

MD-110

CHAPTER 3

SPECIAL PROCEDURES FOR RELATED PROCESSES

I. INTRODUCTION

As set out in Chapter 2, Section V, special procedures apply to certain related processes. The relationship between 29 C.F.R. Part 1614 complaints, Merit Systems Protection Board (MSPB) actions, grievances pursuant to negotiated grievance procedures, notices of intent to sue in Age Discrimination in Employment Act (ADEA) complaints and the alternative available in Equal Pay Act (EPA) complaints are set out more specifically here. All time frames in this chapter are expressed in calendar days.

II. PROCESSING MIXED CASE COMPLAINTS AND APPEALS -- 29 C.F.R.

§ 1614.302

A. Definitions

A "mixed case complaint" is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age, handicap, or reprisal related to or stemming from an action *that may be appealed* to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional non-discrimination allegations that the MSPB has jurisdiction to address. A "*mixed case appeal*" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, or age.

B. Procedures

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

1. Standing

a. The following employees generally have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal:¹

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

(2) career appointees to the Senior Executive Service;

(3) non-competitive service preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and

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

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

(1) probationary employees (*but see* 5 C.F.R.

§ 315.806 under certain circumstances, discrimination based on party affiliation, marital status, procedural deficiencies),

(2) non-appropriated fund activity employees, and

(3) employees serving under a temporary appointment limited to one year or less.

2. *Appealable Matters*

a. Most appealable matters fall into the following six categories:

(1) reduction in grade or removal for unacceptable performance;

(2) removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service;

(3) separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of a reduction in force;

(4) reduction-in-force action affecting a career appointee in the Senior Executive Service;

(5) reconsideration decision sustaining a negative determination of competence for a general schedule employee; and

(6) disqualification of an employee or applicant because of a suitability determination.

b. See Attachment A for a more complete listing of appealable actions.

3. *Election to Proceed is Required*

a. The regulations provide that a covered individual may raise allegations of discrimination in a mixed case either as a direct appeal to the MSPB or as an EEO complaint with the agency, *but not both*.

b. Whatever action the individual files first is considered an election to proceed in that forum. Filing a **formal** EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO counselor or receiving EEO counseling does **not** constitute an election.

c. Where an aggrieved person files an MSPB appeal and timely seeks counseling, counseling may continue pursuant to section 1614.105, at the option of the parties. In any case, counseling must be terminated with notice of rights pursuant to section 1614.105(d), (e), or (f).

4. Procedures for Handling Dual Filing

a. Where the agency does not dispute MSPB jurisdiction:

If an individual files a mixed case appeal with the MSPB before filing a mixed case complaint with the agency, and the agency does not dispute MSPB jurisdiction, the agency must thereafter dismiss any complaint on the same matter, regardless of whether the allegations of discrimination are raised in the appeal to the MSPB.

The agency must advise the complainant that (s)he must bring the allegations of discrimination contained in the dismissed complaint to the attention of the MSPB, pursuant to 5 C.F.R. § 1201.155.

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

b. Where the agency or the MSPB administrative judge questions MSPB jurisdiction:

The agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, *and instruct him/her to bring the discrimination allegation to the attention of MSPB*. During this period, all time limitations for processing or filing the complaint will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint and advise the complainant of the right to petition EEOC to review MSPB's final decision on the discrimination issue. If the MSPB administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

c. Where a complainant files with the agency first:

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

d. Where a complainant has pending a non-mixed case complaint or a series of non-mixed case complaints and the matters raised in those complaints lead to an appeal on a matter that is appealable to the MSPB. ²

If the agency believes that the non-mixed case complaint(s) are sufficiently related to the subsequent mixed case complaint, such that the mixed case matter cannot be adjudicated without also adjudicating the non-mixed matters, the agency must notify the complainant in writing that the filing of a mixed case appeal *may* terminate the

processing of the non-mixed cases and that the non-mixed matters will be consolidated with the mixed case appeal.

The agency may file with the MSPB a motion to consolidate the non-mixed case matter with the mixed case appeal. Upon filing the motion, the non-mixed case complaints will be held in abeyance pending a decision by the MSPB Administrative Judge on the agency's motion. If the MSPB Administrative Judge should fail to consolidate the non-mixed case complaints, they shall be processed pursuant to section 1614.106, *et seq.* Time for processing will commence to run without notice, fifteen (15) days following the decision denying jurisdiction. The time periods are to run from the time processing ceased. This means that if processing of the non-mixed matter ceased on the 70th day, the count of days will begin with day 71.

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

If the individual files a mixed case appeal with MSPB and MSPB subsequently dismisses the appeal as non-jurisdictional, the agency must inform the individual that (s)he may contact a counselor within forty-five (45) days to raise the discrimination claim(s) and that the filing of the mixed case appeal will be deemed to be the date the individual initially contacted the counselor.

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

6. Processing Mixed Case Complaints Filed at the Agency

If an employee elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint, except :

- a. Within **forty-five (45) days** following completion of the investigation, the agency must issue a final decision.
- b. Upon the filing of a complaint, the agency must advise the complainant that if a final decision is not issued within **one hundred and twenty (120) days** of the date of filing the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter, as specified in 5 C.F.R. § 1201.154(a), or may file a civil action as specified in section 1614.310(g), but not both.
- c. Also upon the filing of a complaint, the agency must notify the complainant that if (s)he is dissatisfied with the agency's final decision on the mixed case complaint, (s)he may appeal the matter to the MSPB (not the EEOC) within **twenty (20) days** of receipt of the agency's final decision.
- d. Upon issuance of the agency's final decision on a mixed case complaint, the agency must advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within **twenty (20) days** of receipt of the notice and of the right to file a civil action as provided in section 1614.310(a).

III. NEGOTIATED GRIEVANCE PROCEDURES IN COLLECTIVE

BARGAINING AGREEMENTS

A. Where Agency is Covered by 5 U.S.C. § 7121(d).

The election to proceed under the negotiated grievance procedure or under part 1614 is set out in this Management Directive in Chapter 2 (EEO Counseling). The underlying principle is that an aggrieved employee who has a choice of forums in which to proceed cannot go forward in more than one forum (unless the employing agency is exempt from coverage of 5 U.S.C. § 7121(d)). This is true "irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination." § 1614.301(a).

If an employee first files a grievance and thereafter files a complaint of discrimination on the same matter, the complaint must be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure, including the right to appeal to the Commission from a final decision as provided in subpart D of part 1614 (Appeals and Civil Actions). The dismissal of the complaint must advise the complainant of the obligation to raise discrimination allegations in the grievance process and of the right to appeal the final grievance decision to the Commission. § 1614.301(a).

An individual is not prohibited from filing a grievance alleging a non-EEO discrimination matter and a complaint at the same time.

B. Where Agency is not Covered by 5 U.S.C. § 7121(d).

1. The U.S. Postal Service and the Tennessee Valley Authority are examples of two agencies not covered by 7121(d). In such agencies, aggrieved persons may file a complaint pursuant to part 1614 and may also file a grievance pursuant to a collective bargaining agreement where the agreement provides for filing complaints of discrimination on the same bases as part 1614.

2. In such agencies, complaints filed pursuant to part 1614 may be held in abeyance where a grievance is filed on the same matter, if written notice of the abeyance is provided.

3. Complaints may be held in abeyance until a final decision is issued on the grievance.

IV. PROCESSING NOTICES OF INTENT TO SUE UNDER AGE

DISCRIMINATION IN EMPLOYMENT ACT

It is incumbent upon Federal agency personnel responsible for processing discrimination complaints to inform complainants or potential complainants of the unique nature of age discrimination complaints and the following procedures available to them in pursuing an age discrimination complaint.

A. Election of Administrative Process

An aggrieved person may file an administrative age discrimination complaint with the agency pursuant to 29 C.F.R. Part 1614. If the aggrieved person elects to file an administrative complaint, (s)he must first exhaust administrative remedies before (s)he

may file a civil action in U.S. district court. Exhaustion in an age case means that the complainant has pursued the administrative process to the point where a civil action may be filed, pursuant to section 1614.201. See also chapter 8, sections II and III.

B. Aggrieved May Bypass Administrative Process

An aggrieved person may bypass the administrative complaint process and file a civil action directly in U.S. District Court provided that the aggrieved person first provides the Commission with a written notice of intent to sue under the ADEA. The notice to the Commission must be filed within **one hundred and eighty (180) days** of the date of the alleged discriminatory action. Once a timely notice of intent to sue is filed with the Commission, the aggrieved person must wait at least **thirty (30) days** before filing a civil action.

C. Responsibilities Regarding Notices of Intent to Sue

The following is a statement of the procedures and a delineation of the responsibilities on the part of the aggrieved person, the Commission, and the agency with respect to the filing and processing of notices of intent to sue under the ADEA.

1. The Aggrieved Person

It is the responsibility of the aggrieved person to provide the Commission with a written notice of intent to sue within **one hundred and eighty (180) days** of the date of the alleged discriminatory action.

a. Notices of intent to sue must be mailed to the Commission at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
P.O. Box 77960
Washington, DC 20013

hand delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
131 M Street, NE
Suite 5SW12G
Washington, DC 2050

or facsimile sent to:

(202) 663-7022

b. The notice of intent to sue should be dated and must contain the following information:

(1) statement of intent to file a civil action under section 15(d) of the Age Discrimination in Employment Act of 1967, as amended;

- (2) name, address, and telephone number of the employee or applicant;
- (3) name, address, and telephone number of the complainant's designated representative, if any;
- (4) name and location of the Federal agency or installation where the alleged discriminatory action occurred;
- (5) date on which the alleged discriminatory action occurred;
- (6) statement of the nature of the alleged discriminatory action(s); and
- (7) signature of the complainant or the complainant's representative.

2. The Commission

Upon receipt of a notice of intent to sue, the Commission will promptly notify the concerned agency (and all persons named in the notice as prospective defendants in the action, if any), in writing, of its receipt of the notice of intent to sue and will provide the agency with a copy of the notice. Commission contact with the concerned agency will normally be through the agency headquarters level Office of Equal Employment Opportunity or similarly designated office, as the case may be. A copy of the Commission's notification will be provided to the aggrieved person and/or his/her representative, if any. Additionally, the Commission will take any appropriate action to ensure the elimination of any unlawful practice.

Where an aggrieved person files a civil action before the agency has completed its inquiry, or before the Commission has reviewed the agency's disposition, the Commission will close the matter and will take no further action on the notice of intent to sue.

3. The Agency

Upon receipt of a notice of intent to sue, an agency must review the allegation(s) of age discrimination and conduct an inquiry sufficient to determine whether there is evidence that unlawful age discrimination has occurred. The method of the review/inquiry is a matter of determination by the particular agency and may vary depending on the scope and complexity of the allegations. Agencies are encouraged to make good faith efforts to resolve the matter.

V. EQUAL PAY ACT COMPLAINTS

Equal Pay Act (EPA) complaints will be administratively processed like Title VII complaints. The complainants in EPA cases should be notified of the statute of limitations of two years, or three years for a willful violation, and of the right to file directly in Federal district court without first providing notice to the Commission or exhausting administrative remedies.

[Attachment A]

APPEALABLE ACTIONS -- 5 C.F.R.

The counselor should determine whether the individual has appeal rights for the appealable actions listed below.

Part Action

302 Denial of restoration after recovery from compensable injury of an excepted service employee

315 Termination during probation (under limited circumstances)

317 Certain involuntary reassignments or demotions connected with conversions to Senior Executive Service

330 Improper application of re-employment priority rights

351 Reduction-in-force

352 Denial of re-employment rights under various circumstances

353 Denial of restoration following military duty; recovery of competitive service employees from certain injuries

432 Reduction-in-grade and removal based on unacceptable performance

531 Denial of within-grade increases

731 Adverse suitability determinations

752 Adverse actions by agencies

-- Removal

-- Suspensions for more than 14 days

-- Reduction-in-grade (demotion)

-- Furloughs for 30 days or less

831 All adverse retirement decisions of OPM except termination of annuity payments

930 Adverse actions involving administrative law judges

[Attachment B] (SAMPLE)

NOTICE OF POSSIBLE APPLICABILITY OF

5 U.S.C. § 7121(d) TO ALLEGED DISCRIMINATORY ACTION

(29 C.F.R. Part 1614)

Section 1614.105 of the regulations of the U.S. Equal Employment Opportunity Commission requires that upon an aggrieved person's initial contact with the Equal Employment Opportunity (EEO) counselor, or as soon thereafter as possible, the counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C.

§ 7121(d) to the alleged discriminatory action which caused the aggrieved person to seek EEO pre-complaint counseling. Further, the EEO counselor must communicate to the aggrieved person the substance of 29 C.F.R. § 1614.301 concerning the election of remedies.

Section 1614.301 (Relationship to Negotiated Grievance Procedure) provides as follows:

(a) When a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in section 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under part 1614 are regardless of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure, including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The notice of final action dismissing such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C.

§ 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the

time limits for processing the complaint contained in section 1614.106 and for appeal to the Commission contained in section 1614.402 *may be held in abeyance* during processing of a grievance covering the same matter as the complaint *if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.*

Accordingly, if you are alleging discrimination on the grounds of race, color, religion, sex, national origin, age, and/or handicap, and if you wish to pursue the matter, you *must* make an election to pursue it either as a complaint with your agency under 29 C.F.R. Part 1614 or in a negotiated grievance procedure, *if the following conditions apply:*

1. You are an employee of a Federal agency subject to the provisions of 5 U.S.C. § 7121(d), *and*
2. You are covered by a collective bargaining agreement which permits allegations of discrimination to be raised in a negotiated grievance procedure.

If those two conditions apply to you, then you must elect one or the other procedure, but not both. An election is made as follows:

1. By filing a grievance in writing (*whether or not the grievance has raised an allegation of discrimination*), *or*
2. By filing a written *formal EEO* complaint with your agency under part 1614. Use of the pre-complaint process (counseling) under section 1614.105 does *not* constitute an election.

If you have further questions concerning the possible applicability of 5 U.S.C. § 7121(d) to you, it is suggested that you immediately contact a representative of the employee organization which has a negotiated agreement with your agency or ask the EEO counselor for further information and assistance.

¹ This is not an all-inclusive list of those employees who have standing to appeal to the MSPB, and questions which arise in this area should be referred to the personnel office at the agency or to the MSPB.

² This provision is specifically meant to address those situations where a series of events connected in time or type, culminate in termination or appealable disciplinary action against a person with standing to appeal to the MSPB. Example: minor discipline, warnings or other matters which form the basis for a non-mixed case, but ultimately lead to suspension in excess of 14 days or termination which raise mixed case issues.