of an excepted service employee;
- b termination during probation (under limited circumstances);
- c certain involuntary reassignments or demotions connected with conversions to Senior Executive Service;
- d improper application of reemployment priority rights;
- e reduction-in-force;
- f denial of reemployment rights under various circumstances;
- g denial of restoration following military duty; recovery of competitive service employees from certain injuries;
- h reduction-in-grade and removal based on unacceptable performance;
- i denial of within-grade increases; and
- j adverse suitability determinations.

(4) Election to Proceed

- a A covered individual may raise allegations of discrimination in a mixed case either as a direct appeal to the MSPB or as an EEO complaint with the agency, but not both.
- b Whatever action the individual files first is considered an election to proceed in that forum. Filing a formal EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO counselor or receiving EEO counseling does not constitute an election.
- c Where an aggrieved person files an MSPB appeal and seeks counseling in a timely manner, counseling may continue pursuant to Section 1614.105, at the option of the parties. In any case, counseling must be terminated with the notice of rights pursuant to Section 1614.105(d), (e), or (f).

(5) Procedures for Handling Dual Filing

- a Where the OIG, DoD does not dispute MSPB jurisdiction:
 - 1 If an individual files a mixed case appeal with the MSPB before filing a mixed case complaint with the OIG, DoD and the OIG, DoD does not dispute MSPB jurisdiction, the

OIG, DoD will thereafter dismiss any complaint on the same matter, regardless of whether the allegations of discrimination are raised in the appeal to the MSPB.

2 The OIG, DoD will advise the complainant that he/she must bring the allegations of discrimination contained in the dismissed complaint to the attention of the MSPB, pursuant to 5 C.F.R. 1201.155.

3 The OIG, DoD final decision dismissing the complaint must advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. The OIG, DoD decision to dismiss a mixed case complaint is not appealable to the Commission except where it is alleged that Section 1614.107(d) has been applied to a non-mixed case matter.

b Where the OIG, DoD or the MSPB administrative judge questions MSPB:

1 The OIG, DoD will hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him/her to bring the discrimination allegation to the attention of the MSPB.

2 During that period, all time limitations for processing or filing the complaint will be tolled. The OIG, DoD decision to hold a mixed case complaint in abeyance is not appealable to the EEOC. If the MSPB's administrative judge finds that the MSPB has jurisdiction over the matter, the OIG, DoD will dismiss the mixed case complaint and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB administrative judge finds that MSPB does not have jurisdiction over the matter, the OIG, DoD will recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

c Where a complainant files with the OIG, DoD first: If an employee first files a mixed case complaint at the OIG, DoD and then files a mixed case appeal with the MSPB, the OIG, DoD should advise the MSPB of the prior OIG, DoD filing and request that the MSPB dismiss the appeal without prejudice.

d Where a complainant has pending a non-mixed case complaint or a series of non-mixed case complaints and the matters raised in those complaints lead to an appeal on a matter that is appealable to the MSPB:

1 If the OIG, DoD believes that the non-mixed case complaint(s) are sufficiently related to the subsequent mixed case complaint, such that the mixed case matter cannot be adjudicated without also adjudicating the non-mixed matters, the OIG, DoD will notify the complainant in writing that the filing of a mixed case appeal may terminate the processing of the non-mixed cases and that the non-mixed matters will be consolidated with the mixed case appeal.

2 The OIG, DoD may file a motion with the MSPB to consolidate the non-mixed case matter with the mixed case appeal. Upon filing the motion, the non-mixed case complaint(s) will be held in abeyance pending a decision by the MSPB administrative judge on the agency's motion.

3 If the MSPB administrative judge fails to consolidate the non-mixed case complaints, they shall be processed pursuant to Section 1614.106, et seq. Time for processing

will commence to run without notice 15 days following the decision denying jurisdiction. The time periods are to run from the time processing ceased. That means that if processing of the non-mixed matter ceased on the 70th day, the count of days will begin with day 71.

(6) Processing where the MSPB Dismisses a Mixed Case Appeal Because it Finds no Jurisdiction (i.e., The case is not appealable to MSPB and thus not mixed):

a If an individual files a mixed case appeal with the MSPB and the MSPB subsequently dismisses the appeal as nonjurisdictional, the OIG, DoD will inform the individual that he/she may contact a counselor within 45 days to raise the discrimination claim(s) and that the filing of the mixed case appeal will be deemed to be the date the individual initially contacted the counselor.

b If the individual filed the appeal after the OIG, DoD issued an agency final decision on the mixed case complaint or after the OIG, DoD failed to issue a final decision on the mixed case complaint within the 120 days, the OIG, DoD will provide the complainant a 30-day notice of right to elect a final decision with a hearing or an immediate final decision by the OIG, DoD pursuant to Section 1614.110 and thereafter proceed as in a non-mixed case.

(7) Processing Mixed Case Complaints Filed at the OIG, DoD: If an employee elects to file a mixed case complaint, the OIG, DoD will process the complaint in the same manner as it would any other discrimination complaint, except:

a Within 45 days following completion of the investigation, the OIG, DoD will issue a final decision.

b On the filing of a complaint, the OIG, DoD will advise the complainant that if a final decision is not issued within 120 days of the date of filing the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter, as specified in 5 C.F.R. Section 1201.154(a), or may file a civil action as specified in Section 1614.310(g), but not both.

c Also on the filing of a complaint, the OIG, DoD will notify the complainant that if he/she is dissatisfied with the agency's final decision on the mixed case complaint, he/she may appeal the matter to the MSPB (not the EEOC) within 20 days of receipt of the OIG, DoD final decision.

d On issuance of the OIG, DoD final decision on a mixed case complaint, the complainant will be advised of the right to appeal the matter to the MSPB (not the EEOC) within 20 days of receipt of the notice and of the right to file a civil action as provided in Section 1614.310(a).

5. Dismissal Process

(a) The OIG, DoD will Process Certain Dismissals Expeditiously. To conserve program resources and program integrity, the following types of dismissals will be made early in the administrative process:

(1) Untimely Counseling Contact

a The complaint raises a matter that has not been brought to the attention of a counselor and is not like or related to a matter that was brought to the attention of a counselor. {Section 1614.107(b)}.

b The aggrieved person did not contact an EEO counselor within 45 days of the discriminatory event or within 45 days of the effective date of the personnel action {29 CFR, Section 1614.105(a)(1)}; **and**

c The aggrieved person did not show that the 45-day contact period should be extended pursuant to Section 1614.105(a)(2); **and**

d The aggrieved person cannot show other equitable circumstances that mitigate untimely contact. Time limits are subject to waiver, estoppel and equitable tolling under Section 1614.604(c).

(2) Untimely Filing of the Formal Complaint. The aggrieved failed to file a formal complaint within 15 days of the counselor's notice of right to file a formal complaint in an individual complaint {Section 1614.105(d)} or in a class complaint {Section 1614.204(c)}.

(3) Failure to State a Claim. The aggrieved person failed to state a claim under Section 1614.103. A claim not covered by EEO statutes will be dismissed promptly. Also, where the agency head is incorrectly named, an early dismissal pursuant to Section 1614.106(a), will be issued.

(b) All Dismissals will be Accompanied by Reasons for the Action and will Cite Section and Subsection of the Commission's Regulations. The following are additional bases for dismissal under 29 CFR Part 1614:

(1) The complaint states the same claim that is pending before, or had been decided by, the OIG, DoD or the EEOC except in those cases where a class action complaint is pending.
{29 CFR Section 1614.107(a)}

(2) The complainant files a civil action concerning the same matter at least 180 days after he/she filed his/her administrative complaint.
{29 CFR Section 1614.107(c)}

(3) The same matter has been decided by a United States District Court or Court of Appeals and the complainant was a party to the lawsuit.
{29 CFR Section 1614.107(c)}

(4) The complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination, indicating an election to pursue a non-EEO process.
{29 CFR Section 1614.107(d)}

(5) The complainant has elected to appeal the matter to the MSPB, rather than file a mixed case complaint under Section 1614.302.
{29 CFR Section 1614.107(d)}

(6) The complaint alleges that a proposal to take, or a preliminary step in taking, a personnel action is discriminatory.

{29 CFR Section 1614.107(e)}

(7) The complaint is moot.

{29 CFR Section 1614.107(e)}

(8) The complainant cannot be located provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address.

{29 CFR Section 1614.107(f)}

(9) The complainant has failed to respond to a written "request to provide relevant information or to otherwise proceed" within 15 days of receipt provided that the request contained notice of the proposed dismissal and further provided that there is otherwise insufficient available information to adjudicate the matter.

{29 CFR Section 1614.107(g)}

(10) The complainant refuses, within 30 days of receipt of an OIG, DoD offer of settlement, to accept the offer, providing that it is an offer of full relief containing a certification from the OIG, DoD EEO Director or chief legal officer, that the offer constitutes full relief, and providing further that the offer gave notice that failure to accept within 30 days would result in dismissal of the complaint.

(c) Processing of Partially Dismissed Complaints

(1) Complainants dissatisfied with the dismissal of all or part of the complaint can immediately appeal from the dismissal. Where an appeal from a partial dismissal is filed and the dismissal is reversed by the EEOC Office of Federal Operations, the matter will be sent back to the OIG, DoD for completion of the investigation.

(2) The timeframe for completing the investigation of the accepted portion of the complaint will be stayed pending a decision on the appeal. The OIG, DoD may, but is not required to, investigate accepted portions of the complaint during that time period.

(3) When, on appeal, the dismissal of a portion of a complaint is upheld but the remainder of the complaint is to be processed administratively, the EEOC will not force the complainant to proceed to court on the dismissed portion at that time. The complainant may wait until a final decision is issued by the OIG, DoD or the EEOC on the merits of the remainder of the complaint. He/she will have 90 days from receipt of that decision to file in Federal district court.

(d) Allegations of Dissatisfaction Regarding Processing Pending Complaints

(1) A complainant who is dissatisfied with the processing of his/her pending complaint, whether or not it alleges prohibited discrimination as a basis for dissatisfaction, will be referred to the Director, EEO. The Director, EEO will attempt to resolve dissatisfaction with the complaints process as early and expeditiously as possible.

(2) The OIG, DoD will, subsequent to providing EEO counseling and the opportunity to file a formal complaint, process complaints alleging discrimination pursuant to Part 1614. Where an aggrieved person or participant in the EEO complaints process alleges that he/she is treated differently or that he/she is adversely affected by a policy or practice that results in a discriminatory effect on the processing of his/her complaint on a basis protected by the laws that the EEOC enforces, the aggrieved person will be provided EEO counseling and the opportunity to file a formal complaint.

6. Investigation

- (a) If the complaint is accepted, the Director, EEO, will ensure that:
- (1) all issues listed are investigated;
 - (2) all employees of the OIG, DoD cooperate in the investigation;
 - (3) witness testimony is given under oath or affirmation without a promise of confidentiality;
 - (4) individual complaints are properly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with 29 CFR Section 1614.110; and
 - (5) complaints are resolved within 180 calendar days after the filing date. If not, establish a date for the conduct of an investigation.
- (b) The assigned investigator shall:
- (1) collect and discover factual information concerning the issues in the complaint under investigation;
 - (2) administer oaths;
 - (3) require employees to furnish testimony under oath or affirmation without a promise of confidentiality; and
 - (4) prepare an investigative summary.
- (c) The investigation will include a thorough review of:
- (1) the circumstances under which the alleged discrimination occurred;
 - (2) the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees; and
 - (3) any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.
- (d) The investigator will conduct a survey of the general environment from which the complaint arose in an effort to determine:
- (1) Any improper discrimination in the organizational element involved in the complaint in order to take remedial action.
 - (2) Whether any allegations of discrimination are supported by facts may have the effect of exonerating the principal agency witness(es) (PAW).
- (e) The Director, EEO, will keep the PAW(s) and the complainant informed of the progress of the investigation in approximately the same manner.

(f) When the investigation is complete, the Director, EEO, will review the report of investigation (ROI) to determine whether it contains information relevant to all the allegations.

(g) If there are allegations in the ROI against the PAW that the PAW had no opportunity to confirm or deny, the Director, EEO, will require an additional investigation to complete the case.

(h) After completion of the investigation, the investigator will provide three copies of the ROI to the Director, EEO. The Director, EEO, will provide one each to the complainant and his or her representative.

7. **Hearing, Decision and Appeals**

(a) If a hearing is requested, the Director, EEO, will notify the EEOC, which appoints an administrative judge to hear the case.

(b) The administrative judge shall, within 10 days, review the file, determine whether additional documentation is necessary and make requests of the appropriate party for the production of any additional documentation.

(c) The complainant, his or her representative and the OIG legal representative, will have the opportunity to cross-examine witnesses who appear and testify. Testimony is under oath or affirmation, and hearings are recorded and transcribed verbatim.

(d) If, after reviewing the file, the administrative judge determines that the investigation is inadequate or incomplete due to the OIG, DoD failure to complete the investigation within the time limits set forth in Section 1614.108(e), and the OIG, DoD has not cooperated in the discovery process as required by Section 1614.109(d)(3), the administrative judge may take the following actions:

- (1) Subject the agency to adverse inference findings in favor of the complainant;
- (2) Consider the matters to which the requested information or testimony pertains to be favorable to the complainant;
- (3) Exclude other evidence offered by the agency;
- (4) Permit the complainant to obtain a summary disposition in his/her favor on some or all of the issues without a hearing.

(e) The administrative judge shall have the authority to do the following:

- (1) Administer oaths.
- (2) Regulate the conduct of hearing.
- (3) Limit the number of witnesses so as to exclude irrelevant and repetitious evidence.
- (4) Order discovery or the production of documents and witnesses.
- (5) Direct supplemental investigations when discovery would be inadequate in developing the record.
- (6) Exclude any person from the hearing who is disruptive.
- (7) Issue findings and conclusions without a hearing if there are no material facts in issue.

- (8) Limit the hearing to the issues in dispute.
 - (9) Impose appropriate sanctions on parties who fail to comply with discovery orders.
 - (10) The administrative judge has the authority to impose sanctions on a party if he/she fails to comply without good cause with the rulings on requests for information, documents or admissions, where the information is solely in the control of that party. Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request and the information is solely in the control of that party, the administrative judge may impose sanctions. Those sanctions include, but are not limited to, the authority to:
 - a draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
 - b consider the matters to which the requested information pertains to be established in favor of the opposing party;
 - c exclude other evidence offered by the party failing to produce the requested information;
 - d enter a decision fully or partially in favor of the opposing party; and
 - e take other actions as appropriate.
- (f) Transmittal of Findings and Conclusions. At the conclusion of the hearing stage and within 180 days of a request for a hearing, the administrative judge shall send the following items to the parties by certified mail:
- (1) The findings and conclusions.
 - (2) Copies of the entire record, including the transcript.
 - (3) The administrative judge may, when necessary, release the transcript prior to the issuance of the findings and conclusions, e.g., when the transcript is needed to prepare a post-hearing brief.
 - (4) The administrative judge may issue findings of fact and conclusions of law from the bench after the conclusion of the hearing, in lieu of issuing written findings and conclusions.
 - (5) Subsequent to the hearing, the Inspector General, Department of Defense, will issue a final decision either adopting, modifying or rejecting the recommended decision of the administrative judge. The decision letter will set forth the specific reasons for rejecting or modifying the findings of fact or conclusions of law made by the administrative judge. The final decision will be accompanied by a verbatim transcript of the hearing, a copy of the recommended decision of the administrative judge and notification of the complainant's appeal rights.
 - (6) The final agency decision will be transmitted to the complainant and his or her representative with notice that any request for attorney's fees be documented and submitted within 30 calendar days of receipt of the Inspector General's final decision. Attorney's fees usually are payable only when the complainant prevails. Attorney's fees are not recoverable at the administrative level under the Age Discrimination in Employment Act (ADEA), 29 USC Section 633a or the Equal Pay Act (EPA), USC Section 206(d).
 - (7) If the agency does not, within 60 days of receipt of the recommended decision by the administrative judge, reject or modify the findings and conclusions or the relief, if any, ordered by such decision, then the findings and conclusions and the relief ordered shall become the final decision of the agency, and the agency shall notify the complainant thereof in accordance with 29 CFR 1614.110.

(8) If a complainant is dissatisfied with the final decision of the agency, he or she may file a notice of appeal with the EEOC within 30 calendar days of receipt of the notice of the final decision or a civil action in U.S. District Court within 90 days.

8. **Statutory Rights.** An employee or applicant is authorized to file a civil action in U.S. District Court:

(a) Within 90 calendar days of his or her receipt of notice of final action taken by the agency on a complaint.

(b) After 180 calendar days from the date of filing a complaint with the agency if there has been no final OIG, DoD decision.

(c) After 180 calendar days from the date of filing an appeal with the EEOC, if there has been no EEOC decision.

(d) Within 90 days after receipt of the EEOC decision on an appeal.

(e) Either appellant or the OIG, DoD may ask for reconsideration or reopening of the complaint.

9. **Complaints of Discrimination Based on Age**

(a) Prohibited employment practices of the Age Discrimination in Employment Act (ADEA) of 1967, as amended by Public Laws 92-259 and 95-256, are all-encompassing and include failure to hire, discharge, denial of employment or discrimination with respect to terms of conditions of employment because of an individual's age within the protected age group.

(b) Protected Age Group. The ADEA prohibits age-based employment discrimination against individuals in the Federal Service who are 40 years of age or older. For Federal employees, there is no upper age limit.

(c) Unique ADEA Provisions. Regulations regarding allegations of age discrimination are unique in Federal discrimination statutes in that an aggrieved employee or applicant need not go through the OIG individual administrative process, and are intended to provide an opportunity for the agency to take appropriate action to assure the elimination of any unlawful practice. The notice of intent to file a civil action must be given within 180 calendar days after the alleged unlawful practice occurred.

(d) Procedures for Filing Age Complaints

(1) Procedures for processing complaints of discrimination based on age are the same as existing procedures provided for individual complaints based on race, color, religion, sex, national origin and/or physical and mental disability.

(2) Any employee or applicant for employment who believes that he or she has been discriminated against on account of age and who meets the age requirements may file a complaint.

(e) **Effect of Civil Action.** The filing of a civil action in U.S. District Court by an employee or applicant terminates OIG processing of a complaint or EEOC processing of an appeal.

10. **Complaints of Sexual Harassment.** Any individual who is sexually harassed is encouraged to make it clear to the offender that such behavior is offensive. If the behavior continues, the individual should report the incident through his or her supervisory chain. If that does not resolve the situation, the individual must bring the complaint of sexual harassment to the attention of the Director, EEO, or an EEO counselor to begin informal counseling on the matter. Any supervisor within the OIG who permits prohibited harassment to occur without taking steps to stop it may be found to have tolerated sexual harassment in the workplace. The EEOC and DoD guidelines, as well as court decisions, have made it clear that employers are liable and responsible for acts of sexual harassment by supervisory and nonsupervisory personnel. It is the supervisor's responsibility to assure the work environment is free from sexual harassment. Complaints of sexual harassment will be processed under existing laws/regulations as a form of sex discrimination, as a violation of the agency's policy prohibiting sexual harassment or Code of Conduct provisions.

11. **Other Types of Complaints of Discrimination.** Federal Regulations (29 CFR, Part 1614) provide specific rules and procedures for a variety of complaints of discrimination, e.g., class complaints of discrimination and mixed case complaints. The OIG will comply with such laws and procedures in its administrative processing of such complaints.

12. **Rights of Principal Agency Witnesses (PAWs) in the Complaint Process**

(a) **Precomplaint Process.** During the precomplaint counseling stage of the discrimination complaint process, an aggrieved applicant or employee may identify an OIG official as responsible for an alleged act of discrimination. The EEO counselor must solicit the views of any identified or named PAW unless the counselor obtains and provides information that exonerates the official to the clear satisfaction of the aggrieved person. Prior to interviewing the official, the counselor must advise the official of the nature of the accusations and the right to have a representative of his/her own choice present during the interview and at any time during the processing of the complaint. The EEO counselor must be careful not to identify the aggrieved employee or applicant to the PAW at this stage of the discrimination matter unless authorized to do so by the complainant.

(b) **Investigation**

(1) Whether identified at the time a formal complaint is filed or during the course of an investigation, the PAW must be given an opportunity to respond to any and all allegations.

(2) The portion of the investigative file that accuses the official of discrimination must be made available to the PAW. Names of, and identifying information on, persons other than the complainant and the PAW will be deleted from copies of the documents shown to the PAW to protect such individuals from unwarranted invasion of privacy.

(3) The PAW must be given full opportunity to state the facts as he or she sees them--in affidavit form--for inclusion in the investigative file, as well as the opportunity to suggest witnesses who may provide corroborative testimony.

(4) The Director, EEO, must keep the PAW informed of the progress of the investigation in approximately the same manner as the complainant is informed. The ROI should be reviewed after the investigation has been completed to ensure there are no allegations to which the PAW has not been afforded an opportunity to respond.

(c) Hearing

(1) The administrative judge assigned to conduct a hearing on the discrimination matter must assure that the PAW is informed of the hearing and is given an opportunity to testify. An opportunity must also be afforded the PAW to comment for the record regarding any new allegations of wrongdoing on the PAW's part if brought by witnesses during the course of the hearing.

(2) At any time the PAW is called on for testimony, including the investigative and hearing stages, he or she has the right to have a representative present. The representative's role at a hearing, however, is limited to advising the PAW on how to respond to questions. The presence of the PAW and representative at a hearing is limited to the time the PAW appears as a witness. The PAW's representative does not have the right to examine or cross-examine witnesses. Only the administrative judge and the representatives of the complainant and the agency may examine and cross-examine witnesses.

(d) Final Decision

(1) If the effect of the agency decision is to deny or reject the complainant's allegations against the PAW, then access to the complaint file will not be given the PAW.

(2) The entire complaint file--without deletions--must be made available to the PAW only if the agency takes or proposes adverse action or other disciplinary action against the responding management official, based on evidence developed in connection with the processing of the complaint.

H. Effective Date and Implementation. This instruction is effective immediately.

Eleanor Hill
Inspector General

5 Appendices

- A--References
- B--Definitions
- C--EEO Counselor Responsibilities
- D--Complainant's Use of Representatives
- E--IG Form 1020.1-1

APPENDIX A REFERENCES

- a. 29 Code of Federal Regulations, Part 1614, *Federal Sector Equal Employment Opportunity*, April 10, 1992
- b. Civil Rights Act of 1991, Public Law 102-166, November 21, 1991
- c. Inspector General Instruction 1440.1, *Equal Employment Opportunity Program*, July 1995
- d. DoD Directive 5200.2R, *Personnel Security*, Revised 1987
- e. Department of Defense Directive 1350.2, *The Department of Defense Military Equal Opportunity Program*, April 29, 1987
- f. OASD Administrative Instruction No. 9, *Processing Complaints of Discrimination*, January 11, 1979
- g. Civil Service Reform Act of 1978
- h. Rehabilitation Act of 1973, Sections 501 and 505, as amended
- i. *The Age Discrimination in Employment Act of 1967*, as amended, 29 USC Section 633a, (ADEA)
- j. Title VII of the Civil Rights Act of 1964, as amended
- k. Fair Labor Standards Act 81938, as amended (Equal Pay Act of 1963 [EPA]) 29 USC Section 206(d)
- l. 42 USC Section 2000c-16, (Title VII)
- m. 29 USC Section 791 and 744a (Rehabilitation Act)

APPENDIX B
DEFINITIONS

1. **Administrative Judge.** An official assigned by the EEOC to conduct hearings on formal complaints of discrimination and provide a recommended decision to the head of the agency.
2. **Complainant.** An employee or an applicant for employment who files a formal complaint of discrimination based on his or her race, color, religion, sex, national origin, age, physical/mental disability and/or reprisal.
3. **Discrimination.** Any act or failure to act based in whole or in part on a person's race, color, religion, sex, national origin, age, physical/mental disability and/or reprisal that adversely affects privileges, benefits, working conditions, results in disparate treatment or has a disparate impact on employees or applicants.
4. **EEO Counselor.** An employee of the OIG working under the direction of the Director of Equal Employment Opportunity, who makes informal inquiries and seeks resolution of informal complaints. The EEO counselors may be full-time, part-time or collateral duty. The EEO counselors attempt to identify issues brought to them by employees who believe they have been subject to discrimination. A complaint cannot be made formal unless counseling has taken place.
5. **Investigator.** An individual appointed or assigned who has the authority to gather documentary evidence relevant to the allegations, take sworn statements (affidavits) and make a preliminary finding of whether discrimination has occurred.
6. **Mixed Case Complaint.** A complaint involving an action appealable to the Merit Systems Protection Board (MSPB) that alleges the action was taken because of discrimination. Actions appealable to the MSPB include, but are not limited to, removals, demotions, suspensions for more than 14 days, reductions-in-force and furloughs of 30 days or more.
7. **Principal Agency Witness (PAW).** The management official named by the complainant, or otherwise identified, who proposed to take, took or failed to take the action that forms the basis of the complaint.
8. **Reasonable Time.** 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 (during the administrative process), with the required specificity and detail, to the agency and EEOC officials. 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, and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis.

9. **Representative.** A person selected and designated in writing by a complainant, class agent or principal agency witness (PAW). The representative may accompany, represent and advise the complainant, agent or PAW at any stage of the complaint process (see Appendix D).

10. **Reprisal.** Unlawful restraint, coercion or discrimination against complainants, their representatives, witnesses, Directors of EEO, EEO officers, investigators, counselors and other agency officials with responsibility for processing EEO discrimination complaints during any stage in the presentation and processing of the complaint, including the pre-complaint process or because of opposition to any unlawful EEO employment discrimination (see 29 CFR, 1614.105).

APPENDIX C
EQUAL EMPLOYMENT OPPORTUNITY COUNSELOR RESPONSIBILITIES

A. Knowledge Required

1. Familiarity with the basic goals of civil rights legislation and the Equal Employment Opportunity Program and an understanding of the employment environment and issues for minority groups, women, disabled veterans and other people with disabilities.
2. Specific knowledge of Federal laws and EEOC, OPM, DoD and OIG, DoD policies and procedures on the discrimination complaint process.
3. Basic knowledge of personnel matters to advise employees when the problems do not involve an allegation of discrimination based on race, color, religion, sex, age, national origin, physical/mental disability and/or reprisal.

B. Duties

1. Interviews employees initially by appointment or on a walk-in basis. Determines whether or not the problem is EEO-related. Directs the employee to proper channels for resolution of a problem when the problem does not involve an allegation of unlawful discrimination.
2. Obtains the details as the employee sees them when the problem involves an allegation of unlawful discrimination. Notifies employee that appropriate inquiries will be made and discusses the alleged unlawful discrimination.
3. Gathers facts through interviews with agency officials, supervisors and other employees and through examination of pertinent records and instructional material. The facts are gathered on an informal basis without sworn witnesses or extensive documentation.
4. Attempts resolution of the matter by talking with the aggrieved employee and appropriate management officials, separately or together. Assures that all proposed solutions are based on facts gathered and that such facts are reliable.
5. Prepares a written report that identifies the issues and summarizes the information gathered in interviews and inquiries. When advised that the complainant has filed a formal complaint, submits the counseling report and other notes and summary data to the Director, EEO.
6. Serves as a special communication link between the complainant and management without violating the privileged communication of the counseling relationship.
7. Advises managers, supervisors and employees on all aspects of the discrimination complaint process.

APPENDIX D
COMPLAINANT'S USE OF REPRESENTATIVES

An EEO complainant is entitled to the representative of his/her choosing (See 29 CFR 1614.605), provided the representative poses no conflict of interest or (official/collateral) position. The representative need not be an attorney. The representative may, however, be an employee of the same agency. The representative (attorney, fellow employee or other individual) can provide the complainant with an independent evaluation of the merits of the case, act as a sounding board or assist the complainant in making an objective assessment of the factors in dispute. A representative can provide advice or be involved in the actual representation of the employee. Any relationship with the representative should be defined early to avoid confusion later.

29 CFR 1614.605(a) provides that "At any stage in the processing of a complaint, including the counseling stage (Section 1614.105), the complainant shall have the right to be accompanied, represented and advised by a representative of the complainant's choice." Selection of a representative is a right that is personal to the complainant. It is advisable that a complainant and his/her representative clearly define the scope of representation. The potential for confusion may exist with an attorney; however, the potential is even greater with a lay representative who may not be accustomed to making distinctions between legal determinations and other determinations on which a client should be consulted or make the ultimate decision.

APPENDIX E

**COMPLAINT OF DISCRIMINATION AGAINST
THE INSPECTOR GENERAL, DOD
(IG FORM 1020.1-1)**

For Copy of Form, go to Form Filler, Form "10201-1"