



DEPARTMENT OF MILITARY AND VETERANS AFFAIRS  
OFFICE OF THE ADJUTANT GENERAL  
**COMMONWEALTH OF PENNSYLVANIA**  
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HRO (18-05)

27 June 2018

MEMORANDUM FOR All Commanders, Managers And Supervisors, Title 5 NG Employees And Title 32 Dual Status Technicians As Well As Applicants For Employment Who Are Managed Under The Designation Of Authority To The Adjutant General Pennsylvania National Guard

SUBJECT: Pennsylvania National Guard Civilian Discrimination Complaint Process

1. Reference: CNGBN 9600, 10 May 2017, "State National Guard Civilian Equal Opportunity Complaint Processing and Reporting Guidance"

2. Purpose: This instruction implements recent statutory amendments to section 709 of Title 32 and section 10508 of Title 10, as enacted in Public Law 114-328, 23 December 2016, "National Defense Authorization Act for Fiscal Year 2017," with regard to the processing of civilian Equal Employment Opportunity (EEO) complaints within State National Guard (NG) programs in accordance with (IAW) 29 CFR Part 1614. This instruction also establishes a uniform system to conduct legal and administrative reviews of EEO complaints for final agency decision by The Adjutant General.

3. Cancellation. This is an initial publication.

4. Applicability. This instruction applies to the processing and resolution of discrimination complaints involving Title 5 NG Employees and Title 32 Dual Status Technicians as well as applicants for employment who are managed under the designation of authority to The Adjutant General (TAG). National Guard membership is required for dual status technician employment: This is an excepted service position that requires membership in a compatible military assignment in the National Guard. Dual status technicians are required to wear the military uniform. Acceptance of an excepted service position constitutes concurrence with these requirements as a condition of employment.

a. This instruction does not apply to complaints of discrimination from NG military personnel. They are covered by CNGBM 9601.01, 25 April 2017, "National Guard Discrimination Complaint Process."

b. This instruction does not apply to beneficiaries of services from the Army National Guard (ARNG) and Air National Guard (ANG) in programs receiving Federal financial assistance. Complaints from such beneficiaries are processed IAW NGR 600-23/ANGR 30-12, 30 December 1974, "Nondiscrimination in Federally Assisted Programs."

SUBJECT: National Guard Civilian Discrimination Complaint Process

c. This instruction does not apply to NG Service members serving in a Title 10 status, or to civilian personnel employed in a Title 5 status at the National Guard Bureau (NGB), the ARNG and ANG Readiness Centers, and any NGB field-operating locations.

5. Policy. This instruction establishes a discrimination complaint process IAW 29 CFR Part 1614 and Equal Employment Opportunity Commission Management Directive 110, and complies with the reporting requirements of the Equal Employment Opportunity Commission Management Directive 715, 01 October 2003, "EEO Reporting Requirements for Federal Agencies."

6. Guidance.

a. This establishes and adopts a discrimination complaint processing system and reporting instruction IAW Public Law 114-328, 23 December 2016, "National Defense Authorization Act for Fiscal Year 2017."

b. The Pennsylvania National Guard (PANG) adopts the Model State National Guard Joint Civilian Discrimination Complaint Instruction provided by NGB-EO. (Enclosures A, C, D and E). The PANG established its Reasonable Accommodation Policy and Procedures, 5 June 2018.

c. For any EEO complaint, grievance, claim, or action arising from, or relating to a personnel action or condition of employment:

(1) The Adjutant General shall be considered the head of the agency and the NG of the State shall be considered the employing Agency of the individual and the sole defendant or respondent in any administrative action.

(2) The Judge Advocate shall defend any administrative complaint, grievance, claim, or action, and shall promptly implement all aspects of any final administrative order, judgment, or decision.

(3) Any settlement, judgment, or costs arising from an action described in subparagraph (1) or (2) shall be paid from appropriated funds allocated to the Pennsylvania National Guard.


7. Summary of Changes. None

SUBJECT: National Guard Civilian Discrimination Complaint Process

9. Effective Date. This instruction is effective on the date signed and will expire five years from the date of signature, unless cancelled earlier.

The POC for this memorandum is Dr. Millicent Carvalho-Grevious, State Equal Employment Manager, at [Millicent.j.carvalho-grevious.civ@mail.mil](mailto:Millicent.j.carvalho-grevious.civ@mail.mil) or phone number (717) 861-8520. Further questions you may have concerning Reasonable Accommodation pertinent laws or regulations may be referred to Mr. Scott D. Niles, Deputy HRO, (717)-861-8733, [scott.d.niles.civ@mail.mil](mailto:scott.d.niles.civ@mail.mil).

FOR THE ADJUTANT GENERAL:

  
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SECTIONS:

- A - Civilian Equal Employment Opportunity (EEO) Complaint Process
- B – Reasonable Accommodation Policy
- C - Settlement Agreements
- D - Compliance Actions
- E- Notification and Federal Employee Anti-discrimination and Retaliation (No Fear) Act of 2002 Compliance
- F - References
- G – Glossary
- H Enclosures
  - a. Appendix A: Reasonable Accommodation Request Form
  - b. Appendix B: Examples of Reasonable Accommodation
  - c. Appendix C. Selected Reasonable Accommodation Resources

TABLE OF CONTENTS:

ENCLOSURE A: EEO COMPLAINT PROCESS

1. CIVILIAN EEO COMPLAINTS..... 7  
    a. Objective  
    b. Scope of Program

2. PROPER COMPLAINTS..... 7

3. OTHER MILITARY SERVICES.....7

4. INFORMAL EEO COMPLAINT PROCESSING.....8-10  
    a. EEO Professional Responsibilities

5. EEO INFORMAL CLASS ACTION COMPLAINTS..... 10

6. EEO FORMAL COMPLAINT PROCESSING..... 10-16  
    a. Guidance  
    b. SEEM Responsibilities  
    c. Acceptance and Dismissal  
    d. Investigation of Formal Complaints  
    e. Hearings  
    f. Final Agency Actions

7. NEGOTIATION OF SETTLEMENTS.....16

8. EEO FORMAL CLASS COMPLAINTS.....17-18

9. EEO MIXED CASE COMPLAINTS..... 18-19

10. CIVILLIAN EEO COMPLAINT APPEALS.....20

11. REQUESTS FOR RECONSIDERATION.....21

12. ANONYMOUS COMPLAINTS.....21

13. ALLEGATIONS OF SEXUAL HARRASSMENT.....21-23

ENCLOSURE B: REASONABLE ACCOMODATION POLICY

1. POLICY  
    a. Responsibilities.....24-25

- (1) Human Resource Officer
- (2) State Equal Employment Manager
- (3) Commanders and Directors
- (4) Managers and Supervisors
- (5) Higher-Level Managers and Supervisors
- (6) First-Line Managers and Supervisors

- 2. DEFINITIONS.....25-27
  - a. Direct Threat
  - b. Essential Functions
  - c. Extenuating Circumstances
  - d. Individual with a Disability (IWD)
  - e. Interactive Process
  - f. Major Life Activities
  - g. Qualified Individual
  - h. Reasonable Accommodation
  - i. Undue Hardship
  - j. Personal Assistants
- 3. GENERAL GUIDANCE ON REASONABLE ACCOMODATIONS .....27
  - a. The Rehabilitation Act of 1973 and American with Disabilities Act 1990
  - b. Reasonable Accommodations Serve Two Fundamental Purposes
- 4. REASONABLE ACCOMMODATIONS INTERACTIVE PROCESS.....27-28
  - a. Requesting Reasonable Accommodation
  - b. Personal Assistants
- 5. PROCESSING REQUESTS FOR REASONABLE ACCOMMODATIONS...29-33
  - a. Process
- 6. APPROVAL AND/OR DENIAL OF RA REQUESTS.....33-34
  - a. Appoval of Requests for RA
  - b. Denial of Requests for RA
  - c. Delay in Appoving Requests for RA
- 7. ALTERNATIVE DISPUTE RESOLUTION.....34
  - a. Alternative Dispute Resolution (ADR)
- 8. INFORMAL APPEAL PROCESS.....34
  - a. Overview
  - b. Approval of Appeal Requests
  - c. Denial of Appeal Requests
- 9. EEO DISCRIMINATION COMPLAINT PROCESS.....35
  - a. Federal Agency EEO Complaint Process

10. RECORDKEEPING REQUIREMENTS.....	35-36
a. Tracking Requirements	
 <u>ENCLOSURE C: SETTLEMENT AGREEMENTS</u>	
1. AUTHORITY.....	37
2. SETTLING CIVILIAN EEO COMPLAINTS.....	37
3. COMPLIANCE WITH SETTLEMENT AGREEMENTS.....	38
4. ALLEGATIONS OF NONCOMPLIANCE.....	38
 <u>ENCLOSURE D: COMPLAIANCE ACTIONS</u>	
1. COMPLIANCE WITH EEOC ORDERS AND DECISIONS.....	39
2. RECEIPT OF EEOC DECISIONS	
 <u>ENCLOSURE E: NOTIFICATION OF NO FEAR ACT</u>	
1. NO FEAR ACT DESCRIPTION AND PROCEDURES.....	40-41
2. NO FEAR NOTICE.....	41
 <u>ENCLOSURE F: REFERNCES</u> .....	
42	
<u>GLOSSARY</u> .....	43-47
APPENDIX A.....	48-49
Reasonable Accommodation Request Form	
APPENDIX B.....	50-51
Examples of Reasonable Accommodations	
APPENDIX C.....	52-53
Selected Reasonable Accommodation Resources	

## SECTION A

### EQUAL EMPLOYMENT OPPORTUNITY (EEO) COMPLAINT PROCESS

#### 1. Civilian EEO Complaints Generally

a. Objective. The purpose of the civilian EEO complaint process is to provide for the prompt, fair and impartial processing and resolution of complaints, consistent with its legal obligations under 29 CFR Part 1614. The objective of civilian EEO counseling is to seek opportunities to resolve issues at the lowest organizational level at the earliest possible time.

b. Scope of Program. An aggrieved person who believes that he or she has been discriminated against on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 and older), disability, genetic information or who believes that he or she has been subjected to sexual harassment or retaliated against for participating in the complaint process must consult a State Equal Employment Manager (SEEM) or Agency designated EEO Counselor within 45 calendar days or when he or she becomes aware of the discriminatory action or the effective date of the personnel action. The 45-day time limit may be extended for reasons outlined in 29 CFR 1614.105(a)(2). Failure to contact an EEO Professional within 45 calendar days may result in dismissal of a formal complaint.

2. Proper Complainants. Agency civilian employees, former employees and applicants for employment who meet the criteria outlined in 29 CFR 1614 and 32 USC Section 709(f)(5), if applicable, may file civilian EEO complaints.

a. The aggrieved person starts the civilian EEO process by contacting an EEO Professional and advising that he or she has been subjected to unlawful discrimination.

b. Under EEOC and NG policy, independent contractors, contingent employees and NG military technicians in military pay status or actions concerning fitness for duty in the reserve components are generally not considered Agency employees for Federal Sector EEO purposes.

c. In exceptional cases, however, the EEOC has determined that an individual classified as a contingent employee or independent contractor may be considered an Agency employee under the protection of Federal EEO regulations if the Agency exerts substantial direction and control over the contingent employee/contractor's activities.

3. Other Military Services. When an individual alleges discrimination in a multi-service case (e.g., active component Air Force or Army employee alleges an NG management official has discriminated against him/her), the counseling and complaint processing are conducted by the Agency that will be fiscally responsible for any settlement or judgment resulting from the allegation. Typically, that will be the Agency for whom the complainant works, but in some instances the Agency will be whom the discriminating

official, employee or responsible management official works for because that Agency is responsible for the settlement or judgement.

#### 4. Informal (Pre-Complaint) Civilian EEO Complaint Processing

##### a. EEO Professional Responsibilities:

(1) Determines if a claim is appropriate for processing under 29 CFR Part 1614, Federal Sector Complaint Processing, and where appropriate, offers the use of Alternative Dispute Resolution (ADR) or any other informal dispute resolution procedures to resolve the claim if otherwise found to be appropriate for such alternative procedures.

(2) Processes all claims through the informal complaint process, regardless of timeliness, merit, or other considerations.

(3) Complaints based on sexual orientation or gender identification may be covered under 29 CFR 1614.105(a) as sex stereotyping; therefore, an aggrieved person who believes he or she has been discriminated on the basis of sexual orientation may process their complaint under 29 CFR Part 1614 as sex discrimination.

(4) When an aggrieved person engages an EEO Professional for the purpose of obtaining information about, or articulating, a complaint, but does not elect to start the Informal (Pre-Complaint) process, the visit will be recorded as a Contact and documented as —EEO General Assistance.

(5) When an aggrieved person states their intent to file a complaint, the 30-calendar day informal processing period starts as of the first date the complainant contacts an EEO Professional, SEEM or other official designated to receive discrimination complaints.

(6) Assigns a docket number to each informal complaint.

(7) Advises aggrieved persons in writing of their rights and responsibilities.  
Note: Notice of Rights and Responsibilities Letter IS MANDATORY.

(8) If the complainant alleges sexual harassment, advises aggrieved persons of their right to request an administrative investigation (i.e., Commander Directed Investigation (CDI), AR 15-6 investigation, Office of Complex Investigation, etc. . .), and advises that any investigation would run concurrently with the EEO complaint.

(9) Advises the aggrieved person that he or she may choose between having his or her complaint processed under ADR procedures if deemed suitable and offered by the Agency or the traditional counseling activities described in 29 CFR Section 1614.105(b)(2) and EEOC MD-110, Chapter 2. Ensure the complaint has been properly screened and found appropriate for ADR before offering ADR to the complainant. Do



not decline to offer ADR solely because of the basis alleged in the complaint (i.e., race, color, religion, national origin, sex (including pregnancy, gender identity, and sexual orientation), age, disability, genetic information, or retaliation) etc. [MD-110, Chapter 3, Section II (A)]. Participation in ADR by the complainant and management officials is encouraged. If ADR is not chosen because management is unwilling to engage in ADR, note that in the counselor's report and continue the limited inquiry. If the ADR procedure is chosen, the informal complaint processing period shall automatically extend to 90 days. [29 CFR 1614.105(f)]. The counseling and screening requirements of this subparagraph may be accomplished in accordance with CNGBI 0402.01 and CNGBM 0402.01, for ADR screening requirements. If ADR fails or does not occur, the SEEM must complete the inquiry and counselor's report.

(10) Inform the complainant of her/his right to remain anonymous during the informal stage. If anonymity is elected, take appropriate measures to protect the identity of the complainant until a formal complaint is filed or complainant grants written permission to cease anonymity.

(11) Complete informal complaint counseling within 30 calendar days or obtain written approval from the complainant and the SEEM, prior to the 30th day, to extend counseling for no more than an additional 60 calendar days. If ADR is offered and accepted, complete processing within 90 calendar days. In either case, if the matter is not resolved before the end of the authorized period, including extensions, issue the Notice of Right to File a Formal Complaint letter as described in paragraph 4b below. [29 CFR 1614.105(d)-(f)]

(12) The EEO Professional that worked the pre-complaint will not be the same EEO Professional conducting ADR, [MD-110, Chapter 3, Section III (K)] or preparing the acceptance/dismissal letter. The SEEM will assign another EEO Professional to complete the acceptance/dismissal letter to avoid compromising the integrity and neutrality of the ADR program. However, the EEO Professional that worked the pre-complaint can continue to maintain overall responsibility for tracking the complaint.

(13) Complainants will be advised that disclosure of case file information falls under the FOIA and Privacy Act guidelines. At the pre-complaint stage a complainant will not be provided documents collected from the Human Resource Office (HRO) or other agencies unless requested through the FOIA office.

b. Final Interview. Advise the complainant in the Notice of Right to File a Formal Complaint letter that any formal complaint must be filed with the SEEM or designee within 15 calendar days of receipt. Do not attempt in any manner to encourage or dissuade the person from filing a complaint. This correspondence is to be sent no earlier than the 30th day and no later than the 60th day after the issuance of the Notice of Right to File a Formal Complaint letter. Note: The final interview concludes the informal (pre-complaint) process and there is no requirement that the final interview be conducted face-to-face with the complainant and her/his representative.

c. Counselor's Report. Submit a narrative counselor's report to the SEEM within 5 calendar days after the issuance of the Notice of Right to File a Formal Complaint. The report will include items outlined in MD 110, Chapter 2, Section III (6), *The Roles and Responsibilities of an EEO Counselor*, and Section IX, *The EEO Counselor's Report*.

## 5. Civilian EEO Informal Class Action Complaints

a. Informal Complaint Processing. An individual who wishes to file a class complaint, as defined in 29 CFR 1614.204(a) must seek counseling and be counseled in accordance with 29 CFR 1614.105. The SEEM notifies the HRO, the Staff Judge Advocate (SJA), and the Adjutant General, in writing, when an individual files a class complaint. The notification must include the complainant's name (if releasable), the name of the complainant's representative, the docket number, the date of initial contact, identification of the class, and claim(s) raised. [Note: The complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim(s) raised in an individual complaint. If the complainant moves for class certification after completing the counseling process, according to 29 CFR 1614.204[b], no additional counseling is required.]

### b. Responsibilities.

(1) When notified of a class complaint, the SJA designates an attorney to represent the Agency.

(2) The SEEM tries to resolve individual allegations and personal concerns of the complainant. Before attempting to resolve class-wide issues, the SEEM must coordinate any proposed action with the Human Resources Officer (HRO), the SJA and the Adjutant General.

(3) The SEEM must coordinate the gathering and analysis of statistics with the HRO and the SJA before collecting the data.

(4) Before the final interview with the complainant, the SEEM prepares a draft report for coordination with the HRO and the SJA. This report must include, at a minimum, the following: class claim, basis, definition of the proposed class, information as to potential class size, how agent's claim(s) reflect claims of class (commonality and typicality), and adequacy of representation of the class. [29 CFR 1614.204.]

## 6. Civilian EEO Formal Complaint Processing

a. Guidance. Formal complaints are processed in accordance with 29 CFR 1614. SEEM processes formal complaints.

(1) A formal complaint must be filed with the SEEM or designated EEO Professional, and the complainant, or the attorney designated to represent the complainant, must sign and date it. It must describe the action(s) or practice(s) that form

the basis of the complaint that was discussed with the EEO Professional during the Informal phase of the process.

(2) If a complainant is dissatisfied with the processing of his or her pending complaint, whether or not it alleges prohibited discrimination as a basis for dissatisfaction, he or she should be referred to his or her chain of command. A written response should be provided to the complainant indicating the actions the Agency took to resolve the concerns and attach a copy of the letter to the complaint files maintained on the underlining complaint. Complaints alleging dissatisfaction are processed as required by 29 CFR 1614.107(a)(8). A record of the complainant's concerns and any actions taken to resolve the concerns must be made a part of the complaint file. If no action is taken, the file must contain an explanation for not taking any action.

(3) A complainant may amend a complaint at any time before the mailing of the notice required by 29 CFR 1614.108(f) at the conclusion of the investigation, to include claim(s) that are like or related to those raised in the complaint.

b. SEEM Responsibilities:

(1) Notify the complainant and their representative (if designated) of the docket number and instruct them to refer to it in all future correspondence. Advise the complainant, in writing (within 5 days), of receipt of the formal complaint, the date that the complaint is considered filed, and the right to appeal to EEOC/Office of Federal Operations any full dismissal of the complaint. An identical acknowledgment, in writing, is also required for an amendment to a complaint. [29 CFR 1614.106 (d) and (e)]

(2) Obtain written determination by the HRO as to whether the complainant is eligible under Merit Systems Protection Board (MSPB) jurisdiction. The SEEM will coordinate with the HRO to determine if the individual has identical issues filed under a negotiated grievance procedure (NGP) or the Merit Systems Protection Board (MSPB) appeal procedure. Note: A complaint filed under the Administrative Grievance Procedure (AGP), or those NGPs that do not allow discrimination complaints, will not preclude the complaint from being filed under the Formal EEO process.

(3) Review the complaint file to determine that it has all required forms and supporting documents with signatures including the counselor's report, verifies the employment status of the complainant [29 CFR 1614.103(c)], perfects the claims, and ensures information covered by the Privacy Act is properly protected. Questions concerning the Privacy Act and its coverage are addressed to the SJA.

(4) Provide the counselor's report to the complainant within 15 calendar days of the date the formal complaint is filed [29 CFR 1614.105(c)].

(5) Submit the proposed acceptance and/or dismissal letter, including all proposed amendments, formal complaint (Form 2655), counselor's report, and HRO determination of the MSPB jurisdiction to the SJA, within 21 days in receipt of the formal

complaint. Sends the request for additional information that includes a Notice of Proposed Dismissal [29 CFR 1614.107(a)(7)] by regular or certified mail, as appropriate.

(6) Notify the HRO, the SJA and the Inspector General of any non-frivolous allegations of wrong doing against any senior officials, colonels (or civilian equivalents), or colonel selects.

(7) If ADR is offered and agreed to by the parties, the SEEM may request a third-party neutral from Investigation Resolution Directorate (IRD), from a roster of neutrals maintained for such purposes, or from the NG ADR Program. Expenses for contract neutrals or NG neutrals brought in TDY may be funded locally or from the Joint Forces Headquarters. Coordinates with IRD to de-conflict ADR proceedings from the investigation.

c. Acceptance and Dismissal.

(1) The Agency is required to process formal EEO complaints in accordance with 29 CFR Part 1614 and EEO MD-110. The EEOC requires federal agencies to discharge certain responsibilities once a formal EEO complaint has been filed.

(2) The agency must acknowledge receipt of each formal EEO complaint and amendment to a formal EEO complaint (29 CFR 1614.106[e]).

(3) The agency must process all formal complaints expeditiously and make a determination whether to accept, dismiss, or partially dismiss a complaint or portion of a complaint to allow for an investigation to be completed and the report of investigation (ROI) to be received by the complainant within 180 days from the date of filing [29 CFR 1614.106(e)(1) and (e)(2) and 1614.107(b), and EEOC MD 110, Chapter 5, Section A]. The acceptance and dismissal (A&D) letter shall be provided to the complainant no later than 30 days from the date of the filing.

(4) If dismissed in part or in whole, the Agency must provide appeal rights indicating that partial dismissals may be reviewed by an EEOC Administrative Judge (AJ) if a hearing is requested, or appealed to the EEOC Office of Federal Operations (EEOC/OFO) when a final decision or final action is taken on the complaint, or if dismissed in whole, informing the complainant that he or she has the right to an immediate appeal to EEOC/OFO. The Agency is required to investigate accepted claims and provide the ROI to the complainant within 180 calendar days of the filing of the complaint. [29 CFR 1614.106 (e)(1) and (e)(2) and 1614.107(b)].

(a) If complaint is a mixed case follow procedures IAW MD 110, Chapter 4, Procedures for Related Processes, section II.B, Mixed Case Complaints and Appeals – 29 CFR 1614.302

(5) The Agency adopts the following procedures to assure prompt, fair, and appropriate performance in accordance with the EEOC requirements. SEEM will ensure:

(a) Acknowledgement of receipt of a formal complaint and amendment to a formal complaint is completed as soon as possible, but not later than 5 calendar days after receipt.

(b) EEO Professionals issue counselor reports for internal EEO office review within 5 calendar days of the date of receipt of the formal complaint, and final counselor reports are issued to the complainant not later than the 15th day after receipt of the formal complaint.

(c) A comparison of the report is made to the formal complaint to ensure that the claims in the formal complaint were addressed and the EEOC criteria to Accept, Partially Dismiss, or Dismiss in whole were properly applied to the formal complaint [29 CFR 1614.107].

(d) Preparation of a standard Acceptance and/or Dismissal letter and submission of the formal EEO complaint, the counselor report, a written determination by the SEEM as to whether the complaint and the complainant are eligible for jurisdiction by the MSPB, and whether a formal negotiated grievance or MSPB appeal has been filed on the same claim(s) to the SJA.

(e) Issuance of the coordinated Acceptance and/or Dismissal letter (reference paragraph above) to the complainant or his/her representative, if any. The authority to sign decision letters is vested with the Adjutant General and can only be exercised by the SEEM if delegated this authority in writing.

(f) Legal reviews are for internal use and management's eyes only. Legal reviews are documents that are covered by attorney-client privilege and are protected from disclosure under the Freedom of Information Act, 5 USC 552 and are not to be released without prior authorization from the SJA.

(g) There must be a firewall between the EEO function and the Agency's defensive function. The firewall will ensure that actions taken by the Agency to protect itself from legal liability will not negatively influence or affect the Agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

(h) It is important for the SEEM to be provided with sufficient legal resources (either directly or through contracts) so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office.

(i) At a minimum, however, the Agency representative in EEO complaints may not conduct legal sufficiency reviews of EEO matters. Legal sufficiency reviews in

the EEO process involve legal analysis made by the EEO office during the processing of EEO complaints, such as acceptance/dismissal of complaints, legal theories utilized by the EEO office during investigations, and legal determinations made in final agency actions. The optimal situation is for the EEO office to have sufficient internal legal resources. However, when necessary and requested by the EEO office, legal sufficiency reviews conducted outside the EEO office must be handled by individuals that are separate and apart from the Agency's defensive function.

(j) Similarly, impartiality or the appearance of impartiality is not ensured by simply rotating agency representatives within the same office and is undermined where the Agency representative's associates are assigned the legal sufficiency function in EEO cases from the representative's caseload.

d. Investigation of Formal Complaints.

(1) If the formal complaint is not dismissed in its entirety, within 30 calendar days of the date of receipt of the formal complaint, the SEEM shall request an IRD investigation. However, in no case should an IRD investigation be requested until the Acceptance and Dismissal process is complete. The request must include the following:

(a) Specific claims raised and which ones are accepted.

(b) Specific claims partially dismissed, including reasons and documentary evidence to support recommended dismissal(s).

(c) Complete case file and any other pertinent records.

(d) Name, office symbol, address (including e-mail address), phone and data fax number of the management representative.

(2) The SEEM will obtain the fund citation for IRD investigations and EEOC hearings related to the complaint. The unit/organization in which the discrimination complaint arises is normally responsible for all costs associated with the complaint—to include agency witness travel, complainant witness travel, depositions, back pay, attorney fees, compensatory damages, etc. stemming from an approved settlement agreement, litigation, or an administrative judge's decision.

(3) Investigators determine the scope of the investigation; however, the Agency's preferred method is for the investigator to take on-site affidavits. The on-site affidavit method involves an on-site visit and results in an affidavit, which may be in either summary or question and answer format. If the SEEM desires a verbatim transcript of witness testimony, they will coordinate with the Adjutant General for a final decision on the type of investigation to be conducted. IRD investigators may not unilaterally impose a requirement for any complaint to be investigated by these methods or any other method that imposes additional costs. IRD investigators negotiate with the complainant or complainant's representative for extensions to the 180-day time limit for

processing complaints. SEEMs, at the request of investigators, may act as intermediaries in these negotiations. In accordance with 29 CFR 1614.108(e), agreements to extend the 180-day time limit must be in writing and included in the investigative file.

(4) Upon completion of the investigation, IRD makes available an electronic copy of the ROI and the investigative file on its web site. This copy has not been sanitized to remove Privacy Act information (see unit Security Manager regarding classified material). The SEEM will download the file and provide an un-sanitized copy to the SJA. SEEM and other base officials should not provide an unsanitized copy of the ROI and/or the investigative file to complainants or their designated representatives, and should not create their own sanitized version of these files. The SEEM sanitizes the ROI and provides it (in printed copy form) to complainants and their designated representatives, along with the notification of further rights under the provisions of 29 CFR 1614.108(f), 29 CFR 1614.110, and 29 CFR 1614.302(d)(2) (mixed cases). Further, the notice must state that if the complainant desires a Final Agency Decision (FAD) without an EEOC hearing, he or she must request it from the SEEM, and if he or she requests an EEOC hearing (non-mixed case), he or she must request it directly from the EEOC district office the SEEM specifies. The SEEM tracks the 30-calendar day period for the complainant to elect further processing options.

(5) If the complainant does not request a hearing or a final decision without a hearing within 30 calendar days after receipt of the ROI and investigative file, the SEEM will notify the complainant that a final decision will be issued within 60 calendar days from the end of the 30 calendar day request period, and that further appeal rights will be provided at that time.

e. Hearings.

(1) The SEEM, in coordination with the SJA or the Agency representative, will make all needed arrangements as outlined in EEOC MD-110, Chapter 7, Hearings.

(2) The notice to the EEOC district office that services their area is issued by the SEEM and will include:

(a) Instructions to send the AJ's final decision and two copies of the hearing transcript to the SEEM.

(b) The name, address and telephone number of the Agency representative.

(c) A tabbed and bound copy of the complaint file, including the investigative file. With few exceptions, the SEEM prepares and submits complaint file to EEOC for Hearing.

(3) The complainant must submit the request for a hearing directly to EEOC with a copy to the SEEM. [29 CFR 1614.108(g)]

(4) Upon receipt of the AJ's decision, the SEEM will furnish a copy of the decision to the SJA and the Adjutant General and the SEEM will advise the Adjutant General of the projected date on which a final agency action will have to be issued in order to meet the EEOC 40-day time limit. The SJA will return any extra copies of hearing transcripts and investigative files to the SEEM. The SEEM will in turn furnish copies of AJ's decisions to the appropriate parties, such as commanders and HRO.

(5) EEO Professionals and HRO will assist the Agency representative with responding to discovery requests, setting up depositions, and responding to EEOC orders.

f. Final Agency Actions.

(1) All final actions (whether denominated final decisions or final orders) are prepared by the SEEM for review and signature by the Adjutant General or designee. All proposed final actions will be reviewed for legal sufficiency by an authorized SJA before they are submitted to the Adjutant General for signature.

(2) The SEEM is the official authority for all phases of the formal complaint process subsequent to issuance of the investigation.

7. Negotiation of Settlements.

a. The SEEM, working with the SJA, management representative, the complainant and his/her representative, may negotiate a settlement of the complaint during the pre-complaint stage of the process (prior to the filing of a formal complaint) within the parameters set by the settlement authority. After a formal complaint has been filed, the Agency representative has the authority to negotiate settlement of the complaint through negotiation, ADR or other approach. In complaints filed against persons in the grades of Colonel and above (or civilian equivalents), the Adjutant General is the primary settlement authority, but such authority may be delegated to subordinate personnel in coordination with the SJA and the management representative. Investigators and AJs may also seek to resolve a complaint with the parties during the investigation and/or hearing.

b. The settlement agreement may include remedial action, back pay, attorney's fees, and/or compensatory damages, if allowed by law. However, care should be taken not to stipulate that any compensatory damage amounts have been verified as claimed. Additionally, in age discrimination claims as well as reprisal claims based on prior age discrimination complaints, attorney's fees and compensatory damages are not payable. Insert statutory language as required by Older Workers Benefit Protection Act, 29 USC 626, Subsections (f)(1) and (f)(2), as appropriate, whenever settling allegations of age discrimination.



c. If the settlement binds an organization outside the authority of the Adjutant General, the SEEM/agency representative (whichever appropriate per 7a), obtains written concurrence of an authorized official within that organization before the agreement is signed.

d. Before having the settlement authority sign an agreement, the SEEM/agency representative shall, obtain coordination of the SJA and HRO on personnel actions to be taken as a result of the agreement. Such coordination does not include a determination on the merits of the case or on the settlement. For settlement agreements resulting from an ADR proceeding, the agreement may be signed before formal coordination, contingent upon subsequent coordination and approval.

(1) The SEEM/agency representative shall provide a copy of each finalized settlement agreement to the Adjutant General or designee within five (5) days of signature.

e. The SEEM/agency representative (whichever is appropriate per paragraph 7a) in coordination with the HRO must fax copies of signed settlement agreements requiring action by Defense Finance and Accounting Service (DFAS) (e.g., cancellation/correction of suspension actions, retroactive promotions, reinstatement of leave, etc.) to the servicing DFAS civilian payroll office immediately with copies of applicable SF (Standard Form) 50-B, Notification of Personnel Action.

## 8. Formal EEO Class Complaints

### a. Guidance and Processing Procedures.

(1) HRO develops policy and oversees the processing of all class complaints of discrimination. HRO, in coordination with the SJA, helps prepare the Agency's position statements and briefs in class complaint proceedings, as appropriate.

(2) The HRO personally serves or designates a staff member to serve as a technical representative for class complaints. The HRO also ensures that applicable personnel records are maintained while a class complaint is pending.

(3) The SJA provides legal advice on all administrative class complaint matters and designates the Agency representative for all administrative class complaints.

(4) The complainant must file a formal class complaint with the SEEM no later than 15 calendar days after receipt of the final interview letter. The agent or attorney/representative must sign the class complaint. It must identify the policy or practice adversely affecting the class as well as the action or matter adversely affecting the agent.

(5) Upon receipt of a formal class complaint, the SEEM forwards the original and one copy of the case file to the SJA and the HRO.

(6) Within 30 calendar days of receipt of the written formal complaint, the Agency representative, in coordination with HRO, forwards it to the EEOC district office with the counselor's final report and the Agency recommendation to accept or dismiss based on the criteria at 29 CFR 1614.107 and 29 CFR 1614.204(a)(2). Copies are sent to the SJA, the HRO, and the SEEM.

(7) The EEOC AJ decides whether to accept or dismiss a class complaint. Immediately upon receipt of the decision, the SEEM will forward it to the SJA and will issue a final order within 40 calendar days after receipt, IAW 29 CFR 1614.204(d)(7). A complaint dismissed as a class complaint may be filed as an individual complaint and processed accordingly, or dismissed as an individual complaint if one or more grounds exist under 29 CFR 1614.107(a). The SEEM will notify the Complainant of decision along with his or her rights associated with the decision. If the final order does not implement the AJ's decision to accept a class complaint, the Agency will simultaneously appeal the decision IAW 29 CFR 1614.204(d)(7) and 1614.403. The class agent may appeal dismissal of a class complaint to the EEOC or file a civil action.

(8) When the SEEM receives an individual complaint that he or she believes is related to a pending class complaint, the SEEM will inform the HRO and the SJA of the issue(s) involved and the basis of the individual complaint, and provide a synopsis of the reasons for believing the individual complaint is related to a pending class complaint. Where appropriate, the HRO and the SJA will provide guidance on processing individual complaints related to pending class complaints.

(9) The SEEM makes arrangements for the hearing after the EEOC has set a date. The EEOC will hold a hearing of the accepted class complaint and issue a report of findings and recommendations to the SEEM as the designated service agent for the Agency. The SEEM will immediately notify the HRO and the SJA and provide copies of the report as appropriate. [29 CFR 1614.204(h)].

(10) The HRO and the SJA, who represents the Agency in all phases, are responsible for managing the processing of formal class complaints. Processing will be in accordance with 29 CFR 1614.204(e) through (k).

## 9. EEO Mixed Case Complaints

### a. Guidance and Processing Procedures.

(1) Processing of mixed case informal complaints and formal complaints will be in accordance with 29 CFR 1614.105, 1614.106, 1614.107, and 1614.108 (a) through (d).

(2) An individual may file a mixed case appeal through the MSPB process or a mixed case complaint using the EEO discrimination complaint system, but not both. Whatever action the complainant files first, in writing, is considered the election. Merely

receiving informal complaint counseling does not constitute an election; a formal complaint must be filed to restrict the complaint to the mixed case complaint system.

(a) When the complainant files a mixed case appeal, and the MSPB dismisses the appeal on jurisdictional grounds without a decision on its merits, a copy of the initial decision, and any subsequent decision issued by the full Board in response to the complainant's Petition for Review, will be provided to the SEEM. The SEEM will promptly issue the complainant with notice of his/her right to file an EEO complaint concerning the matter at issue. [29 CFR 1614.302 (b)].

(3) When a formal EEO complaint is accepted, the SEEM advises the complainant that if a decision on the claims appealable to the MSPB is not issued within 120 calendar days of filing the mixed case complaint, the complainant may appeal the matter to the MSPB as specified at 5 CFR 1201.154(b)(2) or file a civil action as specified in 29 CFR 1614.310(g), but not both. [29 CFR 1614.302 (d)(1)(i)].

(4) Upon completion of the investigation and receipt of the investigative file, the SEEM advises the complainant that a final decision will be issued on the claims appealable to the MSPB within 45 calendar days without a hearing.

(5) When a final decision is issued, the SEEM will advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 calendar days of receipt and the right to file a civil action as provided at 29 CFR 1614.310. [29 CFR 1614.302(d)(3)].

(6) Dismissal of a mixed case complaint on the basis of prior election of a mixed case appeal is as follows:

(a) If neither the MSPB nor the Agency disputes MSPB jurisdiction, the EEO claims involving actions appealable to the MSPB are dismissed IAW 29 CFR 1614.107(a)(4). The dismissal letter will advise the complainant to notify the MSPB of the allegations of discrimination contained in the dismissed complaint. It also advises the complainant of the right to petition the EEOC to review the MSPB final decision on the discrimination issue. [29 CFR 1614.302(c)(2)(i)]

(b) If the Agency or the MSPB questions the MSPB jurisdiction over the mixed case appeal, the SEEM will hold the mixed case complaint in abeyance until the MSPB rules on the jurisdictional issue. The SEEM notifies the complainant of the action being taken and instructs him or her to bring the allegation of discrimination to the attention of the MSPB.

(c) If the MSPB determines it has jurisdiction over the matter, the SEEM shall dismiss the mixed case complaint pursuant to 29 CFR 1614.107(a). The SEEM advises the complainant of the right to petition the EEOC to review the MSPB final decision on the discrimination issue.

(d) If the MSPB determines it does not have jurisdiction over the mixed case appeal, the SEEM recommences processing of the mixed case complaint as a non-mixed case EEO complaint.

## 10. EEO Complaint Appeals

### a. Guidance and Processing Procedures.

(1) Complainant Appeals. The SJA has primary responsibility as agency representative in all appeals initiated by the complainant under 29 CFR 1614.401(a).

(a) The SEEM is the central receipt point for all appeals. Upon receipt, SEEM will forward the appeal to the SJA. The SJA will file the complaint with EEOC/OFO within 30 days of initial notification of the complainant's appeal. [29 CFR 1614.403(e)]

(2) The SEEM will establish suspense for response to the appeal. The SJA will file all appeal briefs directly with EEOC/OFO, IAW 29 CFR 1614.403, with service on the complainant and the complainant's designated representative.

(3) An unfavorable decision on an EEOC/OFO appeal will be processed for possible Request for Reconsideration (RFR) IAW the procedures in Section 11.

(4) Agency Appeals. The Adjutant General or designee is the final decision authority on all appeals to the EEOC/OFO initiated by the Agency. The SJA has primary responsibility as agency representative before the EEOC/OFO in all agency-initiated appeals.

(5) A final agency order that does not fully implement the decision of an EEOC AJ must be accompanied by a simultaneous appeal to the EEOC, IAW 29 CFR 1614.110(a). Upon receipt of an AJ decision finding of discrimination, the SEEM will immediately forward the decision to the SJA.

(6) If Adjutant General or designee issues a final order that does not fully implement the decision of the AJ, the SEEM will file the Agency Notice of Appeal form (see MD-110, Appendix O), with EEOC/OFO, including a copy of the final order, IAW 29 CFR 1614.403. The SEEM will request the SJA to prepare a brief or other documentation in support of the appeal. The SJA will file the brief or other statement in support of the appeal with the EEOC/OFO, with service on the complainant or the complainant's designated representative, within 20 days of filing the notice of appeal. [29 CFR 1614.403(d)]. The SJA will file the complaint file with EEOC/OFO within 30 days of filing the notice of appeal. [29 CFR 1614.403(e)]

(7) If EEOC/OFO grants the Agency appeal, the SEEM will notify the SJA. If EEOC/OFO denies the appeal, the SEEM will initiate action to establish compliance and notify the parties of their right to request reconsideration in accordance with Section 11.

## 11. Request for Reconsiderations (RFR)

### a. Guidance and Processing Procedures.

(1) The SJA and the SEEM will assess the propriety of an RFR and notify the Adjutant General of its recommendation. Recommendations to file an RFR should focus on the grounds identified by the EEOC in 29 CFR 1614.405(b), (i.e., the appellate decision involved a clearly erroneous interpretation of fact or law, or the decision will have a substantial impact on the policies, practices, or operations of the Agency). The SJA will file the RFR with EEOC/OFO within 30 days of receipt of the appellate decision, IAW 29 CFR 1614.405(b).

(2) Upon disposition of the RFR by EEOC/OFO, the SEEM will notify the SJA, the HRO and the Adjutant General of the disposition for appropriate action.

## 12. Anonymous Complaints

a. Guidance and Processing Procedures. The EEO office will ensure that an anonymous complaint of discrimination on any basis is documented as an EEO General Assistance/Contact and if the complaint is pursued, ensures that the complaint intake form reflects sufficient details to clarify the complaint and indicate that the source is reliable. As in all EEO complaints, the SEEM has the responsibility of informing the Adjutant General or designee and briefing her/him on complaints raised by employees (complainants) when brought to the EEO office, whether or not they relate to EEO matters. The Commander may decide an investigation outside of the EEO realm is appropriate, (e.g. CDI, AR 15-6 or commander's inquiry, etc.). Keep in mind those interviewed in connection with the matter may be able to determine the identity of the individual making the complaint. However, in accordance with 29 CFR 1614.105(g), the EEO Professional will not reveal the identity of the complainant. Additionally, complainants have the right to anonymity only up to the point of filing a formal civilian EEO complaint.

## 13. Allegations of Sexual Harassment (10 USC 1561 and 29 CFR 1614)

### a. Counseling of Potential Civilian Sexual Harassment Complaints.

(1) When a civilian employee initiates contact with an EEO Professional regarding a complaint of sexual harassment, the EEO Professional must advise him/her of his/her rights and responsibilities under both statutes (Title VII, as implemented by 29 CFR 1614).

(2) The requirements for a commander to conduct an investigation upon receiving a complaint involving sexual harassment and provide the Adjutant General notification also apply to civilian employees when the employee has made the complaint to the Commander. When an employee initially contacts the commander with allegations of sexual harassment, the commander must immediately inform the SEEM

of the contact prior to launching an investigation and encourage the employee to contact the SEEM to ensure he/she preserves his/her rights regarding the EEO complaint process. It is ultimately the employee's responsibility to initiate contact with a SEEM within 45 days of the alleged discriminatory event or within 45 days of the effective date of the personnel action leading to discrimination, IAW 29 CFR 1614.105(a)(1).

(3) The SEEM shall attempt to initiate contact with the employee who has contacted his/her commander to ensure the employee is aware of his/her options and rights. The EEO Professional shall inform the civilian employee of the following:

(a) There are two avenues available for complaints of sexual harassment. The commander's investigation, and the process provided under Title VII, as implemented by 29 CFR 1614, which entitles the employee to anonymity at the informal/pre-complaint stage. Both processes can be used simultaneously.

(1) Filing under the commander investigation process will not serve to exhaust administrative remedies with respect to 29 CFR Part 1614.

(2) Decisions under the commander investigation process are final with no right of appeal to the courts. Monetary damages also are not available.

(3) Anonymity is not a guarantee under the commander investigation process. Anonymity is also not an option at the formal stage of the process under 29 CFR Part 1614.

(b) Commander investigations must be completed no later than 14 calendar days after the start of the investigation. If the investigation is not completed by the 14th calendar day, a progress report to the Adjutant General regarding the progress of the investigation must be submitted within 20 calendar days and every 14 calendar days thereafter until the investigation is closed. Once the investigation is closed, the commander must submit a final report to the Adjutant General.

(4) If a civilian employee elects to pursue both the traditional EEO process (29 CFR Part 1614) and the commander investigation process simultaneously, or if the employee elects to (at least initially) exclusively pursue recourse under the commander investigation process, the SEEM will immediately contact the responsible commander to request an investigation. If both processes are chosen, the SEEM will proceed with the traditional EEO process at the same time the investigation is being conducted.

(5) If an employee elects to exclusively pursue a complaint under the commander investigation process, the SEEM will document the contact, and refer the employee to his/her responsible commander to request an investigation. If the employee does not express intent to pursue an EEO complaint, counseling activities, as identified in MD 110, should NOT occur. The 30-day counseling period for an EEO

complaint commences when the employee expresses intent to begin the EEO process and obtains counseling.

(a) EEO Professionals must inform civilians in writing if they wish to pursue the EEO process after the investigation is completed, they must contact the SEEM within 10 calendar days from the notification that the investigation is complete, to state their intention to begin the EEO process and obtain counseling on the EEO process. This applies when the employee has initiated contact with a SEEM within 45 days of the alleged discriminatory event (or of the effective date of the personnel action leading to the discrimination). It is ultimately the employee's responsibility to make contact, in a timely manner, with the SEEM to pursue complaints of discrimination.

(6) The EEO Professionals who serve as subject matter experts (SME) for an IRD investigation should not serve as the EEO Professional for a subsequent EEO complaint on the same issues/bases.

## SECTION B

### REASONABLE ACCOMMODATION POLICY

The Rehabilitation Act of 1973 (29 USC Section 791 et seq.) as amended by the Americans with Disabilities Act of 1990, as amended (42 USC Section 12101 et seq.) requires all Federal agencies to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.

1. POLICY: This Reasonable Accommodation (RA) Policy for the Pennsylvania National Guard (PANG) is focused on, but not limited to, establishing a procedure that will support the prompt, fair, and efficient processing of requests for RA; and ensuring that civilian and military technician managers and supervisors comply with the mandates of the Rehabilitation Act of 1973, as amended.

a. Responsibilities.

(1) The Human Resources Officer (HRO):

- (a) Oversee the implementation and administration of this RA Policy;
- (b) Assist and advise managers and supervisors in reviewing requests for RA and scheduling training for supervisors and managers;
- (c) Make RA training a part of newly-appointed supervisor and manager orientation;
- (d) Consult with supervisors/hiring officials to recommend the parameters of approval or denial of reasonable accommodation requests or when requests must be submitted to TAG for approval or denial. .

(2) The State Equal Employment Manager (SEEM):

- (a) Conduct new supervisor and manager RA training on an annual basis
- (b) Ensure copies of this RA Policy and its applicable procedures are readily available to PANG Managers, Supervisors, and Employees. This will be accomplished by maintaining copies in the State Equal Employment Manager's (SEEM's) Office as well as in designated locations such as the PANG intranet (PKO/GKO). This RA policy must be accessible to individuals with disabilities, when necessary, through alternative format;

- (c) Process RA applications and assist employees with RA requests;



(d) Develop and disseminate information on available RA resources;

(e) Serve as the proponent for the Program for Individuals with Disabilities (IWD), coordinate RA requests as needed;

(f) Track RA requests and submit applicable RA reports to the National Guard Bureau EEO Office annually for inclusion in the MD-715 Report.

(3) Commanders and Directors:

(a) At all levels, provide the necessary resources to support the availability of the RA process;

(b) Ensure all management and supervisors subject to their authority receive annual training on the RA process.

(4) Management and Supervisors:

(a) Ensure employees are aware the RA process is available to Individuals with Disabilities.

(5) Higher-Level Managers and Supervisors:

a) Review RA requests referred by subordinate supervisors and managers and consult with HRO to determine whether to approve RA requests or offer an alternative RA. HRO is authorized to recommend the parameters of approval or denial of reasonable accommodation requests or when requests must be submitted to TAG for approval or denial.

(6) First-Line Supervisors:

(a) Receive and review RA requests from employees;

(b) Communicate the status and ultimate disposition of employee RA requests to the requesting employee.

## 2. DEFINITIONS:

a. Direct Threat. This is a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

b. Essential Functions. These are job duties that are so fundamental to the position that the individual cannot do the job without being able to perform them. A function is "essential" if, among other things, the position exists specifically to perform that function, there are a limited number of employees who could perform the function if it were

assigned to them, or the function is specialized, so the incumbent is hired based on his/her ability to perform it.

c. Extenuating Circumstances. Described as factors that could not reasonably have been anticipated or avoided in advance of the request for RA, such as back order of necessary equipment or failure of employee's health care professional to timely provide necessary documentation.

d. Individual with a Disability (IWD). An IWD is any person, who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment or is regarded as having such an impairment.

e. Interactive Process. An interactive process allows requests to be made by the individual with a disability as well as by a family member, health professional, and other representative who is legally acting on the individual's behalf.<sup>1</sup>

f. Major Life Activities. These include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, as well as the operation of a major bodily function including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Furthermore, episodic impairments or medical conditions that are in remission are nonetheless disabilities if they would substantially limit a major life activity when active.

g. Qualified Individual. This describes an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

h. Reasonable Accommodation. This describes a change in the work environment or in the way things are customarily done that would enable an individual with a disability to enjoy equal employment opportunities. There are three categories of RA that apply:

(1) Modifications or adjustments to a job application process to permit an IWD to be considered for a job;

(2) Modifications or adjustments necessary to enable a qualified IWD to perform the essential functions of the job;

(3) Modifications or adjustments that enable IWDs to enjoy equal benefits and privileges of employment.

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<sup>1</sup> (EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Sec. II (A), Q.6 (Oct.20, 2000).

i. Undue Hardship. Undue hardship generally involves significant difficulty or expense. It refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. The supervisory chain of command and HRO must assess on a case-by-case basis whether a particular accommodation would cause undue hardship. The analysis focuses on the resources and circumstances of PANG in relation to the cost or difficulty of providing a specific accommodation. HRO is authorized to recommend the parameters of approval or denial of reasonable accommodation requests or when requests must be submitted to TAG for approval or denial. TAG is the final Agency authority.

j. Personal Assistants. Personal assistance services to employees are reasonable accommodations when: (1) employee requires such services because of a targeted disability, (2) provision would enable the employee to perform the essential functions of his/her position, and (3) provision of services would not impose due hardship on the agency. Personal Assistant services have to be provided by a qualified personal assistance service provider. The Agency is prohibited from taking adverse actions for an employee/applicant asking for a personal assistant.

### 3. GENERAL GUIDANCE ON REASONABLE ACCOMODATIONS:

a. The law requires agencies to develop policies and procedures to facilitate the hiring, placement, and advancement in employment of IWD and to provide RA to qualified employees or applicants with disabilities unless doing so would cause undue hardship. This RA Policy helps to implement the requirements of the Rehabilitation Act and the ADA that agencies provide RA to qualified employees and applicants with disabilities.

#### b. Reasonable Accommodations Serve Two Fundamental Purposes:

(1) RAs remove barriers that prevent IWDs from applying for and performing jobs for which they are qualified;

(2) RAs remove barriers that prevent IWDs access to the workplace and enables equal access to job benefits. This RA Policy is to be interpreted and applied in accordance with those two stated purposes, as well as the spirit of the Rehabilitation Act and the ADA.

### 4. REASONABLE ACCOMMODATION INTERACTIVE PROCESS:

#### a. Requesting Reasonable Accommodation.

(1) The RA process is initiated when an IWD indicates a need for an adjustment (or change at work) or in the application process for a reason related to a medical condition. The requestor does not have to use any particular words, cite the Rehabilitation

Act, this RA Policy, or even use the term "reasonable accommodation." For example, it is sufficient for a vision impaired person to ask for specific work related materials to be provided in large print. This is a request for reasonable accommodation.

(2) An IWD may initiate a request for RA orally or in written form at any time. This interactive process allows requests to be made by the individual with a disability as well as by a family member, health professional, and other representative who is legally acting on the individual's behalf.<sup>2</sup>The IWD will be asked to complete an RA request form for documentation and processing purposes. The Reasonable Accommodation Request Form, which is attached to this policy as (Appendix A), has been developed for this purpose. Despite the requirement that the requesting individual complete and submit a request form, the individual's initial request, whether verbal or written, starts the RA process.

(3) Requests for RA should ordinarily be addressed to the individual's direct (first-line) supervisor so that the request can be properly tracked and acted upon. At the individual's discretion, however, the RA request can be made to any of the following: the individual's supervisor; a manager or supervisor in the individual's immediate chain of command; SEEM's office or in the case of an applicant involved in the application process, any Agency employee in the applicant's chain of command. Requests for RA made to individuals or offices other than those listed cannot be properly tracked and will not be processed.

(4) Where an IWD has requested a type of reasonable accommodation that he/she is likely to need on a repeated basis, for example, the assistance of sign language interpreters or readers, the IWD will not be required to submit a written request for recordkeeping purposes each time the RA is needed. In such cases, the IWD may obtain the RA by notice to his/her supervisor once the RA is approved the first time.

#### b. Personal Assistants.

Personal assistance services to employees are reasonable accommodations when: (1) employee requires such services because of a targeted disability; (2) provision would enable the employee to perform the essential functions of his/her position; and (3) provision of services would not impose due hardship on the agency. Personal Assistant services have to be provided by a qualified personal assistance service provider. The Agency is prohibited from taking adverse actions for an employee/applicant asking for a personal assistant.

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<sup>2</sup> (EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Sec. II (A), Q.6 (Oct.20, 2000).

## 5. PROCESSING REQUESTS FOR REASONABLE ACCOMMODATIONS:

### a. Process.

(1) While an employee may request a RA due to a medical condition, this request does not necessarily mean that the Agency is required to provide the RA. A request for RA is the first step in an informal, interactive process between the employee and the supervisor. The process is always begun by the employee or by a family member, health professional, or other representative who is legally acting on the employee's behalf. Supervisors should not unilaterally ask employees if they have a disability or if they need an accommodation.

(2) Upon receipt of a request for RA, supervisors will direct the requesting individual to complete and submit a Reasonable Accommodation Request Form. As stated previously, however, supervisors will not delay the interactive process while waiting for the form. The supervisor will engage the interactive process by discussing the following with the requesting employee:

(a) The underlying disability or medical issue;

(b) The specific functional limitations resulting from the disability or medical issue and how they relate to or affect the employee's job functions;

(c) Any suggestions the employee may have for a reasonable accommodation.

(3) The supervisor will document the conversation in writing and take detailed notes. Supervisors are encouraged to seek guidance from HRO or the SEEM at any time during the process. Information obtained regarding the medical issue and related facts, documents, etc. will be kept confidential to the extent required by applicable law but will be shared with those individuals in the Agency involved in determining whether to grant a request for RA. In situations where the employee's disability and need for an RA are reasonably obvious, the supervisor should assure the employee that he or she will determine whether the requested accommodation is available within thirty (30) calendar days, absent extenuating circumstances. At the close of the meeting, the supervisor will inform the employee of his or her RA rights and opportunity to obtain information and assistance from HRO and SEEM. The supervisor should collect the Reasonable Accommodation Request Form from the employee before the end of this meeting and submit it to the SEEM's Office for processing.

(4) Decisions on RAs will be expedited where: the RA is needed to enable an applicant to apply for a job or the RA is needed for a specific Agency activity that is scheduled to occur shortly.

(5) The Agency is entitled to know that an employee has a covered disability that requires an RA. Thus, when a disability and/or need for an RA are not obvious, the

Agency may require, if there is a safety threat or difficulty performing essential functions of the job, that the employee provide reasonable documentation about the suspected disability and functional limitations. Where the employee has not requested a specific accommodation, the supervisor will inform the employee that he or she may determine whether there is an RA that could be made, again within thirty (30) calendar days. Any documentation requested must come from an appropriate professional, depending upon the type of claimed disability, such as a doctor (including psychiatrist), psychologist, nurse, physical therapist, occupational therapist, speech therapist, vocational rehabilitation specialist, or licensed mental health professional. The documentation must contain the following information:

- (a) The nature, severity, and duration of the employee's impairment;
- (b) The activity or activities that the impairment limits;
- (c) The extent to which the impairment limits the employee's ability to perform the activity or activities; and/or

(d) Why the employee requires an RA or the particular RA requested, as well as how the RA will assist the individual to apply for a job, perform the essential functions of the job, or enjoy a benefit of the workplace. Supervisors will not request medical documentation where both the disability and need for RA are obvious or the employee has already provided the Agency with sufficient information to document the existence of the disability and his/her functional limitations. Supervisors will require only the documentation that is needed to establish that the employee has a disability, and that the disability necessitates an RA. Thus, supervisors will not ask for information that is unrelated to determining the existence of a disability and need for an RA.

(6) Supporting medical documentation must be provided to the requesting official within thirty (30) calendar days after the individual is informed that it is required, absent extenuating circumstances. Failure to provide necessary documentation where it has been properly requested could result in a denial of RA.<sup>3</sup> Medical information will be kept confidential to the extent required by applicable law but will be shared only with those "other agency officials" involved in determining whether to grant a request for RA. These officials include: supervisors and Managers who need to know may be told about necessary restrictions and about the necessary accommodation(s); first aid and safety personnel may be told if the disability might require emergency treatment; government officials to investigate the agency's compliance with the Rehabilitation Act; workers' compensation offices or insurance carriers; and EEO officials may be given the information to maintain records (U.S. EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provisions of Reasonable

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<sup>3</sup> 29 C.F.R. § 1614.203 (d)(3)(I-N).

Accommodation.)<sup>4</sup>

(7) Additionally, the Agency may request supplemental documentation when the information already submitted is insufficient to document the disability and/or functional limitations it causes, as well as need for the RA. In such cases, supervisors or requesting officials should describe for the employee in writing why the submitted documentation is insufficient and identify the information that is needed. This supplemental medical documentation must be received by the requesting official within ten (10) working days of its request. Failure to provide necessary documentation where it has been properly requested could result in a denial of RA.

(8) An IWD does not need to have a particular accommodation in mind before making a request.<sup>5</sup> Once it is determined that the employee requesting an RA has a qualifying disability (and is therefore an IWD), the supervisor/hiring official will consult with the HRO to determine whether the requested RA is appropriate under the circumstances. HRO is authorized to recommend/deny RA requests or submit requests to TAG for approval or denial. TAG is the final Agency authority. RAs will only be provided to individuals with actual disabilities. Supervisors/hiring officials are not obligated to provide RAs to employees/applicants who have been merely "regarded as" having a disability.

(9) In considering whether an RA can be provided, supervisors and the HRO should identify the essential job functions (as defined above) of the IWD's position, the IWD's functional limitations to completing the essential job functions, and whether there are any reasonable alternative approaches to meeting essential job functions. Appendix B lists some examples of reasonable accommodations. Appendix C contains a list of selected resources to help supervisors and HROs in considering possible RAs.

(10) A modification or adjustment is "reasonable" if it is feasible or plausible under the circumstances. An accommodation must also be effective in meeting the needs of the IWD. This means that an RA enables an IWD to perform the essential functions of his/her job. Finally, an RA allows an IWD an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

(11) The Agency has the authority to choose among possible RAs as long as the chosen RA is effective. Thus, as part of the interactive process, supervisors may offer IWDs alternative suggestions for RA and discuss their effectiveness in removing the workplace barrier that is impeding the IWD. If there are two possible RAs, and one costs more or is more burdensome than the other, supervisors may choose the less expensive or burdensome accommodation as long as it is effective. Similarly, when there are two or more effective accommodations, supervisors may choose the one that is easier to

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<sup>4</sup> U.S. EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provisions of Reasonable Accommodation, [https://www.eeoc.gov/policy/docs/accommodation\\_procedures.html](https://www.eeoc.gov/policy/docs/accommodation_procedures.html).

<sup>5</sup> 29 C.F.R. § 1614.203(d)(3)(D).

provide. In either situation, the supervisor is not required to show that it is an undue hardship to provide the more expensive or more difficult accommodation. The preference of the IWD should be given primary consideration, but the supervisor/hiring official in consultation with HRO has the discretion to choose between effective accommodations.

(12) There are several modifications or adjustments to which supervisors do not have the authority to agree:

- (1) A supervisor may not agree to eliminate an essential function, i.e., a fundamental duty of the position.
- (2) Supervisor are prohibited from agreeing to lower production standards as an accommodation, whether qualitative or quantitative, that are applied uniformly to other employees with and without disabilities.

(13) The Agency will not provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, the Agency will not provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, the Agency will not provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be considered as reasonable accommodations in appropriate cases where they are specifically designed or required to meet job-related rather than personal needs.

(14) RA requests may be denied where the requested RA would cause "undue hardship" to the Agency. Undue hardship, which generally involves significant difficulty or expense, is to be determined on a case-by-case basis. The analysis focuses on the resources and circumstances of PANG in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. The supervisor and HRO must assess on a case-by-case basis whether a particular accommodation would cause undue hardship.

(15) The reassignment to a vacant position for which an employee is qualified, and not just permission to compete for such position, is a reasonable accommodation and the Agency must consider providing reassignment to a vacant position as a reasonable accommodation when it determines that no other reasonable accommodation will permit an employee with a disability to perform the essential functions of his or her current position.<sup>6</sup> PANG HRO must notify supervisors and other

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<sup>6</sup> 29 C.F.R. § 1614.203(d)(3)(B).



Agency officials when they are to conduct searches for available vacancies when considering reassignment as a RA.<sup>7</sup>

## 6. APPROVAL AND/OR DENIAL OF REASONABLE ACCOMMODATION REQUESTS:

### a. Approval of Requests for RA.

(1) IAW with this RA Policy, HRO will consult with the appropriate subject matter expert(s) and make a recommendation to the supervisor/hiring official. HRO is authorized to recommend the parameters of approval or denial of reasonable accommodation requests or when requests must be submitted to TAG for approval or denial. TAG is the final Agency authority. When the Agency determines that a RA request will be approved, the IWD's supervisor/hiring official will notify the IWD in writing and document the date and circumstances of the notification. The supervisor/hiring official will implement the approved RA at the earliest possible moment, failure to provide the accommodation in a prompt manner may result in a violation of the Rehabilitation ACT.<sup>8</sup> A copy of the supervisor's/hiring official's written notification will go into a separate file for the employee/applicant, as discussed below.

### b. Denial of Requests for RA.

(1) IAW with this RA Policy, the IAW's supervisor/hiring official will consult with HRO who will consult with the appropriate subject matter expert(s) and make a recommendation to the supervisor/hiring official. HRO is authorized to recommend the parameters of approval or denial of reasonable accommodation requests or when requests must be submitted to TAG for approval or denial. TAG is the final Agency authority. When the supervisor/hiring official concludes that a RA request will be denied or offers an alternative RA, the IWD's supervisor/hiring official will notify the IWD in writing and document the date and circumstances of the notification. The written notification to the IWD must contain: the reasons for the denial; a notice that the IWD can appeal the decision, in writing, within 10 work days to the next level supervisor in the employee's/applicant's chain of command; and notice that the IWD has the right to file an EEO complaint with a PANG EEO Counselor, SEEM's Office, or directly with the Philadelphia EEOC Office<sup>9</sup> (see Appendix B).

### c. Delay in Approving Requests for RA.

(1) When there is any delay in either processing a request for or providing a

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<sup>7</sup> 29 C.F.R. § 1614.203(d)(3).

<sup>8</sup> 29 C.F.R. § 1614.203(d)(3)(O).

<sup>9</sup> Philadelphia EEOC Office, 801 Market Street, Suite 1300, Philadelphia, PA.

reasonable accommodation, the IWD supervisor/hiring official must notify the individual in writing of the reason for the delay, including any extenuating circumstance that justify the delay.<sup>10</sup> If the Agency cannot provide the accommodation immediately, the Agency must provide an interim accommodation that allows the individual to perform some, or all essential functions of his or her job, if it is possible to do so without imposing undue hardship on the Agency.<sup>11</sup>

## 7. ALTERNATIVE DISPUTE RESOLUTION:

a. Alternate Dispute Resolution (ADR). ADR is voluntary for the employee/applicant. PANG will use ADR and other collaborative dispute resolution processes early on in the process to the maximum extent practical and appropriate to resolve disputes. ADR includes mediation, facilitation and conciliation services. Qualified ADR professionals may be chosen by the Agency or requested from DoD's Investigations and Resolutions Division.

## 8. INFORMAL APPEAL PROCESS:

a. Overview. An IWD can appeal a RA request denial or accommodation with which they do not concur (i.e., IWD requested a specific type of chair for the workspace, but RA offered by the Agency was undesirable to the IWD) within ten (10) work days of receipt of the Agency's decision to their higher-level supervisor. The employee's/applicant's appeal must be in writing and should contain any additional information or documentation that the employee/applicant would like the higher-level supervisor to consider. The higher-level supervisor who receives the employee's/applicant's appeal will consult with HRO IAW with this RA Policy. HRO is authorized to recommend the parameters of approval or denial of reasonable accommodation requests or when requests must be submitted to TAG for approval or denial. The appeal should involve reviewing the original supervisor's notes and any documentation submitted by the employee/applicant. The Higher-level supervisor will render a decision on the appeal within fourteen (14) calendar days of receiving the appeal from the employee/applicant unless there are extenuating circumstances. The Agency must notify the IWD of their right utilize the Agency's informal appeal process or PANG EEO Counselor, SEEM's Office, or EEOC to file an EEO complaint<sup>12</sup> (see Appendix B).

### b. Approval of Appeal Request.

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<sup>10</sup>29 C.F.R. § 1614.203(d)(3)(S).

<sup>11</sup> 29 C.F.R. §1614.203(d)(3)(Q).

<sup>12</sup> Philadelphia EEOC Office, 801 Market Street, Suite 1300, Philadelphia, PA.

If the Agency determines that an appealed RA request will be approved, the IWD's supervisor/hiring official will notify the IWD in writing and document the date and circumstances of the notification.

c. Denial of Appeal Request.

Notice of the Agency's decision will be IAW with this RA Policy, except that the notice will remind the employee/applicant that he/she must contact a PANG EEO Counselor or SEEM's Office, or the Philadelphia EEOC Office within forty-five (45) days of receipt of the appeal decision or from the most recent incident of discrimination, if the employee/applicant wishes to file an EEO complaint.

9. EEO DISCRIMINATION COMPLAINT PROCESS:

a. The Federal Agency EEO Complaint Process. For the EEO Complaint Process, PANG is under DoD, which is a Federal agency. This requires the employee/applicant or "aggrieved" to participate in EEO informal resolution processes, e.g., EEO Counseling or if it is offered, another form of alternative dispute resolution, prior to filing an EEO Formal Complaint. Regardless of whether or not the employee/applicant has utilized the Agency's informal appeal process described in Section 8 of this RA Policy, the employee must contact a PANG EEO Counselor, SEEM's Office, or the Philadelphia EEOC Office within forty-five (45) days of receipt of the appeal decision or most recent incident of discrimination, if the employee wishes to file an EEO Complaint.

10. RECORDKEEPING REQUIREMENTS:

a. Tracking Requirements. The proponent for reasonable accommodation is the PANG SEEM Office.

(1) Although the original RA request does not have to be in writing, the SEEM will assign a tracking number to each RA request. For example: PANG-RA-FYXX (fiscal year)-XX (number). The SEEM will notify (in writing) the employee/applicant of his/her tracking number within seven (7) calendar days of receipt of the RA request. The employee/applicant can track his/her request process through his/her tracking number by calling the SEEM's Office.<sup>13</sup> The SEEM is responsible for tracking the following information:

(a) The number and types of RA requested in the application for employment process and whether those requests were granted or denied;

(b) The jobs (occupational series, grade level, and organization) for which RAs have been requested;

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<sup>13</sup> C.F.R. § 1614.203(d)(3)(R).

(c) The types of RAs that have been requested for each of those jobs;

(d) By organization (unit/department), the number and types of RAs for each job that have been approved and denied;

(e) The number and types of requests for RAs that relate to benefits or privileges of employment, and whether those requests have been granted or denied;

(f) The reasons for denial of RA requests;

(g) The amount of time taken to process each RA request;

(h) The source of technical assistance consulted in trying to identify possible RAs;

(i) Dispositions of Reasonable Accommodation Request Data, Including Medical Information;

(j) Documentation related to a particular individual who has requested RA is to be filed apart from other personnel records, safeguarded regarding confidential requirements, and maintained for the duration of that employee's/applicant's employment. Records concerning requests, approval, and disapproval are maintained by the Joint Force Headquarters EEO office;

(k) The tracking information data should be maintained for a period of 5 years. This data will assist an organization in evaluating its performance regarding the adequate, timely processing of RA requests and their corrective action, if required.

## SECTION C

### SETTLEMENT AGREEMENTS

#### 1. Authority.

a. The Agency has general authority to settle EEO complaints during the informal and formal EEO complaint processes as required by 29 CFR 1614.603 and as described in EEOC Management Directive 110, Chapter 12. All EEO Professionals have authority to assist parties in drafting and executing settlement agreements in the pre-complaint stage, within the parameters set by the settlement authority. Agency representatives have the authority to negotiate settlements, within the parameters set by the settlement authority, after a formal complaint has been filed.

b. An Agency official is properly a settlement authority if he or she has the authority to grant the scope of the remedy requested and/or provided. If an expenditure of funds is contemplated and the commander wishes to delegate his/her authority for complaint resolution, such delegation must be in writing.

#### 2. Settling Civilian EEO Complaints.

a. The Agency encourages resolution of civilian EEO complaints at the earliest possible time and the lowest level practical. EEO professionals/agency representatives must ensure coordination of settlement terms with the below offices prior to securing signatures of the complainant and the settlement authority to ensure that any such agreement is practical and enforceable. Such coordination is not required with respect to the merits of the case or the settlement.

b. Ensure settlement terms involving personnel actions or personnel processes are coordinated with the HRO.

c. Ensure settlement terms involving financial matters, including payment of money, are coordinated with the appropriate financial management office. Compensatory damages and payment of other monetary relief are paid from Operations and Maintenance funds.

d. Ensure settlement terms that involve other offices or other agencies are coordinated properly. If the settlement binds an organization outside the authority of the relevant commander, the SEEM or ADR Manager obtains written concurrence of an authorized official within that organization before the agreement is signed. For settlement agreements resulting from an ADR proceeding, the agreement may be signed before formal coordination, contingent upon subsequent coordination and approval. Such a contingency should be made clear to the parties prior to signature.

e. All settlements are subject to the provisions of the Privacy Act of 1974. All settlements reached during ADR proceedings are subject to the provisions of the

Administrative Dispute Resolution Act of 1996. Terms which further restrict management's ability to disclose settlement terms to those with a legitimate need to know are discouraged.

### 3. Compliance with Settlement Agreements.

a. All civilian EEO settlement agreements are binding upon the Agency and the complainant. To ensure compliance with the terms of settlement, the SEEM must accomplish the following actions:

b. Review the terms of settlement and determine the responsible office(s) executing the agreement. Provide each responsible office with a copy of the portion of the settlement agreement that pertains to their action.

c. The SEEM, in coordination with the HRO, transmits copies of signed settlement agreements requiring action by Defense Finance and Accounting Service (DFAS) (e.g., cancellation /correction of suspension actions, retroactive promotions, reinstatement of leave, etc.) to the servicing DFAS civilian payroll office immediately with copies of applicable Standard Form 50-B.

d. Collect documentation from the responsible office(s) indicating execution of their action and retain with the original settlement agreement and follow disposition instructions according to the Agency's Records Management System.

### 4. Allegations of Noncompliance with Settlement Agreements.

a. The SEEM must handle allegations of breach of settlement agreements involving civilian EEO complaints expeditiously and observe the timelines in 29 CFR 1614 Section 504. The SEEM must accomplish the following actions:

(1) Upon receipt of written notice by a complainant that a specific provision(s) of a settlement agreement was breached, promptly conduct appropriate fact-finding and determine if additional action is required to implement the agreement. If necessary, contact the responsible management official(s) and the SJA to ensure implementation of the specific provision(s).

(2) Provide a written decision signed by the Adjutant General or designee to the complainant within 30 calendar days on the determination as to whether the installation is in breach and/or efforts to resolve the matter and advise him/her of the right to appeal the decision to the EEOC for a determination as to whether the terms of agreement have been breached. [29 CFR 1614.504(b)]. Provide the Complainant a copy of EEOC Form 573, Notice of Appeal/Petition.

b. ADR may be used to resolve allegations of breach of agreements if the matter is determined to be appropriate for ADR.

## SECTION D

### COMPLIANCE ACTIONS

#### 1. Compliance with EEOC Orders and Decisions.

a. The SEEM is responsible for the implementation of and compliance with EEOC Orders. The SEEM is responsible for determinations regarding the proper or improper dismissal of complaints, and all findings of discrimination, and identifying actions necessary to establish compliance, submitting interim and final compliance reports to the EEOC Office of Federal Operations (OFO), for internal finding of discrimination and findings by EEOC AJs, responding to the EEOC on behalf of the Agency with regard to orders issued by EEOC/OFO, and distributing copies of decision and orders to offices with oversight responsibility.

b. EEOC Remand Orders. The EEOC/OFO may issue such orders that remand civilian EEO complaints for processing, directing the Agency to submit additional documentation, or with regard to compliance with a settlement agreement. EEOC/OFO sends orders and decisions to the SEEM. The SEEM forwards the orders to the appropriate official for action. The appropriate official must accomplish the following actions:

(1) EEOC Remands for Processing. Immediately implement the actions as directed by the SEEM and provide required documents to the SEEM.

(2) EEOC Orders Involving Findings of Discrimination. Inform the commander (director) and, in coordination with the SJA and HRO, implement the action as directed by the SEEM. Provide required documents to the SEEM in accordance with the suspense.

(3) EEOC Decisions Involving Default Judgments and/or Monetary Sanctions. Immediately inform the commander (director). In coordination with the SJA and HRO, implement the actions as directed by the SEEM. Provide required documents to SEEM in accordance with the suspense.

c. Agency Findings of Discrimination. The agency has the responsibility to comply with the Adjutant General's findings of discrimination to include initiate the actions ordered and submit the documentation to the SEEM.

2. Receipt of EEOC Decisions. The SEEM is the responsible office to respond and ensure compliance with EEOC Orders on behalf of the Agency. Other offices that receive an EEOC Order must immediately submit the Order to the SEEM electronically by email or facsimile.

## SECTION E

### NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION (NO FEAR) ACT OF 2002 COMPLIANCE

#### 1. No FEAR Act Description and Procedures.

a. On May 15, 2002, Congress enacted The No FEAR Act (Public Law (PL) 107-174). One purpose of the Act is to require agencies to be accountable for violations of anti-discrimination and whistleblower protection laws. (PL 107-174 Summary) In support of this purpose, Congress found that agencies cannot be run effectively if those agencies practice or tolerate discrimination. [PL 107-174 Title I, General Provisions, Section 101(1)]. Settlements and judgments arising within the administrative or judicial processes are reportable by the Agency as required by the No FEAR Act.

b. For formal civilian EEO complaints in the administrative process, SEEM will ensure that accurate and timely data is entered into the current Agency IT system on a monthly basis at a minimum.

c. For cases in federal court litigation, the SJA will timely notify the SEEM and the Adjutant General of any settlements or judgments subject to No FEAR Act reporting. The SJA is the sole source for settlements and judgments from the federal courts.

d. The Agency will timely reimburse the Department of Treasury, Judgment Fund for any judgments or settlements subject to the No FEAR Act in accordance with 5 CFR 724.104 and Chapter 3100 of the Treasury Financial Manual. The financial management office will provide the SJA a copy of the reimbursement document showing reimbursement to the treasury.

e. The SEEM will generate the annual report not later than 15 Oct of each fiscal year for review by HRO and submission to NGB, DoD, and EEOC.

f. HRO will approve and forward the final report to the Adjutant General for signature NLT 30 days from the end of the Fiscal Year (FY). The SEEM shall post the final report on a Public Web Site no later than 180 days after the end of the FY.

g. The development of No FEAR Act Training is the responsibility of the SEEM to implement IAW 5 CFR 724.203. The SEEM may implement the training via various media (e.g. briefings, etc.) and track numbers of individuals trained on a biennial basis.

h. The SEEM must ensure the Agency's workforce (to include military supervisors of civilian employees) is trained at least every 2 years.

i. EEO Professionals must train new employees as part of the Agency's orientation program within 90 calendar days of the new employees' appointment.



j. EEO Professionals must track numbers of individuals trained and report the statistics when requested by the SEEM.

2. No FEAR Notice.

a. EEO Professionals must provide notice to all of the Agency's employees, former employees, and applicants for Federal employment about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection applicable to them.

(1) Each EEO Professional must provide the notice to the Agency's serviced employees in paper (e.g., letter, poster or brochure) and/or electronic form (e.g., e-mail, internal agency electronic site, or Internet website). EEO Professionals with internet websites can post the notice on those websites, in compliance with section 508 of the Rehabilitation Act of 1973, as amended.

(2) The format and minimum text to be included in the notice is outlined in the Code of Federal Regulations, Title 5, Chapter 1, Part 724, Subpart B – Notification of Rights and Protections and Training.

b. After the initial notice, each EEO Professional must provide the notice to new employees within 90 calendar days of entering on duty.

SECTION F  
REFERENCES

- a. Title 32, United States Code
- b. Title 10, United States Code
- c. Public Law 114-328, 23 December 2016, "National Defense Authorization Act for Fiscal Year 2017"
- d. Title 29, Code of Federal Regulations
- e. CNGBN 9600, *State National Guard Civilian Equal Employment Opportunity Complaint Processing And Reporting Guidance*, 10 May 2017.
- f. NGR 600-23/ANGR 30-12, 30 December 1974, "Nondiscrimination in Federally Assisted Programs"
- g. Equal Employment Opportunity Commission Management Directive 110, 05 August 2015, "Federal Sector Complaint Processing Manual"
- h. Equal Employment Opportunity Commission Management Directive 715, 01 October 2003, "EEO Reporting Requirements for Federal Agencies"
- i. Public Law 104-320, "Administrative Dispute Resolution Act of 1996", 110 Stat. 3870, *codified at 5 USC Section 571, et seq.*
- j. Rehabilitation Act of 1973, as amended.
- k. Americans with Disabilities Act (ADA) of 1990; ADA Amendments Act of 2008 (ADAAA).
- l. U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act.
- m. Executive Order 13164, 26 July 2000: Requesting Federal Agencies to Establishing Procedures to Facilitate the Provisions of Reasonable Accommodation.
- f. CNGBI 9400.01, *Nondiscrimination in Federally Assisted Programs*, 29 November 2017.

## GLOSSARY

### ABBREVIATIONS, ACRONYMS AND TERMS

ADR	Alternate Dispute Resolution
AGP	Administrative Grievance Procedure
AJ	Administrative Judge
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
FAD	Final Agency Decision
HRO	Human Resources Officer
IRD	Investigations and Resolutions Directorate
IWD	Individuals with Disabilities
MSPB	Merits Systems Protection Board
NG	National Guard
NGB	National Guard Bureau
NGP	Negotiated Grievance Procedure
OFO	Office of Federal Operations
ROI	Report of Investigation
RA	Reasonable Accommodation
RFR	Request for Reconsideration
SEEM	State Equal Employment Manager
SJA	Staff Judge Advocate
TDY	Temporary Duty

**Administrative Judge (AJ)**— For the purpose of this instruction and pursuant to 29 CFR 1614.109, an AJ is an individual appointed by the Equal Employment Opportunity Commission when a hearing is requested, who assumes full responsibility for the adjudication of the complaint--including oversight of the development of the record.

**Aggrieved Person**— For the purpose of this instruction, this refers to an employee, former employee, or applicant for employment who believes he or she has been discriminated against on the basis of race, color, religion, sex, national origin, age, disability or reprisal.

**Alternative Dispute Resolution (ADR)**— The Administrative Dispute Resolution Act of 1996, Public Law (PL) No. 104-320, 110 Stat. 3870, 5 USC Section 571, *et seq.* (1996) defines ADR as any procedure that is used to resolve issues in controversy, including but not limited to facilitation, mediation, fact-finding, mini-trials, arbitration and the use of ombudsmen, or any combination thereof. Sec. 4(b), 5 USC Section 571(3).

**Alternative Dispute Resolution Manager for Workplace Disputes**— An individual appointed at the Joint Forces Headquarters, and installation level to promote the use of

ADR processes for resolving military and civilian workplace disputes, to facilitate the development and implementation of the organization's workplace disputes ADR plan, and to provide oversight of the organization's workplace disputes ADR program.

**Basis of Complaint**— For the purpose of this instruction, the statutory source (Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act (ADEA), Equal Pay Act (EPA), or Rehabilitation Act) upon which the complainant believes she or he has been discriminated against, or the alleged motivation for the employment action being challenged; i.e., race, color, religion, sex, national origin, age, disability and/or reprisal for opposing any practice made unlawful, or for participating in any stage of the complaint process under those statutes.

**Class**— A group of employees, former employees, and/or applicants for employment who allegedly have been or are being harmed by an agency's personnel policy or practice, based on their common race, color, religion, sex, national origin, age, or disability.

**Compensatory Damages**— Payments intended to fully compensate victims of intentional discrimination, if allowed by law, for pecuniary and non-pecuniary losses that result directly from the discrimination. These damages are in addition to equitable relief such as back pay, interest, reinstatement, and attorney's fees.

**Complainant**— For the purpose of this instruction, a military member or retiree, military family member, an employee, former employee, or applicant for employment who files a complaint of discrimination or who submits allegations of unlawful discrimination or sexual harassment.

**Complaint Clarification**— A process of gathering information regarding a formal EO complaint or Hotline complaint to determine whether a "preponderance of evidence" exists and/or that unlawful discrimination or sexual harassment has occurred.

**Complaint**— An allegation of unlawful discrimination based on race, color, national origin, religion, sex, age disability or reprisal filed by a civilian employee with an EEO Office; or an allegation of unlawful discrimination based on race, color, national origin, religion, or sex filed by a military member with an EEO Office.

**Formal Complaint**—Allegation of unlawful discrimination or sexual harassment that is submitted in writing by a complainant to the EEO Office.

**Informal Complaint**—Allegation of unlawful discrimination or sexual harassment, made either orally or in writing to the EEO office by a complainant that is not submitted as a formal complaint. If the complaint is made to the EEO office, it will be recorded on a form.

**Confidentiality**— As used in this AFI, refers to the protection from voluntary or compulsory disclosure, afforded by the Administrative Dispute Resolution Act of 1996, to certain dispute resolution communications given in confidence for the purposes of a dispute resolution proceeding. See ADRA, 5 USC Section 574.

**Discrimination (Civilian EEO)**— An unlawful employment practice that occurs when an employer fails or refuses to hire or promote, discharges, or otherwise discriminates against any individual with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, national origin, age, reprisal, physical or mental disability; limits, segregates or classifies employees or applicants for employment in any way that deprives or tends to deprive any individual of employment opportunities or otherwise adversely affects his/her status as an employee because of race, color, religion, sex, national origin, age, reprisal, physical or mental disability.

**Disparate Treatment**— Treatment that is different because of race color, sex, religion, national origin, age, disability, or reprisal.

**Equal Employment Opportunity Commission (EEOC)**— The Commission is responsible for, among other things, conducting hearings and issuing decisions on complaints of discrimination in the federal sector, as well as enforcing compliance with section 717 of Title VII of the Civil Rights Act of 1964, as amended; sections 501 and 505 of the Rehabilitation Act of 1973, as amended; section 15 of the Age Discrimination in Employment Act of 1977, as amended; and the Equal Pay Act, section 6(d) of the Fair Labor Standards Act of 1938, as amended.

**Equal Employment Opportunity Commission Office of Federal Operations (EEOC/OFO)** — The Equal Employment Opportunity Commission office responsible for federal sector complaint processing.

**Genetic Information Nondisclosure Act (GINA)** — GINA prohibits discrimination on the basis of genetic information. It creates a separate form of unlawful discrimination distinct from disability discrimination under the Rehabilitation Act. GINA prohibits discrimination based on genetic information and not on the basis of a manifested condition. The Rehabilitation Act and the Americans with Disabilities Act prohibit discrimination on the basis of manifested conditions that meet the definition of disability. For example, a woman who carries the genetic marker posing a risk for breast cancer (BRCA 2) but who does not have breast cancer is covered by GINA. If she develops breast cancer, she is likely covered by the Rehabilitation Act, but not by GINA.

**Hostile Work Environment** — A hostile work environment is a series of acts which are so severe and pervasive as to alter the terms and conditions of employment. The acts which make up the hostile environment may be discreet acts or may be ones which taken alone do not rise to the level of an adverse employment action.

**Investigations and Resolutions Division (IRD)** — Component of the Department of Defense (DoD), Civilian Personnel Management Service (CPMS) that is responsible for investigating discrimination complaints for DoD components.

**Merit Systems Protection Board (MSPB)** — The federal agency responsible for holding hearings and issuing decisions on complaints or appeals of adverse personnel actions, including disciplinary actions and performance based actions. Appeals to the MSPB may also contain allegations of discrimination, i.e., mixed cases.

**Mixed Case Appeal** — A mixed case appeal is an appeal filed with the MSPB that alleges that an agency action over which the MSPB has jurisdiction was effected, in whole or in part, because of discrimination based on race, color, religion, sex, national origin, age, disability, or reprisal.

**Mixed Case Complaint** — A mixed case complaint is a complaint of employment discrimination based on race, color, religion, sex, national origin, age, disability, or reprisal related to or stemming from an action that can be appealed to the MSPB. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

**National Origin** — An individual's or ancestor's place of origin. Also applies to a person who has the physical, cultural or linguistic characteristics of a national group.

**Neutral** — An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy. This individual may be a Federal government employee or someone outside the Government. For purposes of determining whether communications are confidential, the term—neutral also includes ADR intake or other administrative personnel designated and identified by the ADR Manager as a neutral for the purpose of taking information from the party or parties to a dispute to assist them in deciding whether to use a dispute resolution proceeding to resolve the dispute. See ADRA, 5 USC Section 571(9).

**Race** — A division of human beings identified by the possession of traits transmissible by descent and that are sufficient to characterize persons possessing these traits as a distinctive human genotype.

**Reasonable Accommodation (RA)** — The Rehabilitation Act of 1973 (29 USC Section 791 et seq.) as amended by the Americans with Disabilities Act of 1990, as amended (42 USC Section 12101 et seq.) requires all Federal agencies to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.

**Religion** — A personal set or institutionalized system of attitudes, moral or ethical beliefs and practices held with the strength of traditional religious views, characterized by ardor and faith and generally evidenced through specific religious observances.

**Report of Investigation (ROI)** — The summary of facts and documents collected during an investigation issued by the investigator pursuant to the investigation of a formal complaint of discrimination under 29 CFR 1614.108.

**Reprisal (Civilian)** — It is unlawful to retaliate against an individual for opposing employment practices that discriminate based on any of the protected categories or for filing an unlawful discrimination charge, testifying, or participating in any way in an investigation, proceeding, litigation, or expressing opposition to a perceived discriminatory practice.

**Sexual Harassment** — Harassment on the basis of sex is a violation of Title VII of the Civil Rights Act of 1964. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

**Substantiated** — A substantiated finding occurs when a preponderance of the evidence supports (more likely to have occurred than not occurred) the complainant's allegation of a violation of law, regulation or NG policy or standards. The documented facts indicate that a violation occurred.

**APPENDIX A: REASONABLE ACCOMMODATION REQUEST FORM**

Name: \_\_\_\_\_ Cell #: \_\_\_\_\_

E-mail: \_\_\_\_\_ Work #: \_\_\_\_\_

Position: \_\_\_\_\_ Grade: \_\_\_\_\_

Date: \_\_\_\_\_

Supervisor: \_\_\_\_\_ Work #: \_\_\_\_\_

E-mail: \_\_\_\_\_

I. Are you requesting a specific accommodation?

II. Please identify the specific limitation(s) which requires accomodation.

III. Specify, how this accomodation will assist you to perform the essential functions of your position.

IV. Is the RA request time sensitive? If so, initial here: \_\_\_\_\_ and explain.

\_\_\_\_\_  
Printed Name of Individual Making Request

\_\_\_\_\_  
Signature of Individual Making Request



Name and Contact Information for First-Level Supervisor/Hiring Official

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Name and Contact Information for Manager or Higher-Level Supervisor

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Today's Date

---

Name of Person Receiving Request

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Position/Work Phone #

## APPENDIX B: EXAMPLES OF REASONABLE ACCOMMODATIONS

1. Job Restructuring. Involves modifications such as reallocating or redistributing marginal job functions that an employee/applicant is unable to perform because of a disability, as well as altering when and or how a function, essential or marginal, is performed. Supervisors/hiring officials will not, however, reallocate essential functions as a reasonable accommodation.

2. Leave. Whether accrued paid leave or unpaid leave, is a form of RA when necessitated by an employee's/applicant's disability. Supervisors are not required to provide paid leave beyond that which is provided to similarly situated employees/applicants. When leave is used as an RA, employees/applicants will use accrued paid leave before beginning any allotted unpaid leave. Supervisors should remember that there may be FMLA implications when considering leave as an RA.

3. Essential Function. For certain positions, the time during which an essential function is performed may be critical and a modification may disrupt operations and lead to undue hardship. This could affect whether a supervisor can grant a request to modify an employee's/employees (applicant/applicants) schedule or if reassignment is more appropriate.

4. Modified Workplace Policies. These constitute an RA when necessitated by an employee's/applicant's disability-related limitations, absent undue hardship. Modification under these circumstances only applies to the IWD and not to other employees/applicants in the supervisor's section or working unit.

### 5. Assistive Devices.

a. Specific to individuals who are deaf or hard of hearing, supervisors/hiring officials should consider amplification devices, closed caption decoders and captioning for training tapes, signaling devices, teletypewriters (TTYs), sign language interpreters, and TTY modems.

b. Specific to individuals with visual impairments, supervisors/hiring officials should consider Braille displays, Braille embossers, portable note-takers, print enlargers, scanner/readers, and screen readers. Specific to individuals with impaired dexterity, supervisors/hiring officials should consider alternative input systems, alternative keyboards, alternative pointing devices, keyboard enhancement programs, and voice recognition systems.

6. Personal Assistants. Personal assistance services to employees are reasonable accommodations when: (1) employee requires such services because of a targeted disability; (2) provision would enable the employee to perform the essential functions of his/her position; and (3) provision of services would not impose due hardship on the agency. Personal Assistant services have to be provided by a qualified personal

assistance service provider. The Agency is prohibited from taking adverse actions for an employee/applicant asking for a personal assistant.

7. Reassignment. Reassignment to a vacant position must be provided to an employee/applicant (not an applicant) who, because of a disability, can no longer perform the essential functions of his/her current position, with or without an RA, unless the supervisor/hiring official can show that reassignment would be an undue hardship. The employee/applicant must be qualified for the position, which means that he/she has the requisite skill, experience, education, and other job-related requirements of the position (not necessarily best qualified). The employee/applicant must also be able to perform the essential functions of the new position, with or without an RA. The Agency is not obligated to assist the employee/applicant to become qualified for the new position, unless the Agency would normally provide such training to an individual transitioning into the position. Reassignment is the RA of last resort and is only required if: (1) there are no effective accommodations that will enable the employee/applicant to perform the essential functions of his/her current position and (2) all other RAs would impose an undue hardship. "Vacant" means that the position is available when the employee/applicant asks for reasonable accommodation, or that the Agency knows that it will become available within a reasonable amount of time. The Agency does not have to bump another employee/applicant from a job in order to create a vacancy; nor does it have to create a new position.

Of the above-cited examples of RA, only Reassignment is mandatory and only under the circumstances stated. The other examples should be considered on a case-by-case basis and may not always be appropriate.

## APPENDIX C: SELECTED REASONABLE ACCOMMODATION RESOURCES

### U.S. Equal Employment Opportunity Commission

Philadelphia District Office

801 Market Street, Suite 1300

Philadelphia, PA 19107-3127

Phone: 1800-669-4000 / 215-440-2601 / or email [PDOContact@eeoc.gov](mailto:PDOContact@eeoc.gov)

FAX: 215-440-2606

TTY: 1-8---669-6820

ASL Video Phone: 844-234-5122

The EEOC's Publication Center has many free documents on the Title I employment provisions of the ADA and the Rehabilitation Act. In addition, the EEOC has published a great deal of basic information about reasonable accommodation and undue hardship.

### Job Accommodation Network (JAN)

(800)526-7234(Voice)

(877)781-9403 (TTY)

<http://janweb.icdi.wvu.edu>

A service of the President's Committee on Employment of People with Disabilities. JAN can provide information, free-of-charge, about many types of reasonable accommodations.

### Mid-Atlantic ADA Center

1-800-949-4232 (Voice/TT)

[www.adainfo.org](http://www.adainfo.org)

The center is part of a national network that provides information, training, and technical assistance on the ADA Act. Each center works with local business, disability, governmental, rehabilitation, and other professional networks to provide current ADA information and assistance. The center can make referrals to local sources of expertise in reasonable accommodations.

### Registry of Interpreters for the Deaf, Inc.

333 Commerce Street

Alexandria, VA 22314

703-838-0030 (Voice)

571-257-3957 (VP)

703-838-0454 (Fax)

<http://www.rid.org>

The Registry offers information on locating and using interpreters and transliteration services.

Computer/Electronic Accommodation Program

4800 Mark Center Drive, Suite 05E22

Alexandria, VA 22350

(833) 227-3272 or (703) 614-8416 (Voice)

(571) 384-5629 (Videophone)

(703) 697-5851 (Fax)

[cap@mail.mil](mailto:cap@mail.mil)

The Computer/Electronic-Accommodation Program (CAP) was established by DOD to help provide RA to individuals with disabilities. The purpose of the CAP is to ensure that all disabled DOD employees get equipment which best meets their needs at no charge to the employer. The Defense Medical Information Management Office is the executive agent for the CAP. The CPA is available to advise on ways to provide RA. The CAP serves the DOD community by:

- Buying accommodations to make computer and telecommunications systems accessible to individuals with disabilities, as required by law.
- Providing funds for sign-language interpreters, readers, and personal assistants for employees attending long-term training (two days or more).
- Providing expertise in solving accessibility problems through the use of software, hardware, and other assistive technology.
- Providing training and educational support.