



**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