

**U.S. FEDERAL LABOR
RELATIONS AUTHORITY**



No FEAR Act Annual Report

Fiscal Year 2023

U.S. Federal Labor Relations Authority

**Annual Report Required by Section 203 of the
Notification and Federal Employee Antidiscrimination
and Retaliation Act of 2002 (No FEAR Act)**

Fiscal Year 2023

Item 1. *Number of cases in Federal Court pending or resolved arising under each of the respective provisions of the Federal Antidiscrimination Laws and Whistleblower Protection Laws as defined in 5 CFR § 724.102 separated by the provision(s) of law involved:*

Total cases: **0**

Total cases broken down by provision(s) of law involved: **Not applicable.**

Item 2. *In the aggregate, for cases covered by Item 1 and separated by provisions(s) of law involved--*

(i): Status or disposition: **Not applicable.**

(ii): Amount of money required to be reimbursed to the Judgment Fund: **Not applicable.**

(iii): Amount of reimbursement to the Judgment Fund for attorney's fees where separately designated: **Not applicable.**

Item 3. *In connection with the cases covered by Item 1 and separated by the provision(s) of law involved, the total number of employees disciplined (i.e., reprimanded, suspended without pay, reduced in grade or pay, or removed) and the specific nature of the discipline taken:*

Total number of employees disciplined: **Not applicable.**

Item 4. *The final year-end data about discrimination complaints posted in accordance with section 301 of the No FEAR Act:*

See Attachment (Attach.) 1.

Item 5. The number of employees disciplined for conduct inconsistent with Federal Antidiscrimination Laws and Whistleblower Protection Laws or for conduct that constitutes another prohibited personnel practice revealed in connection with agency investigations of these laws and the specific nature of the disciplinary actions taken:

0

Item 6. A detailed description of the agency's policy for taking disciplinary action against employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Protection Laws or for conduct that constitutes another prohibited personnel practice revealed in connection with agency investigations of these laws:

The Federal Labor Relations Authority's (FLRA's or Agency) prohibits employment discrimination that is based on activity and personal characteristics protected under applicable Federal Antidiscrimination Laws and Whistleblower Protection Laws.

FLRA Policy Number 3701, Equal Employment Opportunity (Attach. 2(a)), establishes the FLRA's policy: to provide equal employment opportunity (EEO) for all persons, and to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or genetic information.

The FLRA's policy of prohibiting discrimination is also stated in the EEO Program Policy Statement (Attach. 2(b)), which the FLRA has: distributed by e-mail to all employees; posted throughout the FLRA's workspaces; and posted on the FLRA's intranet and internet sites.

In addition, the FLRA's No FEAR Act Notice (Attach. 2(c)) – which is posted on both the FLRA's intranet and internet sites, and was distributed by e-mail to all employees – reaffirms that the FLRA prohibits discrimination based on race, color, religion, sex, national origin, age, disability, or genetic information. That Notice also specifies that retaliation against employees who engage in whistleblower activity is prohibited, and that conduct inconsistent with Federal Antidiscrimination Laws and Whistleblower Protection Laws may be subject to appropriate disciplinary action.

Further, the FLRA's Anti-Harassment Policy (Attach. 2(d)) – which the Agency: distributed to all employees by e-mail; posted at the FLRA's workplaces; and posted on its intranet and internet sites – informs all employees that anyone who engages in workplace harassment based on protected characteristics may be subject to disciplinary action.

Finally, FLRA's discipline and adverse action policy ensures that individuals engaging in misconduct must first be given notice of performance problems and informal measures – such as counseling, training, and close supervision – should be

employed in an effort to correct the misconduct. Where, however, informal efforts to resolve conduct problems are unsuccessful, or if misconduct is sufficiently serious, it is the FLRA's policy to impose discipline that is appropriate to the circumstances. This policy is set forth in FLRA Policy 3752, Employee Discipline and Adverse Actions (Attach. 2(e)), which addresses discipline and adverse actions generally. The policy also covers discipline actions against employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Protection Laws or conduct that constitutes another prohibited personnel practice.

Item 7. An analysis of the information provided in Items 1 through 6 to include an examination of trends, causal analysis, practical knowledge gained through experience, and any actions planned or taken to improve complaint or civil rights programs of the agency with the goal of eliminating discrimination and retaliation in the workplace:

During fiscal year (FY) 2023, as well as during the previous five FYs, there were no court cases involving allegations that arose under Federal Antidiscrimination Laws or Whistleblower Protection Laws.

In FY 2023, the FLRA received 0 formal EEO complaints compared to 0 in FY 2020, 0 in FY 2021, 0 in FY 2020, and 1 in FY 2019. As noted in previous years' reports and reflected in the FLRA's No FEAR Act data posting (Attach. 1), there has been a decline in the number of EEO complaints filed in the past five years. Additionally, during FY 2023, the FLRA received the 2022 results of the Office of Personnel Management's Federal Employee Viewpoint Survey, which showed that the FLRA ranked fifth among twenty-nine small agencies in Best Places to Work for 2022.

As noted above, the FLRA provides notice to employees regarding their rights under applicable Antidiscrimination Laws and Whistleblower Protection Laws. In addition to the No FEAR Act Notice currently posted on its intranet and internet sites (Attach. 2(c)), the FLRA posts and disseminates a notice that informs all employees of the prohibition on employment discrimination based on race, color, religion, sex, national origin, age, disability, genetic information, or retaliation and provides information on the procedures for instituting an EEO complaint (Attach. 2b).

As consistent with OPM regulations implementing the requirements of § 201 of the No FEAR Act, particularly 5 C.F.R. § 724.403, the FLRA provided mandatory biennial No FEAR Act training for all employees, including supervisors and managers. The FLRA also provided such training to all new employees hired during the FY within 90 days of hire, as required under § 724.403.

Item 8. *Any adjustment needed or made to the budget of the agency to comply with its Judgment Fund reimbursement obligations:*

No.

Item 9. *The Agency's written plan developed in accordance with the No FEAR Act to train its employees:*

See Attach. 3.

Attachment 1

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Complaint Activity	Comparative Data Previous Fiscal Year Data					
	2018	2019	2020	2021	2022	2023
Number of Complaints Filed	1	1	0	0	0	0
Number of Complainants	1	1	0	0	0	0
Repeat Filers	0	0	0	0	0	0

Complaints by Basis	Comparative Data Previous Fiscal Year Data					
	2018	2019	2020	2021	2022	2023
<i>Note: Complaints can be filed alleging multiple bases. The sum of the bases may not equal total complaints filed.</i>						
Race	0	1	0	0	0	0
Color	0	0	0	0	0	0
Religion	0	0	0	0	0	0
Reprisal	1	1	0	0	0	0
Sex	0	1	0	0	0	0
National Origin	0	0	0	0	0	0
Equal Pay Act	0	0	0	0	0	0
Age	0	0	0	0	0	0
Disability	0	1	0	0	0	0
Genetic information	0	0	0	0	0	0
Sexual orientation	0	0	0	0	0	0
Non-EEO	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Complaints by Issue	Comparative Data Previous Fiscal Year Data					2023
	2018	2019	2020	2021	2022	
<i>Note: Complaints can be filed alleging multiple issues. The sum of the issues may not equal total complaints filed.</i>						
Appointment/Hire	0	0	0	0	0	0
Assignment of Duties	0	0	0	0	0	0
Awards	0	0	0	0	0	0
Conversion to Full-time	0	0	0	0	0	0
Disciplinary Action						
Demotion	0	0	0	0	0	0
Reprimand	0	0	0	0	0	0
Removal	0	0	0	0	0	0
Suspension	0	0	0	0	0	0
Other	0	0	0	0	0	0
Duty Hours	0	0	0	0	0	0
Evaluation Appraisal	1	1	0	0	0	0
Examination/Test	0	0	0	0	0	0
Harassment						
Non-Sexual	1	1	0	0	0	0
Sexual	0	0	0	0	0	0
Medical Examination	0	0	0	0	0	0
Pay (Including Overtime)	0	0	0	0	0	0
Promotion/Non-Selection	0	0	0	0	0	0
Reassignment						
Denied	0	0	0	0	0	0
Directed	0	0	0	0	0	0
Reasonable Accommodation	0	1	0	0	0	0
Reinstatement	0	0	0	0	0	0
Retirement	0	0	0	0	0	0
Termination	0	0	0	0	0	0
Terms/Conditions of Employment	0	1	0	0	0	0
Time and Attendance	0	0	0	0	0	0
Training	0	0	0	0	0	0
Other	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Processing Time	Comparative Data Previous Fiscal Year Data					
	2018	2019	2020	2021	2022	2023
Complaints pending during fiscal year						
Average number of days in investigation stage	204	17	109	0	0	0
Average number of days in final action stage	118	0	0	0	0	0
Complaint pending during fiscal year where hearing was requested						
Average number of days in investigation stage	0	0	0	0	0	0
Average number of days in final action stage	0	0	0	0	0	0
Complaint pending during fiscal year where hearing was not requested						
Average number of days in investigation stage	204	0	0	0	0	0
Average number of days in final action stage	118	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Complaints Dismissed by Agency	Comparative Data Previous Fiscal Year Data					
	2018	2019	2020	2021	2022	2023
Total Complaints Dismissed by Agency	0	0	1	0	0	0
Average days pending prior to dismissal	0	0	339	0	0	0

	Comparative Data Previous Fiscal Year Data					
	2018	2019	2020	2021	2022	2023
Complaints Withdrawn by Complainants	0	0	0	0	0	0

Total Final Actions Finding Discrimination	Comparative Data Previous Fiscal Year Data											
	2018		2019		2020		2021		2022		2023	
	#	%	#	%	#	%	#	%	#	%	#	%
Total Number Findings	0		0		0		0		0		0	
Without Hearing	0	0	0	0	0	0	0	0	0	0	0	0
With Hearing	0	0	0	0	0	0	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Findings of Discrimination Rendered by Basis	Comparative Data Previous Fiscal Year Data												
	2018		2019		2020		2021		2022		2023		
	#	%	#	%	#	%	#	%	#	%	#	%	
<i>Note: Complaints can be filed alleging multiple bases. The sum of the bases may not equal total complaints and findings.</i>													
Total Number Findings	0	0	0	0	0	0	0	0	0	0	0	0	0
Race	0	0	0	0	0	0	0	0	0	0	0	0	0
Color	0	0	0	0	0	0	0	0	0	0	0	0	0
Religion	0	0	0	0	0	0	0	0	0	0	0	0	0
Reprisal	0	0	0	0	0	0	0	0	0	0	0	0	0
Sex	0	0	0	0	0	0	0	0	0	0	0	0	0
National Origin	0	0	0	0	0	0	0	0	0	0	0	0	0
Equal Pay Act	0	0	0	0	0	0	0	0	0	0	0	0	0
Age	0	0	0	0	0	0	0	0	0	0	0	0	0
Disability	0	0	0	0	0	0	0	0	0	0	0	0	0
Genetic Information	0	0	0	0	0	0	0	0	0	0	0	0	0
Sexual orientation	0	0	0	0	0	0	0	0	0	0	0	0	0
Non-EEO	0	0	0	0	0	0	0	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Findings of Discrimination Rendered by Basis	Comparative Data Previous Fiscal Year Data											
	2018		2019		2020		2021		2022		2023	
	#	%	#	%	#	%	#	%	#	%	#	%
Findings After Hearing	0	0	0	0	0	0	0	0	0	0	0	0
Race	0	0	0	0	0	0	0	0	0	0	0	0
Color	0	0	0	0	0	0	0	0	0	0	0	0
Religion	0	0	0	0	0	0	0	0	0	0	0	0
Reprisal	0	0	0	0	0	0	0	0	0	0	0	0
Sex	0	0	0	0	0	0	0	0	0	0	0	0
National Origin	0	0	0	0	0	0	0	0	0	0	0	0
Equal Pay Act	0	0	0	0	0	0	0	0	0	0	0	0
Age	0	0	0	0	0	0	0	0	0	0	0	0
Disability	0	0	0	0	0	0	0	0	0	0	0	0
Genetic Information	0	0	0	0	0	0	0	0	0	0	0	0
Sexual orientation	0	0	0	0	0	0	0	0	0	0	0	0
Non-EEO	0	0	0	0	0	0	0	0	0	0	0	0

Findings of Discrimination Rendered by Basis	Comparative Data Previous Fiscal Year Data											
	2018		2019		2020		2021		2022		2023	
	#	%	#	%	#	%	#	%	#	%	#	%
Findings Without Hearing	0	0	0	0	0	0	0	0	0	0	0	0
Race	0	0	0	0	0	0	0	0	0	0	0	0
Color	0	0	0	0	0	0	0	0	0	0	0	0
Religion	0	0	0	0	0	0	0	0	0	0	0	0
Reprisal	0	0	0	0	0	0	0	0	0	0	0	0
Sex	0	0	0	0	0	0	0	0	0	0	0	0
National Origin	0	0	0	0	0	0	0	0	0	0	0	0
Equal Pay Act	0	0	0	0	0	0	0	0	0	0	0	0
Age	0	0	0	0	0	0	0	0	0	0	0	0
Disability	0	0	0	0	0	0	0	0	0	0	0	0
Genetic Information	0	0	0	0	0	0	0	0	0	0	0	0
Sexual orientation	0	0	0	0	0	0	0	0	0	0	0	0
Non-EEO	0	0	0	0	0	0	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Findings of Discrimination Rendered by Issue	Comparative Data Previous Fiscal Year Data											
	2018		2019		2020		2021		2022		2023	
	#	%	#	%	#	%	#	%	#	%	#	%
Total Number Findings	0	0	0	0	0	0	0	0	0	0	0	0
Appointment/Hire	0	0	0	0	0	0	0	0	0	0	0	0
Assignment of Duties	0	0	0	0	0	0	0	0	0	0	0	0
Awards	0	0	0	0	0	0	0	0	0	0	0	0
Conversion to Full-time	0	0	0	0	0	0	0	0	0	0	0	0
Disciplinary Action	0	0	0	0	0	0	0	0	0	0	0	0
Demotion	0	0	0	0	0	0	0	0	0	0	0	0
Reprimand	0	0	0	0	0	0	0	0	0	0	0	0
Suspension	0	0	0	0	0	0	0	0	0	0	0	0
Removal	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0
Duty Hours	0	0	0	0	0	0	0	0	0	0	0	0
Evaluation Appraisal	0	0	0	0	0	0	0	0	0	0	0	0
Examination/Test	0	0	0	0	0	0	0	0	0	0	0	0
Harassment	0	0	0	0	0	0	0	0	0	0	0	0
Non-Sexual	0	0	0	0	0	0	0	0	0	0	0	0
Sexual	0	0	0	0	0	0	0	0	0	0	0	0
Medical Examination	0	0	0	0	0	0	0	0	0	0	0	0
Pay (Including Overtime)	0	0	0	0	0	0	0	0	0	0	0	0
Promotion/Non-Selection	0	0	0	0	0	0	0	0	0	0	0	0
Reassignment	0	0	0	0	0	0	0	0	0	0	0	0
Denied	0	0	0	0	0	0	0	0	0	0	0	0
Directed	0	0	0	0	0	0	0	0	0	0	0	0
Reasonable Accommodation	0	0	0	0	0	0	0	0	0	0	0	0
Reinstatement	0	0	0	0	0	0	0	0	0	0	0	0
Retirement	0	0	0	0	0	0	0	0	0	0	0	0
Termination	0	0	0	0	0	0	0	0	0	0	0	0
Terms / Conditions of Employment	0	0	0	0	0	0	0	0	0	0	0	0
Time and Attendance	0	0	0	0	0	0	0	0	0	0	0	0
Training	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Findings of Discrimination Rendered by Issue	Comparative Data Previous Fiscal Year Data											
	2018		2019		2020		2021		2022		2023	
	#	%	#	%	#	%	#	%	#	%	#	%
Findings After Hearing	0	0	0	0	0	0	0	0	0	0	0	0
Appointment/Hire	0	0	0	0	0	0	0	0	0	0	0	0
Assignment of Duties	0	0	0	0	0	0	0	0	0	0	0	0
Awards	0	0	0	0	0	0	0	0	0	0	0	0
Conversion to Full-time	0	0	0	0	0	0	0	0	0	0	0	0
Disciplinary Action	0	0	0	0	0	0	0	0	0	0	0	0
Demotion	0	0	0	0	0	0	0	0	0	0	0	0
Reprimand	0	0	0	0	0	0	0	0	0	0	0	0
Suspension	0	0	0	0	0	0	0	0	0	0	0	0
Removal	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0
Duty Hours	0	0	0	0	0	0	0	0	0	0	0	0
Evaluation Appraisal	0	0	0	0	0	0	0	0	0	0	0	0
Examination/Test	0	0	0	0	0	0	0	0	0	0	0	0
Harassment	0	0	0	0	0	0	0	0	0	0	0	0
Non-Sexual	0	0	0	0	0	0	0	0	0	0	0	0
Sexual	0	0	0	0	0	0	0	0	0	0	0	0
Medical Examination	0	0	0	0	0	0	0	0	0	0	0	0
Pay (Including Overtime)	0	0	0	0	0	0	0	0	0	0	0	0
Promotion/Non-Selection	0	0	0	0	0	0	0	0	0	0	0	0
Reassignment	0	0	0	0	0	0	0	0	0	0	0	0
Denied	0	0	0	0	0	0	0	0	0	0	0	0
Directed	0	0	0	0	0	0	0	0	0	0	0	0
Reasonable Accommodation	0	0	0	0	0	0	0	0	0	0	0	0
Reinstatement	0	0	0	0	0	0	0	0	0	0	0	0
Retirement	0	0	0	0	0	0	0	0	0	0	0	0
Termination	0	0	0	0	0	0	0	0	0	0	0	0
Terms / Conditions of Employment	0	0	0	0	0	0	0	0	0	0	0	0
Time and Attendance	0	0	0	0	0	0	0	0	0	0	0	0
Training	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Findings of Discrimination Rendered by Issue	Comparative Data Previous Fiscal Year Data											
	2018		2019		2020		2021		2022		2023	
	#	%	#	%	#	%	#	%	#	%	#	%
Findings Without Hearing	0	0	0	0	0	0	0	0	0	0	0	0
Appointment/Hire	0	0	0	0	0	0	0	0	0	0	0	0
Assignment of Duties	0	0	0	0	0	0	0	0	0	0	0	0
Awards	0	0	0	0	0	0	0	0	0	0	0	0
Conversion to Full-time	0	0	0	0	0	0	0	0	0	0	0	0
Disciplinary Action	0	0	0	0	0	0	0	0	0	0	0	0
Demotion	0	0	0	0	0	0	0	0	0	0	0	0
Reprimand	0	0	0	0	0	0	0	0	0	0	0	0
Suspension	0	0	0	0	0	0	0	0	0	0	0	0
Removal	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0
Duty Hours	0	0	0	0	0	0	0	0	0	0	0	0
Evaluation Appraisal	0	0	0	0	0	0	0	0	0	0	0	0
Examination/Test	0	0	0	0	0	0	0	0	0	0	0	0
Harassment	0	0	0	0	0	0	0	0	0	0	0	0
Non-Sexual	0	0	0	0	0	0	0	0	0	0	0	0
Sexual	0	0	0	0	0	0	0	0	0	0	0	0
Medical Examination	0	0	0	0	0	0	0	0	0	0	0	0
Pay (Including Overtime)	0	0	0	0	0	0	0	0	0	0	0	0
Promotion/Non-Selection	0	0	0	0	0	0	0	0	0	0	0	0
Reassignment	0	0	0	0	0	0	0	0	0	0	0	0
Denied	0	0	0	0	0	0	0	0	0	0	0	0
Directed	0	0	0	0	0	0	0	0	0	0	0	0
Reasonable Accommodation	0	0	0	0	0	0	0	0	0	0	0	0
Reinstatement	0	0	0	0	0	0	0	0	0	0	0	0
Retirement	0	0	0	0	0	0	0	0	0	0	0	0
Termination	0	0	0	0	0	0	0	0	0	0	0	0
Terms / Conditions of Employment	0	0	0	0	0	0	0	0	0	0	0	0
Time and Attendance	0	0	0	0	0	0	0	0	0	0	0	0
Training	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0

**Federal Labor Relations Authority
No FEAR Act Data
(as of 9-30-23)**

Pending Complaints Filed in Previous Fiscal Years by Status	Comparative Data Previous Fiscal Year Data					
	2018	2019	2020	2021	2022	2023
Total complaints from previous Fiscal Years	0	0	1	0	0	0
Total Complainants	1	0	1	0	0	0
Number complaints pending						
Investigation	0	0	1	0	0	0
Hearing	0	0	0	0	0	0
Final Action	0	1	1	0	0	0
Appeal with EEOC Office of Federal Operations	0	0	0	0	0	0

Complaint Investigations	Comparative Data Previous Fiscal Year Data					
	2018	2019	2020	2021	2022	2023
Pending Complaints Where Investigations Exceeds Required Time Frames	0	0	0	0	0	0

Attachment

2(a)



A. GENERAL PROVISIONS

1. **Purpose.** This policy articulates the Federal Labor Relations Authority's (FLRA) dedication to promote and achieve equal opportunity in employment and personnel practices within the Agency without regard to race, color, religion, sex, national origin, age, disability, or genetic information.

2. **Cancellation.** This FLRA policy cancels and supersedes FLRA Instruction No. 3700.1B, Equal Employment Opportunity, dated June 27, 2001.

3. **Definitions.**

a. *Individual Complaint.* An individual complaint is a written complaint of discrimination filed by an employee, applicant for employment, those found to be employees for the purposes of Title VII, or former employee alleging that a specific act of discrimination or retaliation (reprisal) has taken place and has adversely affected the individual. (For procedure, see section C - Individual Complaint Procedures, below).

b. *Mixed Case.* A mixed case complaint is a complaint of employment discrimination based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that is appealable to the Merit Systems Protection Board (MSPB), such as a removal, demotion, suspension for more than 14 calendar days, reduction in force, denial of within-grade increase, or furlough for less than 30 calendar days. (See 29 C.F.R. § 1614.302, and procedures at section D – Mixed Cases, below).

c. *Class Complaint.* A class complaint is a written complaint filed on behalf of a class by the agent of the class alleging that an FLRA personnel management policy or practice discriminates against a class and the agent has been personally harmed by the policy or practice. A class complaint is appropriate where: (1) the class is so numerous that a consolidated complaint of the members of the class is impractical; (2) there are questions of fact common to the class; (3) the claims of the agent of the class are typical of those of the class; and (4) the agent or representative of the class will fairly and adequately protect the interests of the class. (See 29 C.F. R. § 1614.204(a)(2)).

i. *Class.* A group of FLRA employees, former FLRA employees, those found to be employees for the purposes of Title VII, and/or applicants for FLRA employment on whose behalf it is alleged that they have been, are being, or may be adversely affected by an FLRA personnel management policy or practice on the basis of their common race, color, religion, sex, national origin, age, disability, and/or genetic information.

ii. *Agent*. A class member who acts for the class during the processing of the class complaint.

d. *An Individual with Disability*. An individual who: (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. (See 29 C.F.R. § 1630.2(g)(1)(i)-(iii)). This term shall not include an individual who is currently engaging in the illegal use of drugs, when the FLRA acts on the basis of such use, but may include an individual who has successfully completed or is currently participating in a supervised rehabilitation program, or is erroneously regarded as engaging in such drug use. (29 C.F.R. § 1630.3(a)-(b)). See also FLRA Policy 3891 "Reasonable Accommodation Procedures for Individuals with Disabilities."

e. *Physical or Mental Impairment*. (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory (including speech organs), genitourinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (29 C.F.R. § 1630.2(h)(1)-(2)).

f. *Has a Record of Such an Impairment*. Means that an individual has a history of, or has been classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more major life activities. (29 C.F.R. § 1630.2 (k)(l)).

g. *Is Regarded as Having Such an Impairment*. Except as provided in 29 C.F.R. § 1630.15(f), means that an individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment. (29 C.F.R. § 1630.2(i)(1)).

h. *Major Life Activities*. These activities include, but are not limited to:

i. Functions, such as caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, working; and,

ii. The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. (29 C.F.R. § 1630.2(i)(1)(i)-(ii)).

i. *Qualified Individual with Disability*. With respect to an individual with a disability, means that individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or

without reasonable accommodation, can perform the essential functions of such position. (29 C.F.R. § 1630.2(m)).

j. *Civil Action.* A complaint filed by an employee, class agent, claimant, applicant for employment, or former employee in a Federal district court.

4. **References.**

- a. Executive Order 11478 of August 8, 1969, as amended;
- b. Public Law 88-352, Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e)-16);
- c. Public Law 93-112, The Rehabilitation Act of 1973, as amended (29 U.S.C. §§ 791 and 794(a));
- d. Public Law 93-259, The Equal Pay Act of 1963, as amended (29 U.S.C. § 206(d));
- e. Public Law 93-259, Section 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 633(a));
- f. The Equal Employment Opportunity Commission (EEOC) Federal Sector Complaint Procedures (29 C. F. R. Part 1614);
- g. The EEOC Management Directive, MD-110, as revised (August 5, 2015);
and
- h. The Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. §§ 2000ff-2000ff-11)).

5. **Responsibilities.** The responsibility for assuring that equal opportunity is achieved within the FLRA rests with every employee. The following sets forth specific responsibilities for designated officials in discharging specific programmatic aspects of the FLRA EEO program.

- a. **Chairman.** The Chairman of the FLRA has the overall responsibility for the FLRA EEO program and shall:
 - i. Provide personal leadership in establishing, maintaining and carrying out a continuing affirmative program designed to promote equal opportunity for all employees and all applicants for employment in every aspect of the FLRA's policies and practices;
 - ii. Provide sufficient resources to carry out a positive, innovative, and continuing EEO program; and
 - iii. Annually review the EEO program to ensure that its direction, capability, and results are consistent with the stated EEO goals of the Agency.

b. Director, EEO Program. The EEO Director is delegated the authority for managing the overall FLRA EEO Program and reports directly to the Chairman concerning all EEO matters, and shall:

i. Develop and implement operating guidelines and instructions for the FLRA EEO programs;

ii. Make written materials available to all FLRA employees and applicants concerning all established EEO programs and the administrative and judicial procedures available to them, and post the names and business telephone numbers of all EEO counselors at each FLRA location;

iii. Develop EEO reports, as required;

iv. Manage the EEO counseling process, and incorporate alternative dispute resolution (ADR) procedures wherever deemed appropriate, to attempt to resolve matters at the lowest possible level and the earliest possible stage, and to provide a workable process of investigations, dispute resolutions, hearings, as necessary, and final decisions;

v. Participate with the Affirmative Action Director and other public and private sector employees, groups, and organizations in cooperative action to improve employment opportunities for all groups;

vi. Evaluate periodically the sufficiency and responsiveness of the EEO Program and report findings with recommendations to the Chairman;

vii. Evaluate the effectiveness of the FLRA non-EEO programs and procedures, including general personnel management, the Selective Placement Program, the Upward Mobility Program, etc., for factors which may impede EEO progress, and recommend improvements;

viii. Collaborate with the Affirmative Action Director in developing solutions to barriers related to recruitment, training, employee utilization, and career advancement with other individuals within the Agency, including the communication of the FLRA EEO policy to all sources of job candidates and solicitation of recruitment assistance from those sources on a continuing basis, and the evaluation and training of managers and supervisors to ensure their understanding and implementation of this Policy;

ix. Ensure that the FLRA makes reasonable accommodation regarding the religious beliefs of all employees and applicants when such accommodations can be made without undue hardship on the FLRA;

x. When authorized by the Chairman, make the final decision on discrimination complaints, and order such improvements as considered necessary; and

xi. When not authorized to make the final decision for the Chairman, review the record of a complaint before the final decision is made, and make recommendations to the Chairman, as appropriate.

c. Director, Affirmative Action Program. The Director of the Human Resources Division (HRD) is delegated the authority to maintain a continuing affirmative action program to promote equal employment opportunity. The FLRA Affirmative Action Program Director shall report directly to the Chairman and develop and implement affirmative plans that:

- i. Communicate the Agency's EEO policy and program to all sources of job candidates;
- ii. Work with Agency managers to develop solutions to problems of recruitment, training, employee utilization, and career advancement with other individuals within the FLRA;
- iii. Train managers and supervisors to ensure their understanding and implementation of the EEO Affirmative Action Program;
- iv. Collect and maintain accurate employment information on the race, national origin, sex, and disabilities of its employees to use in studies and analyses which contribute to achieving the Agency's EEO objectives; and
- v. Periodically evaluate the efficacy of the Agency Affirmative Action Program and report findings and recommendations to the Chairman.

d. EEO Counselors. EEO counselors are selected by the EEO Director. They make informal inquiries and seek solutions to informal complaints. These duties and responsibilities are collateral duties which are performed in addition to a counselor's regular duties. EEO counselors shall receive a minimum of 32 hours of appropriate training prior to assuming their counseling responsibilities, and shall receive a minimum of 8 hours training annually.

e. EEO Investigators. EEO investigators, including contract investigators where appropriate, are selected by the EEO Director and are responsible for timely investigating formal complaints of discrimination submitted by employees, those deemed employees for purposes of Title VII, or applicants of the FLRA. EEO investigators shall receive a minimum of 32 hours of appropriate training prior to performing EEO complaint investigations, and shall receive a minimum of 8 hours training annually.

f. Managers and Supervisors. All managers and supervisors are responsible for promoting and implementing the EEO program in their organizational units, and shall:

- i. Stay informed of all EEO program policies and procedures;
- ii. Comply with FLRA EEO policy as set forth in this Policy;
- iii. Ensure that employees working as collateral-duty EEO Counselors are provided an adequate amount of duty time to carry out their counseling responsibilities in a timely and effective manner;
- iv. Provide all employees and applicants equal opportunity within the

merit system in employment, development, career advancement, and treatment in their areas of responsibility;

v. Consult with the FLRA Director of Human Resources and/or the EEO Director on personnel management decisions with EEO implications;

vi. Provide an atmosphere free from discrimination;

vii. Make reasonable accommodations as required by law; and

viii. Cooperate with EEO Counselors and/or EEO Investigators in carrying out their EEO responsibilities.

g. Employees. Employees shall:

i. Keep informed of all EEO program policies and procedures as required by their job description or performance plan;

ii. Cooperate with supervisors and managers in carrying out their responsibilities in the EEO Program;

iii. Comply with FLRA EEO policy as set forth in this Instruction;

iv. Provide non-discriminatory treatment to all individuals with whom they are in contact while in the performance of their official duties; and

v. Cooperate with EEO Counselors and/or EEO Investigators in carrying out their EEO responsibilities.

B. GENERAL PROVISIONS FOR PROCESSING COMPLAINTS

1. **Coverage.** This section covers individual and class complaints of employment discrimination and retaliation, prohibited by Title VII, as amended, made by employees, former employees, those deemed employees for the purposes of Title VII, and applicants who believe they have been discriminated against because of race, color, religion, sex, national origin, age, disability, genetic information, and/or complaints of retaliation (reprisal), as described below:

a. **Race, Color, Religion, and National Origin.** Allegations of discrimination filed by members of protected categories and allegations of failure to accommodate religious needs.

b. **Sex.** Allegations of sex discrimination, including sexual harassment, gender identity, sexual orientation, pregnancy, and sex-based wage claims, filed by either women or men.

c. **Age.** Allegations of age discrimination filed by persons who were at least 40 years of age when the action complained of took place. (See 29 C.F.R. § 1614.201).

d. **Disability.** Allegations of discrimination based on physical or mental impairment, including alleged failures to make reasonable accommodations. (See 29 C.F.R. § 1630.2).

e. **Genetic Information.** Allegations of discrimination based on genetic information including an individual's genetic tests, genetic tests of family members, and family medical history.

f. **Retaliation (reprisals).** Allegations of reprisal in connection with: (i) opposing an Agency act or practice believed to be discriminatory; (ii) participating in the EEO process. (See 29 C.F.R. § 1630.12(a)).

2. **Effect of Regulations.** This Policy is intended to supplement the procedures found in 29 C.F.R. Part 1614 and in EEOC MD-110. Employees are advised to consult these resources, as well as this Policy. In the event there is a conflict between the provisions of this Policy and the applicable regulations, the regulations will govern.

3. **Employee Rights.** All employees, those deemed to be employees for purposes of Title VII, former employees, and applicants for employment have a right to file a discrimination complaint. Employees involved in the discrimination complaint process, including complainants, class agents, and witnesses, have the right to use a reasonable amount of official time under the administrative complaint process, and the right to be free from coercion, interference, intimidation, or reprisal. Individuals will be notified of their rights at each stage of the complaint process. (See section C - Individual Complaint Procedures).

4. **Representatives.** At any stage in the preparation and presentation of complaints or administrative appeals from decisions on complaints, complainants have the right to be accompanied, represented, and advised by a representative of their own choosing, including another FLRA employee, provided the choice does not involve a conflict of interest or position (e.g., an EEO counselor cannot also represent employees processing discrimination complaints), does not conflict with the priority needs of the FLRA, and does not give rise to unreasonable costs to the Government. A complainant or class agent must promptly notify the EEO counselor or EEO Director in writing of the representative's identity. Any changes must also be reported in writing to one of them. The FLRA will designate its Agency representative. The Agency representative may not be an EEO staff member, the alleged-responsible management official, or, in the case of a class complaint, a member of the class.

5. **Time Extensions.** A time limit may be extended if a complainant, agent, or claimant shows that: a) he/she was not notified and was not otherwise aware of the time limit; b) he/she did not know or reasonably should not have known that the alleged discriminatory action occurred; c) circumstances beyond his/her control prevented submission of the matter within the time limit; or d) for other reasons considered sufficient by the EEO Director. Time limits may also be reasonably extended for other reasons noted in the regulations. (See 29 C.F.R. §§ 1614.105(a)(2), 1614.105(e), 1614.105(f), and 1614.108(e)).

6. **Computation of Time.** Any time period specified in this chapter will be computed by counting as the first day the day following the event, such as the day after

receiving a notice. When the last day falls on a Saturday, Sunday, or Federal holiday, the time period will be extended to include the next business day. (See 29 C.F.R. § 1614.604).

C. INDIVIDUAL COMPLAINT PROCEDURES

1. **Pre-complaint Procedures.** An individual complainant who believes that he/she has been discriminated against must consult with an EEO counselor before filing a complaint in order to pursue an informal resolution of the matter. The counselor may not reveal the complainant's identity during the informal counseling process unless so authorized by the complainant. The counselor can be contacted through the EEO Director or by notifying one of the EEO counselors listed in the FLRA telephone directory. The counselor must be contacted within 45 calendar days of the alleged discriminatory action, the effective date of an alleged personnel action, or the date that complainant knew, or reasonably should have known, of the discriminatory action. In an attempt to resolve the issue on an informal basis, the counselor shall advise the complainant, in writing, at the initial counseling session, of his or her rights and responsibilities including:

- a. The right to pursue only those matters raised in the pre-complaint process in a subsequent complaint;
- b. The right to a hearing or an immediate Agency decision after an investigation;
- c. The right to elect among procedures for pursuing allegations of discrimination (see 29 C.F.R. §§1614.106, 1614.201, 1614.301, and 1614.302);
- d. The obligation to mitigate damages;
- e. The obligation to keep the FLRA and EEOC informed of his or her current address; and
- f. The obligation to serve copies of an appeal on the FLRA.
- g. The counselor shall also inform the complainant of administrative and judicial time limits. In addition, the counselor shall advise the complainant that, where the FLRA has deemed ADR appropriate, the complainant may choose either the ADR program or counseling. (See 29 C.F.R. § 1614.105). The FLRA ADR program is set forth and described in an Addendum to this Policy.

2. **Time Limits.** The counselor shall conduct the final interview within 30 calendar days of the date on which the complainant brought the matter to the counselor's attention. The 30-day counseling period may be extended for:

- a. Up to an additional 60 calendar days if the complainant and the FLRA agree to such an extension in writing; or
- b. 90 calendar days if the FLRA and the complainant agree to participate in an ADR procedure.

c. If the matter is not resolved to the satisfaction of the complainant, the counselor shall notify the complainant, in writing, of the right to file a complaint of discrimination up to 15 calendar days after complainant's receipt of the notice. The counselor shall also inform the complainant of the appropriate official with whom to file a complaint and of the complainant's duty to promptly inform the Agency if the complainant retains a representative. (See 29 C.F.R. § 1614.105(d)).

d. When advised that a complaint has been filed by an aggrieved person, the counselor shall submit a written report within 15 calendar days to the EEO Director and to the aggrieved person concerning the issues discussed and actions taken during counseling.

3. **Manner of Filing.** A complaint must:

a. Be signed by complainant, or complainant's representative, and submitted to the Chairman;

b. Describe the specific FLRA personnel management policy or practice giving rise to the complaint or the action that allegedly harmed the complainant; and

c. Be filed within 15 calendar days of the date of receipt of the notice referred to in section C.2. – Time Limits, above. The date of filing is the postmark date rather than when the complaint is received by the designated receiving official.

4. **Amendment of Complaints.** A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like those raised in the complaint. After requesting a hearing, a complaint may be amended only on motion to the administrative judge. (See 29 C.F.R. § 1614.106(d)).

5. **Transfer of Received Complaints.** Upon receipt of the complaint, the receiving official shall transmit it to the EEO Director, who shall acknowledge its receipt in accordance with paragraph C.6. – Acknowledgement of Complaint, below.

6. **Acknowledgment of Complaint.** The EEO Director shall acknowledge receipt of a complaint in writing, and shall inform the complainant of the date on which the complaint was filed. Such acknowledgment shall also advise the complainant that:

a. The complainant has the right to appeal the final decision or dismissal of all, or (subject to paragraph 7.c. – Where the FLRA determines..., below) a portion of, the complaint; and the FLRA is required to conduct a complete and fair investigation of the complaint within 180 calendar days of the filing of the complaint, unless the parties agree in writing to extend the period.

7. **Dismissal of a Complaint.**

a. Prior to a request for a hearing, the Chairman, or designee, shall dismiss an entire complaint for the reasons set forth in 29 C.F.R. § 1614.107, including where:

i. The complainant has failed to contact an EEO counselor, or has

raised a matter that has not been presented to the EEO counselor, and is unrelated to issues presented;

- (a)(2);
 - ii. The complaint is not timely filed (see 29 C.F.R. § 1614.107(a)(2));
 - iii. The complaint lacks specificity and detail;
 - iv. The complaint involves matters not subject to FLRA control;
 - v. The complainant fails to state a claim covered in this Policy (see 29 C.F.R. § 1614.107(a)(1));
 - vi. The claim is the same as one pending or previously decided by the FLRA or the EEOC (see 29 C.F.R. § 1614.107(a)(1));
 - vii. The claim relates to an issue that is moot, or an action that is in a preliminary stage (see 29 C.F.R. § 1614.107(a)(5));
 - viii. The complainant cannot be located, provided that reasonable efforts have been made to locate the complainant (see 29 C.F.R. § 1614.107(a)(6));
 - ix. The complainant has failed to: (a) proceed with the complaint without undue delay; or (b) respond to the Agency's request to provide relevant information, or otherwise proceed with the complaint (see 29 C.F.R. § 1614.107(a) (7));
 - x. The complainant has filed a civil action in a Federal district court (see 29 C.F.R. § 1614.107(a)(3));
 - xi. The complaint alleges dissatisfaction with the processing of a previously filed complaint (see 29 C.F.R. § 1614.107(a)(8)); and/or
 - xii. The complaint is part of a clear pattern of misuse of the EEO process. A clear pattern of misuse requires evidence of multiple complaint filings and (1) allegations that are similar or identical, lack specificity or involve matters previously resolved; or (2) evidence of circumventing other administrative processes, retaliating against the FLRA in-house administrative processes or overburdening the EEO complaint system. (See 29 C.F.R. § 1614.107(a)(9)).

b. If the Agency determines that the complaint does not meet the requirements of EEOC regulations, the Agency will give the complainant, and representative, if any, a written notice of proposed dismissal of the complaint, and an opportunity to respond, or to provide a specific explanation and/or relevant information in writing within 15 calendar days. If such an explanation or information is not received within the 15 calendar days, the complaint will be dismissed. The Agency will notify the complainant and his/her representative of its decision to dismiss the complaint. The content of the final decision is discussed in section 11 – Final Action by the FLRA, below. Allegations may be withdrawn, in writing, at any time.

c. Where the Agency determines that some, but not all, of the claims in a complaint should be dismissed, the Agency shall notify the complainant, and representative, if any, in writing of its determination, the rationale for that determination, and that those claims will not be investigated. A copy of this notice shall be placed in the investigative file. The determination is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but it is not appealable until final action is taken on the remainder of the complaint.

8. Investigation of Allegations.

a. The EEO Director shall provide for an independent, impartial, and prompt investigation of a complaint. An investigation is conducted in accordance with 29 C.F.R. § 1614.108 and shall include a complete and impartial review of:

- i. The circumstances under which the alleged discrimination occurred;
- ii. The treatment of members of the complainant's group as compared with the treatment of other employees in the same organization; and
- iii. Any work-related policies and practices that may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant.

b. Time Limits. The Agency will conduct a complete and fair investigation within 180 calendar days of the filing date of the complaint (29 C.F.R. § 1614.108(e)) or, where the complaint has been amended, within the earlier of 180 days after the last amendment of the complaint or 360 days after the original complaint was filed (29 C.F.R. § 1614.108(f)), unless otherwise directed when an appeal from dismissal is involved. An extension of time is authorized for not more than:

- i. 90 calendar days if the complainant and Agency agree in writing; and/or
- ii. 30 calendar days if the complaint file must be sanitized.

c. Authority of the Investigator. An investigator is authorized to:

- i. Investigate all aspects of the complaint;
- ii. Require all Agency employees to cooperate in the conduct of investigations;
- iii. Obtain sworn statements from Agency employees who have knowledge of the events surrounding the complaint;
- iv. Obtain certified copies of relevant documents and information about a person's membership, or non-membership, in a complainant's group; and/or

v. Where appropriate, when a party fails to provide requested information: (1) draw an adverse inference against the uncooperative party; (2) establish the matter to which the requested information relates in favor of the opposing party; (3) exclude other evidence submitted by the uncooperative party; (4) issue, in whole or in part, a decision in favor of the party opposing the uncooperative party; or (5) take other appropriate action. (See 29 C.F.R. § 1614.108(c)(3)).

d. **Report of Investigation.** A report of investigation will contain relevant documents and information, including affidavits or other sworn statements acquired during the investigation. A copy of the report of investigation will be furnished to the complainant or complainant's representative with a notice of complainant's right to an EEOC hearing or an immediate final FLRA decision without a hearing. The complainant must notify the EEO Director in writing of his/her choice within 30 calendar days of receiving the investigation file. If complainant does not notify the Agency within the 30-day period, the final FLRA decision may be issued.

9. **Hearings.** A hearing will be conducted when requested by the complainant, in writing, within the time limits specified in 29 C.F.R. § 1614.108(f). When a complainant requests a hearing, the FLRA shall request the EEOC to appoint an administrative judge to conduct the hearing. Procedures for the hearing can be found at 29 C.F.R. § 1614.109 and EEOC MD-110, Chapter 7. Where there is no issue of material facts, findings and conclusions may be issued without a hearing or other appropriate action may be taken. (29 C.F.R. § 1614.109(g)). Absent good cause, the administrative judge will issue a decision, and, where discrimination is found, order appropriate relief, within 180 calendar days of receipt by the administrative judge of the complaint file.

10. **Offer of Resolution** (see 29 C.F.R. § 1614.109(c)).

a. The Agency may make an offer of resolution:

i. To a complainant represented by an attorney, at any time after the filing of a formal complaint, until 30 calendar days prior to a hearing, or

ii. To a complainant not represented by an attorney, at any time after the appointment of an administrative judge, but not later than 30 calendar days prior to the hearing.

b. An offer of resolution must be in writing and provide:

i. An explanation of the possible consequences of failing to accept the offer;

ii. Attorney's fees and costs, as of the date of the offer;

iii. Any specific non-monetary relief; and

iv. Any monetary relief, which may be offered as a lump sum, or may be itemized as to amounts and types.

c. The complainant shall have 30 calendar days from receipt of the offer to accept it. If the complainant does not accept the offer and the relief ultimately awarded, whether by an administrative judge, the FLRA, or the EEOC, is not more than the offer, the complainant may not recover attorney's fees or costs incurred after the end of the 30-day acceptance period. However, the EEOC may, in unusual circumstances, find that equitable considerations make it unjust to withhold such attorney's fees and costs.

d. An acceptance of an offer of resolution must be in writing and be postmarked or received by the Agency within the 30-day period.

11. **Final Action by the FLRA.** The Chairman, or designee, shall take the following final FLRA action on complaints based on information in the complaint file.

a. Where an administrative judge has issued a decision, the FLRA shall issue a final order within 40 calendar days after receipt of the judge's decision.

i. The final order shall notify the complainant whether or not the Agency will implement the decision and order of the administrative judge, and must inform the complainant of the right of appeal, the right to file a civil action, applicable time limits, the name and address of the EEOC official with whom to file an appeal, and the name of the proper defendant in a civil action. A copy of the EEOC Form 573, Notice of Appeal/Petition, shall be attached. (See sections P – Civil Actions, and Q – Confidentiality, below);

ii. If the final order does not fully implement the administrative judge's decision and order, the Agency shall simultaneously file an appeal with the EEOC and append a copy of the appeal to the final order.

iii. If the Agency fails to issue a final order within the 40-day period, the decision of the administrative judge becomes the final action of the Agency.

b. When the Agency dismisses a complaint in its entirety, receives a request for a final decision or does not receive a response to the notice referenced in section C.7 – Dismissal of a Complaint, above, it shall issue a final decision. The final decision shall include:

i. Findings on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint;

ii. When there is a finding of discrimination, appropriate remedies and relief in accordance with 29 C.F.R. § 1614.501; and

iii. When there is a finding of discrimination, the complainant and complainant's representative will be notified that in order to request attorney's fees or costs, a verified statement of costs and fees accompanied by an affidavit, executed by the attorney, must be submitted to the Agency within 30 calendar days of receipt of the final decision. (See section O – Appeals to the EEOC, below).

c. **Time Limits.** The Chairman, or designee, shall issue a final decision within 60 calendar days after:

- i. Receiving a request for an immediate final FLRA decision;
 - ii. The 30-day period for requesting a hearing or an immediate final FLRA decision has expired, and the complainant has requested neither a hearing nor a final FLRA decision.
- d. **Transmittal of Decision.** The final decision shall be transmitted to the complainant and complainant's representative by a method that will show the date of issuance and receipt.

D. **MIXED CASES**

1. **Choice of Procedures.** Where a personnel action is appealable to the MSPB, an employee may appeal to the MSPB or file a discrimination complaint, but not both. The choice is made when a timely appeal is filed with the MSPB, or a formal complaint of discrimination is filed with the FLRA. (See 29 C.F.R. § 1614.302).

2. **Mixed Case Appeals.** When an individual elects to file a mixed case appeal with the MSPB, the matter is processed pursuant to MSPB procedures. (See 5 C.F.R. § 1201).

3. **Mixed Case Complaints.** When an individual elects to file a formal discrimination complaint with the FLRA, it is processed pursuant to section C – Individual Complaint Procedures, above, with the following exceptions:

- a. A complainant's appeal from a final FLRA decision and request for a hearing is made to the MSPB, not the EEOC;

- b. A final FLRA decision shall be made within 45 calendar days after completion of the investigation without a hearing; or

- c. If a final FLRA decision is not issued within 120 calendar days from the filing of a formal complaint, an employee may appeal to the MSPB at any time thereafter as specified at 5 C.F.R. § 1201.154((b)(2)), or may file a civil action as specified at 29 C.F.R. § 1614.310(g), but not both.

4. **Dismissal of Mixed Case Complaints.** Mixed case complaints shall be dismissed for the reasons specified in section C.7 – Dismissal of a Complaint, above, and additionally shall be dismissed if the complainant has made a prior election of the MSPB procedures. (29 C.F.R. § 1614.302(c)(2)).

5. **Petition for Review of Final MSPB Decisions Involving Allegations of Discrimination.** An individual who has been before the MSPB with a matter involving allegations of discrimination and has received a final MSPB decision may petition the EEOC to consider the MSPB decision on the discrimination issues within 30 calendar days after receipt of notice of the final MSPB decision, or within 30 calendar days after the decision of an MSPB field office becomes final. (See 29 C.F.R. § 1614.303).

6. **Review Procedures.** The procedures governing petitions for review of final MSPB decisions are set forth in 29 C.F.R. § 1614.303-305.

E. **GRIEVANCE PROCEDURES.** The FLRA's administrative grievance procedure does not permit the filing of grievances over matters covered by this Policy.

F. **AGE DISCRIMINATION COMPLAINT PROCEDURES**

1. **Administrative Complaint.** An individual within the protected age group may choose to use either the EEO complaint procedure, or mixed case procedures, as applicable to the circumstances of the case.

2. **Civil Action.** As an alternative to filing a complaint, an aggrieved individual may bypass the administrative complaint process and file a civil action directly in an appropriate United States district court. (See section P.3.c. – Age Complaints, and 29 C.F.R. § 1614.201(a)).

G. **CLASS COMPLAINT PROCEDURES** (see 29 C.F.R. § 1614.204)

1. **Pre-complaint Procedures.** Paragraph C.1. – Pre-complaint Procedures, above, applies to class complaints, with the following exceptions:

- a. An employee or applicant who wishes to pursue a class complaint will be the agent of the class (hereinafter referred to as "agent"); and
- b. The counselor shall explain class complaint procedures and the agent's responsibilities.

2. **Manner of Filing.** Paragraph C.3. – Manner of Filing, above, applies to class complaints, with the following exceptions:

- a. The term "agent" is substituted for complainant; and
- b. The complaint must describe the policy or practice adversely affecting both the class and agent.

3. **Acceptance or Dismissal of a Complaint.**

a. Within 30 calendar days of the Agency's receipt of a complaint, the EEO Director will forward the complaint, a copy of the EEO counselor's report, relevant information, and Agency recommendations to the EEOC. The EEOC will assign the complaint to an administrative judge. The administrative judge may dismiss the complaint for any of the reasons found in paragraph C.7. – Dismissal of a Complaint, above, or because the complaint does not meet the prerequisites of a class complaint.

b. The administrative judge will transmit the decision to accept or dismiss the class complaint to the Agency and the agent. The FLRA must issue its final order within 40 calendar days of receipt of the administrative judge's decision.

i. The final order shall notify the agent whether or not the Agency will implement the decision and order of the administrative judge, and must inform the agent of the right of appeal, the right to file a civil action, applicable time limits, the name and address

of the EEOC official with whom to file an appeal, and the name of the proper defendant in a civil action. A copy of the EEOC Form 573, Notice of Appeal/Petition, shall be attached. (See sections P – Civil Actions, and Q – Confidentiality, below).

ii. If the final order does not fully implement the administrative judge's decision and order, the Agency shall simultaneously file an appeal with the EEOC and append a copy of the appeal to the final order.

iii. If the Agency fails to issue a final order within the 40-day period, the decision of the administrative judge becomes the final action of the FLRA.

iv. A dismissal of a class complaint shall inform the agent either that the complaint is being accepted as of that date as an individual complaint to be processed under section C – Individual Complaint Procedures, above, or that the complaint is also being dismissed as an individual complaint.

c. Within 15 calendar days of receiving notice that the administrative judge has accepted a class complaint (or a reasonable time set by the administrative judge), the FLRA shall, by reasonable means, notify all class members of the acceptance of a class complaint.

4. **Obtaining Evidence.**

a. Once the class complaint is accepted, the agent, or the agent's representative, and the Agency representative shall be given a period of at least 60 calendar days to prepare their cases and develop evidence through accepted discovery techniques. The time for developing evidence may be extended, upon the request of either party, by the administrative judge.

b. If cooperative efforts fail, either party may request a ruling from the administrative judge on a request to develop evidence. Failure to comply with such a ruling without good cause may result in the administrative judge's action(s) set forth at 29 C.F.R. § 1614.204(f).

c. During the period for development of evidence, the administrative judge may direct that an investigation of facts relevant to the complaint be conducted by an outside Agency certified by the EEOC, and that a copy of that investigative file be given to the representatives of each party.

5. **Opportunity for Resolution.** After the evidence is developed, the administrative judge shall furnish the agent, or the agent's representative, and the Agency representative a copy of all pertinent documents and provide opportunities for discussion and resolution. Any resolution will be reduced to writing, signed by the agent and/or class representative, and the Agency's representative. The complaint may be resolved at any time pursuant to the notice and approval provisions set forth below.

a. Notice. If a resolution is proposed, notice must be given, where possible, to all members of the class. The notice must include a copy of the proposed resolution, set out the relief, if any, the Agency will grant, and inform the class members that the resolution will

bind all class members. The notice must also inform the members of the right to object to the resolution to the administrative judge within 30 days of receipt of the notice.

b. **Approval.** The Agency will provide the administrative judge with the proposed resolution and the notice sent to the class members. If the administrative judge determines that the resolution is not fair, adequate and reasonable, the agreement between the class agent and the Agency will be vacated. The class agent, class members and the Agency may appeal the determination to the EEOC. If the administrative judge determines that the resolution is fair, adequate and reasonable, the resolution becomes binding. Any class member who filed objections to the proposed resolution may appeal the administrative judge's decision.

6. **Hearings.** A hearing shall be conducted in accordance with 29 C.F.R. § 1614.109 (a)-(f).

7. **Findings and Recommended Decision.** The EEOC will send the hearing record, analysis and findings, and recommended decision on the complaint to the FLRA Chairman, or designee, and will notify the agent of the date on which this was done.

8. **Final FLRA Decision.** Within 60 calendar days of receipt of the administrative judge's findings and recommendations, the Agency must issue a decision to accept, reject, or modify those findings and recommendations. If the Agency does not issue a decision within 60 calendar days, the administrative judge's findings and recommendations become the decision of the Agency. The decision shall be served on the class agent within 5 calendar days after the expiration of the 60-day period.

a. If the final FLRA decision dismisses the class element of the complaint, the allegations of individual discrimination shall be processed under section C – Individual Complaint Procedures, above.

b. A final decision finding discrimination is binding on the class. A finding of no discrimination is not binding on a class member's individual complaint.

c. The Agency shall notify class members of the final decision and the relief awarded, if any, through the same medium used to give notice of the existence of the class complaint and within 10 calendar days of transmittal of the decision to the agent.

H. **COMPLAINTS BASED ON PHYSICAL OR MENTAL DISABILITY**

1. The Agency shall make reasonable accommodation to the known physical or mental disability of a qualified applicant or employee unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its program. (See 29 C.F.R. § 1630.2(o)(4) or FLRA Policy 3891 Reasonable Accommodation for Individuals with Disabilities).

2. Reasonable accommodation may include, but shall not be limited to:

- a. Making facilities readily accessible to, and usable by, disabled persons;
- b. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies;
- c. Provision of readers and interpreters, or other similar actions.

3. In determining whether an accommodation would impose an undue hardship on the operation of the Agency, factors to be considered include: (a) the overall size of the Agency's program with respect to the number of employees, number and type of facilities, and budget; (b) type of Agency operation, including the composition and structure of the Agency's work force; and (c) the nature and cost of the accommodation.

I. COMPLAINTS OF RETALIATION (REPRISAL)

1. **Manner of Filing.** Any employee who believes he/she has suffered retaliation (reprisal) based on his/her:

- a. Opposition to discriminatory FLRA policies or practices; and/or
- b. Participation in a discrimination complaint procedure, may file formal charges of retaliation (reprisal). Allegations of retaliation (reprisal) may be processed as an individual complaint of discrimination, or as a mixed case if related to an Agency action which is appealable to the MSPB. (See sections C – Individual Complaint Procedures, D – Mixed Cases, and E – Grievance Procedures, above).

2. **Allegations at Hearing Stage.** If a complainant alleges coercion, interference, intimidation, discrimination, or reprisal, during the hearing stage, the EEOC may consolidate the allegations with any pending complaint.

J. COMPLAINTS AGAINST THE CHAIRMAN, THE EEO DIRECTOR, OR AN EEO COUNSELOR

1. **Chairman.** When the FLRA Chairman is named in an individual capacity in a complaint of discrimination, a designee named by the Chairman will take any action that is otherwise the primary responsibility of the Chairman.

2. **EEO Director or EEO Counselor.** The EEO Director and EEO counselors shall not participate in the complaint process if named in any capacity in a complaint of discrimination. The EEO Director shall notify the FLRA Chairman of his/her disqualification and shall refer the complaint file to the Chairman. The Chairman shall designate a person to receive and process the complaint.

K. COMPLIANCE WITH SETTLEMENT AGREEMENTS

1. When a complainant believes that the Agency has failed to comply with the terms of a settlement agreement, he/she must notify the EEO Director in writing, within 30 calendar

days of when he/she knew or should have known of the alleged noncompliance. (See 29 C.F.R. § 1614.504 and paragraph O.4. – Time Limits, below; MD-110, Chap. IX, F.). The complainant may request that the agreement be specifically implemented or that the complaint be reinstated.

2. The Agency shall respond to the complainant in writing. If the Agency fails to respond or the complainant is dissatisfied with the response, the complainant may appeal to the EEOC in accordance with 29 C.F.R. § 1614.504. The complainant may file an appeal 35 calendar days after serving the EEO Director with the allegations of noncompliance, but must file an appeal within 30-days of the Agency response.

L. COMPLAINTS ALLEGING VIOLATION OF THE EQUAL PAY ACT

1. Complaints alleging violation of the Equal Pay Act may be filed as an individual or class complaint. (See sections C – Individual Complaint Procedures, and G – Class Complaint Procedures, above, 29 C.F.R. § 1614.202, and C.F.R. § 1614.409).

2. In its enforcement of the Equal Pay Act, the EEOC has the authority to investigate FLRA employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act. The EEOC will provide notice to the Agency when it will be initiating an investigation.

M. CONSOLIDATION AND JOINT PROCESSING OF COMPLAINTS (see 29 C.F.R. § 1614.606)

1. Complaints filed by different persons relating to the same or similar issues may, after appropriate notice to the parties, be consolidated for joint processing.

2. Two or more complaints of discrimination filed by the same individual shall be consolidated after appropriate notice to the complainant. There is one investigation, one attempted informal adjustment, one proposed disposition, and one hearing when complaints have been joined for processing.

N. ATTORNEY’S FEES AND COSTS (29 C.F.R. § 1614.501(e))

1. The Agency is authorized to award reasonable attorney’s fees or costs incurred in the processing of an administrative complaint when there is a finding of discrimination or retaliation (reprisal), as follows:

a. Attorney’s fees may be awarded for services performed after the filing of the complaint and after the complainant has notified Agency that (s)he is represented; and

b. Attorney’s fees may be awarded only to members of the bar and law clerks, paralegals, or law students under the supervision of members of the bar. No fees may be awarded, however, for the services of any employee of the Federal Government.

2. The amount of the attorney’s fees and costs is determined under 29 C.F.R. § 1614.501(e). If the Agency determines not to award attorney’s fees or costs to a prevailing

complainant, it will give specific reasons for denying the award. Attorney's fee awards may be appealed to the EEOC. (See section O – Appeals to the EEOC, below).

O. APPEALS TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1. **Procedures.** The procedures governing appeals on individual and class complaints and grievances (if applicable) are found at 29 C.F.R. § 1614.401-405. A written appeal must be submitted by mail, personal delivery or facsimile ((202) 663-7022) to the Director, Office of Federal Operations, EEOC, P.O. Box 77960, Washington, D.C. 20013. The complainant should use EEOC Form 573, Notice of Appeal/Petition, and describe the FLRA decision giving rise to the appeal. (See 29 C.F.R. § 1614.403(a)).

2. **Appealable Matters.** Appealable matters include:

- a. Dismissal of an entire complaint;
- b. The final FLRA decision on the merits and/or partial dismissal of the complaint;
- c. The award of attorney's fees or costs; and
- d. Failure to comply with the terms of a settlement agreement. (See 29 C.F.R. § 1614.504).

3. **Non-appealable Decisions.** A complainant may not appeal to the EEOC when:

- a. The Agency dismisses some but not all claims in a complaint;
- b. A determination has not been made on all issues in the complaint;
- c. The issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the EEOC;
- d. A final FLRA decision has been issued on the merits of the mixed case complaint; or
- e. An FLRA decision rejects or cancels a mixed case complaint, unless a misapplication of procedures is alleged.

4. **Time Limits.**

- a. **FLRA Decisions.** A complainant may appeal any matters, outlined in paragraph O.2. – Appealable Matters, to the EEOC within 30 calendar days of receiving the dismissal or final decision. If there is an attorney of record, the 30-day period will run from the day the attorney received the dismissal or final FLRA decision. Time limits may be extended, at the discretion of the EEOC Office of Federal Operations, upon a showing that complainant was not notified of the time limit and was not otherwise aware of it, or that

circumstances beyond his/her control prevented the filing of an appeal within the time limit.

b. **Non-compliance Complaint.** If the Agency fails to respond, in writing, within 30 calendar days of receipt of allegations of noncompliance, or if complainant is not satisfied with the Agency's attempt to resolve the allegations, the complainant may appeal to the EEOC. A complainant may file an appeal 35 calendar days after the service of the allegations of noncompliance, but must file within 30 calendar days after receiving the final FLRA decision.

5. **Briefs.** Any statement or brief in support of the appeal must be submitted to EEOC and FLRA representatives within 30 calendar days of filing the appeal.

P. **CIVIL ACTIONS** (see 29 C.F.R. §§1614.407-409)

1. **Statutory Rights.** The FLRA will notify complainants, agents, and claimants, of the right to file civil actions and the applicable time frames.

2. **Proper Defendant.** When a civil action is filed, the FLRA Chairman is the appropriate official to be named as defendant in captioning the complaint.

3. **Time Limits.**

a. **Individual and Class Complaints and Claims.** A complainant or class agent may file a civil action alleging Title VII, Age Discrimination in Employment Act, or Rehabilitation Act violations in an appropriate Federal district court:

i. Within 90 calendar days of receiving notice of the final FLRA decision on a complaint or claim where no appeal has been filed;

ii. After 180 calendar days of filing a complaint or claim with the Agency, if there has been no decision on the complaint or claim;

iii. Within 90 calendar days of receiving the final EEOC decision on an appeal; or

iv. After 180 calendar days of filing an appeal with the EEOC, if there has been no final EEOC decision. (See 29 C.F.R. § 1614.407).

v. A complainant or class agent may file a civil action alleging violation of the Equal Pay Act in an appropriate Federal district court within two years or, if the violation is willful, within three years of the alleged violation. (See 29 C.F.R § 1614.408).

b. **Mixed Case Complaints.** A mixed case complainant may file a civil action in an appropriate Federal district court within 30 calendar days of receiving:

i. The final FLRA decision, unless an appeal is filed with MSPB;

ii. The MSPB decision, unless a petition for consideration is filed with the EEOC;

- iii. The EEOC decision not to consider the MSPB decision;
- iv. The EEOC concurrence with the MSPB decision;
- v. The MSPB concurrence and adoption of the EEOC decision, if the EEOC differs from the MSPB decision; and
- vi. The Special Panel decision, if MSPB disagrees with the EEOC decision and reaffirms its initial decision with or without revisions.
- vii. A civil action may also be filed:
 - (1) After 120 calendar days of filing a complaint with the Agency if there has been no final FLRA decision on the complaint;
 - (2) After 120 calendar days of filing an appeal with MSPB if there has been no decision on the appeal; or
 - (3) After 180 calendar days of filing a petition for consideration with EEOC if there is no decision by the Commission, reconsideration decision by the MSPB, or decision by the Special Panel. (See section D – Mixed Cases, above, and/or 29 C.F.R. § 1614.310).
- c. Age Complaints. A complainant or agent may serve the EEOC with a notice of intent to file a civil action, and after 30 calendar days, may file a civil action in an appropriate Federal district court. The notice of intent must be filed within 180 calendar days after the alleged discriminatory act occurred. (See 29 C.F.R. § 1614.201).

Q. **CONFIDENTIALITY**

- 1. **Pre-complaint Process.** The identity of an aggrieved person will be maintained on a confidential basis in the pre-complaint process unless the person authorizes the counselor to reveal the person's identity.
- 2. **Post-complaint Process.**
 - a. The complainant, the complainant's representative, and the Agency representative will be provided copies of the complaint file and the investigative report.
 - b. Information and documents may also be disclosed to a witness who is a Federal employee where the investigator determines that the disclosure of the information is necessary to obtain further information from the witness (see MD-110, Chapter 6, § VIII.A.).

R. **USE OF OFFICIAL TIME AND RESOURCES**

- 1. **Official Time and Resources.** FLRA employees involved in the complaint process, such as complainants, agents, witnesses, and representatives, have the right to use a reasonable amount of official duty time and Agency resources, including library research,

copy machines and office supplies, as needed, to prepare a complaint under this Policy.

2. **Reasonable** refers to the time necessary to allow a complete presentation of information associated with the complaint. The time will vary depending on the nature and complexity of the complaint and the Agency's need to have its employees available to perform their normal duties on a regular basis.

3. **Official duty time** refers to time used during working hours without charge to leave or loss of pay.

a. Employees who do not request anonymity during pre-complaint procedures or who file a formal complaint must get advance approval from their immediate supervisors to use official time prior to meeting with EEO personnel.

b. Employees who request anonymity during pre-complaint procedures must use annual leave, or schedule meetings with EEO personnel before or after regular office hours or during scheduled lunch periods.

This policy is effective on March 22, 2019.

A handwritten signature in black ink that reads "William Tosick". The signature is written in a cursive style with a large, looping flourish above the name.

William Tosick
Executive Director

Addendum

FLRA Alternative Dispute Resolution (ADR) for EEO Disputes

The FLRA ADR program provides an alternative to the informal counseling process and an option during the formal complaint process, currently provided for in the EEOC regulations codified in 29 C.F.R. Part 1614. This ADR program supersedes all other existing EEO-related ADR programs at the Agency.

A. INTRODUCTION

1. The ADR program as described below will be administered in a manner that is consistent with the core principles as outlined in the EEOC Management Directive (MD-110), including fairness, flexibility, and an emphasis on training and evaluation.
2. The FLRA ADR program includes but is not limited to, mediation, and is available as an alternative to informal EEO counseling, or during the formal complaint process, for aggrieved persons who believe they have been discriminated against based on race, color, religion, sex (including sexual harassment), national origin, age, disability (mental and/or physical), genetic information, and retaliation (reprisal), coercion or intimidation as referenced in the FLRA EEO Policy (to which this ADR program notice is attached).
3. The ADR program is designed to settle disputes without litigation or administrative adjudication. ADR is intended to address individual disputes within a reasonable period at the informal stage of the EEO process by using trained mediators to facilitate resolution. If ADR is chosen during the informal counseling stage, the initial 30 day informal period is extended to 90 calendar days. This replaces the informal counseling process. The second opportunity for ADR is during the formal complaint process. A formal complaint must be timely filed, and if ADR is requested during that stage of the process, the time period for processing the complaint may be extended by agreement for not more than 90 days. If the dispute is not resolved, the complaint must be processed within the extended time period.
4. The aggrieved person may request ADR, or its use may be recommended by a management official or an EEO counselor.
5. Participation in the ADR program by the aggrieved person is strictly voluntary. However, when the aggrieved person elects to participate in the ADR program, appropriate management officials are required to participate in this program as well. Management will abide by the procedural requirements of the ADR program. The Agency will designate management officials who have the authority to enter into a settlement agreement. This official with settlement authority will not be the official directly involved in the case. As explained below, the aggrieved person and FLRA management are entitled to be represented throughout the ADR process.
6. Due to the voluntary nature of this process, the aggrieved person can terminate ADR after sessions have begun. Participants are advised that this is an alternative process, and therefore all EEO processes are still available if ADR is not successful.

B. DIFFERENCES BETWEEN INFORMAL COUNSELING AND MEDIATION

1. **EEO Counseling.** During the informal counseling period, an EEO counselor works with the aggrieved person and management to gather information on the matter and attempts to resolve the dispute. If the matter is not resolved during this period, the EEO counselor writes a counseling report that documents the alleged discrimination and any attempts at settlement. The counseling report must detail the issue(s), basis of discrimination claimed, and address any other jurisdictional questions. The counseling report is subsequently used in the processing of the formal complaint to determine the scope of the complaint. Counselors are trained to gather information (interview witnesses and gather records and documents) about the matter in order to effectively write the counseling report. The EEO counselor generally focuses on gathering information from each individual separately. Informal resolution efforts by the counselor are usually pursued by circulating information and resolution proposals between the parties rather than directly holding joint discussions.

2. ADR

a. ADR involves alternatives to formally established processes, usually litigation, for resolving disputes. In the context of EEO processes, ADR generally provides an alternative to the traditional informal EEO counseling and/or formal complaint processes. ADR usually involves a third-party neutral such as a mediator or facilitator working with the parties in dispute to facilitate communication and to assist them in working toward a resolution of their dispute. Generally, the third-party neutral is a process expert, skilled in a particular type of ADR.

b. The FLRA ADR program is available at any time during the EEO process. However, the objective is to seek informal resolution of alleged employment discrimination through the Agency EEO process at the earliest possible time while not infringing upon the rights guaranteed under 29 C.F.R. Part 1614.

c. Mediators are neutral third parties whose focus is to facilitate communication and problem solving by the individual disputants. Mediators work to identify common ground between the parties and help them develop options for resolving their dispute. The mediator is someone from outside the disputants' office/organization who has no interest in the matter. The mediator meets with the disputing parties and their representative(s) (if any) jointly to discuss the issues and ways of possibly resolving the dispute.

d. The mediator may meet separately with the parties, namely the management representative with authority to settle on behalf of the FLRA and with the aggrieved person with any representative, to further discuss the issues and explore possible settlement options privately. The mediator may carry settlement offers between the parties. Mediators do not evaluate the merits of the matters in dispute or the fate of the potential case if the matter is not resolved through mediation and is pursued through the formal complaint process and litigation in the courts. However, the mediator may provide information about the resolution of similar disputes. The parties retain complete control over the outcome. The parties decide whether or not to continue with mediation, whether or not to resolve the matter through a settlement agreement, and how to fashion the terms of their agreement. Mediation is a confidential process, as more fully discussed in section D, below. The mediator does not keep records or write reports or otherwise disclose anything about the mediation proceedings. Because they have no role in documenting the matter, mediators do not engage in fact-finding activities. If the mediation does not result in a resolution

of the matter during the informal stage, the EEO Counselor will be informed only that mediation has not resolved the dispute. Thereafter, the aggrieved person will receive written notice from the EEO counselor that if he/she wishes to go forward with the dispute, a formal complaint must be filed with the EEO Director. The mediator will play no role in advancing the EEO process. Mediation may continue, however, into the formal stage of the complaint process so long as a formal written complaint has been timely filed.

C. ADR PROGRAM COVERAGE. This ADR program covers EEO disputes initiated by all current employees, those deemed employees for purposes of Title VII, former employees concerning matters arising during their employment, and applicants for FLRA employment. Also, the program covers aggrieved persons who are currently involved in the pre-complaint counseling stage. However, for the latter instances, the pre-complaint process cannot extend the period for filing a formal EEO complaint beyond the 90 day period (discussed during the introduction of this addendum) provided in 29 C.F.R. Part 1614 for informal counseling. Even if the aggrieved person files a formal complaint, any informally initiated ADR process may continue, if all parties agree.

D. CONFIDENTIALITY

1. In general, a mediator is prohibited from disclosing any dispute resolution communication or any communication provided to the mediator in confidence, including personnel data, such as performance evaluations. A dispute resolution communication is any oral or written communication prepared for purposes of a proceeding under this program, except any written agreement to mediate or any final written agreement reached as a result of this program. Unless the communication falls within one of the exceptions discussed below, the mediator cannot voluntarily disclose the communication and cannot be forced to disclose the communication through a discovery request or other compulsory process.

2. A mediator may disclose a communication if all parties and the mediator agree in writing to the disclosure. A mediator may disclose a communication if the communication already has been made public. A mediator may disclose a communication if there is a statute that requires the communication to be made public. A mediator may disclose a communication if so ordered by a court. Courts may order disclosure upon finding that the mediator's testimony or the disclosure is necessary to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health and safety. Courts may require disclosure upon determining that the need for disclosure outweighs the detrimental impact on the integrity of dispute resolution proceedings in general.

3. The aggrieved person is advised that these provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (a) classified information, (b) communications to Congress, (c) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (d) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

4. The EEO Director or his/her designee will assure that all aggrieved parties and mediators are familiar with these confidentiality provisions.

E. **PROCEDURES.** The procedures for electing either mediation or the traditional EEO counseling process are outlined below. These procedures also apply where mediation is elected after a formal written EEO complaint has been filed.

1. As set forth in the EEO Policy, when an aggrieved person timely contacts an EEO Counselor alleging specific grounds for believing that unlawful discrimination has occurred, the EEO Counselor will inform the aggrieved person of the ADR option and provide him/her with a copy of the ADR program. If deemed necessary, the aggrieved person may contact the EEO Director for further explanations concerning how ADR works generally.

2. The EEO Counselor will also advise the aggrieved person of his or her rights and responsibilities in the EEO process, as set forth in 29 C.F.R. § 1614.105(b).

3. The initial contact with the EEO Counselor will start the time limits provided in EEOC regulations for informal counseling. If the person elects to use ADR instead of counseling, the 30-day informal counseling period shall be extended to 90-days.

4. If the aggrieved person chooses to use ADR, he or she must fill out the ADR Request Form (Form A).

5. The EEO Counselor will contact the EEO Director for assistance in obtaining names of mediators within 5 working days of the notification that ADR has been chosen by the aggrieved person. Mediators must be mutually agreeable to the aggrieved person and the appropriate management official(s).

a. Mediators will come from the following sources:

i. The Federal Sharing Neutrals Program, and/or

ii. The private sector.

b. All mediators must meet minimum training and qualification requirements as defined in the EEOC Management Directive (MD)-110.

6. The EEO Director will coordinate the mediation effort, having primary responsibility for logistical arrangements. The EEO Director is responsible for the overall management of the ADR program. He or she develops and maintains trained staff to implement the ADR program and ensures that the ADR program is in compliance with applicable EEOC and OPM regulations. The EEO Director arranges for mediators and manages, implements, and evaluates the ADR process.

7. The mediation process will commence by the mediator contacting the aggrieved person (and representative, if any) and the appropriate management official with settlement authority to schedule the mediation session. When the parties to the dispute convene, they will sign an Agreement to Mediate (Form B). Per MD-110, the alleged discriminating management official cannot be the management official with settlement authority. By signing the agreement, the parties indicate that they understand the mediation process and the conditions and procedures of participation. After electing to participate in the mediation process, the aggrieved person may opt-out of the process at any time.

8. If mediation successfully resolves the EEO dispute, the parties will execute a Mediation Settlement Agreement describing the resolution of the dispute. (Form C serves as an example of such an agreement). The mediator will notify the EEO counselor that the dispute has been resolved so that the counselor can close the case. An aggrieved person cannot file an EEO complaint concerning anything said or done during attempts to resolve the dispute through ADR, including the Agency's failure to provide a neutral. Allegations by an aggrieved person that the Agency has not complied with the terms of the Mediation Settlement Agreement shall be handled in accordance with 29 C.F.R. § 1614.504 (see also MD-110, Ch. IX), beginning with the aggrieved person's notice to the EEO Director, in writing, of the alleged non-compliance within 30-days.

9. If mediation in the informal stage is unsuccessful, the mediator will report the outcome (without specifics) to the EEO Director and will indicate on the Mediator Reporting Form (Form D) that no resolution was reached. The EEO Director will then contact the EEO Counselor of record and ask him/her to prepare the Notice of Final Interview/Right to File a Formal Discrimination Complaint and the EEO Counselor's Report as referred to in the FLRA EEO Policy. The latter report will specify the aggrieved person's alleged grounds of discrimination, and will reflect that the aggrieved person was offered and accepted ADR, in lieu of counseling, but that such efforts at informal resolution were unsuccessful.

10. The EEO Counselor will provide the aggrieved person with two copies of the Counselor's report, the Notice of Final Interview, the Notice of Right to File a Formal Discrimination Complaint, and the Complaint Form. The EEO counselor will advise the aggrieved person that if he or she elects to file a complaint of discrimination on any of the grounds previously raised, it must be filed within 15 calendar days of receipt of the Notice of Right to File a Discrimination Complaint.

11. If the aggrieved person has opted for EEO counseling rather than ADR mediation during the informal stage of the EEO process, he or she still may choose to invoke mediation after a formal written EEO complaint has been timely filed (see paragraph 10, above) by so notifying the EEO Director in writing. The same procedures governing ADR at the informal stage also apply after a formal EEO complaint has been filed, except that if mediation is successful, the EEO Director upon being so notified will take the necessary steps to close the case by advising the EEO investigator, the EEOC, and/or the FLRA representative responsible for preparing a final agency determination, as appropriate. If mediation of the formal complaint is unsuccessful, the complaint must be processed within the applicable time period as extended by the 90 days during which ADR procedures were in effect.

F. **IMPLEMENTATION.** The ADR program will be implemented and training will be conducted through a variety of methods designed to involve employees and inform them about mediation as an alternative to EEO counseling and as an adjunct to the processing of formal complaints.

1. **Awareness Education.** The ADR program for mediating EEO disputes will be explained Agency-wide to management and employees in the following manner:

a. A memorandum signed by the FLRA Chairman, the General Counsel, and the Chairman of the Federal Service Impasses Panel will be sent to all employees describing the ADR mediation process as an alternative to traditional EEO counseling and/or EEO litigation;

- b. Notification will be sent to all employees when the program begins; and
- c. Detailed information concerning the ADR program, including a copy of the program, will be placed on the FLRA Home Page.

2. **Training.**

a. Training about ADR, mediation, and the EEO process will be a vital factor in the successful implementation of the program at the FLRA. Employees need detailed information about the two alternatives (counseling or ADR available at the informal stage). Participants in mediation need to know what to expect and the roles of the parties. The Agency's full support for the ADR process should be communicated.

b. The EEO Director will provide a briefing (approximately 30 minutes) about the ADR program to all staff during the first 3 months of the program and routine updates. In addition, a portion of the New Employee Orientation will include a description of this program.

G. **EVALUATION**

1. **Data Requirements.** Management will evaluate the program and how it is functioning on an annual basis. The following statistical data will be used:

- a. The total number of EEO cases filed;
- b. The number of disputes referred to ADR, the stage of referral (informal or formal), and the number of those referred which were resolved;
- c. The parties' level of satisfaction with the ADR process, and the reasons for satisfaction or dissatisfaction (Participant's Comments Form - Form E);
- d. The amount of time spent on ADR attempting to resolve the dispute; and
- e. The estimate of cost savings, showing the criteria used to calculate savings.

2. **Data Gathering.** The ADR program will be evaluated by using the following questionnaires: Mediator's Reporting Form (Form D) and Participants' Comments (Form E). The distribution of evaluation questionnaires and the gathering of information will be the responsibility of the EEO Director or his/her designee. The EEO Director will have the responsibility of summarizing the information to be evaluated and will develop an annual report on the status and/or accomplishments of the ADR program. These summary reports will be shared with the FLRA Chairman, the General Counsel, and the Chairman of the Federal Service Impasses Panel.

Note: All forms referenced throughout this document are available in a Form Book to be distributed to all EEO counselors and staff administering this ADR program. Employees who would like copies can contact the Human Resources Director or the EEO Director.

Form A

FLRA ALTERNATIVE DISPUTE RESOLUTION REQUEST/REFERRAL

Case #:

1. Date of Request/Referral:
 2. Name of Requester:
 3. Organization of Requester:
 4. Telephone # of Requester:
 5. Briefly summarize the dispute which you wish to resolve:
-
6. Note other parties to this dispute (these may be referenced in #5 above. Please provide name and telephone number if possible).
-
7. I understand that ADR is a joint effort between the parties to facilitate an expedited resolution of disputes involving them.

I understand that the pre-complaint processing period shall be extended to 90 days for the purposes of resolving the dispute through the ADR process.

I understand that my right to continue with the administrative complaints process will remain intact and available to me should an agreement not be reached using ADR, provided I have timely filed a formal complaint.

I understand that I have the right to representation (attorney or other person of my choice) throughout this process.

Signature of ADR Requester

Date of Request

Form B

AGREEMENT TO MEDIATE

The parties agree to engage in mediation to attempt resolution of issues pertaining to the dispute of alleged employment discrimination. The parties understand that mediation is voluntary and may be ended by the requester at any time.

The parties understand that the mediator(s) has/have no authority to decide the case and is/are not acting as advocates, or attorneys, for any party.

Mediation is a confidential process. Any documents submitted to the mediators, and any statements made during the mediation are for settlement purposes only. The parties agree not to subpoena the mediators, or any documents prepared by or submitted to the mediator(s). In no event will the mediator(s) voluntarily testify for any party or submit any type of report concerning this mediation.

Confidentiality will not extend to (1) threats of imminent physical harm; (2) matters deemed not to be confidential under the Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584; or (3) disclosures made pursuant to statutory whistleblower rights (see 5 U.S.C. § 2302(b)(13)).

The aggrieved person is advised that these provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

No party is bound by anything said or done at the mediation unless a written settlement agreement is reached and executed by the parties and/or their representatives. If an agreement is reached, it will be reduced to writing and, when signed and approved by the parties and/or their representatives, will be binding upon them.

By signature below, we acknowledge that we have read, understand, and agree to this mediation process.

Aggrieved person

Date

Management/Settlement Official

Date

Mediator(s)

Date

Form C

MEDIATION SETTLEMENT AGREEMENT

Memorandum of settlement in the complaint(s) of (name), Case Numbers(s) if applicable_.

The Aggrieved person, (name), and the Federal Labor Relations Authority (FLRA), the parties to this agreement, hereby agree and stipulate as follows:

TERMS OF AGREEMENT

1. The FLRA (name of Center/Division/Office)

agrees to _____

2. The Aggrieved person _____ agrees to withdraw or dismiss with prejudice all informal/formal complaints of illegal discrimination related to and including the complaint(s) identified above which he/she has filed against the FLRA.

The Aggrieved person represents that no other action or suit with respect to the matters encompassed by the complaint referenced herein or to related matters occurring at any time up to and including the effective date of this agreement has been or will be filed in or submitted to any court, administrative agency, or legislative body. If any other related complaint was filed prior to the effective date of this agreement, (name) agrees that it too is covered by the terms of this agreement and, by signing this agreement, withdraws and dismisses each with prejudice. The Aggrieved person is advised that these provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling. *See* 5 U.S.C. § 2302(b)(13).

This agreement is not intended as, and will not be construed by either party to constitute, an admission or statement by either party as to the validity of any legal position or factual contention advanced in the above referenced complaint(s). Nor does it indicate in any way the views of either party as to the substantive merits of the complaint(s).

Issues related to compliance under this agreement shall be resolved in accordance with 29 C.F.R. § 1614.504; MD-110, Chap. IX.

This agreement shall become effective as of the date the last signature is obtained below. This settlement agreement constitutes the entire agreement between the aggrieved person and FLRA, and there are no other representations or obligations except for those enumerated herein. The parties agree that the terms of this agreement constitute a full and complete satisfaction and settlement of all claims which the aggrieved person may have against the FLRA, its officers, agents or employees which are encompassed by or arise out of the instant complaint(s).

The aggrieved person acknowledges that he/she clearly and fully understands the terms and conditions of this agreement and fully agrees to its terms. Further, the aggrieved person acknowledges having voluntarily entered into this agreement.

Aggrieved person

Date

Name of Management/Settlement

Date Official

Form D

FLRA ADR MEDIATOR REPORTING FORM

INSTRUCTIONS: This form is to be completed immediately upon closing of your case. Please return the form to the EEO Director.

1. Mediator's Name:
2. Office Telephone Number:
3. ADR Case Number:
4. Date of Sessions and Time Spent:
 - 1.
 - 2.
 - 3.
 - 4.
5. If either party had a representative in attendance please indicate which party did so:

A. Employee	B. Manager or 2nd Party
1. ___Attorney	1. ___Attorney
2. ___Other	2. ___Other
6. OUTCOME:

_____Not Settled	_____Settled prior meeting
_____Settled, agreement	_____Partial settlement signed

7. GENERAL: In the preparation process, it was determined that ADR was appropriate to address this dispute. In your opinion was it appropriate in this case?

1. Yes/No
2. Why or why not?

8. Other comments or suggestions:

Signature

Date

Form E

FLRA PARTICIPANT'S COMMENTS - ADR

To assist in improving the ADR process, please take a few minutes to answer the questions below. Send your completed survey to the EEO Director at 1400 K Street, N.W., Suite 200, Washington, D.C. 20424-0001. All personal information will be kept confidential.

Please circle the letter which best reflects how you feel about each of the following statements:

1- Strongly Agree 2- Somewhat Agree 3-No opinion 4- Somewhat Disagree 5- Strongly Disagree

1. The Mediator explained the program so that I knew what to expect during the process.

1 2 3 4 5

2. The Mediator allowed me and/or my representative to fully present my case.

1 2 3 4 5

3. The Mediator carefully listened to my side of the case.

1 2 3 4 5

4. The Mediator treated all parties fairly.

1 2 3 4 5

5. The Mediator asked appropriate questions.

1 2 3 4 5

6. The Mediator helped facilitate realistic options for settling the dispute.

1 2 3 4 5

7. Did you reach an agreement and settle your case? Yes/No

8. Did the ADR process help you understand the other party's/parties' concerns? Yes/No

9. Did you feel that the process helped the other party or parties understand your concerns?

10. How satisfied are you overall with the ADR process?

11. Please provide any comments you wish to make regarding the process in the space below:

Signature (Optional)

Date

Attachment

2(b)



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1400 K STREET N.W. • WASHINGTON, D.C. 20424

OFFICE OF THE CHAIRMAN

EEO PROGRAM POLICY STATEMENT

The purpose of this statement is to reaffirm the Federal Labor Relations Authority's (FLRA's) commitment that equal employment opportunity (EEO) will be available to all employees, former employees, and applicants without regard to race, color, religion, sex (including pregnancy, sexual orientation, gender identity, and gender expression), national origin, age, disability, genetic information, marital status, or political affiliation. The FLRA's commitment to EEO extends to all employment programs, practices, and decisions, including, but not limited to, those affecting: recruitment and hiring, promotion, transfers and reassignment, training and career development, employment benefits, discipline, and separation.

In keeping with its commitment to EEO, it is the FLRA's policy to prohibit discrimination in employment that is based on race, color, religion, sex (including pregnancy, sexual orientation, gender identity, and gender expression), national origin, age, disability, genetic information, marital status, or political affiliation. Further, it is the FLRA's policy that, in employment matters, all employees and applicants will have the opportunity to compete on a fair and equal basis without regard to race, color, religion, sex (including pregnancy, sexual orientation, gender identity, and gender expression), national origin, age, disability, genetic information, marital status, or political affiliation.

The FLRA assures you that managers at all levels share both this commitment to upholding EEO within the agency and the responsibility for enforcing EEO-program requirements.

In the interest of preventing employment discrimination, the FLRA will not tolerate workplace harassment. The FLRA will promptly investigate allegations of such harassment and, where substantiated, will take appropriate action in accordance with [FLRA Anti-harassment Policy 3895](#).

All employees and applicants are free to exercise their rights under the statutes that provide for EEO and prohibit employment discrimination in federal employment. The FLRA will not tolerate reprisal (retaliation) against anyone for having engaged in activity protected by those statutes.

The FLRA will process complaints of discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, gender identity, and gender expression), national origin, age, disability, genetic information, or reprisal for protected activity in accordance with the FLRA's discrimination-complaints procedures. Those procedures are set forth in [FLRA EEO Policy 3701](#). To file an EEO complaint, you must contact an FLRA EEO Counselor within 45 days from: the date of the alleged discriminatory action; the effective date of a personnel action alleged to be discriminatory; or the date you knew, or reasonably should have known, of the alleged discriminatory action. You may also

obtain information regarding these procedures from the FLRA's EEO Director, Erica Balkum at (771) 444-5809 or EEODirector@flra.gov.

You should pursue complaints of discrimination based on marital status or political affiliation through the complaint process administered by the U.S. Office of Special Counsel (OSC). You can find information regarding this process on OSC's website at www.osc.gov.



Susan Tsui Grundmann
Chairman

October 13, 2023

Attachment

2(c)



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

TO: All FLRA Employees
FROM: Rebecca J. Osborne, Director of Legislative Affairs and Program Planning
DATE: October 13, 2023
RE: Whistleblower Protection/Prohibited Personnel Practices

The purpose of this memorandum is to ensure that all Federal Labor Relations Authority (FLRA) employees are aware of, and understand, the prohibited personnel practices and whistleblower protections available to federal employees.

The U.S. Office of Special Counsel (OSC) is an independent agency that protects federal employees from prohibited personnel practices, including whistleblower retaliation and unlawful hiring practices. OSC also provides an independent, secure channel for disclosing and resolving wrongdoing in federal agencies.

The Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012 provide the right for all covered federal employees to make whistleblower disclosures and to ensure that employees are protected from whistleblower retaliation. The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and OSC's Reauthorization Act of 2017 further enhanced and reinforced these rights and protections.

Whistleblowing is defined as the disclosure of information that an employee reasonably believes evidences: a violation of any law, rule or regulation; gross mismanagement; gross waste of funds; an abuse authority; a substantial and specific danger to public health or safety; or censorship related to scientific research or analysis. Employees may make lawful disclosures to anyone, including, for example, management officials, the [FLRA's Inspector General](#), and/or [OSC](#).

You will find attached and hyperlinked below two documents prepared by OSC. FLRA employees also receive these two documents in the initial employee orientation materials. The first is the fact sheet, [Your Rights as a Federal Employee](#), which provides detailed information on the fourteen prohibited personnel practices and employees' rights to file complaints with OSC. Additionally, you should review [Know Your Rights When Reporting Wrongs](#), which describe different avenues for making whistleblower disclosures as federal employees. More information can also be found on the [OSC website](#).

Employees should also be aware of four posters the OSC has created to inform employees of their rights and responsibilities. They are:

"Whistleblowing": Defines a "whistleblower" as someone who discloses information they reasonably believe evidences a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety.

"Whistleblower Retaliation": Asks, "What is whistleblower retaliation?" A federal employee authorized to take, direct others to take, recommend or approve any personnel action may not take, fail to take, or threaten to take any personnel action against an employee because of protected whistleblowing. Cites an example. Defines "protected whistleblowing."

"Prohibited Personnel Practices" (PPPs): Lists 14 prohibitions, including: whistleblower retaliation; discrimination for engaging in conduct unrelated to work performance, such as discrimination based on gender identity or sexual orientation; and hiring and promotion offenses that offend the merit system. 5 U.S.C. § 2302(b)(1)-(b)(14).

The Hatch Act: Permitted and Prohibited Activities for Most Federal Employees: Lists permitted and prohibited activities for employees who may engage in partisan activity.

Federal employees have the right to be free from prohibited personnel practices, including retaliation for whistleblowing. The FLRA is committed to making sure that all employees are aware of their rights as well as the safeguards that are in place to protect them. If you have any questions regarding this notice, please contact the Office of Legislative Affairs and Program Planning at 771-444-5778 or olapp@flra.gov. You can also visit the OSC website at: <https://osc.gov/Services/>.

Attachments

YOUR RIGHTS AS A FEDERAL EMPLOYEE ENFORCED BY THE U.S. OFFICE OF SPECIAL COUNSEL

- I. The U.S. Office of Special Counsel (OSC) is an independent agency that investigates and prosecutes allegations of prohibited personnel practices.

WHAT IS A PROHIBITED PERSONNEL PRACTICE (PPP)?

Under 5 U.S.C. §§ 2302(b)(1)-(b)(14) a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not:

- **Discriminate (including discrimination based on marital status and political affiliation).** *EXAMPLE: Supervisor Joe refuses to promote Employee Jane because Jane is a registered Republican; or his refusal is because she is a single mother. (OSC will generally defer Title VII discrimination allegations to the EEO process, rather than duplicating already existing procedures.)*
- **Solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics.** *EXAMPLE: Selecting Official Joe hires Applicant Jack based on Senator Smith's recommendation that Jack be hired because Jack is a constituent; or fails to hire Applicant Jane because of Congressman Smith's recommendation based on the Congressman's friendship with Jane's parents.*
- **Coerce the political activity of any person, or take action against any employee as reprisal for refusing to engage in political activity.** *EXAMPLE: Supervisor Jane takes away significant job duties of Employee Jack because Jack will not make a contribution to Jane's favorite candidate.*
- **Deceive or willfully obstruct any person from competing for employment.** *EXAMPLE: Supervisor Joe, located in Headquarters, orders that no vacancy announcements be posted in the field office where Employee Jack works because he does not want Jack to get a new job; or falsely states that there will be extensive travel in the position when he knows that there is no travel.*
- **Engage in nepotism.** *EXAMPLE: Second-level Supervisor Jane asks First-level Supervisor Joe to hire her son; or to promote her daughter.*
- **Take a personnel action against an employee because of whistleblowing.** *EXAMPLE: Supervisor Joe directs the geographic reassignment of Employee Jack because Jack reported safety violations to the agency's Inspector General; or because employee Jill reported a gross waste of funds to the Office of Internal Affairs.*
- **Take a personnel action against any employee because of the exercise of an appeal, complaint, or grievance right.** *EXAMPLE: Supervisor Jane places Employee Jack on an undesirable detail because Employee Jack filed an administrative grievance about his performance rating.*
- **Discriminate against an employee on the basis of conduct, which does not adversely affect the performance of the employee, including discrimination based on sexual orientation.** *EXAMPLE: Jack's employment is terminated because he attended a "Gay Pride" march; or he attended a "Pro-Life" event; or he attended an animal rights rally; or he attended a gun-owners' rights meeting.*
- **Take or fail to take a personnel action, if such action would violate a veterans' preference requirement.** *Example: Supervisor Jane hired Employee Jack, without considering Veteran Jennifer, who was included on the list of eligible employees. (OSC's jurisdiction is for disciplinary actions only; the Dept. of Labor has jurisdiction to investigate for corrective actions.)*
- **Influence any person to withdraw from competition for a position to improve or injure the employment prospects of any other person.** *EXAMPLE: Supervisor Jane, in an effort to hire Employee Joe, tells Employee Jack that he should not apply for a position because he is not qualified and will never be selected. Employee Jack is qualified.*

- **Give an unauthorized preference to a person to improve or injure the employment prospects of any particular employee or applicant.**
EXAMPLE: Supervisor Jane specifies that Spanish-speaking skills are necessary for a vacant position, for the purpose of selecting Employee Jack, who speaks fluent Spanish. The position, however, does not require Spanish-speaking skills.
- **Take a personnel action against an employee which violates a law, rule, or regulation which implements a merit systems principle.** *EXAMPLE: Supervisor Joe terminates the probationary appointment of Employee Jack because of Jack's letter to the editor criticizing affirmative action - a valid exercise of First amendment rights, a law implementing a merit system principle.*
- **Implement or enforce a nondisclosure agreement or policy lacking notification of whistleblower rights.** *EXAMPLE: A manager requires all employees in his program to sign a non-disclosure agreement that prohibits the employees from discussing the program in any way and fails to notify employees of protected channels for making disclosures.*
- **Access the medical record of an employee or applicant, as part of, or in furtherance of any of the above-listed prohibitions.** *EXAMPLE: An employee expresses interest in an open position to the hiring official, who wants to hire another applicant. The hiring official accesses the employee's medical record and attempts to influence the employee to withdraw from competition by telling her that the stress of the new position will worsen a condition found in her medical record.*

What can you do if you believe a PPP has been committed?

Current and former federal employees, including probationary employees, and applicants for federal employment can file a written complaint with the U.S. Office of Special Counsel. Complaint forms are available on the Web at www.osc.gov. Employees do not need attorneys to file a complaint. OSC is an independent and prosecutorial agency. It will investigate allegations of prohibited personnel practices and seek the appropriate corrective and/or disciplinary action.

II. OSC also receives confidential disclosures and enforces the Hatch Act.

RECEIVING CONFIDENTIAL DISCLOSURES (5 U.S.C. § 1213):

Current and former federal employees and applicants can confidentially report information evidencing a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. OSC has the authority to require the head of the agency concerned to investigate the matter if OSC determines that a disclosure has been made.

ENFORCING THE HATCH ACT (5 U.S.C. §§ 7321-26):

OSC is authorized to issue advisory opinions that respond to federal employee questions about whether or not they may engage in specific political activities under the Act. OSC also prosecutes violations of the Hatch Act before the Merit Systems Protection Board. These violations include: using official authority to interfere with an election result; soliciting, accepting or receiving political contributions; soliciting or discouraging political activity of persons before the employing agency; and running for public office in a partisan political election.

Need additional information?

- Information on filing a complaint or making a disclosure: 202-804-7000, 800-872-9855, or info@osc.gov.
- Updated and detailed information on OSC and its procedures: www.osc.gov.
- Information about training and certification: 202-804-7163 or certification@osc.gov.



KNOW YOUR RIGHTS WHEN REPORTING WRONGS

Whistleblower disclosures can save lives as well as billions of taxpayer dollars. They play a critical role in keeping our government honest, efficient and accountable. Recognizing that whistleblowers root out waste, fraud and abuse, and protect public health and safety, federal laws strongly encourage employees to disclose wrongdoing. Federal laws also protect federal employees from retaliation.

The U.S. Office of Special Counsel (OSC) plays an important role in helping whistleblowers. OSC is an independent agency that protects federal employees from prohibited personnel practices (PPPs), including whistleblower retaliation and unlawful hiring practices, such as nepotism. OSC also provides an independent, secure channel for disclosing and resolving wrongdoing in federal agencies. This guide provides a summary of whistleblower protections and avenues available to employees to disclose wrongdoing. For more information, please visit OSC's website at www.osc.gov.

Disclosures of Wrongdoing

Where can I report wrongdoing?

Current and former federal employees and applicants (henceforth "federal employees") can report on any of the following types of wrongdoing:

- a violation of any law, rule, or regulation,
- gross mismanagement,
- a gross waste of funds,
- an abuse of authority,
- a substantial and specific danger to public health or safety, or
- censorship related to scientific research if censorship meets one of the above-listed categories.

Federal employees have many options on where to disclose wrongdoing, including but not limited to, making disclosures to supervisors or someone higher up in management; the agency's Inspector General (IG); OSC; or, Congress. For whistleblower disclosures involving classified national security information or other information protected from public release by law (e.g. patient privacy information), whistleblowers must use confidential channels such as an IG, OSC, or Congress in order to be protected from adverse personnel actions related to their disclosures.

Can probationary employees file disclosures or PPP complaints with OSC?

Yes. Probationary employees have the same right to file disclosures or PPP complaints with OSC as do most current federal employees, former federal employees, or applicants for federal employment. Note – except for appeals alleging retaliation for whistleblowing or engaging in protected activity, probationary employees generally do not have the right to appeal personnel actions to the Merit Systems Protection Board (MSPB).

Can I keep my identity confidential?

Yes. Most Inspectors General have hotlines that allow employees to make confidential disclosures. Inspectors General are prohibited from disclosing an employee's identity unless the IG determines that disclosure is unavoidable or is compelled by a court order. If you file a disclosure with OSC, your identity will not be shared outside of OSC without your consent. However, OSC may disclose your identity only if OSC determines that it is necessary because of an imminent danger to public health or safety or an imminent violation of any criminal law.

What will OSC do once I make a disclosure?

When a federal employee discloses wrongdoing to OSC, OSC evaluates the information and interviews the federal employee. OSC determines whether it is substantially likely that the employee's allegation – or any portion of it – can be proven and whether it discloses a violation of a law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. If it meets that standard, OSC will require the agency to investigate and submit a report of the agency's findings to OSC. The whistleblower then has an opportunity to comment on the agency report. Those comments, together with any comments or recommendations by the Special Counsel, are sent with the agency report to the President and congressional oversight committees. The agency report is usually made available to the public.

Prohibited Personnel Practices

Are whistleblowers protected from retaliation?

Yes. The Civil Service Reform Act and whistleblower protection laws prohibits retaliation. Retaliation for whistleblowing is one of fourteen [PPPs](#). Protection from whistleblower retaliation means it is unlawful for agencies to take, threaten to take, or fail to take a personnel action because the employee disclosed one or more of the six categories of government wrongdoing (listed on page 1). Personnel actions can include actions such as poor performance reviews, demotions, suspensions, or terminations. As noted above, probationary employees have the right to file PPP complaints with OSC.

However, disclosures of information specifically prohibited by law or required by Executive Order to be kept secret are protected only when made to an OIG, OSC, or certain individuals within Congress. Additionally, federal law establishes that a federal employee has the right to communicate with and provide information to Congress.

OSC also has jurisdiction to protect federal employees at most agencies from retaliation for filing an appeal, complaint, or grievance; helping someone else file or testifying on their behalf; cooperating with or disclosing information to the Special Counsel, an Inspector General, or a component responsible for internal investigations/reviews; or, refusing to obey an order that violates a law, rule or regulation.

What can you do if you believe retaliation occurred?

If you believe that an agency has retaliated against you because of your whistleblowing or because you engaged in protected activity such as disclosing information to an Inspector General, you can:

- file a complaint with OSC, which may seek corrective or disciplinary action when warranted;
- file a union grievance; or
- if you have been subject to a significant personnel action, you can file an appeal with the MSPB (www.mspb.gov) and assert retaliation (or any other PPP) as a defense.

Note that a federal employee may choose only one of these three options when appealing a significant personnel action.

What relief is available to an employee who has suffered retaliation?

Many forms of relief are available. They include job restoration, reversal of suspensions and other adverse actions, back pay, reasonable and foreseeable consequential damages, such as medical costs, attorney fees, and compensatory damages. In addition, damages may be awarded for attorney fees and expenses incurred due to retaliation.

Can OSC delay a personnel action while the matter is investigated?

Yes. An individual may ask OSC to delay, or “stay,” an adverse personnel action pending an investigation. OSC will consider requesting a delay of a personnel action if OSC has reasonable grounds to believe that a prohibited personnel action was taken and, absent a stay, the employee will be subjected to immediate and substantial harm, such as removal, suspension for more than 14 days, or geographic reassignment.

How can OSC remedy a prohibited personnel practice?

Federal employees may report suspected PPPs to OSC. Their complaint will be investigated. If there is sufficient evidence to prove a violation, OSC can seek corrective action, disciplinary action, or both. Alternatively, parties in selected cases may agree to mediate their dispute in order to reach a mutually agreeable resolution of the complaint. OSC may attempt to resolve a case with an agency at any stage. If an agency refuses to provide corrective action, then OSC can take the case to the MSPB. The MSPB can order the agency to take corrective action. Such litigation begins with the filing of a petition by OSC that alleges there are reasonable grounds to believe a PPP occurred, is occurring, or is imminent.

Can a manager be held accountable for retaliating against a federal employee?

Yes. OSC may seek disciplinary action against any employee who commits a PPP. If an agency fails to take disciplinary action, then OSC can bring a disciplinary action case to the MSPB against the employee who committed the PPP. If the MSPB finds that an individual has committed a PPP, it can order disciplinary action, including removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, or a fine of up to \$1,000. Additionally, new statutory provisions impose a mandatory proposed penalty for supervisors that commit violations of 5 U.S.C. § 2302(b)(8), (b)(9), or (b)(14).

Can appeals of PPP complaints be filed with the MSPB?

Retaliation Claims – Individual Right of Action (IRA) Appeals

Under some circumstances, employees may file appeals of PPP complaints with the MSPB. Employees may file what is called an IRA appeal with the MSPB for any personnel action taken, not taken, or threatened because of retaliation for whistleblowing or for engaging in protected

activity, such as filing an Office of Inspector General complaint. More information on the right to file an IRA may be found at [5 U.S.C. § 1221\(a\)](#). However, before filing an IRA appeal with the MSPB, employees must file a retaliation PPP complaint with OSC, requesting an investigation.

Can other types of appeals involving PPPs be filed with the MSPB?

Appeals of Significant Adverse Actions – Affirmative Defense

Yes. Employees may raise one or more of the 14 PPPs as a defense to a significant adverse action with the MSPB. However, the employee must elect whether to file a PPP complaint with OSC, file an appeal of the significant adverse action with the MSPB, or file a grievance with the union. The list of significant adverse actions may be found at [5 C.F.R. § 1201.3](#). If the employee elects to raise a PPP as a defense to a significant adverse action with the MSPB, such an appeal is called an “affirmative defense” to the agency’s personnel action and the MSPB will determine if the action that was taken was based on any of the 14 PPPs described in section 2302(b) of Title 5 of the U.S. Code.

For more information on MSPB appeal rights, go to www.mspb.gov.

*For more information on PPPs, including retaliation, go to www.osc.gov/ppp.
To learn more about filing a whistleblower disclosure with OSC, go to www.osc.gov/disclose.
To file a PPP complaint or whistleblower disclosure with OSC, go to www.osc.gov/efile.*

U.S. Office of Special Counsel

1730 M Street, N.W., Suite 218 | Washington, D.C. 20036

Phone: (202) 804-7000 | Toll Free: 1-800-872-9855

TTY: 1-800-877-8339 | Email: info@osc.gov

www.osc.gov

Rev. 03/19

Attachment

2(d)



WASHINGTON, D.C.



FLRA Policy No. 3895

ANTI-HARASSMENT POLICY

Issue Date: 08/24/20

A. GENERAL PROVISIONS

1. **Purpose.** The Federal Labor Relations Authority (FLRA) establishes this policy to ensure that the Agency maintains a workplace free from harassment and takes all necessary steps to address and promptly correct any form of harassing conduct that may occur before it rises to the level of unlawful harassment. This policy serves to supplement, and in no way replace, the Equal Employment Opportunity (EEO) complaint process and other Federal processes. Thus, one or more of these processes may be invoked simultaneously.

2. Statement of Policy.

a. FLRA is committed to maintaining a workplace free from harassment, where all employees are treated with dignity and respect. Harassment of any kind is contrary to the FLRA's values, and undermines employee performance and the efficiency of Government operations. Such behavior is also inconsistent with the merit system principles outlined in the Civil Service Reform Act, 5 U.S.C. § 2302, which make clear that all Federal employees should receive fair and equitable treatment and maintain the highest standards of conduct to promote an efficient and effective workplace.

b. FLRA will promote and maintain a workplace free from harassment, which includes taking clear and immediate steps upon receiving any report of harassing behavior to determine whether any type of remedial intervention, as well as corrective and/or disciplinary actions are warranted, and, if so, to take such actions without delay.

c. FLRA will not tolerate retaliation against any employee for making a good faith report of harassment or for assisting in any inquiry or investigation under these policy and procedures. Complaints of such retaliation will be handled in accordance with the procedures set forth below.

d. This Policy applies to all FLRA employees, contractors, and applicants for employment.

3. Definitions of Harassing Conduct.

a. Harassing conduct prohibited by this policy includes unwelcome verbal or physical conduct - including any type of threatening, demeaning or abusive utterance or action -

based on race, color, religion, sex (including gender identity, sexual orientation, and pregnancy, whether or not of a sexual nature), national origin, age, disability (physical or mental), genetic information, or retaliation (reprisal), even if the conduct has not risen to the level of illegality, where:

i. The behavior can reasonably be considered to adversely affect the employee's work environment; or

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

b. Isolated incidents of unwelcome conduct need not violate Federal law to be prohibited by this policy. To be unlawful, the conduct must create a work environment considered hostile, intimidating, or offensive to a reasonable person. The broader scope of harassing conduct covered by this policy prohibits harassment associated with any prohibited personnel practice outlined in 5 U.S.C. § 2302 or prohibited by anti-discrimination law protections.

4. **References.**

a. Public Law 88-352, Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e)-16);

b. Public Law 93-112, The Rehabilitation Act of 1973, as amended (29 U.S.C. §§ 791 and 794(a));

c. Public Law 93-259, The Equal Pay Act of 1963, as amended (29 U.S.C. § 206(d));

d. Public Law 93-259, Section 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 633(a));

e. Americans with Disabilities Act of 1990 (42 U.S.C. ch. 126 § 12101)

f. The EEOC Management Directive, MD-715;

g. The Genetic Information Nondiscrimination Act (GINA) of 2008 (42 U.S.C. §§ 2000ff-2000ff-11); and

h. FLRA Policy 3701 – Equal Employment Opportunity

5. **Responsibilities.**

a. All Employees must:

i. Act professionally and responsibly to refrain from engaging in

any type of harassing conduct;

ii. Report promptly - following the procedures set forth below - any incident(s) of harassing conduct that s/he experiences, observes, or otherwise learns about;

iii. Participate in periodic training required by this Policy; and

iv. Cooperate fully with any inquiry or investigation initiated as a result of this policy.

b. Supervisors and other Management Officials must:

i. Attain and maintain the requisite knowledge and training to ensure both their compliance with this policy and their employees' familiarity with this Policy and its requirements;

ii. Act promptly and appropriately to address and correct harassment in the workplace;

iii. Report any incident of harassing conduct they witness, or about which they otherwise become aware;

iv. Receive and handle allegations of harassing conduct promptly and appropriately, utilizing the procedures set forth below;

v. Ensure that all individuals who report harassing conduct or who cooperate during an investigation are protected from retaliation; and

vi. Coordinate with the Anti-Harassment Program Coordinator (the Director, Human Resources Division) to:

(1) Provide interim relief to alleged victims of harassing conduct pending the outcome of an investigation to ensure that further misconduct does not occur; and

(2) Take prompt and appropriate corrective and/or disciplinary action, in coordination with appropriate management officials, against any personnel who, upon proper investigation, are found either to have engaged in harassing conduct or to have failed to carry out their responsibilities under this policy.

c. Anti-Harassment Program Coordinator (AHPC) shall be responsible for:

i. Disseminating this policy and procedures to all employees on a regular (annual) basis and periodically reminding employees of their responsibilities under this policy, particularly the procedures to follow to timely report harassing conduct;

ii. Providing technical assistance and support to Agency managers and supervisors to ensure compliance with this policy, particularly the procedures in place to timely investigate and correct harassing conduct and mitigate the effect on the victim to the maximum extent possible;

iii. Developing and providing periodic training for all employees on this Policy and its procedural requirements, including, as appropriate, additional training for managers and supervisors;

iv. Receiving all allegations of harassing conduct and maintaining a tracking system to monitor inquiries and allegations of harassment;

v. Ensuring that the necessary inquiry and/or investigation into allegations of harassing conduct are prompt, thorough, impartial, and appropriate to the allegation;

vi. Maintaining, in a secure location, a written record of reports made and actions taken pursuant to this policy; and

vii. Assisting managers and supervisors in incorporating into Position Descriptions, where appropriate, performance measures that include compliance with this policy.

d. The Office of the Solicitor shall be responsible for providing legal advice and counsel to Agency managers, supervisors and the Human Resources Division concerning the implementation and interpretation of this policy.

B. PROCEDURES

1. Reporting Harassing Conduct.

a. Any employee who believes that s/he has been subjected to harassing conduct in violation of this policy must report this matter to anyone in the employee's supervisory chain, another supervisor or management official, or the AHPC;

b. Employees who witness or otherwise learn about harassing conduct also are responsible for reporting such behavior. Employees who observe or know of harassing conduct directed at others should report the matter to his or her own supervisor, the supervisor of the harassed employee, any other supervisor or management official, or the AHPC; and

c. All information the Agency receives pursuant to this policy will be maintained on a confidential basis to the greatest extent possible. The maintenance of records and any disclosure of information from these records shall be made in accordance with the Privacy Act, 5 U.S.C. § 552a. Such information, however, may be necessary to disclose in order to defend the FLRA in any litigation to which the information may be deemed relevant.

Furthermore, information also may need to be disclosed to those officials and employees in the Agency with a reasonable need to know in order to carry out the purpose and intent of this Policy and/or their job responsibilities.

2. **Agency Response.**

a. **Preliminary Inquiries into Allegations of Harassing Conduct.** A supervisor or manager who witnesses or otherwise becomes aware of an allegation or occurrence of harassing conduct shall immediately:

i. Inform the AHPC and obtain guidance about the next steps the manager or supervisor must take under this policy, including the following:

(1) In consultation with the AHPC, document the details of the allegation of harassment received;

(2) In consultation with the AHPC, take immediate necessary action to stop any harassing conduct and prevent further harassment while the allegations are being investigated, including granting appropriate interim relief to the alleged victim of harassing conduct and documenting all such steps and actions taken;

(3) In consultation with the AHPC, determine the extent which the alleged misconduct should be investigated (including the persons who must be interviewed and the critical facts that must be established); and

(4) In consultation with the AHPC, prepare, promptly upon the completion of the inquiry or investigation, a written summary of the investigation. The summary may be brief, depending upon the complexity and seriousness of the case. The summary shall then be submitted to both the AHPC and the supervisor who would be responsible for taking corrective and/or disciplinary action against the alleged harasser, if the allegations are determined to be well-founded.

b. **Ensuring a Proper Investigation.** Within ten (10) days of receiving notice of an allegation of harassing conduct (a “complaint”), the AHPC will begin an investigation of the complaint and shall:

i. Ensure that a prompt, thorough, impartial and appropriate inquiry is conducted; and

ii. Recommend appropriate action to stop any harassing conduct and prevent further harassment, including granting appropriate interim relief to the alleged victim while the allegations are being investigated.

c. **Timeliness Requirements.**

i. A supervisor or manager who becomes aware of allegedly

harassing conduct must take prompt appropriate action even if an employee requests that no action be taken.

ii. A supervisor or manager who becomes aware of allegedly harassing conduct involving employees outside of his/her chain of command must, as soon as practicable, notify the appropriate management officials within such employee's chain of command of the allegation.

iii. Supervisors and managers who become aware of harassing conduct within their own chain of command must, as soon as practicable upon learning of such allegation, notify the AHPC. This notification must include a description of initial steps taken in response to the conduct and, as appropriate and necessary, a plan of action to address the potential ongoing harm resulting from such conduct.

iv. Supervisors and managers whose subordinate has been allegedly subjected to harassing conduct shall immediately begin and promptly conclude a preliminary inquiry to determine the necessary facts, in consultation with the AHPC, and immediately take any other necessary and appropriate action warranted to effectively stop the harassing conduct and otherwise shield the alleged victim from any such further conduct.

3. **Alternate of Supplemental Investigative Procedures.**

a. Deciding whether alternate or further investigation is necessary. The AHPC has the discretion to decide whether further investigation is required, or if the preliminary inquiry is sufficient to determine whether corrective action is necessary. These decisions are fact specific, and must be made on a case- by-case basis.

b. Deciding how investigations will be carried out. When the AHPC determines that further investigation is necessary:

i. The AHPC shall determine who will direct further investigations. Investigators may include management officials outside the chain of supervision in which the alleged harassing conduct occurred, as s/he deems necessary and appropriate.

ii. All investigations shall be conducted promptly, thoroughly, impartially, and in a manner appropriate to the allegation.

4. **Resolving Conflicts of Interest Issues.** If a senior-level manager is implicated in the alleged harassing conduct, the AHPC shall be responsible for conducting the preliminary inquiry and directing any further investigation that is warranted, as well as taking any warranted corrective action in the interim period when the investigation is ongoing. Should the investigation result in a finding that disciplinary action against a senior management official is warranted, the AHPC shall designate the next most senior manager outside the implicated chain of supervision to undertake the necessary disciplinary process.

5. Corrective Action.

a. Within 60 days of receiving a complaint of harassment, the agency will determine if corrective action is necessary, and if necessary, take corrective action. If the investigation results in a finding that harassing conduct occurred, the investigating manager will act promptly to stop the harassing conduct and ensure that further harassment does not occur.

i. To determine the appropriate corrective action, the manager or supervisor whose immediate subordinate is implicated in the report shall promptly consult with the AHPC to determine and undertake the appropriate disciplinary action. Such action will depend upon various factors: the severity and/or pervasiveness of the offense, the response required to end such conduct, the offender's disciplinary history, and the individual circumstances surrounding the offense.

ii. Possible corrective actions may include, but are not limited to:

(1) Counseling. The appropriate management official shall meet with the responsible individual(s), explaining why the specific conduct was inappropriate, and instructing the individual(s) that the harassment may not continue, and any further misconduct may result in more severe formal discipline, up to and including removal;

(2) Training. The appropriate management official shall require the individual(s) to attend specific training on what harassing conduct is, and what workplace conduct is appropriate and permissible; and

(3) Reprimand, Suspension, or Other Disciplinary Action As Warranted. The appropriate management official has the discretion, as warranted by the investigative findings, to impose any type of disciplinary action otherwise available for violations of workplace conduct standards, such as suspension, demotion, or termination.

6. Maintaining Confidentiality, Keeping Records, and Monitoring Compliance.

a. Maintaining Confidentiality. All reports of harassment and related information will be maintained by the Agency on a confidential basis to the greatest extent possible. Disclosures about allegations of harassment, including the identity of the employee alleging violations of this policy shall be kept confidential, except as necessary to conduct an appropriate investigation into the alleged violations, take appropriate action, and/or as otherwise necessary when required by law. Pursuant to EEOC Regulations, FLRA EEO Counselors will inform the AHPC of all counseling activity alleging harassment.

b. Writing Reports and Maintaining Records. A brief written report must be made to the AHPC delineating the findings and the final resolution of each allegation of harassing conduct under this Policy.

i. These written reports must identify the individuals implicated, the specifics of the conduct involved, and the corrective action taken, if any. These records must sufficiently inform the AHPC should s/he need to determine how to address any further incidents;

ii. If requested by the AHPC, written reports may also include a detailed description of the inquiry or investigation, an explanation of any conclusions reached the reasoning for any corrective actions issued, and/or any documents or other tangible evidence obtained during or created as a result of the inquiry or investigation. The length of the report may vary depending upon the complexity and seriousness of the case;

iii. The obligation to keep the FLRA and EEOC informed of his or her current address; and

iv. The AHPC shall maintain the written reports in a secure location. These written reports are protected by the Privacy Act, and will be maintained in accordance with its requirements and exceptions.

C. PARALLEL EEO OR OTHER CLAIMS

1. The procedures set forth in this Policy are separate and distinct from the EEO complaint process, and other Federal processes, which may take place simultaneously. The EEO process is designed to make individuals whole from any injury suffered as a result of discrimination or retaliation for engaging in EEO activity. The intent of the anti-harassment program is to take immediate and appropriate corrective action to eliminate harassing conduct regardless of whether the conduct violates the law.

2. Any employee wishing to raise a harassment complaint through the EEO process pursuant to 29 C.F.R. § 1614 must contact an Agency EEO Counselor **within 45 calendar days** of the alleged harassment.

3. Reporting an allegation of harassment under this Policy does **not** satisfy the EEO requirements for contacting an EEO Counselor and does not suspend the time limits for initiating that contact. Reporting an allegation of harassment under this policy also does not satisfy any requirements for reporting a prohibited personnel practice and does not suspend the time limits for initiating that contact.

4. Employees may pursue a parallel claim of harassment under other Federal anti-discrimination laws while following the procedures of this Policy. Any employee wishing to pursue such parallel claims should do so as soon as possible after the alleged harassment and should not wait for the completion of internal procedures.

5. If an Agency management official receives notice that an employee is pursuing a claim of harassment through the EEO complaint process, or any other Federal process, the official shall treat it as a report under Sections B and C of this policy, unless inconsistent with

applicable regulatory or statutory requirements.

6. The AHPC shall provide the record of actions taken under this Policy to the EEO Director, or any other Agency official handling a parallel claim as appropriate and warranted. However, the EEO Director will not be involved in the day-to-day functions of the Anti-Harassment Program so as to prevent conflicts of interest.

D. **CONSULTATION OPTION.** Employees who have experienced harassing conduct may also receive assistance and advice via the Employee Assistance Program (EAP). The FLRA EAP is an employee benefit program that helps employees with personal and/or work-related problems that may impact their job performance, health, and mental and emotional well-being. Employees may contact EAP at: 1-800-869-0276, or visit the website at www.foh4you.com/. Engaging in the EAP does not constitute a report under this Policy, as this entity does not have an obligation to inform management of allegations of harassing conduct.

This policy is effective on August 24, 2020.

A handwritten signature in black ink, appearing to read "M. Jeffries".

Michael Jeffries
Executive Director

Attachment

2(e)



FLRA Policy No. 3010

**EMPLOYEE DISCIPLINE AND
ADVERSE ACTIONS**

Issue Date: June 3, 2020

SECTION I. – GENERAL PROVISIONS

- A. **Purpose.** This Policy sets forth the policies and processes of the Federal Labor Relations Authority (the FLRA or the agency) for dealing with employee misconduct and/or poor performance, and for furloughing employees for 30 days or less because of lack of work or funds.
- B. **Cancellation.** This FLRA Policy cancels FLRA Instructions No. 3752, Employee Discipline and Adverse Actions, dated September 2, 1998.
- C. **Scope.**
1. The formal disciplinary and adverse actions described in this Policy provide the tools and procedures for managers to apply in administering employee discipline. Employees who are covered by Sections II and III of this Policy generally fit into two categories:
 - (a) Those who commit serious or repeated acts of misconduct that are unacceptable in the work place and that would cause a loss of efficiency in achieving the FLRA mission if allowed to continue; and
 - (b) Those who fail to meet performance expectations. (Note: Procedures set forth in this Policy are optional for performance-based problems. 5 C.F.R. § 432 also sets forth procedures for performance-based actions. Those procedures are set forth in FLRA Policy 3430.3)
 2. Actions covered by this Policy include:

- (a) Reprimands;
- (b) Suspensions;
- (c) Reductions in grade or pay;
- (d) Furloughs of 30 days or less;
- (e) Removals; and
- (f) Permanent notations of a former employee's eOPF documenting an adverse finding in a personnel investigation.

3. This Policy does not apply to:

- (a) Suspensions for National Security under 5 U.S.C. § 7532;
- (b) Reductions-in-Force under 5 U.S.C. § 3502;
- (c) Reduction in grade back to the grade previously held of a new manager or supervisor who fails to successfully complete the one-year probationary period under 5 U.S.C. § 3321(a)(2);
- (d) An action initiated by the Office of the Special Counsel under 5 U.S.C. § 1215 or actions against Administrative Law Judges under 5 U.S.C. § 7521; and
- (e) Removal during a probationary or trial period, or during a temporary or time-limited appointment.

D. Applicability.

Sections II, III, and V of this Policy apply to all FLRA employees in excepted and competitive General Schedule positions.

Section IV applies to all supervisors in excepted and competitive General Schedule positions, as well as supervisors who are in Senior Level positions and Senior Executive Service.

With the exception of Section VI, this policy does not apply to individuals who are in a probationary or trial period.

This policy does not apply to employees serving under a temporary or time-limited appointment.

E. **Policy.** The Agency's policy is that:

1. Supervisors will timely identify and take appropriate action to notify employees of conduct and/or performance problems in order to correct the problem using informal processes such as counseling, training, and closer supervision to achieve the mission of the FLRA in an efficient manner. While what is "timely" rests with the discretion of the FLRA and the appropriate supervisor, performance issues should be identified and addressed as soon as practicable, and within the applicable performance appraisal period absent unusual circumstances, and not be allowed to carry over from appraisal period to appraisal period without being disclosed to the employee.
2. If good faith efforts to resolve the problem informally fail, or if the problem is so severe that informal resolution is impractical, supervisors will apply discipline that is consistent and appropriate to the situation to achieve the mission of the FLRA in an efficient manner.
3. The FLRA protects from retaliation employees who have information that they reasonably believe to be evidence of violations of law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, unless disclosure of such information is prohibited by law. As a result, the FLRA will take appropriate disciplinary action against supervisors who retaliate against such whistleblowers.
4. The FLRA will attempt other means of avoiding costs in times of temporary budget shortfalls or mission lags so that furloughing employees is a last resort to accommodate the temporary deficit.

F. **References.**

1. 5 U.S.C. ch. 75, Adverse Actions;
2. 5 U.S.C. § 3322, Voluntary separation before resolution of personnel investigation;
3. Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. 115-73, 131 Stat. 1235 (2017);

4. National Defense Authorization Act for Fiscal Year 2018, Office of Special Counsel Reauthorization, Pub. L. No. 115-91, § 1097, 131 Stat. 1283, 1617-1626 (2017);
5. 5 C.F.R. pt. 752, Adverse Actions;
6. FLRA Regulations 3820.1, dated August 1, 1986, Administrative Grievance System;
7. FLRA Instruction No. 3430.3, dated October 1, 2012, General Schedule Performance Management Plan; and
8. FLRA Policy No. 3451, dated November 30, 2018, SES Performance Management System.

G. Definitions.

1. Adverse action refers to suspensions for more than 14 days, reductions in grade or pay, furloughs for 30 days or less, and removals.
2. Current continuous employment means a period of employment immediately preceding a suspension action in the same or similar position without a break in Federal civilian employment of a workday.
3. Day means calendar day.
4. Disciplinary action refers to reprimands and suspensions of 14 days or less.
5. Employee, for purposes of Sections 2 and 3, means:
 - (a) An individual in the competitive service who:
 - (1) is not serving a probationary or trial period under an initial appointment; and
 - (2) has completed one year or current continuous employment under other than a temporary appointment limited to one year or less.
 - (b) A preference eligible in the excepted service who has completed one year of current, continuous employment in the same or similar positions.

- (c) An individual in the excepted service other than a preference eligible who:
 - (1) is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
 - (2) has completed two years of current continuous service in the same or similar positions on other than a temporary appointment limited to two years or less.

- 6. Furlough means placing an employee in a temporary status without duties or pay because of lack of work or funds or other non-disciplinary reason.

- 7. Grade means a level of classification under a position classification system.

- 8. Indefinite suspension means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or other agency action. The indefinite suspension continues to an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action, which may include the completion of any subsequent administrative action.

- 9. Pay means the rate of basic pay that is fixed by law or administrative action for the position held by the employee.

- 10. Personnel Investigation includes:
 - (a) an investigation by an Inspector General; and
 - (b) an investigation that, had the employee not voluntarily resigned, would have resulted in an adverse action as a result of performance, misconduct or for such cause as will promote the efficiency of the service under 5 U.S.C. ch. 43 or 5 U.S.C. ch. 75.

- 11. Preference eligible means veterans, spouses, widows, or mothers who meet the definition of “preference eligible” in 5 U.S.C. 2108. Preference eligibles, other than sole survivor veterans, are entitled to have 5 or 10 points added to their earned scores on a civil service examination; are entered on registers in the order prescribed by 5 C.F.R. § 332.401; are considered ahead of non-preference eligible for excepted service positions; and are listed ahead of individuals who are not preference eligibles in alternative ranking and selection procedures, in accordance with 5 U.S.C. § 3319. Preference eligibles, other than those who have not yet been discharged or released from active duty, are accorded a higher retention standing than non-preference eligible in the event of reduction-in-force under 5

U.S.C. § 3502. Preference does not apply to in-service placement actions such as promotions.

12. Prohibited personnel practice related to whistleblowing means:

- (a) a personnel action that a supervisor takes, fails to take, or threatens to take or not take because an employee or applicant for employment has lawfully disclosed information employee or applicant reasonably believes evidences: a) a violation of any law, rule or regulation, b) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
- (b) a personnel action that a supervisor takes, fails to take, or threatens to take or not take against employees who:
 - (1) lawfully exercise their right to appeal, complain or grieve an action;
 - (2) testify for or assist others in the lawful exercise of their rights to appeal, complain or grieve an action;
 - (3) cooperate with or disclose information to individuals responsible for conducting internal agency investigations or to the Special Counsel;
 - (4) refusing to obey directions that would require the individual to violate a rule, law or regulation; or
- (c) a supervisor's access of the medical records of an employee or applicant for employment in furtherance of any prohibited personnel practice described in 5 U.S.C. § 2302(b)(1)-(13).

13. Reprimand is a formal memorandum—the least severe form of formal discipline for a first or relatively minor offense—that remains in the employee's Official Personnel Folder (eOPF) for an established period of at least one, but no more than three, years. Reprimands may be expunged before their expiration dates if the appropriate supervisor determines they should be expunged or the employee leaves the FLRA, whichever comes first. Reprimands will not be erased, removed, altered, or withheld from another agency as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

14. Supervisor means an individual employed by the FLRA who has authority to take, direct others to take, recommend or approve any decision to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.
15. Suspension means placing the employee, for disciplinary reasons, in a temporary status without duties and pay.

SECTION II. - DISCIPLINARY ACTIONS: REPRIMANDS AND SUSPENSIONS OF 14 DAYS OR LESS

A. **Standard for Action.** The FLRA may reprimand an employee or suspend an employee for 14 days or less under this Section only for such cause as will promote the efficiency of the federal service.

B. **Procedures.**

1. Supervisory responsibilities before taking disciplinary action.
 - a. In cases of employee misconduct or poor performance, supervisors should consider the facts surrounding the circumstances carefully to ensure that formal action is warranted. This can include having a discussion with the employee and the employee's representative, if any.
 - b. The supervisor or designated FLRA representative should carefully document in writing the facts surrounding the offense. This documentation may take the form of a written memorandum or other internal document or may be reflected in the written reprimand or notice of proposed action that sets forth the reasons for the proposal.
 - c. In choosing the appropriate penalty, the supervisor should consider the employee's work performance and disciplinary history. When taking disciplinary action, supervisors have discretion to consider an employee's disciplinary record and past work record, including all past misconduct — not only similar past misconduct. Disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies the discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. Nonetheless, employees should be treated fairly. Thus,

supervisors should consider appropriate comparators and how they have treated similar instances of misconduct and/or poor performance as they evaluate potential disciplinary actions, in order to apply discipline consistently. Supervisors also should consider the Douglas Factors that are set forth herein as Appendix A.

- d. If the supervisor, after discussion with the Human Resources Division (HRD), determines that formal action is not required, management should document the occurrence and the reasons for the decision in a memorandum for the record. The memorandum is not filed in the employee's eOPF, but is retained in a separate agency file in case the problem continues or recurs within a one-year period. Copies of the memorandum should be provided to the employee or the employee's representative (if the employee designates a representative).
- e. When a supervisor, in coordination with the HRD, decides that formal discipline is warranted, the supervisor prepares an appropriate notice for the employee. For a reprimand, this is a notice of reprimand. For a suspension from duty without pay for up to fourteen days, this is a notice of proposed action.

2. Employee entitlement.

- a. An employee reprimanded under this Section is entitled to a written reprimand that provides both specific information regarding the offense that is the basis for the reprimand and the length of time (one to three years) that the reprimand will remain in the employee's eOPF.
- b. An employee suspended under this Section is entitled to:
 - (1) Notice of the proposed suspension. The written notice shall inform the employee of the nature of the offense in enough detail that the employee can respond to the charges. It informs the employee of the specific duration of the advance notice period, of the proposed suspension, and of the employee's right to review the material that is relied upon to support the reasons for the action given in the notice.
 - (2) Representation. An employee whose suspension is proposed is entitled to be represented by an attorney or other representative. The FLRA may disallow an employee's representative if the

representative's activities would cause a conflict of interest or position, or if release from the employee's official position would give rise to unreasonable costs or whose priority work assignments preclude the employee's release to represent an employee.

- (3) Employee answer. The employee will be given a reasonable time to answer a proposed suspension, but not less than 24 hours. The answer may be presented orally, in writing, or both ways, and may include affidavits and other documentary evidence in support of the answer. If an employee makes only an oral response, the FLRA representative to whom the employee responds summarizes the points made by the employee and provides a copy of the summary to the employee or the employee's representative, if the employee designates a representative.
- (4) FLRA decision. The employee will be given a timely written decision. In arriving at its written decision, the FLRA deciding official may consider only the charges specified in the notice of proposed suspension and will consider any response made by the employee or the employee's representative to the designated FLRA representative. The FLRA decision will be to impose either the proposed penalty, a lesser penalty, or no penalty at all. The FLRA deciding official will deliver the notice of decision to the employee or the employee's representative, if the employee designates a representative, at or before the time the action is to be effective.

C. **Employee Right to File a Grievance.** Employees may not grieve a proposed disciplinary action. Employees against whom formal disciplinary action, including a reprimand, is imposed may file a grievance. Employees must use the FLRA Administrative Grievance System that is set forth in FLRA Regulation No. 3820.1.

D. **Agency Records.**

1. The FLRA will maintain copies of the written summary of the investigation of misconduct, if any, or instances of poor performance; the notice of proposed action; the summary of the employee's oral response and/or the employee's written response; the notice of decision; and any other material documenting the action in a FLRA disciplinary action file maintained by HRD.

2. Reprimands will state the duration (from one to three years) in which the reprimand will remain a part of the Employee's eOPF. Reprimands are temporary documents and must be removed from the eOPF at their scheduled expiration date.
3. Reprimands, along with other information about an employee's conduct or performance, may not be removed, altered or erased from the eOPF or withheld from another agency as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.
4. Suspensions are documented by OPM Form 50, which are permanent records filed in the employee's eOPF.
5. The FLRA may take corrective action at any time during the adverse action process when:
 - a. The FLRA becomes aware that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, the FLRA would have the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. The FLRA may take such action even if an appeal/complaint has been filed relating to the information that the FLRA determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the FLRA must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error; or
 - b. Persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the FLRA to sustain the action in litigation. In such a case, the FLRA may decide to cancel or vacate the proposed adverse action. Such additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other FLRA records contain a proposed action that is subsequently cancelled, the FLRA will remove

that action from the employee's personnel file or other agency files.

SECTION III. - ADVERSE ACTIONS: REMOVAL, REDUCTION IN GRADE, PAY, AND SUSPENSION FOR MORE THAN 14 DAYS

A. **Standard for Action.** The FLRA may remove an employee from Federal service, reduce an employee in grade and/or pay, or suspend the employee for more than 14 days for misconduct or poor performance under this Section only for such cause as will promote the efficiency of the service.

B. **Procedures.**

1. Supervisory responsibilities before taking action.

- a. In cases of employee misconduct or poor performance, supervisors must gather and consider the facts surrounding the circumstances carefully to ensure that formal action is warranted.
- b. The supervisor or designated FLRA representative must carefully document in writing the facts surrounding the offense or the instances of poor performance. This documentation may take the form of a memorandum or other internal document, or a letter of proposed action that sets forth the reasons supporting the proposal.
- c. In choosing the appropriate penalty, the supervisor should consider the employee's work performance and disciplinary history. When taking an adverse action, supervisors have discretion to take into account an employee's disciplinary record and past work record, including all past misconduct — not only similar past misconduct. Disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies the discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. Nonetheless, employees should be treated fairly. Thus, supervisors should consider appropriate comparators and how they have treated similar instances of misconduct and/or poor performance. Supervisors also must consider the Douglas Factors that are set forth herein as Appendix A.
- d. Supervisors should coordinate with the HRD to determine if this Policy provides the appropriate processes for taking action on a performance

problem. Examples of reasons that a supervisor would choose this process include: a situation that involves both poor performance and misconduct, and a situation in which the supervisor wishes to use a history of performance problems and/or instances of misconduct that extend back beyond one year. If a supervisor takes a performance-based action under this Section, the supervisor must consider whether the employee has had appropriate notice of performance deficiencies and a reasonable opportunity to improve the deficiencies before that supervisor proposes an adverse action. As mentioned in the example above, and different from performance-based actions taken under 5 C.F.R. § 432.105(a), management can consider performance deficiencies that occurred further back than one year from the notice period. Although a supervisor is not required to provide a formal opportunity period to improve performance under this Section, the supervisor must be prepared to prove that the employee had appropriate notice and to justify the action before a third party under the higher “preponderance” standard of evidence rather than the “substantial” standard applied to actions taken under 5 C.F.R. pt. 432. See 5 U.S.C. § 7701(c)(1).

- e. If the supervisor, in consultation with the HRD, determines that formal action is not required, management should document the occurrence and the reasons for the decision in a memorandum for record. The memorandum is not filed in the employee’s eOPF, but is retained in a separate agency file in case the problem continues or recurs. Copies of the memorandum should be provided to the employee or the employee’s representative.
- f. When the supervisor, in coordination with the HRD, decides that adverse action is warranted, that supervisor prepares a notice of proposed action.

2. Employee entitlement.

- a. Notice of proposed action. The employee against whom an adverse action is being considered has the right to a written notice of proposed action at least 30 days before the action will be taken. The notice will explain the offense in enough detail that the employee can respond to the charges. It will also advise the employee of the specific proposed action and of the employee’s and the employee’s representative’s right to review the material and records relied upon to propose the action. The FLRA may not rely upon material that, under the Privacy Act, cannot be disclosed to

the employee, the employee's representative, or the employee's designated physician.

- b. Representation. An employee covered by this Section is entitled to be represented by an attorney or other representative. The FLRA may disallow an employee's representative only if the representative's activities might cause a conflict of interest or position or whose release from the employee's official position would give rise to unreasonable costs or whose priority work assignments preclude the employee's release.

- c. Employee answer.
 - (1) FLRA will give the employee, and the employee representative, if any, a reasonable amount of official time, to extend over not less than seven days, to review the material relied upon to support its proposal and to prepare an answer and to secure affidavits, if the employee is otherwise in a duty status.

 - (2) FLRA will designate an official to hear the employee's oral response who has the authority either to make or recommend a final decision on the adverse action.

 - (3) The employee may make an oral response, provide a written response, or respond in both ways to a designated FLRA official. The employee may provide affidavits or other documentary evidence to support the answer. If an employee makes only an oral response, the FLRA representative to whom the employee responds should summarize and document the points made by the employee for the record and provide a copy of the summary to the employee or the employee's representative, if the employee designates a representative.

- d. FLRA decision. In arriving at the decision, the FLRA designated official must consider only the reasons for the action set forth in the notice of proposed action. The FLRA designated official must also consider any information provided by the employee and the employee's representative, if any, in response to the charges. The decision must be to impose either the proposed penalty, a lesser penalty, or no penalty at all. The FLRA designated official will deliver the notice of decision to the employee at or before the time that the action will be affected and advise the employee of the employee's grievance or appeal rights. To the extent practicable, the

FLRA will issue decisions concerning proposed removals within 15 business days of the end of the employee answer period.

- C. **Employee Status During Notice Period.** Under ordinary circumstances, an employee whose removal, reduction in grade and/or pay, or suspension, including indefinite suspension, has been proposed will remain in a duty status in the employee's regular position during the advance notice period. If management concludes that the employee's presence in the employee's position of record may be detrimental to the employee or unduly disruptive to the efficiency of the agency, management may detail the employee to another position during the notice period. In circumstances in which the FLRA determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the FLRA may elect either one or a combination of the following alternatives:
1. Assign the employee to duties where the employee is no longer a threat to safety, the FLRA mission, or Government property;
 2. Allow the employee to take leave or carry the employee in an appropriate leave status (annual, sick, leave without pay, or absent without leave if the employee has absented himself from the workplace without requesting leave);
 3. Curtail the notice period when the FLRA can invoke the "crime" provision of 5 C.F.R. 752.404(d)(1). This provision, which is described below, may be invoked even in the absence of judicial action if the FLRA has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed; or
 4. Place the employee in a paid, non-duty status during the notice or proposed action period, subject to the limitations of 5 U.S.C. § 6329a (2018).
- D. **"Crime" Provision.** In accordance with 5 C.F.R. 752.404(d)(1), the FLRA may forego providing 30 days advance written notice if it has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension (including an indefinite suspension). If this is the case, the FLRA may require the employee to furnish the employee's answer to the proposed charges, including affidavits and other documentary evidence, within a time that is reasonable under the circumstances, but not less than seven days. If the circumstances require the employee to be kept away from the work site, the FLRA may place the employee in a non-duty status with pay for the time necessary to affect the action.

E. Introduction of Medical Evidence.

1. If the employee wishes the FLRA to consider any medical problem which contributed to the conduct or performance problem, the employee will be given a reasonable time to provide medical documentation in accordance with the applicable provisions of 5 C.F.R. 339. Whenever possible, the employee will provide the medical documentation within the time limits allowed for the response to the proposed action.
2. After its review of medical evidence, the FLRA is authorized by 5 C.F.R. 339.301 - 304 to require an agency-sponsored medical examination. In this case, the FLRA will name the physician and pay for the costs associated with the examination. If the FLRA determines that an agency-sponsored examination is necessary to make an informed decision regarding the proposed action, the FLRA will notify the employee in writing of the reasons for requiring the examination and the consequences if the employee fails to comply.
3. If the employee has the requisite years of service under either the Civil Service Retirement System or the Federal Employees Retirement System, the FLRA will provide the employee with information regarding disability retirement. In doing so, the FLRA will remain aware of its affirmative obligations under the provisions of 29 C.F.R. § 1614.203, that require reasonable accommodation of a qualified employee who is disabled.
4. An employee's application for disability retirement will not preclude or delay any other appropriate personnel action. 5 C.F.R. §§ 831.1204(e); 831.1205 describes the basis under which the FLRA will file an application for disability retirement on behalf of the employee.

F. Employee Grievance and Appeal Rights. An employee may not grieve or appeal a proposed action. An employee against whom action is taken under this Section is entitled to appeal the action to the Merit Systems Protection Board (MSPB).

G. Agency Records.

1. The FLRA will maintain copies of the written summary of the investigation of misconduct, if any, or instances of poor performance; the notice of proposed action; the summary of the employee's oral response and/or the employee's written response; the notice of decision; and any other material documenting the action in an Agency disciplinary action file maintained in the HRD.

2. Information about an employee's conduct or performance may not be removed, altered or erased from the eOPF or withheld from another agency as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.
3. Suspensions are documented by OPM Forms 50, which are permanent records filed in the employee's eOPF.
4. The FLRA may take corrective action at any time during the adverse action process when:
 - a. The FLRA becomes aware that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. The FLRA may take such action even if an appeal/complaint has been filed relating to the information that the FLRA determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the FLRA must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error; or
 - b. Persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the FLRA to sustain the action in litigation. In such a case, the FLRA may decide to cancel or vacate the proposed adverse action. Such additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other FLRA records contain a proposed action that is subsequently cancelled, the FLRA will remove that action from the employee's personnel file or other agency files.

SECTION IV. - SUPERVISOR VIOLATIONS OF WHISTLEBLOWER PROTECTIONS

- A. **In General.** Subject to 5 U.S.C. § 1214(f), if the Chairman of the FLRA, an administrative law judge, the MSPB, the Office of Special Counsel, a judge of the United

States, or the Inspector General of the FLRA has determined that an FLRA supervisor has committed a prohibited personnel practice related to whistleblowing, the Chairman of the FLRA, consistent with the procedures required under Section IV(B):

1. for the first prohibited personnel action committed by the supervisor:
 - a. shall propose suspending the supervisor for a period that is not less than three days; and
 - b. may propose an additional action the FLRA Chairman determines to be appropriate, including a reduction in grade or pay; and
2. for the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.

If the Chairman of the FLRA is responsible for determining whether a supervisor has committed a prohibited personnel practice related to whistleblowing, the Chairman may not delegate that responsibility.

B. Procedures.

1. Notice of proposed action. A supervisor against whom an action is proposed to be taken under Section IV(A) is entitled to written notice that:
 - a. states the specific reasons for the proposed action; and
 - b. informs the supervisor of the employee's right to review the material that the FLRA relies upon in support of the notice for the proposed action.
2. Representation. A supervisor covered by this Section IV is entitled to be represented by an attorney or other representative. The FLRA may disallow an employee's representative if the representative's activities might cause a conflict of interest or position or whose release from the employee's official position would give rise to unreasonable costs or whose priority work assignments preclude the employee's release.
3. Supervisor Answer. A supervisor who receives notice under Section IV(B)(1) may, not later than 14 days after the date on which the supervisor receives the notice, submit an answer and furnish evidence in support of that answer.
4. FLRA Decision. If, after the end of the 14-day period described in Section IV(B)(3), a supervisor does not furnish any evidence as described in that Section clause, or if the Chairman of the FLRA determines that the evidence furnished by the supervisor is insufficient, the Chairman shall impose the penalties proposed under Sections IV(A)(1) or IV(A)(2), as applicable. In arriving at the decision,

the Chairman must:

- a. consider only the reasons for the action set forth in the notice of proposed action;
- b. consider any information provided by the supervisor and the supervisor's representative, if any, in response to the charges;
- c. issue a written decision containing specific reasons for the decision as soon as practicable (in removal cases, within 15 business days of the end of the employee answer period, if practicable); and
- d. deliver the notice of decision to the supervisor or authorized representative at or before the time that the action will be effected and advise the supervisor of the employee's appeal rights.

C. Supervisor Appeal Rights. A supervisor may not appeal a proposed action. A supervisor against whom action is taken under this Section is entitled to appeal the action to the MSPB.

D. Agency Records.

1. The FLRA will maintain copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order imposing an adverse action, together with any supporting material. Such material shall be furnished to the MSPB upon its request and to the supervisor upon the supervisor's request.
2. Reprimands, along with other information about an employee's conduct or performance, may not be removed, altered or erased from the eOPF or withheld from another agency as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.
3. Suspensions and removals are documented on OPM Form 50, which are permanent records filed in the employee's eOPF. Suspension and removals on OPM Form 50 are removed from the eOPF if the action, due to an employee appeal, is canceled or mitigated.
4. The FLRA may take corrective action at any time during the adverse action process when:

- a. The FLRA becomes aware that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, the FLRA would have the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. The FLRA may take such action even if an appeal/complaint has been filed relating to the information that the FLRA determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the FLRA must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error; or
- b. Persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the FLRA to sustain the action in litigation. In such a case, the FLRA may decide to cancel or vacate the proposed adverse action. Such additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other FLRA records contain a proposed action that is subsequently cancelled, the FLRA will remove that action from the employee's personnel file or other agency files.

SECTION V. - ADVERSE ACTIONS: VOLUNTARY SEPARATION BEFORE RESOLUTION OF A PERSONNEL INVESTIGATION

- A. **Notating an Employees Personnel Record.** When an FLRA employee occupying a position in the competitive service or the excepted service is the subject of a personnel investigation and resigns from Government employment prior to the resolution of such investigation, the Chairman shall, if an adverse finding was made with respect to such employee pursuant to such investigation, make a permanent notation in the employee's official personnel record file. The Chairman shall make such notation not later than 40 days after the date of the resolution of such investigation.
- B. **Definitions:** In this section, the term "personnel investigation" includes an investigation by and Inspector General and an adverse personnel action as a result of misconduct or for such cause as will promote the efficiency of the serviced under 5 U.S.C. ch. 75.

- C. **Procedures.** Prior to making a permanent notation in an employee's official personnel record file under subsection (1), the Chairman shall:
1. Notify the employee in writing within 5 days of the resolution of the investigation and provide such employee a copy of the adverse finding and any supporting documentation;
 2. Provide the employee with not less than 30 days, to respond in writing and to furnish affidavits and other documentary evidence to show why the adverse finding was unfounded (a summary of which shall be included in any notation made to the employee's personnel file under subsection (D.1.)); and
 3. Provide a written decision and the specific reasons for the decision to the employee at the earliest practicable date.
- D. **Employee Appeal.** An employee is entitled to appeal the decision of the head of the agency to make a permanent notation under subsection (A) to the Merit Systems Protection Board under section 7701.
1. If an employee files an appeal with the Merit Systems Protection Board pursuant to this subsection, the Chairman shall make a notation in the employee's official personnel record indicating that an appeal disputing the notation is pending not later than 2 weeks after the date on which such appeal was filed.
 2. If the Chairman is the prevailing party on appeal, not later than 2 weeks after the date that the Board issues the appeal decision, the head of the agency shall remove the notation made under paragraph C.1. from the employee's official personnel record file.
 3. If the employee is the prevailing party on appeal, not later than 2 weeks after the date that the Board issues the appeal decision, the Chairman shall remove the notation made under paragraph C.1. and the notation of an adverse finding made under subsection B.3. from the employee's official personnel record file.

SECTION VI. - FURLoughS FOR 30 DAYS OR LESS

- A. **Standard for Action.** The FLRA may take action under this Section for reasons of lack of money or work.
- B. **Procedures.** When the FLRA decides that it must furlough employees for 30 days or less, it will follow procedures described below:
1. Notice of proposed furlough.

- a. Employees are entitled to 30 days advance written notice of a pending furlough of 30 days or less. The notice will include the employee's and the employee representative's, if any, right to review the material relied upon to determine that the furlough is necessary.
 - b. When some, but not all, employees in a competitive level are being furloughed, the notice of proposal will state the basis for selecting particular employees for furlough, as well as the basis for the furlough.
 - c. The advance written notice and opportunity to answer are not required for furloughs without pay caused by unforeseeable circumstances such as sudden emergencies requiring immediate curtailment of activities, acts of nature, or government shutdowns.
 - d. If a furlough extends beyond 30 calendar days (as in, for example, a government shutdown), the FLRA will treat the successive thirty-day period as a second furlough and issue another furlough notice as described in paragraphs a and b above. If the extension of the furlough is caused by unforeseen circumstances, the FLRA may dispense with the advance written notice and opportunity to answer as described in paragraph c above.
2. Representation. An employee covered by this Section is entitled to be represented by an attorney or other representative. The FLRA may disallow an employee's representative if the representative's activities might cause a conflict of interest or position or whose release from the employee's official position would give rise to unreasonable costs or whose priority work assignments preclude the employee's release.
3. Employee's answer.
- a. Except as provided above, the FLRA will give the employee a reasonable amount of official time to review the material relied upon to support the proposed furlough and to reply orally, in writing, or both ways.
 - b. The FLRA will designate an official to hear the employee's oral response who has the authority either to make or recommend a final decision on the furlough action. If an employee makes only an oral response, the FLRA representative to whom the employee responds

must summarize and document the points made by the employee for the record and provide a copy of the summary to the employee and the employee's representative, if any.

4. FLRA decision. In arriving at its decision, the FLRA designated official will consider only the reasons for action set forth in the notice of proposed action. It will also consider any information provided by the employee and the employee's representative, if any, in response to the proposed notice. The FLRA designated official will deliver the notice of decision to the employee at or before the time that the furlough will be affected and advise the employee of appeal rights.

C. **Employee Appeal Rights.** An employee against whom action is taken under this Section is entitled to appeal the action to the MSPB.

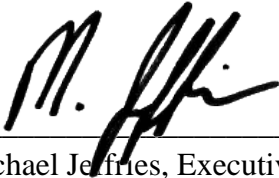
D. **Agency Records.**

1. The FLRA will maintain copies of the notice of proposed action; the summary of the employee's oral response, if any; the employee's written response, if any; the notice of decision; and any other material documenting the furlough.
2. Furloughs are documented on OPM Form 50, which are permanent records filed in the employee's eOPF.

SECTION VII. - PROGRAM ADMINISTRATION AND EVALUATION

The HRD administers and evaluates these programs and sets forth the procedures set forth in this Policy. Questions and suggestions for improvements are welcome and should be directed to the HRD.

This Policy is effective June 3, 2020.



Michael Jeffries, Executive Director

APPENDIX A. Douglas Factors

APPENDIX A. DOUGLAS FACTORS

Douglas Factors are the factors set forth by the Merit Systems Protection Board in its precedent setting case, *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280 (1981). In considering disciplinary actions based on conduct issues, supervisors must consider Douglas Factors. Note that supervisors may properly take into account factors not listed under appropriate circumstances:

- (1) Nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;
- (2) Employee's job level and type of employment, including fiduciary roles, contacts with the public, and prominence of the position;
- (3) Employee's past disciplinary record;
- (4) Employee's past work performance, including length of service, ability to get along with fellow workers, ability to do the work, and dependability;
- (5) The effect of the offense on the employee's ability to perform effectively and the supervisor's confidence in the employee;
- (6) Consistency of the penalty with those imposed upon other employees for same or similar offenses;
- (7) Notoriety of the offense and its impact upon the FLRA's reputation;
- (8) Clarity with which the employee was on notice that he or she was violating rules and had been warned about the misconduct or performance;
- (9) Potential for the employee's rehabilitation;
- (10) Mitigating circumstances such as unusual job tensions or sexual harassment; and
- (11) Adequacy and effectiveness of alternative sanctions to deter such future misconduct or poor performance.
- (12) Consistency of the penalty with other penalties imposed by the same supervisor for the same or similar instances of misconduct.

Attachment 3



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1400 K STREET N.W. • WASHINGTON, D.C. 20424-0001

Training Plan
(Rights and Remedies under Federal Antidiscrimination
and Whistleblower-Protection Laws)

(Last updated December 15, 2020; Last reviewed December 15, 2020)

Purpose and Background

The Agency developed the following training plan, which it has reviewed and updated as necessary, in response to the requirement in § 201 of the Notification and Federal Employees Antidiscrimination and Retaliation Act of 2002 (NoFEAR Act), 5 U.S.C. §2301 note, that each federal agency provide training to its employees regarding the rights and remedies applicable to them under the Federal Antidiscrimination Laws and Whistleblower Protection Laws. Pursuant to Office of Personnel Management (OPM) regulations implementing the requirements of § 201 of the NoFEAR Act, each federal agency is required to develop a written plan to train all of its employees, including supervisors and managers, regarding those matters. 5 C.F.R. § 724.203.

Scope of Training

The Agency will provide all Agency employees, including supervisors and managers, with training regarding their rights and remedies under Federal Antidiscrimination Laws and Whistleblower Protection Laws.

Instructional Material and Method of Training

The training will be an online, self-paced, computer-based program. Although the course is self-paced, employees will be directed to complete it by the applicable deadlines in OPM's regulations.

Beginning with the FY 2018-2019 bi-annual training cycle, the Agency has used a self-guided PowerPoint training. Topics covered include: whistleblowing; race, color, and national origin; religion; sex and age; disability; retaliation; and genetic information. After completing the course, employees are able to: identify and interpret the antidiscrimination and whistleblower protection laws; explain the rights and responsibilities of whistleblower protection or antidiscrimination laws; follow the steps for filing a complaint alleging a violation of whistleblower protection or antidiscrimination laws; and understand the equal employment opportunity laws enforced by the EEOC. Upon completion of the training segment, employees must provide a certificate of completion to the FLRA's Human Resources Department (HRD).

Training schedule

The completion date for the initial training was December 17, 2006, and the completion date for subsequent trainings of all employees has been no later than December 17, 2008, and every two years thereafter.

The completion date for new employees is within 90 days after their appointment.

Means of documenting completion of training

Employees are required to submit certificates of completion and provide it to the HRD. The Human Resources Director prints out these results and maintains them in the HRD files.

Periodic review of training plan

The Agency will continue to review this policy periodically, and update it as necessary.